Gestational surrogacy. Ethical aspects

Subrogación gestacional. Aspectos éticos

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Abstract

Gestational surrogacy is the practice that takes place when a woman becomes pregnant with a fetus with which she is not genetically related, and the eggs used to produce it come from a donor or the contracting mother, to whom the baby will be handed over after the birth. The woman acting as surrogate may be contracted commercially and remunerated for her service, or the surrogacy may be altruistic, a circumstance that arises when, generally, a member of the family or friend selflessly volunteers. The ethical debate lies in which should prevail: the hypothetical right of the parents to have a child, the reproductive rights of the woman, or even the good of the child itself. At the heart of the matter is the risk of "objectification" of the gestational mother and the child itself. To resolve this question, we must assess the overall ethical principles of the reproductive process and what it implies for all parties involved, as well as the ethicality of the means used and the end pursued.

Instrumentalisation of mother and child invalidates any other reason that may be adduced to positively value gestational surrogacy, from an ethical point of view.

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1. Introduction

"Gestational surrogacy" is an assisted procreation practice by which a woman gestates an embryo with which she has no biological relationship on behalf of a commissioning couple or individual, having to relinquish the child to them after its birth. This practice normally entails a financial remuneration for the gestational carrier; when this is not the case, it is called altruistic surrogacy.

In terms of the genetic determination of paternity, maternity and parentage in gestational surrogacy, there are several possibilities: 1) genetic paternity and maternity of the commissioning couple and biological maternity of the woman providing her uterus (couple's egg and sperm and gestational carrier's uterus; 2) "semi-genetic" paternity and maternity of the commissioning couple and biological maternity of the woman providing her uterus (couple's egg or sperm and gestational carrier's uterus and, as the case may be, egg or sperm from an anonymous donor; 3) neither genetic nor "semi-genetic" paternity or maternity of the commissioning couple, but biological maternity of the gestational carrier (donor egg and sperm); 4) neither genetic nor "semi-genetic" paternity or maternity of the couple, but the woman provides not only her uterus, but also her egg fertilized with the sperm of an anonymous donor; and 5) "semi-genetic" maternity and genetic paternity of the couple (sperm from the man and the gestational carrier provides her uterus and egg) [1].

2. Ethical aspects

It can generally be said that gestational surrogacy raises a number of issues that can be added to those frequently attached to the use

of assisted human reproduction techniques, such as: Is surrogacy simply about resolving fertility problems? Is it not a new form of exploitation of women? Is it not an attack on the natural family? Is it not also an attack on the dignity of the child? [2]

3. Ethical problems related with the gestational carrier

3.1 General considerations

When assessing the ethicality of gestational surrogacy, it could first be argued that acceptance of the pregnancy by the surrogate could be described as an expression of her personal autonomy. However, as Deonadan rightly notes, in the vast majority of cases, «it is rational to argue that their autonomy is being expressed from a space of desperation and thus vulnerability. To benefit from such autonomy can be described as the exploitation of desperation», so it is difficult to accept it uncritically [3].

Martín Camacho, by contrast, says that, «gestational surrogacy is a practice based on the free decision of adults who exercise their rights and prerogatives, without harming themselves or others, which is why we cannot point accusing fingers at or object to people who practice it, or the practice itself. All the participants and persons involved usually benefit from it: the child born of such an agreement would not have been born if the practice had not been carried out, and found a family who welcomed him with love and in which he is very much wanted, the commissioning couple get to become parents and have the opportunity to give their child love and all the care needed, and finally, the gestational carrier can satisfy her desire to help other people and obtain a benefit, generally economic, in exchange for that help» [4]. This approach, however, may represent a theoretical, formal and idyllic view of gestational surrogacy, since it does not take account of the complex

set of difficulties that this raises in reality, especially for the most vulnerable parties, namely the surrogate and the child. It also presupposes a dualist concept of the person, which splits the person in two: on one side, their reason and autonomy and, on the other, their bodily dimension [5].

