

**THE ‘BABIES M’:**  
**THE RELEVANCE OF *BABY MANJI YAMADA V. UNION OF***  
***INDIA (UOI) AND IN THE MATTER OF BABY “M”***

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*The two cases dealt with in this paper highlight a modern day reproductive practice, surrogacy motherhood. The relevance of the comparative analysis lies in their role in highlighting the legal void. The focus on the absence of the law has also been amplified by the intense media scrutiny public debates and the legislative activism that followed in the wake of these two cases, thereby enhancing the legal regulation of surrogacy in their respective jurisdictions.*

**I. INTRODUCTION**

The Babies ‘M’ of the cases<sup>1</sup> mentioned in this paper were both, incidentally baby girls, whose lives were separated by geographical miles and time yet intertwined by one modern social practice, commercial surrogacy. The practice of surrogacy is ancient<sup>2</sup> but surrogacy in exchange for money evolved with the development of the science relating to infertility and the possibilities of “non-coital reproduction [which] have given society awesome opportunities”.<sup>3</sup>

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<sup>1</sup> *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518 and *In the Matter of Baby M*, 217 N.J. Super 313, (1987).

<sup>2</sup> Biblical and Indian mythological stories document the prevalence of surrogacy as a practice in the ancient times. For an example of the references in the Bible, see Jamie Levitt, *Biology, Technology And Geneology: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J. L. & SOC. PROBS. 451,454 (1992). Also see, Usha Rangachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between The United States And India*, 39 CUMB. L. REV. 15, 16(2009) for both Biblical as well as Hindu mythological references.

<sup>3</sup> *In the Matter of Baby M*, 217 N.J. Super 313, (1987) at 333

Commercial surrogacy is indeed a modern practice as opposed to traditional surrogacy. Infertility of either of the partners and the desire for a child has led to them into looking for alternate ways of child bearing.<sup>4</sup> The development of assisted reproductive technology has made it possible for a child to be born through a surrogate mother to whom it is not genetically related. This is known as gestational surrogacy.<sup>5</sup>

In traditional surrogacy, the egg is of the mother who gestates the child making her the biological/genetic mother. However, traditional surrogacy is given a commercial angle when the surrogate mother is implanted with a fertilised egg, which might be fully genetically related to the intending parents or only to one of them and carries the baby to full term, all in exchange for money.<sup>6</sup> The clichéd expression of ‘wombs for rent’ was coined when it became possible for fertilised eggs to be implanted and, thus, grow to a full term baby in any womb, sometimes with the help of cross-border surrogacy mothers.<sup>7</sup>

Baby Melissa Stern (*hereinafter* Baby Melissa), known as Baby ‘M’ for most of the trial period and earlier parts of the Court’s judgment (to protect her identity) was born on the 27<sup>th</sup> of March 1986 in Bergen County, New Jersey, USA,<sup>8</sup> whereas Baby Manji Yamada was born on the 25<sup>th</sup> of July 2008 in Anand, Gujarat, India.<sup>9</sup> Their young lives

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<sup>4</sup> Infertility is seen as a health problem and statistics point out to the prevalence of infertility as being from 8-10% to 15% amongst Indian women. [See Imrana Qadeer and Mary E. John, *The Business and Ethics of Surrogacy*, 44(2) *ECO. & PL. WEEKLY* 10 (2009) as well as The Preamble to the Draft Assisted Reproductive Technologies (Regulation) Bill, 2010]

<sup>5</sup> See ANDREW GRUBB, JUDITH LAING AND JEAN MCHALE, *PRINCIPLES OF MEDICAL LAW* 832-833 (Oxford University Press, 2010), JEAN MCHALE AND MARIE FOX, *HEALTH CARE LAW: TEXT AND MATERIALS* 782 (London: Sweet and Maxwell, 2007), EMILY JACKSON, *MEDICAL LAW, TEXT CASES AND MATERIALS* 828-832 (Oxford University Press, 2010).

<sup>6</sup> *Ibid.*

<sup>7</sup> See *Wombs for rent: A tale of two mothers*, BBC News World, July 28, 2011, available at <http://www.bbc.co.uk/news/world-14138394>, (Last visited on August 1, 2011).

<sup>8</sup> *Supra* note 3, 341.

<sup>9</sup> *Baby Manji Yamada vs. Union of India and Another* (2008) 13 SCC 518 at 521, para 4.

were subjected to the vagaries of the legal process long before they could understand the system. More importantly their birth and the events incidental thereto, led to the inception of laws relating to surrogacy in their respective nation states. The issues raised in these two cases were different but their common relevance lies in them being the first of their kind in the context of surrogacy in their respective jurisdictions.

This paper aims to look into both these cases, discuss the facts and make a comparative commentary on them. The paper will analyse the cases focusing on the background in which they were decided and on their impacts in the development of law relating to surrogacy in the India and the State of New Jersey, where the cases were decided respectively.

## II. DIFFERENT LIVES AND ABSENT LAWS

Both Baby Melissa and Baby Manji were born when the commercial surrogacy industry was booming, in the absence of any legislation regulating commercial surrogacy in their respective places of birth. At the time of the decision of the Superior Court of New Jersey in Baby Melissa's case, the Court acknowledged this legal void.<sup>10</sup>

The absence of law relating to surrogacy in India was raised in the case of Baby Manji before the Supreme Court of India, where it was alleged that "...in the name of surrogation lot of irregularities are being committed....in the name of surrogacy a money making racket is being perpetuated..[and].... that the Union of India should enforce stringent laws relating to surrogacy."<sup>11</sup>

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<sup>10</sup> 217 N.J. Super. 313, 333 (1987) :

"...Unfortunately, the law is slow to react to the rapid advance of science and changing human behaviour.... This minimal pace is made apparent when it is realized that as of this date not one state in this nation has adopted a law that specifically addresses either affirmatively or negatively the concept of surrogate parenting although many studies are in process and legislation has been introduced. There are two bills pending in the New Jersey Legislature." [Emphasis supplied].

<sup>11</sup> *Supra* note 6, p.521, para 5.

At the time of the decision of Baby Manji, the fertility clinics were subjected to regulation by the 2006 guidelines of the Indian Council of Bio-medical Research (*hereinafter* ICMR Guidelines) which validated surrogacy contracts. However, it specifically considered surrogacy for infertile married couples and the reading of the guidelines clearly proposes gestational surrogacy with the baby required to be genetically related to the intending parent and mandating them to adopt the baby within six weeks of birth.<sup>12</sup> Thus, the Guidelines aimed at preventing multiple parentages which could result in a situation when there were donors of either of the gametes and also gestational surrogacy. However, in practice, gestational surrogacy with non-genetic gametes was also carried out by the clinics.

