

# Cross-border Gestational Surrogacy in Japan and the Spectre of Statelessness

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## Cross-border Gestational Surrogacy in Japan and the Spectre of Statelessness

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### Author biography

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### Key words

Statelessness in Japan—Gestational surrogacy—Parentage—nationality—*Koseki*.

### Abstract

Taking the practice of cross-border gestational surrogacy in Japan as its focus, this paper explores how this assisted reproductive technology may render children born through this method of reproduction to be at an increased risk of statelessness. Japan's *de facto* prohibition on gestational surrogacy compels many to pursue cross-border surrogacy arrangements, but because Japanese laws on maternity and paternity have not kept pace with advances in biomedical technology, children who have no control over the circumstances of their birth are left with an uncertain legal status upon arrival in their intended home country of Japan. Fortunately, Japan is well-positioned to address this issue, and through the establishment a domestic regulatory framework, Japan could reduce and prevent cross-border surrogacy-related statelessness before the numbers of children affected begin to swell.



## 1. Introduction

This paper calls attention to an emerging area of research with respect to statelessness in Japan: cross-border gestational surrogacy. To begin, an explanation of gestational surrogacy and a brief overview of the global surrogacy industry is provided. Following from this, the practice of gestational surrogacy in Japan is discussed to explain how Japanese children born through surrogacy are placed at risk of statelessness. Three approaches that Japan could employ in response to this growing area of concern are then explored. This paper argues that the absence of formal regulation of gestational surrogacy in Japan compels those who wish to have children via surrogacy to seek out the services of overseas surrogates, which in turn places the children born through such arrangements at a high risk of statelessness upon arrival in Japan.

## 2. What is Gestational Surrogacy?

Gestational surrogacy is an assisted reproductive technology (ART) whereby an individual or couple, unable to procreate, enter into contract with a woman (the surrogate) to carry to term a baby that has been conceived by having an egg fertilized outside the uterus via in vitro fertilization implanted in the surrogate's uterus.<sup>1</sup> The gametes used in these arrangements may come from the intended parents or anonymous donors, such that five different parties may be involved in the conception and birth of a child.<sup>2</sup> Gestational surrogacy was first reported in 1985,<sup>3</sup> and with the global expansion of this commercial practice, ART has blossomed into a global industry estimated to generate \$6 billion USD annually.<sup>4</sup>

Until recently, India was recognized as the premiere destination for commercial surrogacy, with more than 3,000 clinics generating an annual collective revenue of \$400 million USD.<sup>5</sup> However, following exclusionary legislation introduced in 2013, Thailand briefly replaced India as the so-called womb of Asia until all forms of international surrogacy were banned by the military government in July 2015.<sup>6</sup> Owing to the barriers encountered in either India or Thailand, countries like Poland, Ukraine, Russia, Georgia, Mexico, Nepal, and Cambodia are now emerging as major commercial surrogacy destinations.<sup>7</sup>

A key challenge with respect to this ART is identifying the legal parent(s) of a child given that surrogacy may implicate up to five parties, thus complicating the historical view of parentage and child creation as involving only one woman and one man.<sup>8</sup> Currently, there is no consensus among states as to how legal parentage in a surrogacy contract is to be identified. For those seeking to evade the scrutiny of a home country that prohibits surrogacy or champions strict familial norms by pursuing surrogacy abroad, the conceived child is

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<sup>1</sup> Trisha A. Wolf, 'Why Japan Should Legalize Surrogacy' (2014) 23 Pacific Rim Law and Policy Journal 461.

<sup>2</sup> *Ibid.*

<sup>3</sup> Katherine Voskoboinik, 'Clipping the Stork's Wings: Commercial Surrogacy Regulation and its Impact on Fertility Tourism' (2016) 26 Indiana International Law Review 336.

<sup>4</sup> Raywat Deonandan, 'Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy' (2015) 8 Risk Management and Healthcare Policy 111.

<sup>5</sup> *Ibid.*

<sup>6</sup> Jessica M. Caamano, 'International, Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention' (2016) 96 Boston University Law Review 571; Katherine Voskoboinik, 'Clipping the Stork's Wings: Commercial Surrogacy Regulation and its Impact on Fertility Tourism' (2016) 26 Indiana International Law Review 336.

