



Surrogate motherhood as a right of procreational will for infertile couples in Ecuador

La maternidad subrogada como derecho de voluntad procreacional en parejas infértiles en Ecuador

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ABSTRACT

This research paper contributes to the regulation of surrogacy in Ecuador, a controversial topic that has gained attention in scientific and social circles. Although the practice is not legally regulated, there has been an increase in discussion and interest in this topic in the country. The objective is to examine the Ecuadorian regulations and jurisprudence applicable to the regulation of surrogate motherhood considering ethical and social principles. It was based on a historical, normative and jurisprudential study. The qualitative methodology was applied, by means of the empirical analytical method that allowed analyzing the opinions of experts in family law, human rights and bioethics, and evaluating how surrogate motherhood would be integrated within the existing legal framework in Ecuador, which requires further research and an informed debate to structure a legal

and ethical framework that regulates surrogate motherhood in Ecuador. We were able to conclude the potential impact that surrogacy has in terms of equity and reproductive justice, as well as in the integral protection of the rights of all parties involved. However, it must be recognized that this discussion must encompass a variety of perspectives, including the opinions of experts in bioethics, reproductive medicine and psychology.

RESUMEN

El presente trabajo de investigación aporta a la regulación de la maternidad subrogada en Ecuador, un tema controvertido que ha ganado atención en los círculos científicos y sociales. Aunque la práctica no está regulada legalmente, se ha observado un aumento en la discusión y el interés en torno a este tema en el país. El objetivo es examinar la normativa y jurisprudencia ecuatoriana aplicables para la regulación de la maternidad subrogada considerando los principios éticos y sociales. Se fundamentó en un estudio histórico, normativo y jurisprudencial. Se aplicó la metodología cualitativa, por medio del método empírico analítico que permitió analizar opiniones de expertos en derecho familiar, derechos humanos y bioética, y evaluar cómo se integraría la maternidad subrogada dentro del marco legal existente en Ecuador lo cual requiere una investigación más profunda y un debate informado para estructurar un marco legal y ético que regule la maternidad subrogada en Ecuador. Se logró concluir el impacto potencial que la maternidad subrogada tiene en términos de equidad y justicia reproductiva, así como en la protección integral de los derechos de todas las partes involucradas. Sin embargo, es preciso reconocer que esta discusión debe abarcar una variedad de perspectivas, incluyendo las opiniones de expertos en bioética, medicina reproductiva y psicología.

Keywords / Palabras clave

Maternidad subrogada, derecho de procreación, Reproducción asistida.

Surrogacy, surrogate motherhood, procreation rights, assisted reproduction.

Introduction

Ecuador is defined as a social state of rights and justice, which gives way to the public authorities to create effective mechanisms for the fulfillment of these rights, either by the application of constitutional guarantees or by recognizing the principle of progressiveness, which studies the new social realities, as well as their needs to take measures that gradually allow the effectiveness of the legal norm, it is recognized to the legal reform that allows changing the content of the law without affecting its integrity. The legislative power has the obligation to guarantee the objectivity of the legal norms for their compliance.

The Constitution of Ecuador recognizes the right to the family, and for its protection it establishes that "responsible maternity and paternity shall be promoted" (Constituent Assembly of Ecuador, 2008, art. 68 no. 1). Within the rights of freedom, sexual freedom is established, which guarantees "... The right to make free, responsible and informed decisions about their health and reproductive life and to decide when and how many daughters and sons to have ..." (Constituent Assembly of Ecuador, 2008, art. 66 núm. 10) this gives citizens the right to decide about their reproductive life.

The aforementioned rights are related and above all give way to the fact that the constitutional norm recognizes the different types of families, therefore, it is the job of the state to protect the family as the nucleus of society and guarantee that the necessary conditions exist for the formation of the same, giving relevance to the protection of the minor, whether the child is their own, adopted or born thanks to biogestation. Assisted reproduction techniques have established procreation procedures that replace the traditional method and manage to overcome the infertility problems of couples, contributing to the formation of functional families.

In addition to being preventive and protective of the integral development of the child, health has the capacity to promote the effectiveness of other rights such as procreation, identity and freedom. This is how medicine would work for the formation of maternal bonds, this by means of ovo-donation as a process for the effectiveness of surrogate motherhood. Surrogate motherhood was born in 1976 in the United States of America, where the lawyer Noel Kaene formalized the surrogacy agency, which consisted of a contract between the surrogate mother and the interested couples. The contract established the cost of obtaining the maternity and paternity of the child. In Ecuador, in

1993, the first case was presented through bioethics and the donation of an ovum, however, this type of contract has not been regulated.

The Constitution of the Republic of Ecuador, in Art. 361, makes the state responsible for exercising stewardship within the health system; said responsibility includes regulating new social conflicts, as well as the legalization of abortion or surrogate motherhood, however these have been partial, failing to comply with what is structured in Art.363 of the CRE, The State shall be responsible for "...Ensuring sexual and reproductive health actions and services, and guaranteeing the integral health and life of women, especially during pregnancy, birth and postpartum".

The Ecuadorian state has the obligation to adjust the legal system to the social needs, as well as to the scientific development we are involved in. It is necessary to mention that infertility affects the family, which is recognized as the main nucleus of society. It is pertinent that when there is a means to promote the construction of conventional families, it should be regulated with the intention that it should not be used as a means of commerce, but on the contrary, it should be structured as a form of support guaranteeing the rights of protection and care throughout the process of pregnancy, birth and postpartum of whoever decides to be the surrogate, as well as the rights of acquired maternity. (Art.43, CRE).