The city of Anand, Gujarat is acknowledged as the hub of surrogacy in India.<sup>13</sup> Other cities like Bombay have come into the limelight with the report of an Israeli gay couple who became parents through a

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<sup>12</sup> See *Statement of Specific Principles for Assisted Reproductive Technologies, ETHICAL GUIDELINES FOR BIO-MEDICAL RESEARCH AND HUMAN PARTICIPANTS*, Indian Council of Medical Research 101-102 (New Delhi, 2006). The Guidelines mandated that the intending parents agree to adopt the baby after six weeks of birth and that they were to undergo genetic (DNA) fingerprinting to prove that they were the intending parents and the record was to be kept with the clinic. Available at <[www.icmr.nic.in/ethical\\_guidelines.pdf](http://www.icmr.nic.in/ethical_guidelines.pdf)> (Last visited on May 21, 2011).

<sup>13</sup> “In commercial surrogacy agreements, the surrogate mother enters into an agreement with the commissioning couple or a single parent to bear the burden of pregnancy. In return of her agreeing to carry the term of the pregnancy, she is paid by the commissioning agent for that. The usual fee is around \$25,000 to \$30,000 in India which is around 1/3rd of that in developed countries like the USA. This has made India a favourable destination for foreign couples who look for a cost-effective treatment for infertility and a whole branch of medical tourism has flourished on the surrogate practice. ART industry is now a 25,000 crore rupee pot of gold. Anand, a small town in Gujarat, has acquired a distinct reputation as a place for outsourcing commercial surrogacy. It seems that wombs in India are on rent which translates into babies for foreigners and dollars for Indian surrogate mothers.” **India – a reproductive tourism destination**, Law Commission of India Report No. 228, Para 1.7, page 11. Also see *Anand in Gujarat surrogacy hub for childless Brits*, EXPRESSINDIA, December 10, 2007, available at <[www.expressindia.com/latest-news/Anand-in-Gujarat...../248727/](http://www.expressindia.com/latest-news/Anand-in-Gujarat...../248727/)> (Last visited on May 21, 2011).

surrogacy arrangement in the city.<sup>14</sup> Recently, a Spanish gay couple also became parents through a surrogacy arrangement in Delhi.<sup>15</sup>

Infertility clinics in India are baby makers. They treat couples for infertility and in case of their inability to have a baby through natural reproductive process, use artificial insemination procedures and also assist in finding surrogates. For this, they involve one of the women from their database of prospective surrogates and arrange meetings with the infertile couples. Many a times, the couples seeking surrogacy are foreign couples and they are assisted by the infertility clinics in their endeavour to be parents. These clinics also arrange donors of gametes when required, determine the money involved, arrange for legal help to work out the terms of the surrogate agreement and the benefits to each of the parties, supervise the pregnancy of the surrogate mother, monitor her during the gestation period, successfully deliver the child, obtaining of birth certificates from the municipal corporation and the final formalities to ensure that the baby is handed over to the intending parents. The foreign exchange rates make India even more lucrative and easier for international couples to decide on Indian surrogates.<sup>16</sup>

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<sup>14</sup> See *Israeli gay case to hit surrogacy biz in India*, THE TIMES OF INDIA, May 11, 2010, available at <[www.articles.timesofindia.indiatimes.com/2010-05-11/india/28289465\\_1\\_1surrogacy-fertility-clinics-surrogate-mother](http://www.articles.timesofindia.indiatimes.com/2010-05-11/india/28289465_1_1surrogacy-fertility-clinics-surrogate-mother)> (Last visited on May 21, 2011).

Also see Law Commission of India Report No.228, 2009, 14-15.

<sup>15</sup> See *Spanish gay couple's child dream comes true in India*, SIFYNEWS, February 16, 2011, available at <[www.sify.com/news/spanish-gay.....lcqt4jbigi.html](http://www.sify.com/news/spanish-gay.....lcqt4jbigi.html)> (Last accessed on May 22, 2011). See the NDTV video *Ahmedabad: Twin hope for gay couple*, May 31, 2011, where a Spanish gay couple, incidentally the first in Gujarat, to become parents to twins through surrogacy from Ahmedabad, available at <[www.ndtv.com/video/player/news/ahmedabad-win-hope-for-gay-couple/201125](http://www.ndtv.com/video/player/news/ahmedabad-win-hope-for-gay-couple/201125)> (Last visited on May 31, 2011).

<sup>16</sup> See SAMA Team, *Assisted Reproductive Technologies: For whose Benefit?* 44(18) ECO. & PL. WEEKLY 25 (2009).

Also, see SAMA Women's Health, *The Regulation of Surrogacy in India: Questions and Complexities*, April 23, 2011 at <http://samawomenshealth.wordpress.com/2011/04/23/the-regulation-of-surrogacy-in-india-questions-and-complexities/>, (Last visited on July 25, 2011)

With each successful birth, the stamp on the legality of their activities is sanctioned in absence any State or Central legislation. Although the ICMR Guidelines do exist, there is no central or state body to ensure that these regulations are followed strictly when it comes to surrogacy.<sup>17</sup>

Incidentally, financial considerations seem to be the main reason for the surrogates to participate in these arrangements. These agreements are carried on with the help of local lawyers and in case of problems, parties settle and move ahead with whatever comes out of the agreement as long as one gets the baby and the other, the money for the surrogacy. The infertility clinics maintain a low profile in the absence of a concrete law. The uncertainty regarding the rights and duties of the parties involved, coupled with the absence of specialised forums for redressal of grievances related to surrogacy ensures that matters relating to breach of contract, non-payment, exploitation and violation of human rights are swept under the carpet.

### III. BABY MELISSA: THE WORLD WAKES UP TO SURROGACY

Baby Melissa was born to William Stern, who was married to Elizabeth Stern, through artificial insemination of Mr. Stern's seminal fluid in the womb of surrogate mother Mary Beth Whitehead. The latter was married to Richard Whitehead and was already a mother of two school going children. In the judgment, much emphasis is laid on the background of these individuals to justify the exercise of the *parens patriae* jurisdiction of the Court on how it is the "...power of the sovereign (in this case the State of New Jersey by its judicial branch) to watch over the interests of those who are incapable of protecting themselves". in this case, Baby Melissa.

The case was decided by the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County. It arose out of:

- a. an *ex-parte* application filed by the Sterns for an order to show cause as to why the Court should not issue an order for the summary judgment to enforce a surrogacy parenting contract;

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<sup>17</sup> *Supra* note 9.

and,

- b. a complaint filed by the Sterns seeking to enforce a surrogate-parenting agreement, compel Mrs. Mary Beth Whitehead to surrender the infant born to her, restrain any interference with their custody of the child, terminate her parental rights and allow adoption of the child by Mrs. Stern.<sup>18</sup>

Thus, the issues before the Court were:

- a. Whether there was a breach of contract of surrogacy?
- b. Whether it is in the best interest of Baby Melissa to be allowed to grow up with her surrogate mother or her genetic parents?
- c. Whether the claim made by the parents of Mrs. Whitehead as Baby Melissa's grandparents and their prayer to be allowed to have visitation rights could be entertained?