3.2 Objectification of the gestational carrier

In terms of the gestational carrier, commercial surrogacy is not ethically acceptable to begin with, because by using her body for an end other than her own good, and by treating it as a commodity, as something that can be bought and sold, this practice objectifies women, which is incompatible with their dignity and violates their rights. As Aparisi says, surrogacy directly contradicts some basic requirements for human dignity, since, ultimately, it commodifies, instrumentalises, objectifies, discriminates against and splits the personal unity of the gestational carrier, [5] i.e. it directly violates her dignity, because, according to the Kantian imperative, the person is an end in himself, so he should never be treated as a means to serve other ends.

3.3 The body of the gestational carrier as an object of trade

At present, in countries where gestational surrogacy is legally acceptable, it tends to be practiced as a contract between the parties. Its content is usually called a "gestational service" [6]. Thus, the surrogate mother's body, with all its physical and psychological, rational and emotional implications, is the object of a commercial transaction, generally economic. This transaction is usually very well paid or "compensated", owing to the potential physical and psychological consequences that the situation might have for the surrogate [7]. We have, therefore, a form of "self-commodification" of a human function –the reproductive function– which is ethically unacceptable [5; 8].

3.4 Gestational surrogacy is a social injustice

Non-altruistic surrogacy is not ethically acceptable either, because of the social injustice that it entails, given that it involves exploitation of economically disadvantaged women by economically strong couples or individuals.

Some authors present gestational surrogacy as a new form of exploitation within neoliberal globalization, which, nonetheless, suggests a neocapitalist undertone [9]. Gestational surrogates –and other people whose productivity is derived from biological and emotional processes– are converted into subjects of the capitalist labor force [10].

Nonetheless, it is evident that many women in underdeveloped countries have made surrogacy a way of life, because the economic benefits that they obtain are much higher than the wages in those countries. A paradigmatic case of the latter is that of four Mexican sisters from Tabasco, Milagros, Martha, María and Paulina, who made surrogacy their normal life, receiving around €13,000 per pregnancy [11]. In this case, the sisters, as well as carrying the child, agreed to breastfeed it for the first ten days.

Conversely, reality has shown that the poorest women living in patriarchal societies are those who are most exposed to the risks of exploitation. Thus, in countries such as India, women are particularly defenseless against the possible instrumentalisation of their bodies, even subjected to the will of the men, whether it be their husband or father-in-law, which is a social injustice that is ethically unacceptable [12].

3.5 Rupture of the mother-child bond

The mother-child bond, which can be defined as the emotional and biological relationship that a mother experiences towards her child, begins early, at week 10 of gestation. It becomes stronger

throughout the pregnancy, and is important for the child's normal development [13-15].

In surrogacy, the drastic rupture of this mother-child bond may lead to the development of physical and psychological disorders in mother and child. In the latter, these can manifest mainly in adolescence, in the form of depression, anxiety, psychiatric and psychological problems, feelings of insecurity and even suicidal tendencies [16-17].

It has also recently been reported that the surrogate mother's genome can affect the child's, modifying it [18]. This would genetically link the gestational carrier to the child to some degree. Since these modifications in the child's genome can be transmitted to their offspring, the surrogate mother's genome will continue to be present, in some way, in the offspring of the child she carries, which may bring new ethical conflicts.

3.6 Medical problems that may affect the gestational carrier

The medical problems detected in surrogate mothers are no different to those in other pregnancies, [8; 19] although a previous study showed that, long term, gestational surrogates may experience «depression, anxiety, various physical symptoms of psychological distress, feelings of insecurity or suicidal tendencies» [16]. More recently, the Swedish Women Doctor's Association, referring to surrogacy in India, said that this practice may increase the risks of hypertension, thromboembolism and depression in the surrogate [20].

3.7 Ethical problems posed by the selection of surrogate mothers

The American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology have published recommendations for the practice of surrogacy, in which they stipulate in detail the conditions that potential gestational surrogates must meet [21].

