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# Surrogacy, are we prepared in Peru? A reflection from an ethical point of view

## Gestación subrogada, ¿estamos preparados en Perú? Una reflexión desde la ética

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### ABSTRACT

The development of medical technology makes possible incredible procedures that modify the conceptions of life and death. The beginning of biological life with conception and the consideration of the beginning of the human person question the limits that should be established in consideration of the respect for the dignity of the person. Assisted reproduction techniques have been evolving, creating expectations for the best results and opening possibilities of parenthood to couples and single persons. The recognition of sexual and reproductive rights was a milestone that led to the realization of surrogacy or surrogate motherhood. However, ethical and legal conflicts have arisen in which the basic issues are the respect for the rights of the persons involved and the different cultural and economic contexts in which this medical practice is developed. The various legislations that have arisen range from lax, permissive and utilitarian to conservative positions. Between the two, there are a series of nuances, where ethical reflection looks for the best courses of action, considering the principle of reality and always considering respect for the rights and dignity of the people involved.

**Key words:** Surrogate mothers, Gestational mothers, Ethics

### RESUMEN

El desarrollo de la tecnología médica hace posibles procedimientos increíbles que modifican las concepciones de vida y muerte. El principio de la vida biológica con la concepción y la consideración del inicio de la persona humana cuestiona los límites que se debieran establecer en consideración al respeto de la dignidad de la persona. Las técnicas de reproducción asistida han ido evolucionando, creando expectativas por los mejores resultados y abriendo posibilidades de realización de paternidad a parejas y personas solas. El reconocimiento de los derechos sexuales y reproductivos significó un hito que ha llevado a la realización de la gestación subrogada o vientre de alquiler. Sin embargo, surgen conflictos éticos y legales donde de fondo están el respeto de los derechos de las personas intervinientes y los diversos contextos culturales y económicos donde se desarrolla esta práctica médica. Las diversas legislaciones surgidas van desde aquellas laxas, permisivas y utilitaristas a las posiciones conservadoras. Entre ambas hay una serie de matices, donde la reflexión ética busca los cursos medios de acción teniendo en cuenta el principio de realidad y considerando siempre el respeto de los derechos y dignidad de las personas involucradas.

**Palabras clave.** Madres sustitutas, Gestación subrogada, Ética

### INTRODUCTION

Advances in science are making it possible for certain conditions and diseases to be overcome thanks to medical interventions and procedures that until recently were unthinkable and, as a result, the emergence of situations that require reflection from an ethical, sociological, anthropological and legal point of view.

One of these conditions is infertility, which some do not consider a disease, but which affects between 12-16% of couples of fertile age<sup>(1,2)</sup>. The recognition by the WHO of sexual and reproductive health rights (1994)<sup>(3)</sup> is an important milestone in the search for ethical and legal solutions to help the people involved and allow the enjoyment of full sexual and reproductive health through the so-called assisted reproductive techniques (ART), including surrogacy.



In this ART modality there are three important actors: the couple (hetero or homosexual) or only the father/mother, the woman who will carry the surrogacy and finally the child/children that could be procreated with this technique, of which one or more will be born. The medical team, the legal team and the gamete donors are also important players<sup>(4)</sup>. Each one of these actors conditions a diverse ethical (and legal) reflection that finally must be considered as a whole in order to provide the respective orientations to the couples, gestational carrier mothers and health professionals, especially physicians, for the most appropriate decisions in each case. In addition, it will allow legislators and administrators of justice to dictate norms, laws and judicial decisions, taking into account all the complex aspects that arise.

This article intends to give an ethical view on this subject that raises questions and positions for and against in the world, being in our country an issue that remains in ethical and legal limbo, generating conflictive situations and affecting the rights of many of those involved.

## DEFINITIONS

In the Warnock Report (1984)<sup>(1)</sup> the first definition of surrogacy was given as 'a woman who gestated or carried a child for another woman, with the intention of giving it to her after birth'. This first definition has been changing over time, as there are now other conditions to consider.