The Court, fully aware that it was deciding on a crucial social issue in the absence of any legislation, approached the case on the following terms:

“...Many questions must be answered; answers must come from legislation. If there is no law then society will suffer the negative aspects of this alternative reproduction vehicle that appears to hold out so much hope to the childless who make up a substantial segment of our society.

Today, however, this court can only decide what is before it. . . . It will decide on legal principles alone. *This court must not manage morality or temper theology. Its charge is to examine what law there is and apply it to the facts proven in this cause.*

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<sup>18</sup> *Ibid.*, at 326.

This is a nonjury trial. At law, it is the jury that makes the findings of fact. As in all chancery proceedings, the court is the fact finder.”<sup>19</sup> [Emphasis Supplied]

The Sterns met Mrs. Whitehead through an infertility clinic, when Mrs. Stern was diagnosed with multiple sclerosis. The disease made her incapable of carrying a pregnancy without having debilitating effects on her health. Mrs. Whitehead was registered with the clinic and the Sterns reached an agreement with her and appointed her as the surrogate by a surrogate parenting agreement dated 6<sup>th</sup> February 1985.<sup>20</sup> The seminal fluid of Mr. Stern was introduced in Mrs. Whitehead’s womb through artificial insemination where the latter was successfully impregnated after nine attempts. This was celebrated by the Sterns by taking out the Whiteheads for dinner.<sup>21</sup>

The terms of the contract specifically stated that Mrs. Whitehead was to be appointed the surrogate whereby she accepted “...that her obligation was to attempt conception by artificial insemination, upon conception to carry the child to term, deliver and surrender the child to Mr. Stern renouncing at that time all of her parental rights and acknowledging that doing so would be in the child’s best interest. It was also agreed that Mr. Stern’s name would appear on the child’s birth [certificate as her father]”.<sup>22</sup> Mrs. Stern was not a signatory to the contract but the understanding was that she would adopt the baby after the child was handed over to her husband, as was the practice with relation to

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<sup>19</sup> *Ibid.*, at 334.

The responsibility before it was also emphasised in the following words:

“This is not the usual custody situation because there is no shared parenting, no history of any relationship of consequence between the natural parents. It is all about a child with special needs because of her origin”. *Supra* note 3, 367.

<sup>20</sup> *Ibid.*, at 344.

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

<sup>22</sup> *Ibid.*, at 344.



babies born out of surrogacy at the time in New Jersey.

The contract further stated that “... Mrs. Whitehead would assume the risks of the pregnancy and child birth. She would submit to a psychiatric evaluation for which Mr. Stern would pay. Mr. Stern had the right to name the child. In the event of the death of Mr. Stern, the child would be placed in the custody of Mr. Stern’s wife. Mrs. Whitehead would not abort the child. In addition, she would undergo amniocentesis; and if the child were found to have a genetic or congenital abnormality, it would be aborted if Mr. Stern requested it. That in the event the child possessed genetic or congenital abnormalities William Stern would assume legal responsibility for the child once it was born”.<sup>23</sup> In return, Mrs. Whitehead was to be paid \$10,000 and all the medical expenses and dental expenses, on fulfilment of her contractual obligations. She promised not to meet the Sterns but asked to be sent an annual picture of Baby Melissa and her progress in a letter.<sup>24</sup> Although Mr. Whitehead did not initially consent to his wife’s attempts at surrogacy, he ultimately came around and was fully aware of the negotiations with the Sterns, many times participating in the discussions.<sup>25</sup> He was however, not a signatory to the contract.

Contrary to the contract, Mrs. Whitehead developed an attachment to the child and insisted on keeping the baby. The Sterns were forced to litigate when the baby was taken away from their possession.

The best interest of the child was decided by looking into three aspects:

1. Background and character of the parties, their past family life and actions.

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<sup>23</sup> *Ibid.*, at 345.

<sup>24</sup> *Ibid.*, at 344.

<sup>25</sup> *Ibid.*, at 345. The Court gave him the status of a ‘step-father.’ *Ibid.*, at 401.

2. Their behaviour after the conception and the birth of the child.
3. The behaviour of the parties during the trial.

Much emphasis was laid on the background of the parties where the scales were tilted in favour of the Sterns. They had an upmarket, educated and 'private' life and even their parents had had stable marriages. On the other hand, the Whiteheads, only had a high school education, and had a history of domestic turbulence, bad financial status, a brief separation and alcohol abuse by Mr. Whitehead. The parenting skills of the Whiteheads were put under intense scrutiny in light of their decisions relating to their two children.<sup>26</sup>

The inability of Mrs. Whitehead to honour the surrogacy agreement and detach herself from the baby also worked against her. When Baby Melissa was born, the Whiteheads chose her name which was not Melissa, the name given by the Sterns. This was contrary to the agreement. They further went ahead and registered her birth, in that name, stating themselves to be the parents. They also requested the Sterns not to mention the factum of surrogacy to the hospital authorities.<sup>27</sup> Although she handed over Baby Melissa to the Sterns, she came to them the evening of the same day and asked to keep her for some days. The Sterns were distraught as Mrs. Whitehead showed suicidal tendencies. However, on being handed the baby, she eloped with the baby, assisted by her husband, to a different State and refused to comply with orders of the Court demanding her appearance. This was a long drawn horror for the Sterns lasting for about four months until the address of the Whiteheads was identified in the state of Florida with the help of private detectives.<sup>28</sup>

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<sup>26</sup> 217 N.J. Super 313, 341 (1987) states ".....Despite recommendations by the professionals who comprise her son's school district child study team, Mrs. Whitehead requested that their recommendations be disregarded and that her wishes be adopted. Dr. Metnick, the school psychologist, testified that in seven years only ten parents, out of hundreds of students tested, have rejected the child study team recommendations."

<sup>27</sup> *Supra* note 3, at 346.

<sup>28</sup> *Ibid.*, at 394, 350, 406.

During the trial, Mrs. Whitehead subjected the case to media scrutiny by going to the press.<sup>29</sup> She also allowed photographs of her own eleven year old daughter to be published in magazines and newspapers and also unnecessarily took her to the Court. She even made false allegations against Mr. Stern of having sexually abused her daughter<sup>30</sup>, charges which were later withdrawn.