The most notable of these are: a) use of surrogacy; b) conditions that intended parents must meet; c) medical and social guidelines for selecting gestational carriers; and d) the potential relationships that may exist between the intended parents and gestational carriers. In terms of the conditions that gestational carrier candidates must meet, the following are worth noting: a) analysis of their psychosocial condition by an expert in these matters, which should include a clinical interview and psychological testing (where appropriate), carried out in accordance with American Psychological Association Ethical Standards; b) a complete evaluation of their health by a qualified medical professional; c) testing to ensure that they do not have any sexually transmitted diseases, and that they do not use drugs, or have recent tattoos or piercings, and other clinical circumstances; and d) undergo complete laboratory testing to exclude HIV or other sexually transmitted diseases.

This selection of surrogacy candidates also means objectification of the woman by classifying her as acceptable based only on some physical conditions and not her intrinsic dignity.

3.8 Need to ensure the informed consent of the gestational carriers

Throughout the entire surrogacy process, there must be a guarantee that future surrogate mothers are informed of the problems that their pregnancy may cause them, i.e. to ensure that they sign an informed consent, which, it seems, is not always the case [22- 23].

Given the problems that can arise for both mother and child, informed consent is an essential element in any surrogacy process, a consent that is not solely to serve as an element of dissuasion against possible legal claims, but which is a true safeguard for the gestational carrier and records her motivation, her free choice and the fact that she has been well informed, because there are many who warn about shortcomings in currently used consent forms. For example, one study showed that none of the surrogate mothers interviewed had received information about the types of me-

dical interventions that they would eventually have to undergo, nor had they received information on the health risks derived from repeated hormonal hyper stimulation. Many women were unaware that they could have a caesarean at weeks 36-38 of pregnancy. Finally, none of the surrogates interviewed had received postnatal care by the contracting agencies [24]. Hence, when formulating the informed consent, all these circumstances must be taken into account to thus guarantee freedom and respect for the gestational carrier's principle of autonomy [10].

3.9 Other circumstantial problems

As well as the aforementioned ethical issues that affect the surrogate, other circumstances may also arise, such as those that occurred in the case of Miles, son of Kyle Casson. After fertilizing the egg of an unknown donor with his sperm, the embryo obtained was implanted in his mother, [25-26] thus making Miles his grandmother's son and his father's brother, which is ethically difficult to accept.

4. Problems related with children born through surrogacy

It must first be well established that the child is a subject of rights that are to be respected.

4.1 Objectification of the child

Several circumstances can negatively affect children born through surrogacy, [3] because alongside the good of the mother, we must not forget the good of the child.

Satisfaction of the desires of people who want a child has a limit: the good of the child. A child is a person, with his rights, and no one has absolute dominion over him. Surrogacy highlights the folly of

considering a child as a right that drives one to possess it in any way. A child is not a thing, an object of property to suit the needs of those who own it, and that can be acquired through a purchase. If it were so, it would be objectifying the child, which is ethically unacceptable.

4.2 Medical problems that may affect children born through surrogacy

Available evidence seems to suggest that children born through surrogacy do not show a higher rate of abnormalities than those born naturally [27-29].

Another aspect to consider is whether medical problems can arise throughout their life. Although there is little experience in this respect, a study that addressed this issue found no differences between children born through surrogacy and those born naturally [30]. In a meta-analysis that included 1795 articles on biomedical studies in surrogacy, only 55 of which met inclusion criteria, the authors found that «at the age of 10 years, there were no major psychological differences between children born after surrogacy and children born after other types of assisted reproductive technology or after natural conception» [2]. As previously mentioned, however, some have reported differences during adolescence [16-17].

4.3 Problems posed by possible disability in children born through surrogacy

In light of the possibility of the child being diagnosed with a disability during the pregnancy or after the birth, three positions may arise: a) the disability is accepted by the commissioning parents and they take custody of the child; b) they do not accept it and the responsibility is transferred to the gestational carrier, encouraging her to abort it; and c) the gestational carrier is obliged to accept custody of the child with the disability.

When the option of abortion is suggested, it is sometimes difficult to determine to whom this decision corresponds, the commissioning

parents or the gestational carrier, although on most occasions, it is the commissioning parents who decide, so they can impose an abortion on the surrogate that she may not want. In any event, the decision to abort, although supported contractually, does not exempt the gestational carrier from the moral responsibility that the abortion entails.