<sup>7</sup> Raywat Deonandan, 'Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy' (2015) 8 Risk Management and Healthcare Policy 111; Yuri Hibino, Gestational Surrogacy in Japan, in: E. Scott Sills, Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues, Cambridge University Press 2016, p. 174-180; Katherine Voskoboinik, 'Clipping the Stork's Wings: Commercial Surrogacy Regulation and its Impact on Fertility Tourism' (2016) 26 Indiana International Law Review 336.

<sup>8</sup> Brittany M. Nichol, 'A Child Without a Country: Dissolving the Statelessness of Children Born Through Surrogacy' (2016) 2016 Michigan State Law Review 907.

at risk of being denied legal recognition and is hence at risk of statelessness upon the family's return home.<sup>9</sup> For this reason, even if the intended parents are identified as the child's parents on a birth certificate obtained in the country of birth, "incompatible [inter-state] norms complicate or foreclose altogether the recognition of parental statuses on which rights to transmit citizenship...are predicated"<sup>10</sup>, and it is this legal quandary that places such children at risk of statelessness in Japan.

### 3. Gestational Surrogacy in Japan

In contemporary Japan, an increase in delayed marriage and late-in-life pregnancy have triggered what commentators refer to as "a crisis of ultra-low fertility rates",<sup>11</sup> and these issues create a demand for gestational surrogacy.<sup>12</sup> Further, Japanese women endure societal pressures to reproduce for reasons of maintaining the family line, curbing the declining birth rate, and conforming to conservative ideals of parenthood,<sup>13</sup> all of which place an undue responsibility on women to procreate. Beyond these pressures, the government fears that the declining birth rate will imperil economic growth and increase the cost of social welfare programs. Some officials have even labelled women as "birth machines",<sup>14</sup> underscoring the outmoded expectations levied at Japanese women from certain corners. Despite these pressures there is a *de facto* prohibition on gestational surrogacy in Japan, but for those unable to procreate by traditional methods, cross-border surrogacy presents a viable option.

Gestational surrogacy is neither legal nor illegal in Japan,<sup>15</sup> rather guidelines and legal opinions proffered by professional associations and government have seen the practice of this specific ART forbidden. Beginning in 2003, the Japan Society of Obstetrics and Gynecology (JSOG) issued guidelines advising its members not to perform gestational surrogacy at risk of losing their membership and their license to practice medicine.<sup>16</sup> Later that year, both the Ministry of Health, Labor and Welfare and the Ministry of Justice issued reports calling for the prohibition of surrogacy, with this opinion further supported in 2007 by the Science Council of Japan and the Japan Federation of Bar Associations.<sup>17</sup> In 2008, Japan's ART Review Committee repeated the call to prohibit the practice of gestational surrogacy, and in 2014 the Liberal Democratic Party put forth a proposal calling for the prohibition of surrogacy except for in exceptional circumstances.<sup>18</sup> Even so, because

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<sup>9</sup> yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating International Surrogacy Agreements' (2016) 24 Brooklyn Journal of Law and Policy 1; Brittany M. Nichol, 'A Child Without a Country: Dissolving the Statelessness of Children Born Through Surrogacy' (2016) 2016 Michigan State Law Review 907.

<sup>10</sup> Yasmine Ergas, 'Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy' (2013) 27 Emory International Law Review 117.

<sup>11</sup> Genaro Castro-Vázquez, 'Assisted Reproductive Technologies in Contemporary Japan: Experiences and Perceptions of some Japanese Mothers' (2015) 19 Gender, Technology and Development 271, 272.

<sup>12</sup> Genaro Castro-Vázquez, 'Assisted Reproductive Technologies in Contemporary Japan: Experiences and Perceptions of some Japanese Mothers' (2015) 19 Gender, Technology and Development 271; Yuri Hibino, Gestational Surrogacy in Japan, in: E. Scott Sills, Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues, Cambridge University Press 2016, p. 174-180.

<sup>13</sup> Trisha A. Wolf, 'Why Japan Should Legalize Surrogacy' (2014) 23 Pacific Rim Law and Policy Journal 461.