In coming to its conclusions, the Court relied on the evidence given by thirty eight witnesses out of which fifteen were expert witnesses. The Court ruled that it was in the best interest of the child that she be placed in the custody of the Sterns. Joint custody was deliberated upon by the Court on the recommendation of one of the experts, a child psychiatrist. However, it was denied as the Court found that “[t]he rancor [between the parties] is too great”<sup>31</sup> and thus not in the best interest of the child as “[the] court doubts that they can isolate their personal animosity and ‘all of a sudden’ [to] cooperate for the child’s benefit”.<sup>32</sup>

The Court also found that there was a breach of contract by Mrs. Whitehead on two counts; by failing to surrender the child and by refusing to relinquish her parental rights to the child<sup>33</sup>. The best interest of the child was also an issue in determining whether specific performance of the contract should be ordered. This was decided in favour of the Sterns.<sup>34</sup> The decision of the Court dealing with surrogacy contract will be dealt with in detail later in section V of this paper.

The claim to the grandparental rights of the parents of Mrs. Whitehead, Catherine and Joseph Messer, was examined under the provisions of New Jersey Statutes Annotated 9:2-7.1.<sup>35</sup> This allows certain

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<sup>29</sup> *Ibid.*, at 369, 392-393, 397.

<sup>30</sup> *Ibid.*, at 351, 360, 368, 392,393.

<sup>31</sup> *Ibid.*, at 358.

<sup>32</sup> *Ibid.*, at 358-359.

<sup>33</sup> *Ibid.*, at 388-389.

<sup>34</sup> *Ibid.*, at 390-399.

<sup>35</sup> As amended in 1972. The Statute deals with the visitation rights for the grandparents or siblings.

rights to grandparents to preserve the “important relationships”<sup>36</sup> that might have been developed with a minor child in case of death of parents, divorce or living separate or apart inspite of Court orders and agreements.<sup>37</sup> The Court held that for such an order to be passed,<sup>38</sup> there must be a disintegration or dysfunction in the family unit of the child in order to allow the visitation rights; a unit which itself was missing in this case. Also, in exercise of its equity jurisdiction, the Court found that certain conduct of the grandparents showed that it would be against the best interest of the child to allow them visitation rights. The complete disinterest of the grandparents towards the surrogacy contract, their inability to act contrary when their daughter, Mrs. Whitehead, eloped with the baby in violation of the Court order, and their delayed involvement in the case, i.e. at the time of the trial were some factors taken into consideration by the Court.<sup>39</sup> This decision of the Court was enhanced by its refusal to allow the custodial rights to Mrs. Whitehead and the order for specific performance of the contract.<sup>40</sup>

The Whiteheads made an application for appeal against the above decision of the Superior Court of New Jersey before the Supreme Court of New Jersey, along with an application for grant of custody; the

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<sup>36</sup> *Ibid.*, at 404.

<sup>37</sup> *Ibid.*, at 403.

<sup>38</sup> *Ibid.*, at 404-408.

<sup>39</sup> “This court finds these two people to be the genealogical maternal grandparents of Melissa who, at first view, seem to have been somewhat casual and aloof about their daughter’s extraordinary agreement. Their emphasis seems to have changed with the advent of this litigation”. 217 N.J. Super. 313, 403 (1987)

Also:

“It is necessary at all times, in using any measure for Melissa, to note with emphasis and concern that she is a special child-at risk-because of her origin and the extraordinary publicity attendant to the trial of this case. Melissa will need protection at all times whether it be from inappropriate or inadvertent remarks made by family, friends or strangers or from an intrusion into her privacy. This protection will require a superior sense of responsibility and obligation. It requires placing the welfare of the child paramount to one’s self or one’s children. Do the Messers measure up to such stringent standards?” 217 N.J. Super 313, 405 (1987)

<sup>40</sup> *Supra* note 3, at 408.

appeal was allowed but the custody was not granted.<sup>41</sup> The Supreme Court affirmed the decision of the Superior Court in part while reversing the decision with respect to the validity of the surrogacy contract and remanded the case back to the Superior Court of New Jersey.<sup>42</sup> The custody of the child was allowed to be retained by Mr. Stern accepting the decision of the lower Court and the ‘best interest of the child’ argument.<sup>43</sup> However, Mrs. Whitehead was given visitation rights in recognition of her entitlement as the natural mother, consequently terminating the adoption rights of Mrs. Stern.<sup>44</sup> The case was remanded back to the Superior Court for the parties to work out the terms of the visitation rights by the parties.<sup>45</sup>

The other important argument raised in Baby Melissa’s case, before the Supreme Court of New Jersey, related to the constitutionally protected rights of the parties. Mrs. Whitehead contended that the order of the Superior Court violated her constitutionally protected right to the companionship of her child. The Sterns on the other hand claimed “.....a constitutional right to privacy, which includes the right of procreation, [also includes] the right of consenting adults to deal with matters of reproduction as they see fit.”<sup>46</sup>

Mrs. Whitehead’s claim of the right to companionship of her child was dropped as her right to companionship has been restored by the part of the order allowing her the visitation rights. As far as Mr. Stern is concerned, the Court refused to give an all encompassing definition to his claim to the right to procreation simply because, it reasoned that giving

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<sup>41</sup> *In the Matter of BABY M., a Pseudonym for an Actual Person*, Supreme Court of New Jersey, 107 N.J. 49, vide order dated 21.11.1986.

<sup>42</sup> *In the Matter of BABY M., a Pseudonym for an Actual Person*, Supreme Court of New Jersey, 109 N.J. 396, (1987).

<sup>43</sup> *Supra* note 40, at 454.

The Whiteheads divorced during the trial proceedings and Mrs. Whitehead remarried but both were considered as the appellants for the Court proceedings. 109 N.J. 396, 412 (1987), *Supra* note 1.

<sup>44</sup> *Ibid.*, at 463- 468.

<sup>45</sup> *Ibid.*, at 468-469.

<sup>46</sup> *Ibid.*, at 420

him the right would be to refuse Mrs. Whitehead the same right. It held:

“.....The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that.....

Mr. Stern has not been deprived of that right. We conclude that the right of procreation is best understood and protected if confined to its essentials, and that when dealing with rights concerning the resulting child, different interests come into play. There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child.....”<sup>47</sup>

#### IV. THE TALE OF BABY MANJI

It has been almost three years since the Supreme Court decided *Baby Manji Yamada vs. Union of India (UOI) and Another*.<sup>48</sup> The relevance of this case lies in it being not only the first decision relating to surrogacy made by the Apex Court but also in bringing to light the absence of regulation of the existing surrogacy industry in India. Thus, it can be said to be the direct precursor of the newly enacted Assisted Reproductive Technologies (Regulation of) Bill, 2010<sup>49</sup> which followed the 2008 Draft Bill.<sup>50</sup> The case is also relevant because it was decided under a presumption of legality of surrogacy agreements and motherhood, with the Court merely commenting on the status of such agreements. At the time, the Guidelines regulating surrogacy had been laid down by the Indian Council of Medical Research in 2006 but did not find mention in the judgment of the Court to support its presumption of legality of surrogacy in India.