In surrogacy, the following scenarios arise<sup>(5,6)</sup>:

- Gestation with genetic maternity and paternity of the contracting couple (gametes of both parents) and biological maternity, where through in vitro fertilization (IVF) the embryo is obtained and placed in the carrier uterus.
- Gestation with partial genetic link of maternity or paternity where one of the gametes is donated and the other, belonging to one of the members of the couple, through IVF the embryo is obtained and then placed in the carrier uterus.
- Heterologous gestation: when both gametes (egg and sperm) are donated, submitted to IVF and the embryo is placed in the carrier

uterus. Neither partner has a genetic link to the embryo.

- Ovodonation: When the male gamete of the couple through artificial insemination fertilizes the egg of the gestational carrier. Only the father has a genetic link with the embryo, and the carrier mother is also a genetic mother<sup>(5,6)</sup>.

As can be deduced, there are several scenarios that give rise to various rights of the parents and the gestational carrier that must be carefully studied and reflected upon from an ethical and legal point of view.

The following are synonyms for surrogacy: gestational surrogacy, surrogate motherhood, surrogate womb, surrogate mother, substitute mother, carrier mother, temporary donation of uterus, assignment mother, hired mother<sup>(7)</sup>.

## MEDICAL INDICATIONS FOR SURROGACY

It is suggested that surrogacy is an exceptional and last resort, only justifiable when there is a condition of structural sterility (homosexual couples), infertility where other treatments have been exhausted<sup>(7)</sup> or in special situations such as genetic or surgical absence of uterus and patients with oncological treatment.

## HISTORY OF ART AND SURROGACY

In 1975<sup>(1)</sup> the first case of surrogacy was known and, in 1985, the case of Baby M was presented. In this case, the male gamete was provided by the father of the applicant couple and the egg was from the gestational mother (ovodonation case). As a result of the gestational and genetic mother's refusal to surrender the child, a judicial process was initiated where the child was finally handed over to the care of the biological father and it was decided that the gestational mother as a surrogate mother had the possibility to visit the child.

The first organization dedicated to surrogacy was COTS (Childlessness overcome through surrogacy), created in 1985, whose task was to connect couples and women willing to lend their wombs for surrogacy, once they obtained official permission<sup>(8)</sup>. From these milestones, there have developed, with variations in the world, from



permissive and utilitarian regulations and legislation, situations where care is taken to respect the rights of the parties involved, countries where it is radically prohibited and which nevertheless give rise to situations such as 'gestational tourism'<sup>(9)</sup>, or as in our country where the legislation is unclear or contradictory, remaining undefined and depending for its solution on the different views of the administrators of justice.

### INTERNATIONAL LEGISLATION

The following systematizations of countries according to the status of surrogacy are described in the international legislation<sup>(10)</sup>:

- a. Prohibition of surrogacy and nullity of surrogacy agreements or contracts: France, Germany, Sweden, Switzerland, Italy, Austria, Spain.
- b. Accept surrogacy only when it is altruistic: United Kingdom, Canada, Brazil, Israel, Greece, Australia, South Africa, and New Zealand. In this case there are requirements and they are evaluated by a special committee and/or post-partum affiliation is facilitated.
- c. Surrogacy is widely admitted: Georgia, Ukraine, India, Russia, United States (some States), Mexico (Tabasco).

### OVERVIEW IN PERU

Article 7 of the General Health Law<sup>(11)</sup> states:

"Art. 7. Every person has the right to resort to the treatment of their infertility, as well as to procreate through the use of assisted reproduction techniques, provided that the condition of genetic mother and gestating mother falls on the same person. For the application of assisted reproductive techniques, the prior written consent of the biological parents is required. The fertilization of human eggs for purposes other than procreation is prohibited, as well as the cloning of human beings".

The phrase '...provided that the condition of genetic mother and gestational mother falls on the same person' implies for some the tacit prohibition of surrogacy. However, from a legal point of view, prohibitions have to be clearly established, which is not the case. Within ART there is ovidonation; this technique applied to surrogacy would

allow the transfer of the embryo obtained from heterologous fertilization with male gamete and egg of the gestational carrier but would not allow the transfer of an embryo obtained from the fertilization of the female gamete (of the contracting mother) with donated sperm. Apparently, it would not prohibit surrogacy in case the gestational carrier is the same one who performs the ovidonation, in which case the mother would be both genetic and gestational. However, contradictorily, and not very understandable, it would not recognize the maternal filiation of the contracting mother, creating a conflict<sup>(2,12)</sup>. Neither is embryodonation explicitly prohibited, i.e., of both donated gametes. However, the lack of minimum regulation causes problems in the registration of filiations in the National Registry of Identity.