<sup>14</sup> *Ibid*, 470.

<sup>15</sup> Vera Mackie, 'Science, Society and the Sea of Fertility: New Reproductive Technologies in Japanese Popular Culture' (2014) 26 Japan Forum 441.

<sup>16</sup> Marcelo de Alcantara, 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 48 Family Court Review 417; Vera Mackie, Birth Registration and the Right to Have Rights: The Changing Family and the Unchanging *Koseki*, in: David Chapman and Karl Jakob Krogness, Japan's Household Registration System and Citizenship: *Koseki*, Identification, and Documentation, Routledge 2014, p. 203-220.

<sup>17</sup> Marcelo de Alcantara, 'Surrogacy in Japan: Legal Implications for Parentage and Citizenship' (2010) 48 Family Court Review 417

<sup>18</sup> Yuri Hibino, Gestational Surrogacy in Japan, in: E. Scott Sills, Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues, Cambridge University Press 2016, p. 174-180.

there is no statutory regulation regarding surrogacy in Japan, people are free to avail the services of an overseas surrogate, and do so without realizing the potential consequences this may have for their child.

To avoid abstraction, the case of baby Manji is instructive to better understand how cross-border surrogacy places children at risk of statelessness in Japan. In 2008, Manji was born in India through gestational surrogacy to Japanese parents that had divorced prior to her birth.<sup>19</sup> The father was genetically related to Manji but because the couple had used a third-party donated ovum the intended mother was not.<sup>20</sup> The father wanted to raise Manji despite having divorced the intended mother one month prior to the birth, but when returning to Japan the Japanese embassy refused to issue a Japanese passport to Manji and sought to use the surrogate's nationality to determine that of Manji's. However, neither the intended mother, the anonymous ovum donor, nor the surrogate had parental rights, and because India only issues passports to those with Indian parents, Manji was also ineligible for Indian nationality.<sup>21</sup> Approximately two months after Manji's birth a Japanese humanitarian visa was issued allowing her to enter Japan whereupon the Japanese government had promised to grant her nationality once the father's paternity had been formally established.<sup>22</sup> However, it remains unclear whether this child was ever granted Japanese nationality.<sup>23</sup>

To clarify, Japanese nationality is premised on the principle of *jus sanguinis* (right of blood),<sup>24</sup> and parentage as recorded in the *Koseki* (Family Registration) is the principle basis upon which Japanese nationality is transmitted.<sup>25</sup> Japanese jurisprudence has established that gestation is the basis for maternity<sup>26</sup> whereas the Civil Code holds that a presumption founded on marriage serves as the basis for paternity.<sup>27</sup> Because Japan recognized the Indian surrogate as Manji's mother, and because Manji's father was not the surrogate's husband such that no presumption founded on marriage would hold, both the maternal and paternal transmission of nationality were foreclosed, leaving Manji with an uncertain legal status in her intended home country of Japan.

Although this is only one example, as of 2011 it was documented that more than 100 Japanese couples had pursued surrogacy overseas, many of whom encountered issues with respect to the status of their children.<sup>28</sup> Yet, because Japan has no statutory framework regulating cross-border surrogacy, people will continue to avail the services of overseas surrogates and in so doing place their children at risk of statelessness.

#### 4. What can be done?

Moving forward, there are at least three approaches Japan can take to remedy these issues. First, Japan could follow the example of several European countries and notify ART clinics abroad to no longer provide services to their nationals.<sup>29</sup> However, there is evidence to suggest that nationals of these countries continue to

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<sup>19</sup> Trisha A. Wolf, 'Why Japan Should Legalize Surrogacy' (2014) 23 Pacific Rim Law and Policy Journal 461.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Nationality Law, art 2(1).

<sup>25</sup> As stated by the Ministry of Justice, the *koseki* is 'an authentic record of a person's kinship ties from birth until death which establishes a person as a Japanese national and is the sole system for authenticating Japanese nationality.' Ministry of Justice, 'Koseki' <<http://www.moj.go.jp/MINJI/koseki.html>> accessed 5 December 2017.