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<sup>47</sup> *Ibid*, at 448-449 (1988)

<sup>48</sup> (2008) 13 SCC 518

<sup>49</sup> Available in: <http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> (Last visited on May 22, 2011).

<sup>50</sup> Available at [http://www.prsindia.org/uploads/media/vikas\\_doc/docs/1241500084~~DraftARTBill.pdf](http://www.prsindia.org/uploads/media/vikas_doc/docs/1241500084~~DraftARTBill.pdf) (Last visted on May 31, 2011)

The case developed in the backdrop of the Gujarat riots of 2008. Baby Manji was born on the 25<sup>th</sup> July, 2008, to Japanese biological parents who came to Anand in the year 2007, looking for surrogates. The egg extracted from her biological mother, Dr. Ikufumi Yamada was fertilised by her father, Dr. Yuki Yamada's sperm. The fertilised egg was then implanted in the womb of an Indian surrogate mother. Her biological parents soon developed marital problems and her mother left for Japan before her birth. They were divorced by the time Baby Manji was born. It is not clear from the judgment if the surrogacy was responsible for the 'matrimonial discord'.<sup>51</sup>

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<sup>51</sup> *Supra* note 46, Para 4

There are a lot of contradictory reports regarding the parentage of Baby Manji. Some state that she was born to an anonymous Indian donor whose eggs were fertilized by her biological father. The marital discord that developed between the parents is considered to be a consequence of the wife of Dr. Yamada refusing to bring up a baby which is not genetically related to her. However, this article has relied on the facts stated in the judgment which has definitely 'the' precedence over newspaper and web articles.

See generally:

1. "*Baby Mani's wait may end soon*", dated August 8, 2008; <[www.dnaindia.com/india/report\\_baby-manji-wait-may-end-soon\\_1182152](http://www.dnaindia.com/india/report_baby-manji-wait-may-end-soon_1182152)> (Last visited on May 22, 2011)
2. Kari Points, "*Institutions in crisis, Commercial Surrogacy and Fertility Tourism in India- the case of Baby Manji*", The Kenan Institute For Ethics at Duke University; <[www.duke.edu/web/kenanethics/case\\_studies/Baby\\_Manji.pdf](http://www.duke.edu/web/kenanethics/case_studies/Baby_Manji.pdf)> In this article, the author has written the facts contrary to the Supreme Court judgment and this she has accredited to "...nearly 100 articles in the newspapers .....surveyed:.....[the] survey spanned mid-July 2008 to mid-May 2009." She further writes: "I ascertained the timeline of events and facts of the case from these accounts. Although to the best of my knowledge what I have presented here is an accurate representation of what happened, the articles often providing conflicting details." See footnote 1. ( Last visited on May 22, 2011)
3. "*Baby Manji's luck looks up, may get Japan visa*"; August 15, 2008, CNN-IBN; <[www.ibnlive.in.com/news/baby-manjis-visa/71312-3.html](http://www.ibnlive.in.com/news/baby-manjis-visa/71312-3.html)> (Last visited on May 22, 2011)
4. "*SC extends custody of baby Manji granted to her grandmother*", August 28, 2008, THE TIMES OF INDIA. (Last accessed on May 22, 2011)
5. Amana Fontanella- Khan, "*India, the rent-a-womb capital of the world*",

The father too had to go back to Japan as his visa expired and thus, she was under the care and supervision of her paternal grandmother in the clinic in Anand. She was issued a birth certificate in the name of her genetic father by the Municipality of Anand. According to the existing laws, the birth certificate would entitle Mrs. Yamada to adopt the baby. She was breastfed by an Indian lady but later had to be shifted to Rajasthan due to the riots where she was placed under intensive care as she developed complications due to an infection.

Subsequently, a Division Bench Habeas Corpus Writ Petition was filed before the High Court of Rajasthan, Jaipur Bench, by a NGO, M/s SATYA. It was filed against the Union of India through Ministry of Home Affairs, State of Rajasthan through the Principal Secretary, the Director General of Police, Government of Rajasthan and the Superintendent of Police Jaipur City (East), Jaipur.

The writ petition challenged the legality of surrogacy and criticised it as feeding an illegal industry in India and stressed the need for the enactment of a law. Consequently, the Division Bench of the HC of Rajasthan passed the writ ordering the production of the child before the Court. This order was challenged by the grandmother on behalf of Baby Manji in the Writ Petition before the Supreme Court in which the NGO, M/s SATYA was the Respondent No. 3. The *locus standi* of the Respondent No. 3 to file the Writ Petition before the High Court was challenged and it was also argued that the Writ Petition was baseless as it was not proved in whose illegal custody the child was.<sup>52</sup> It was also argued that the petition before the High Court was styled as a public interest litigation there was no element of public interest involved”.<sup>53</sup> The

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SLATE, September 3, 2010, <[www.asianwindow.com/tag/surrogate-mothers/](http://www.asianwindow.com/tag/surrogate-mothers/)>

6. “*Supreme Court to hear infacnt Manji’s case on Wednesday*”, August 19, 2008, THAIINDIAN NEWS, <[www.thaindian.com/newsportal/uncategorised/supreme/.....wednesday\\_10086146.html](http://www.thaindian.com/newsportal/uncategorised/supreme/.....wednesday_10086146.html)> (Last accessed on May 22, 2011)

<sup>52</sup> *Supra* note 46, para 3.

<sup>53</sup> *Ibid.*



Court set aside the order of the High Court and held that complaints relating to the misuse of surrogacy and it being an illegal racket in India, should be made before the Commission set up under the Commissions For Protection of Child Rights Act, 2005. The court also stated that no such complaint had been made with respect to Baby Manji, thus the order requiring her production before the Court was not valid. An additional prayer that the passport for the baby be granted and that the grandmother's visa be extended was allowed and directions to that effect were given to the government.<sup>54</sup>

Later, Baby Manji was issued a Certificate of Identification instead of a passport by the Regional Passport Authority, Rajasthan just to facilitate her transit out of the Indian territory.<sup>55</sup> This fact was highlighted in the case of *Jan Balaz v. Anand Municipality and Others*, a decision of the High Court of Gujarat which involved the question of nationality of twins born to an Indian surrogate mother with the help of an unknown Indian donor and the sperms of the father, Jan Balaz.<sup>56</sup> The decision of the High Court has been discussed at a later point in this paper.