Another problem arises with the obligation to require the informed consent of the 'biological parents', in this case threatening the anonymity of the sperm donor.

The recognition of sexual and reproductive rights in our country, although recognized by the Constitution, in practice its application will depend on the personal appreciation of each judge. As an example, we have the contradictory judicial resolutions in the cases of Cassation 5005-2007-Lima and on the other hand, Case 183515-2006-00113 of the 15th Family Court of Lima<sup>(2,12)</sup>.

On the other hand, in the recently updated Code of Ethics of the Peruvian Medical Association, Art. 39° states that 'The physician shall not induce, promote or use assisted reproduction techniques in women proposed as surrogate mothers ('renting belly') for the profit of these, the treating physician or other persons'. Therefore, from this norm, surrogacy would be admitted only for altruistic and solidary purposes<sup>(13)</sup>.

These problems caused by the lack of regulation have created a clandestine market, where accessibility to the procedure is possible for couples or persons with medium-high purchasing power, a kind of discrimination for couples with lower resources, and the appearance of problems of filiation of children, affecting their right to identity. The emergence of subsequent conflicts due to the lack of clearly determined rights, responsibilities or obligations would constitute limitations to the equity of what would be considered a human right<sup>(12)</sup>.



## MAIN ETHICAL CONFLICTS

The main ethical conflicts of surrogacy arise in relation to the hypothetical right of individuals to have a child, to the reproductive rights of the woman, and in relation to the rights of the child and the search for his or her highest good<sup>(5)</sup>. The following question then arises: is surrogacy a valid and ethical way to solve the fertility problem?

- a. Right to have a child: Is there really a right for people to be parents and therefore to have a child? Josette Trat states: 'one can suffer for not being able to have one's own children, but it does not justify that this be solved at the price of transforming other women into a 'child factory'<sup>(8)</sup>.

Although surrogacy is considered by some to be within sexual and reproductive rights, it ends up being controversial. Rights are inalienable. However, there are people who give up having a child, for example, for personal or professional reasons or because of the risk of transmitting genetic diseases. It is also true that for many people it is important for their full personal development to transcend through having a child. Thus, not being able to have a child either due to morbid conditions such as male or female infertility or structural conditions (homosexual couples), would lead to resort to ART in the modality called surrogacy<sup>(2)</sup>.

- b. Reproductive rights of the woman who exercises surrogacy. Although it is assumed that it is an autonomous decision, it is also true that the decision to gestate a child that is not hers and give it up at the end of the pregnancy is not always based on a feeling of altruism and solidarity but rather for the economic benefit it generates, a situation especially found in countries with very permissive or non-existent legislation where women of low economic levels are the most frequent candidates for it<sup>(14)</sup>. One wonders whether these women really exercise their autonomy in making the decision to carry this gestation or whether they are pushed by social and economic pressures.

Although there is no uniformity in terms of protocols and legal norms on surrogacy, in most of the countries where surrogacy is legal, contracts or agreements are established which imply, on

the one hand, the provision of a service which is to carry the gestation (others call it uterus rental) and the consideration which is the payment of economic compensation established under different parameters which can justify the expenses and time of the gestational carrier and in other cases originate a clear economic gain not obtainable by any other means. The final result is that these contracts or agreements constitute a commercial transaction, where there is a reification or objectification of the gestational carrier<sup>(5)</sup> and of the child.

Against this background, gestational carriers must then meet a series of conditions such as psychosocial examination, evaluation of their state of health and the signing of an informed consent in order to guarantee as much as possible the final result: a healthy child. However, many times the informed consent does not make explicit or minimizes the risks that may be involved, the probable complications and treatments that may be needed and the measures to be taken. This affects the dignity of the surrogate gestational carrier, since it objectifies her, putting her on the level of a biological incubator whose proper functioning must be guaranteed.