An example of the foregoing is the so called "Baby Gammy" case, at the end of July 2014. Pattaramon Chanbua, a Thai woman, was contracted as a surrogate by an Australian couple. She gave birth to a set of twins, a boy and a girl, in December 2013. During the pregnancy, Down's syndrome was detected in the male fetus. The Australian couple were against accepting it, so they pressured Pattaramon to abort it. She refused, because as a Buddhist, she considered that it was an immoral act, and so continued the pregnancy. Accordingly, a healthy girl and a boy with Down's syndrome were born. In August 2014, the Australian couple offered Pattaramon 16,000 dollars to compensate her for the inconvenience that it may have caused her to take care of a child with Down's syndrome. The commissioning couple took only the healthy girl [31].

In order to get around this issue, an attempt is generally made to resolve it in the surrogacy contract, leaving it well established which of the aforementioned proposed solutions is the one that must be chosen. There are even agencies that guarantee a healthy child in writing. Thus, "Baby Bloom", an international agency with a head office in London, offers "a complete surrogacy package" that includes a guarantee that the child will be healthy [32]. This agency works mainly in the United States, more specifically in California, where surrogacy is legal. One important aspect to achieve the goal offered by the agency is to previously select the gestational carriers to be contracted using very rigorous health criteria. As previously detailed, the company not only guarantees the quality of the future surrogate mother, but the quality of the embryos for transfer; thus if the transferable embryo shows any de-

fects after genetic analysis, it would not be used, and if the impairment manifests later, during the pregnancy, interruption of the pregnancy is guaranteed, by abortion.

In relation to this, determining to whom the decision to abort legally corresponds when the fetus has a disability was evaluated at length in an article published in Bioethics, because of a case that occurred in Connecticut (USA) involving a surrogate mother. Following a medical examination at five months pregnant, a series of potentially life-threatening physical abnormalities was detected in the fetus, including cleft lip, brain cysts and heart defects, all of which could seriously compromise the child's health, and even its life [33]. The commissioning parents requested an abortion, but the surrogate mother refused, sparking a considerable legal debate on who should take the decision to abort or not.

In regards to this, one approach suggests that the surrogate has no right to make decisions about the life of the child, since she is neither the child's genetic nor social mother, but neither are there sufficient reasons to give sole rights to the commissioning parents, even if this is specified in the surrogacy contract. The authors of this article therefore advocate what they call the "professional model", in which the rights and responsibilities of both parties must be acknowledged. In essence, though, they advocate that the right of the surrogate prevails, and that if she refuses to undergo an abortion, the commissioning parents have the obligation to accept custody of the child. This opinion appears to be shared by the American College of Obstetricians and Gynecologists, which stated that, «to allow a woman to contract away the right to control her own health would be to institute contractual slavery» [34].

When it comes to altruistic surrogacy, though, it is normally the surrogate who is allowed to decide what to do with the disabled child and the commissioning parents have the possibility of refusing to accept him or her.

However, in our opinion, while these terms may be administratively correct, they in no way resolve the ethical judgment that these

facts merit, because they almost always choose not to accept the disabled child, which, ethically, is difficult to justify.

4.4 Ethical problems that may arise if the commissioning couple divorce

This occurred in the case of Baby Manji, born in India in 2008 as the result of a commercial surrogacy agreement between a Japanese couple and an Indian woman. The child was conceived using the sperm of Mr. Yamada, the commissioning parent, and an egg from an anonymous Indian donor. Unfortunately, the Yamadas divorced a month before she was born. Because of the divorce, Mrs. Yamada, who obviously was not genetically related to the child, did not want to take her, [35] and custody was eventually granted to Mr. Yamada's mother [36]. Once again, there is disregard for the rights of the child who, conceived to satisfy the desire of the commissioning couple, can end up in a state of abandonment when the desire disappears.