## V. THE COURTS ON SURROGACY AND SURROGACY CONTRACTS:

Much can be said about the difference in the manner in which the judgments have been written and the reasoning used by the Courts in dealing with this nascent issue. The Supreme Court of India, in a short and hurried judgment, delegated the responsibility on the National Commission Protection of Child Rights to decide on the legality of surrogacy. On the other hand, the Superior Court and Supreme Court of New Jersey, more aware of the repercussions of its decision, deliberated

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<sup>54</sup> The Court could have entered into the area of the rights of the grandparent over a surrogate child as was done in the case of Baby M, 217 N.J. Super. 313. However, this omission could be because she was representing the minor *Baby Manji* and as happens in most cases filed before Indian Courts, the major "next friend's/ guardian's" right to approach the Courts on behalf of the minor is decided and accepted on the basis of blood relation. More so, in this case, the relationship of Baby Manji and her grandmother was not a matter of dispute.

<sup>55</sup> AIR 2010 Guj 21

<sup>56</sup> *Ibid*, para 16

upon surrogacy as a method of bearing progeny and the legality of surrogacy agreements. Both Courts were aware that they were acting in the absence of legislation.<sup>57</sup>

The issue regarding the unregulated surrogacy industry in India was raised by M/s SATYA, Respondent No. 3 before the Supreme Court in its counter affidavit; it was dismissed as being ‘not made in good faith’ and ‘not in public interest’ by the counsel for the Union of India.<sup>58</sup> The Court missed a chance to take a stand on such an important contemporary issue. Neither did it go into the details of the *locus standi* of the Respondent No. 3 nor into “whether *bona fides* [of the Petitioner alleging illegality in the name of surrogacy] are involved or not”.<sup>59</sup> Instead, it merely went into discussing the different methods of surrogacy, “a well known method of reproduction”<sup>60</sup> which can be sought by infertile females,<sup>61</sup> intending parents or “single male or a male homosexual couple”.<sup>62</sup> Curiously, the court did not mention that the intended couple might also include an aspect of male infertility.

Another major drawback in the judgment could be the failure of the Court to undertake a detailed discussion of the surrogacy contract as well as the facts of the case.<sup>63</sup> It did write about the various forms of surrogacy and as far as surrogacy in exchange for money is concerned, it wrote:

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<sup>57</sup> The *Baby Manji* decision is a hurried decision which is a characteristic of most of the judgments written by Pasayat, J. He has the record of writing the most number of judgments in the Supreme Court, but which many a times suffer in quality and some mistakes are ‘cut, copied and pasted’ in subsequent judgments involving the same facts.

<sup>58</sup> (2008) 13 SCC 518, 521, para 6

<sup>59</sup> *Ibid*, para 7

<sup>60</sup> *Ibid*, para 8, p. 523

<sup>61</sup> *Ibid*, para 14, p. 523-524

<sup>62</sup> *Ibid*, para 15, p. 524

<sup>63</sup> “Ordinarily in Article 32 proceedings the Court does not enter into questions of fact but it may do so if it finds it necessary in appropriate cases. [Citing (1991) 2 SCC 488: AIR 1991 SC 1070; 1994 SUPP (1) SCC 87: AIR 1993 SC 2491], V.N. SHUKLA, CONSTITUTION OF INDIA 320 (M.P. Singh ed., 11<sup>th</sup> Edition, Eastern Book Company, 2010).

“‘Commercial surrogacy’ is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well-off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. ***This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions.*** Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms ‘wombs for rent’, ‘outsourced pregnancies’ or ‘baby farms’.”<sup>64</sup> [Emphasis supplied]

That the surrogates could be ‘poor’ and surrogacy ‘is reaching industry proportions’ in India due to ‘high international demand’ did not seem to alarm the Court into action. Instead it delegated the task of deciding on the legality of these surrogacy agreements to the Commission. Also, the excerpt of the Court above does not mention the absence or a need for a law to regulate surrogacy which is ‘reaching industry like proportions’ in India.

However, it must also be appreciated that the Court was only deciding on a Writ Petition which arose out of an interim order of the High Court. The hurry to decide on the fate of an infant, stranded on a foreign land, in the backdrop of the Gujarat riots could also be a factor responsible for the nature in which the judgment was written.

Comparatively, the decisions of the Superior Court as well as the Supreme Court of New Jersey in Baby Melissa’s case dealt with the issue in greater detail. The issues were definitely more concrete before the Courts but it is apparent that they used the opportunity to discuss the legality of surrogacy contracts.

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<sup>64</sup> *Supra* note 56, para 13, p. 523.

Apart from the best interest argument, the other main issues raised related to the validity of surrogacy contracts. It was argued that the surrogacy contract is invalid because<sup>65</sup> :

1. “.....it conflicts with public policy since it guarantees that the child will not have the nurturing of both natural parents- presumably New Jersey’s goal for families.”
2. “.....it deprives the mother of her constitutional right to the companionship of her child, and that it conflicts with statutes concerning termination of parental rights and adoption.”

Thus, “.....Mrs. Whitehead claim[ed] primary custody (with visitation rights in Mr. Stern) both on a best interests basis (stressing the “tender years” doctrine) as well as on the policy basis of discouraging surrogacy contracts[;]...that even if custody would ordinarily go to Mr. Stern, here it should be awarded to Mrs. Whitehead to deter future surrogacy arrangements.”<sup>66</sup>

The Court concluded that the surrogacy contract was invalid in whole on two grounds<sup>67</sup> :

1. It conflicts with statutory provisions;
  - a) prohibiting the use of money in connection with adoptions,<sup>68</sup>

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<sup>65</sup> *Supra* note 42.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, at 423.

<sup>68</sup> *N.J.S.A.* 9:3-54a

*N.J.S.A.* 9:3-54 reads as follows[ extracted from 109 N.J. 396, 423 (1988), Footnote 4]:

a. No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith

(1) Pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or

(2) Take, receive, accept or agree to accept any money or any valuable consideration.

- b) requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted;<sup>69</sup>
- c) that make surrender of custody and consent to adoption revocable in private placement adoptions. This is a procedural requirement that gives precedence to the right of the natural mother to surrender her child voluntarily but demand return if she changes her mind. The surrogacy agreement between the Mr. Stern and Mrs. Whitehead was absolute in its terms regarding the relinquishment, "...giving her no right to rescind"<sup>70</sup> of the child and thus invalid.<sup>71</sup>

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b. The prohibition of subsection a. shall not apply to the fees or services of any approved agency in connection with a placement for adoption, nor shall such prohibition apply to the payment or reimbursement of medical, hospital or other similar expenses incurred in connection with the birth or any illness of the child, or to the acceptance of such reimbursement by a parent of the child.

c. Any person, firm, partnership, corporation, association or agency violating this section shall be guilty of a high misdemeanor.