Another situation to contemplate is when problems arise with the implanted embryo, where it will depend on the country where the surrogacy is carried out. If the abortion is legal for eugenic reasons and the surrogate agrees, there would be no problem. The situation varies if the gestational carrier for reasons of conscience does not want to have an abortion. How would the conflict be resolved then? A similar situation arises in countries where abortion is not allowed, being necessary to legally determine the future of the child as soon as it is born. In this case, which right prevails, that of the contracting parents or that of the gestational carrier?

In the scenario in which the gestational carriers are family of the contracting party, family relationship problems are created, since the children born end up being children of the grandmothers or siblings of the father, for example, situations that can have psychological repercussions on the child in the future, not observed in other types of surrogate pregnancies.

- c. Rights of the child: This is a very important point and little examined in the literature, in



which the child in this condition of surrogacy is to a certain extent objectified, subrogated to the rights of the future parents or of the gestational carrier and, in some realities, such as countries where surrogacy is seen from an excessively utilitarian point of view, as a merchandise with a price, which is negotiable<sup>(15,16)</sup>.

We assume that the child is a subject of rights. Therefore, they should not be conceived to satisfy the reproductive needs of the parents, leading to a trivialization of parenthood. And therefore, they are not the property of any of the actors (contracting parents, gamete donors, gestational carrier). The situation is different in postnatal adoption where the rights of the child already born to have a family prevail and where the parents can exercise their paternity as fully as in surrogacy.

Research has been done on whether children born from surrogacy have psychological problems later in life. The current evidence indicates that it is no more than their peers from normal gestations<sup>(5)</sup>. We have already referred above to the only observation found.

If problems are detected during pregnancy or shortly after birth in relation to the embryo or child, such as certain conditions or disabilities, the question to be resolved is how to proceed in these cases. Several possibilities may arise: (1) that it is accepted by the contracting parents and they assume custody of it, (2) that it is not accepted and the responsibility for its care is transferred to the gestational carrier, or (3) that the gestational carrier is obliged or transferred responsibility for the decision to abort it. Under these conditions, the greatest vulnerability is placed on both the child and the gestational carrier since the contracting parents have a privileged (and contractually established) position to opt for the most comfortable solutions. However, in countries with less utilitarian legislation, what is called the 'professional model' is established in the contract, where the right and responsibility of both parties is recognized, whether the decision to abort or not, or when abortion is not possible for legal reasons; in this case, the contracting parents must accept custody of the child<sup>(5)</sup>.

Another situation of ethical conflict is originated at the stage prior to the embryo transfer because, in order to guarantee a healthy child, the most suitable embryos are chosen. And the question is: what happens with the embryos that do not meet the quality requirements? In these cases, it will depend on the will of the contracting parents, on the legislation of the country, or it will be subject to the decision of the medical team that can keep them (for how long?), use them for scientific research (if accepted by the Research Ethics Committees), or discard them, and this is the most conflictive point and the most difficult to solve.

Another point of conflict is what happens if once the surrogacy is initiated, the parents separate or divorce, what happens if the parents die, what happens when the surrogate mother, who is the genetic mother, does not want to give up the child once it is born? Since these aspects are not regulated, it is likely to enter a judicial process, directly affecting the rights of the child and putting the woman carrying the gestation in a difficult situation, much more serious if the parents do not have a genetic link with the child.

Finally, should the financing of ART and surrogacy be public, private, or both possibilities?

## CONFLICT ANALYSIS

Ethical principles involved<sup>(7)</sup>:

- a. Autonomy: of the one who needs it (the contracting parents) and of the one who surrogates it (the gestational carrier, insofar as there are no external pressures that force her to use this medium as a means of subsistence).
- b. Non-maleficence: which would be violated by the series of problems that could arise in the health of the surrogate mother, and which will depend on the contractual conditions and legal framework. This principle is also affected by filiation problems caused by the lack of clarity in the contracts and unclear legal norms, or as in our country, nonexistent, which have repercussions on the newborn, affecting its emotional and spiritual wellbeing.