<sup>26</sup> Supreme Court, 27 April 1962, Minshū 16, 1247; Supreme Court, 23 March 2007, Minshū 61, 619.

<sup>27</sup> Civil Code, ch 3, s 1, art 772 (1).

<sup>28</sup> Melissa Ahlefeldt, 'Less than Family: Surrogate Birth and Legal Parent-Child Relationships in Japan' (2011) 32 Zeitschrift Für Japanisches Recht 65; Yuri Hibino, Gestational Surrogacy in Japan, in: E. Scott Sills, Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues, Cambridge University Press 2016, p. 174-180.

<sup>29</sup> Tina Lin, 'Born Lost: Stateless Children in International Surrogacy Arrangements' (2013) 21 Cardozo Journal of International and Comparative Law 545; Usha Rengachary Smerdon, 'Birth Registration and Citizenship Rights of Surrogate Babies Born in India' (2012) 20 Contemporary South Asia 341.

pursue cross-border surrogacy,<sup>30</sup> not to mention that clinics may choose to ignore such prescriptions when motivated by the primacy of the economic imperative.<sup>31</sup>

Elsewhere, and in keeping with its responsibilities under 'Article 3(1)' of the Convention on the Rights of the Child,<sup>32</sup> Japan could resolve the uncertain legal status of these children by treating the child's best interests as paramount when determining nationality. However, as Margalit<sup>33</sup> reminds us, local jurisdictions are free to interpret what those best interests are, thereby undermining the cross-border purchase of such international treaties. Finally, and as Wolf<sup>34</sup> has called for, Japan could establish a framework to legalize and regulate surrogacy to avoid the problems discussed herein. If legalized, a more conducive environment for domestic surrogates would likely be created, thereby increasing the number of domestic surrogates and lowering the cost of service.<sup>35</sup> As well, because Japan has a highly developed healthcare system and one of the lowest maternal mortality rates globally, it is better able to provide comprehensive health services to the surrogate, the child, and the intended parents alike.<sup>36</sup> Furthermore, the thousands spent on overseas services would remain in Japan, and the potential exploitation of surrogates in low-income countries would be altogether avoided.<sup>37</sup>

## 5. Conclusion

The absence of any formal regulation of gestational surrogacy in Japan has the two-fold effect of compelling those who wish to have children via surrogacy to seek overseas surrogates, which in turn places the children born of such arrangements at high risk of statelessness upon arrival in Japan. Granted, the number of children in such a predicament is likely minimal, but it is precisely because this population is so small that Japan should act to reduce and prevent statelessness brought about by cross-border surrogacy. Nevertheless, until reforms are implemented, children will continue to be arbitrarily punished for the circumstances of their birth, and the number of children so affected will continue to grow.

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<sup>30</sup> Tina Lin, 'Born Lost: Stateless Children in International Surrogacy Arrangements' (2013) 21 *Cardozo Journal of International and Comparative Law* 545.

<sup>31</sup> Charles P. Kindregan Jr. and Danielle White, 'International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements' (2013) Suffolk University Law School Research Paper 13-39 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2359775](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359775)> Accessed 5 September 2017.

<sup>32</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>33</sup> yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating International Surrogacy Agreements' (2016) 24 *Brooklyn Journal of Law and Policy* 1

<sup>34</sup> Trisha A. Wolf, 'Why Japan Should Legalize Surrogacy' (2014) 23 *Pacific Rim Law and Policy Journal* 461.

<sup>35</sup> yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating International Surrogacy Agreements' (2016) 24 *Brooklyn Journal of Law and Policy* 1.

<sup>36</sup> yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating International Surrogacy Agreements' (2016) 24 *Brooklyn Journal of Law and Policy* 1; Trisha A. Wolf, 'Why Japan Should Legalize Surrogacy' (2014) 23 *Pacific Rim Law and Policy Journal* 461.

<sup>37</sup> Raywat Deonandan, 'Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy' (2015) 8 *Risk Management and Healthcare Policy* 111; yehezkel Margalit, 'From Baby M to Baby M(anji): Regulating International Surrogacy Agreements' (2016) 24 *Brooklyn Journal of Law and Policy* 1.