4.5 Problems that may be posed by a multiple surrogate pregnancy

Another circumstance that may arise is that the pregnancy is a twin, triple or multiple pregnancy, and that the commissioning parents do not want accept custody of all the children. Multiple pregnancies can involve more risk than singleton ones, [37-38] which is sometimes resolved by applying so-called "fetal reduction", i.e. the elimination of the number of fetuses considered appropriate, to leave those desired, without taking into account the serious ethical difficulty that this entails. A recent study evaluating this issue in various Indian clinics reached the conclusion that, in many of them, the decision to use "foetal reduction" was taken by the physicians responsible for the case, without the surrogate mother participating in this arrangement, which is undoubtedly ethically contrary to her autonomy [22]. This is what happened in the

case of Californian Brittneyrose Torres, who after becoming pregnant with triplets, was asked by the commissioning parents to undergo fetal reduction, even though they had agreed to pay her $25,000 dollars for the pregnancy and $5,000 dollars extra in the event of a twin pregnancy; triplets, however, did not enter into their plans. They therefore asked her to terminate one of the fetuses, but she refused and decided to go ahead with the pregnancy [39].

4.6 Difficulties for the child to determine their genetic identity

Children born through surrogacy may wish to know their true genetic origin, which would only be possible if a judge so rules, for reasons of law that justify it, and provided that DNA samples are available from the possible persons involved. The number of persons who should undergo DNA tests –if there has been no anonymous donation of gametes or embryoss– is undoubtedly more exhaustive than in routine paternity tests. In some cases, obtaining this would be impossible when there is no register or tracking that enables the gamete donors or provenance of the embryos to be known. In others, it would have be determined which of the two fathers involved is the sperm donor who fertilized the egg, if, as happens in some reported cases of surrogacy on behalf of a gay couple, the semen samples are mixed [2].

As far as the child is concerned, though, even if these problems are regulated, it does not seem possible to avoid the anguish of separation from the mother who carried him, his commodification, identity problems and psychosocial problems that he may have, the impossibility in some cases of learning his biological origins and other problems that affect his best interests [6].

In conclusion, it may be said that gestational surrogacy can deprive the child of his right to continuity between his genetic origin and his biological gestation, between gestation, upbringing and education, circumstances that should be respected and not dramatically altered [3-40].

5. Ethical problems that can be presented the physicians responsible for the surrogacy

Are obstetricians or gynecologists obliged to participate in non-emergency medical care related to gestational surrogacy? In relation to this, the Ethics Committee of the American College of Obstetricians and Gynecologists has ruled that they are not obligated to assume responsibility for a surrogate pregnancy. However, «physicians who choose to care for gestational carriers should provide the same level of medical care as they would to any patient, regardless of the complexities of gestational surrogacy and their personal beliefs [...]» [41].

6. Can a child be demanded as a right or is it a gift?

Those who claim a supposed right to have children, in our opinion, rarely provide solid arguments to justify it, although some include it as another of the "sexual and reproductive rights" of women, which were first set out at the conference in Cairo in 1994. Since then, the World Health Organization defines them as «the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence» [42].

If this right were prioritized, the child would be denied the consideration of absolute good in and of himself. He would become a disposable object, something instrumentalisable, i.e. he would be treated as an object. Not all that one wishes acquires the category of right. Desires for parenthood have their limits in the dignity of persons and the protection of their fundamental rights. Defending the right of parents to have a child –with no ethical limitations

whatsoever– violates the rights of the child, and in the case of gestational surrogacy, those of the surrogate mother as well, although the right to a child should not be confused with the right to parenthood, because no one can be prevented from making the autonomous decision to have children when the rights of others are not violated.

The obligation to respect the intrinsic dignity of the child, inseparably from his own nature, is unlimited. Therefore, any action that instrumentalises a human being and makes him an object to satisfy the desires of others is absolutely unjustified. There is no right that allows another to be used like a commodity. Moreover, if it were a demandable right to call another human being into existence, there would also be the opposing right to be able to take it away.

For thousands of years, family law answered to a "child-centered" logic, centered on the good of the child, but for half a century now, "child-centered" logic has been displaced by "adult-centered" logic: the freedom and desires of the adult have become more important than the rights of the child. In this sense, surrogacy is the culmination of "adult-centrism", by sacrificing the happiness of children to the whims of adults [43].