- c. Beneficence: from the point of view of the surrogate mother when she accepts this gestation for altruistic purposes, this being the only acceptable scenario from the ethical point of view and beneficence from the contracting parents' point of view in realizing their desire for paternity.
- d. Justice: respect for this principle to the extent of compliance and recognition of the right to have children as part of sexual and reproductive rights. However, this collides with the observation that, being a costly technique, it would exclude couples or people with few resources from accessing it. This principle could be observed if, if surrogacy were accepted and regulated, its access could be not only in the private sector but also in the public sector. It is also important to invoke this principle when having a gestation with a product with problems conflicts with the rights of the surrogate gestational carrier by having to opt for abortion if it is legal and she accepts it, or to assume responsibility for the care of a child with problems, thus benefiting the contracting parents and shifting the responsibility to the surrogate mother.

We will now raise those arguments for and against. Following the Aristotelian model, we will try to choose the intermediate options as the most appropriate way to approach the solution. It is important to consider that, in recognition of the principle of reality, it is undeniable that in our country surrogacy is practiced in spite of and because there is a legal vacuum in this regard. There are companies/clinics that develop this practice of surrogacy, an extremely delicate situation because, in the absence of regulations and legislation (there have been several attempts)<sup>(17)</sup>, it is likely that ethical principles are not considered or the rights of the people involved, especially the most vulnerable, are not sufficiently valued.

#### Arguments against<sup>(6)</sup>:

- When there is a strong utilitarian burden in the contracts, it can lead to the concealment of purchase and selling of children.

- It interferes with the solidary practice of adoption. In the restrictive Peruvian legislation, adoption by homosexual couples and single men is not accepted. Adoption by single women is accepted, establishing gender discrimination<sup>(2)</sup>.
- The dignity of the gestational carrier is violated (commodification of the woman's human body) as well as that of the gestated child (identity problems: duplicity of mothers, or even up to three mothers).
- Given the legal vacuity, there is a danger of favoring reproductive tourism, as is already happening here (lower costs than in other countries of the region) and in countries with lax regulations (India)<sup>(10)</sup> or excessively utilitarian ones (some states of the U.S.A.).
- Probable psychological consequences for the child.

#### Arguments in favor<sup>(6)</sup>:

- Attention to sexual and reproductive rights, favoring personal development and the need for transcendence of the contracting parents.
- Exercise of the principle of autonomy of the woman who decides to become a surrogate mother.
- Freedom to decide to become parents through ART.
- Equality between men and women is established by recognizing the right of same-sex couples to have children and admitting that there are other family models than the traditional one.
- Recognize the right to exercise autonomy and, on this basis, to enter into contracts.

In the search for ethical answers it is necessary to consider in a proportional and equitable manner the rights of the participants, including the rights of the child, in order to consider with a fair view the possible solutions, making a case by case analysis in order to have the complete context in which surrogacy is requested.



## PROPOSALS

The outlook is clearly challenging, and a course of action for prioritized attention can be concluded in some cases. The initial point is to rethink the wording of Article 7 of the General Health Law based on a broad discussion by civil society, the scientific institutions involved and legislators, where the legal framework is explicitly established and the prohibitions are explicitly settled, contemplating all the variants examined and possible scenarios.

The need to have a regulation constituting the processes and procedures to be followed in each case, proposing that the surrogate pregnancy be carried out under specific assumptions, with a precise and mandatory regulation. The creation of a Registry of Pregnant Women is proposed, where the number of times a woman can gestate is limited, in order to guarantee her health, minimize possible complications and ultimately the health of the newborn.

It seems that altruistic surrogacy is the best way forward, where financial compensation is fairly established and therefore subject to compliance supervision, without discrimination between men and women.

It must be admitted that the concept of the traditional family has changed. Therefore, it is the duty of the State to recognize and protect the new families, since it is the fundamental element of society and peaceful coexistence<sup>(12)</sup>.

The agreements or contracts of surrogacy must contain minimums that guarantee the future of the child, facilitating mechanisms such as the relinquishment of the newborn in favor of the contracting parents, having legal guarantees in case of non-compliance (where will the cases be derived when problems or disputes arise?)<sup>(8)</sup>.

To regulate the adequacy of postpartum filiation in order to avoid conflicts that violate the rights of the child to have an identity, always acting in the best interest of the child<sup>(5)</sup>.

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