<sup>69</sup> N.J.S.A. 9:2-16,-17; N.J.S.A. 9:3-41; N.J.S.A. 30:4C-23;

The conflict was also with the decision of the Supreme Court of New Jersey in *Sees v. Baber*; supra, 74 N.J. 201, 377 A.2d 628, (1977). The Court in *Baby M* observed:

"The surrogacy situation, of course, differs from the situation in *Sees*, in that here there is no "adoptive couple," but rather the natural father and the stepmother, who is the would-be adoptive mother. This difference, however, does not go to the basis of the *Sees* holding. In both cases, the determinative aspect is the vulnerability of the natural mother who decides to surrender her child in the absence of institutional safeguards." 109 N.J. 396, 434 (1988), Footnote 8.

<sup>70</sup> *Supra* note 41, at 433: "Contractual surrender of parental rights is not provided for in our statutes as now written. Indeed, in the Parentage Act, N.J.S.A. 9:17-38 to -59, there is a specific provision invalidating any agreement "between an alleged or presumed father and the mother of the child" to bar an action brought for the purpose of determining paternity "[r]egardless of [the contract's] terms." N.J.S.A. 9:17-45. Even a settlement agreement concerning parentage reached in a judicially-mandated consent conference is not valid unless the proposed settlement is approved beforehand by the court. N.J.S.A. 9:17-48c and d. There

2. It conflicts with public policy as laid down by statute and decisions of the Courts.

The Court observed:

“The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents.....

.....The whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother.....<sup>72</sup>

....The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child, the father’s right no greater than the mother’s”.<sup>73</sup>

The Court noted that the adoption agency did have the report of the psychological evaluation of Mrs. Whitehead which had stated that she mentioned that she might have problems in giving up the child. But the adoption agency was blinded by profit and thus did re-evaluation of her psychological state and explain the implications of giving up her child to her.<sup>74</sup> The nature of the surrogacy also entailed that the mother’s consent was not voluntary and was uninformed as the decision was prior to the birth of the baby “.....and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement

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is no doubt that a contractual provision purporting to constitute an irrevocable agreement to surrender custody of a child for adoption is invalid”.

<sup>71</sup> *Ibid.*, at 434: “The provision in the surrogacy contract whereby the mother irrevocably agrees to surrender custody of her child and to terminate her parental rights conflicts with the settled interpretation of New Jersey statutory law.”

<sup>72</sup> *Ibid.*, at 435.

<sup>73</sup> *Ibid.*, at 436.

<sup>74</sup> *Ibid.*, at 436-437.

of a \$10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction”.<sup>75</sup>

The surrogate contract also was held to not take the best interest of the child into consideration:

“Worst of all, however, is the contract’s total disregard of the best interests of the child. There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother. This is the sale of a child, or, at the very least, the sale of a mother’s right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here”.<sup>76</sup>

Thus, the Court held that:

“...our present laws do not permit the surrogacy contract used in this case. Nowhere, however, do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights. Moreover, the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints.”<sup>77</sup>

The Court did go into the concerns regarding the exploitation of women from poor backgrounds but did not deliberate much on this point as “... it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket

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<sup>75</sup> *Ibid.*, at 437.

<sup>76</sup> *Ibid.*, at 437-438.

<sup>77</sup> *Ibid.*, at 469.

as among those in the bottom twenty percent.”<sup>78</sup>

However, it stated that:

“Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction”.<sup>79</sup>

This was held, to directly affect the child when it would grow up to know that “...someone...gave birth to her only to obtain money”.<sup>80</sup> Though altruism could be the reason for women agreeing to become surrogates, but it might not always be so as is seen in India where women become surrogates mainly for money. These reservations were highlighted by the Supreme Court of New Jersey in the following words:

“.....[T]he potential degradation of some women that may result from this arrangement. In many cases, of course, surrogacy may bring satisfaction, not only to the infertile couple, but to the surrogate mother herself. The fact, however, that many women may not perceive surrogacy negatively but rather see it as an opportunity does not diminish its potential for devastation to other women.

In sum, the harmful consequences of this surrogacy arrangement appear to us all too palpable.”<sup>81</sup>

The Supreme Court of India in exercise of its Writ jurisdiction understandably could not go much into the facts and issues involved. However, unlike the Superior Court or the Supreme Court of New Jersey, which mentioned its intention to exercise the *parens patriae* jurisdiction in the judgment, the Supreme Court of India did exercise its *parens patriae* jurisdiction without mentioning it in the judgment. The Supreme Court of India in many cases has held that courts can exercise their *parens patriae* jurisdiction in spite of the existence of special statutes that govern the

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<sup>78</sup> *Ibid.*, at 440.

<sup>79</sup> *Ibid.*, at 438.

<sup>80</sup> *Ibid.*, at 441.

<sup>81</sup> *Ibid.*, at 443.



rights of parents and guardians.<sup>82</sup> Thus, in extension of this jurisdiction, the Court ordered that the Central Government expedite the processing of the passports of Baby Manji to facilitate her departure for Japan.<sup>83</sup>

## VI. CONCLUSION

The biggest impact of the Baby Manji decision has been that it spurred the government of India to enact a law regulating surrogacy. In August 2009, the Law Commission of India delivered the Report No. 228, titled “*Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy.*” The Report stated that:

“The legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial ones.”<sup>84</sup>

The Report also submitted a Draft Assisted Reproductive

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<sup>82</sup> See, *Kakumanu Peda Subbayya and Anr. vs. Kakumanu Akkamma and Anr.*, AIR 1958 SC 1042; *Charan Lal Sahu vs. Union of India*, (1990) 1 SCC 613; *Nil Ratan Kundu and Anr. v. Abhijit Kundu*, (2008) 9 SCC 413; *Gaurav Nagpal vs. Sumedha Nagpal*, (2009) 1 SCC 42;

<sup>83</sup> *Supra* note 56, paras 16, 17.

<sup>84</sup> The Draft of the Bill, 2010 at Para 4, p. 6.

Technology (Regulation) Bill, 2008.<sup>85</sup> This was later replaced by the Draft Assisted Reproductive Technologies (Regulation) Bill, 2010.<sup>86</sup>

The Bill mainly aims to regulate the already thriving surrogacy industry in India, which the Law Commission Report referred to as a ‘pot of gold’<sup>87</sup> while noting that the infertility clinics have managed to reach the end of the rainbow.