7. Can surrogacy be ethically compared to post-natal adoption?

An issue that has sometimes arisen is whether the ethicality of surrogacy can be compared to that of post-natal adoption. In our opinion, a fundamental aspect that makes them different is that, in the former, in surrogacy, the right of some adults to have a child prevails, putting the commissioning parents' right to a child first. In contrast, in post-natal adoption, the rights of already-born children to be adopted to try to find a family prevails, i.e. the good of the child prevails, although the parents also gain a benefit. This

means that both situations are ethically very different, because the purpose of post-natal adoption is to benefit the good of the child, whose bio-logical parents are unable to take care of him, while the purpose of surrogacy is to produce a child to serve the rights of some adults [44].

8. Is altruistic surrogacy ethical?

It is striking that, generally, when assessing the ethicality of surrogacy, only commercial surrogacy is considered, but no reference is made to altruistic surrogacy [44].

Altruism is defined as the desire to selflessly help others. With regard to this, it is remarkable to observe how the "altruistic" label has been strengthened in all matters relating to surrogacy, ignoring the fact of the economic mediation. This is undoubtedly a marketing strategy by some, and an element to ease consciences by others [10]. Although we believe that surrogacy can be genuinely altruistic in some cases, what is certain is that this practice also objectifies the child and its mother, because the child may be required to meet certain quality standards, which, if not met, may affect his fundamental rights or even his life; in addition, the gestational carrier becomes a mere vessel for another, objectively becoming the carrier of that other's desire.

Furthermore, the gratuitousness may be fiction, because as we know, it is not usually completely free of charge, because it can be framed within a system of compensation for the "inconvenience". The lower the compensation, the further it seems from "renting". But as feminist Kajsa Ekis Ekman says, in an article in *The Guardian*, the effect is that, if we consider pregnancy for another as exploitation, it tells us that the less the woman is paid, the less exploitation we will have, which is nonetheless a contradiction [45].

She continues, «In reality, «altruistic» surrogacy means that a woman goes through exactly the same thing as in commercial

surrogacy, but gets nothing in return. It demands of a woman to carry a child for nine months and then give it away. She has to change her behavior and risk infertility, a number of pregnancy-related problems, and even death. She is still used as a vessel, even if told she is an angel. The only thing she gets is the halo of altruism, which is a very low price for the effort and can only be attractive in a society where women are valued for how much they sacrifice, not what they achieve» [46].

Regardless of these considerations, it should be noted that altruistic surrogacy has a low incidence. According Carol Weathers, director of Building Families, Inc., «in the mid seventies, several articles were published in which they talked of agreements between mothers and siblings to have children, but these types of surrogacy agreements are very scarce at present» [47]. As Aréchaga says, «no one knows of any rich European altruists who volunteer themselves to act as surrogates for a couple of poor Indian peasants» [48]. Sometimes, even the commodification of surrogacy is concealed by compensating it financially for the hypothetical treatments and inconvenience that the pregnancy may cause the surrogate mother. In connection with this, on 10 March 2016, the non-governmental association "No maternity traffic" presented an official petition, signed by 107,957 European citizens, to the President of the Parliamentary Assembly of the Council of Europe, asking them to reject the legalization of altruistic surrogacy [49].

Proposing altruistic surrogacy does not result in it being seen as a solution but as an extraordinarily problematic option, because it continues to put the surrogate in a situation of vulnerability and exploitation; it creates confusion in the child by duplicating and diluting the parental bonds; it permits commercial surrogacy covertly through reparatory compensation; and necessarily results in a much broader regulation, which could give a real response to the demand for this service [50].

9. Epilogue

When a child is produced using any assisted reproduction technique, in the ethical debate about whether the hypothetical right of the parents to have a child, the reproductive rights of the woman, or even the good of the child should prevail over any other ethical consideration, such as the objectification of the surrogate mother and the child itself in this case, we believe that the overall ethical principles of the reproductive process should be assessed.

Any instrumentalisation of mother and child invalidates any other reason that may be adduced to positively value gestational surrogacy, from an ethical point of view.

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