The highlights of the Bill are as follows:

1. Constitution of authorities to regulate assisted reproductive technology by framing policies and guidelines. These authorities are also to receive any complaints relating to surrogacy. The Bill stipulates the establishment of Advisory Boards at the state and national level. The proceedings before these boards are to be considered as judicial proceedings.
2. The assisted reproductive clinics are to be regulated by the Advisory Boards and their registration and accreditation is to be mandatorily sought before the Registration Authority. This entails that these clinics will function under heavy regulation.
3. It details the rights of the patients (persons, who seek the help of assisted reproductive technology; who can be such ‘patients’ has also been dealt with), gamete donors, surrogates and children.
4. It criminalises advertisements relating to pre-natal sex determination.
5. A draft of a surrogacy agreement has also been given in the Schedule to the Draft Rules.<sup>88</sup>

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<sup>85</sup> *Supra* note 48.

<sup>86</sup> *Supra* note 47.

<sup>87</sup> *Supra* note 10.

<sup>88</sup> Form J, The Draft Assisted Reproductive Technologies (Regulation) Rules- 2010.

The immediate effect of the Baby Manji case in India was the impending legislative activity.

On the other hand, the impact of Baby Melissa's case in New Jersey is that surrogacy contracts are void and payment of money for surrogacy is 'perhaps' criminal.<sup>89</sup> The judgment also states that a woman could 'volunteer' to become a surrogate but on the condition that she is given the right to assert her parental rights.<sup>90</sup>

Since Baby Melissa's case involved a contract for traditional surrogacy, this type is completely barred by the decision of the Court. By 'volunteer[ed]' surrogacy, the Court could mean gestational surrogacy through a surrogacy contract or gestational surrogacy for altruistic reasons. Since a gestational contractual surrogacy could involve payment of money, in case of breach of contract, the question of it being voidable could arise putting the parties in a disadvantage. However, altruistic surrogacy would not involve any dispute relating to payment, as it is unlikely that the surrogate mother would raise questions relating to payments or parentage as she has concerns other than money for entering into the surrogacy. In all likelihood, intending parents would not go for a surrogacy arrangement in New Jersey due to the grey nature of the law. They could opt for states where surrogacy is legal, like Arkansas, New Hampshire, and Tennessee where surrogacy contracts are enforceable.

The Court also added a clause that the Legislature is free to deal with this sensitive issue within constitutional constraints. However, the State of New Jersey has till now not enacted any law relating to the regulation of surrogacy and thus the anomaly still exists.<sup>91</sup>

Similarly in India, inspite of the spur of legislative activity that followed the decision of the Court in Baby Manji we are yet to see results with the ART Bill still pending. The need for an urgent legislation in India

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<sup>89</sup> *Supra* note 40, at 409.

<sup>90</sup> *Ibid.*

<sup>91</sup> Visit the website of The American Surrogacy Center (TASC), [www.surrogacy.com](http://www.surrogacy.com) for an overview of the laws relating to surrogacy in the various States of the USA.

was also highlighted by another case which was decided by the Gujarat High Court after the judgment on Baby Manji.. On 11th November, 2009, the High Court of Gujarat delivered a judgment in *Jan Balaz v. Anand Municipality and 6 Or.s*<sup>92</sup> An appeal against the case is pending final disposal before the Supreme Court of India. This case is a presage of the complications that may arise out of surrogacy agreements and highlights the urgent need for a legislation to regulate these agreements.

The petition was filed before the High Court by Jan Balaz, the father of twin boys born out of a surrogacy agreement. The babies were conceived through the fertilisation of a donor egg with the genetic father, as the intending mother was unable to produce eggs due to bad health. The surrogate mother was Indian while the intending parents were German nationals working in the United Kingdom.<sup>93</sup> The donor too was an unknown Indian female.<sup>94</sup> The denial of a passport by the Regional Passport Authority to the twins was challenged by the Petitioner on the ground that the twins were Indian citizens by virtue of their birth in India to an Indian surrogate mother and thus entitled to Indian citizenship under Section 3 of The Citizenship Act, 1955. They also argued that since surrogacy was not illegal in India, a surrogate mother was entitled to be called a mother of a child for the purposes of obtaining a passport.<sup>95</sup> The Passport Authority on the other hand argued that ‘the central government was yet to legalise surrogacy’ and thus the twins born to a German father were to be considered as non-citizens.<sup>96</sup> The Court stated that the egg donor, although genetically related to the twins, could not be asked to disclose her identity as she was entitled to her privacy under Article 21.<sup>97</sup> The Court depended on the mother-child bond shared during the gestation period to give the surrogate the status of the natural mother rather than the intending mother who is neither the genetic nor the natural mother. The Court concluded that given both the gestational mother and the egg donor

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<sup>92</sup> *Supra* note 53

<sup>93</sup> *Ibid*, paras 2, 3, 4

<sup>94</sup> *Ibid*, para 9

<sup>95</sup> *Ibid*, para 7

<sup>96</sup> *Ibid*, para 6

<sup>97</sup> *Ibid*, para 16

were Indian nationals it reinforced the stand that the twins were born to an Indian national.<sup>98</sup>

Held:

“Egg donor is also reported to be an Indian woman, of course her identity is not disclosed. Either way the mother of the babies is an Indian national. Petitioner, it is true, has not married Khristi Marthaben Immanuel, surrogate mother of the children or the egg donor. Children are born not out of a subsisting marriage. Even if the children are described as illegitimate children, even then they are born in this country to an Indian national and hence, they are entitled to get Citizenship by birth as per Section 3(1)(c)(ii) of the Citizenship Act, 1955, since one of their parent is an Indian citizen.”<sup>99</sup>

Thus, the Court held that they were Indian citizens and thus entitled to the issuance of the passports.

Here, the Court mentioned the urgent need for a legislation.<sup>100</sup> An appeal against this decision is pending final disposal before the Supreme Court.

At the time of this decision, the Draft Assistant Reproductive Technologies (Regulation of) Bill, 2008 had been introduced for deliberations. However, the Draft Bill, 2010 which replaced it is yet to be passed by the Parliament, leaving the area devoid of any legal regulation.

Surrogacy and its virtues are still hotly debated issues both in the USA as well as India. Some see it as a form of exploitation of poor Indian women. However, women themselves consider it an economical opportunity, hence ensuring the continuation of this practice. On the other hand, the intending parents who enter into surrogacy agreements need to

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<sup>98</sup> *Ibid*, para 16

<sup>99</sup> *Ibid*, para 17

<sup>100</sup> *Ibid*, para 21

be protected as they invest a lot of money and emotions. From the Baby Melissa case, we can conclude that surrogate mothers do get emotionally attached to the child while carrying it for someone else. Although, it could be argued that in gestational surrogacy, a mother cannot be attached to a baby as she has no genetic link to her, the psychological effects of being a surrogate mother still need to be studied. In addition, a certain bond is established between mother and child even during such a short period of carrying the child for nine months. Thus, the studies relating to the effects of surrogacy on all parties, which is beyond the scope of this paper, would be a worthwhile endeavour that can help parties that will in the future opt for this unique method to create progeny.