Several health centers specialized in assisted reproduction techniques operate in Ecuador, and despite the lack of a specific legal regulation, they follow the general legal provisions on health and medical ethics. This situation poses important challenges, since when dealing with such a sacred right as the right to life, health centers may face difficulties in patient care and there is a risk that the rights of the new being to be born may be violated. For this reason, the present research has been structured to answer the question: How does a reform of the legal regulations allow the fulfillment of the right of pro-creational will through surrogate motherhood? In such a way that it achieves the objective of applying the principle of progressivity and give way to the effectiveness of constitutional rights.

Assisted reproduction and its impact on surrogate motherhood

Since the first girl conceived by in vitro fertilization was born in the United Kingdom in 1978 (Kamel 2013), assisted human reproduction techniques have made possible the birth of thousands of children a year around the world. According to figures published by the Latin

American Network of Assisted Reproduction (RED LARA) from 1990 to 2012, 12'824,534 children were born in Latin America with the help of some assisted human reproduction technique. In Latin America, so far, Argentina (Argentine Law 26.862) and Uruguay (Uruguayan Law 19.167) have established regulations on assisted human reproduction; both laws were enacted in 2013. For its part, Brazil, although it does not have a comprehensive law regulating assisted human reproduction techniques, has an administrative agreement (CFM Resolution 1.957-2010, 2011) issued by the Federal Council of Medicine, which establishes ethical standards for the use of these procedures. In addition, in 1995 Costa Rica regulated the practice of assisted human reproduction; however, months later an appeal of unconstitutionality was filed against Executive Decree 24029-S, arguing that it violated the right to life by discarding embryos through in vitro fertilization.

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In Ecuador, through the Latin American Network of Assisted Reproduction (REDLARA), eight centers have been created and are accredited for the application of assisted reproduction techniques. REDLARA, founded in Latin America in 1995 with 50 centers, has grown to more than 200 centers at present. The organization has the Latin American Registry of Assisted Reproduction (RLA), which annually compiles all the results of assisted reproduction techniques reported by these centers. In order to promote specialization in the scientific community, REDLARA offers the Continuing Education Program, which includes annual congresses, as well as the Online Continuing Education Program (PEC Online), which offers online refresher courses. All these activities position REDLARA as a true school of Reproductive Biology and Medicine.

The history of surrogate motherhood dates back to antiquity, with accounts of similar practices in various cultures. The pioneering role of attorney Noel Keane and the creation of the term "surrogate motherhood" in 1976 marked an important milestone in the modern development of surrogacy. The establishment of the first surrogacy agency, where children were gestated under contract with interested couples, represents a turning point in the evolution of the practice. In the 1980s, surrogacy began to receive greater public and media attention. (Guzman, 2007) One of the best known cases was that of "Baby M" in the United States. In this case, a woman named Mary Beth Whitehead agreed to carry a pregnancy to term as a surrogate mother for an infertile couple. However, after the baby was born, legal disputes arose over custody and maternal rights.

It is until 1986 that the gestation of a baby without any genetic relation to her is recognized for the first time, it is a significant milestone that highlights the progress in assisted reproductive techniques and their application in the context of surrogacy. (Ruiz, 2013) Since then, the history of surrogacy has been characterized by medical advances in assisted reproductive techniques, changes in social attitudes toward parenthood, and ongoing debates about the rights and responsibilities of all parties involved. The "Baby M" case generated intense debate about the ethics, legality and emotional implications of surrogacy. In the wake of this and similar cases, several countries began to enact specific laws and regulations to address the practice of surrogacy.

The closest concept to this term is that of Coleman, P. (1982), who established it as "A novel application of the technique of artificial insemination resulting in the birth of a child with a unilateral biological nexus to the infertile couple", Once the baby is born, the pregnant mother relinquishes custody of the child, ceding the rights of the child, including the right of filiation so that the child has the surnames of the parents.

Surrogate motherhood (SM), also known as gestational surrogacy (GS), is one of the assisted reproduction techniques in which a woman who will be the gestational carrier decides to gestate the child of another heterosexual or homosexual couple, or even of a single person. For this process to be effective, it is necessary to have direct participants such as the surrogate mother, the couple or the aspiring parent who must accompany the process from gestation. It is necessary to count on the presence of intermediaries that are the Institutions or organizations, it is possible to count on the centers in charge of the Latin American Network of assisted reproduction, within these intermediaries it is necessary to count on health professionals, lawyers and other people involved.

Correa, Waldimeiry (2021) recognizes two modalities; the first is the traditional one in which the pregnant woman not only allows gestation in her womb, but also provides her gametes, either with or without the donor's sperm, that is, with or without the existence of genetic material. The second is gestational, in which the pregnant woman only contributes with the gestation, that is to say, with her womb, since the eggs come from the donor. At present this is the most used form because it minimizes legal conflicts in the event that a loving bond is generated between the baby and the gestational mother.

It is currently recognized as a model that issues economic compensation for the loan of the womb. There are different legal models applied worldwide for this practice, among them are: The commercial model, which issues a compensation to the mother and the intermediary agency to complete the business. The altruistic model does not involve a large amount of money, but only that which is derived from the gestation, i.e. there is no intention of profit, but there is a biological intention. The prohibition model is the one that goes against the exploitation of women, claiming to violate the right to dignity and integral development. (Lamm, 2019).

The concept of procreative volition is extremely complex and covers a wide range of situations. It is not only limited to the issue of abortion, but also extends to issues related to Assisted Human Reproduction Techniques (AHRT). In essence, it refers to the intention to take on board the legal and ethical implications that arise when our genetic material is used in reproductive contexts. To fully understand this concept, it is crucial to link it with two fundamental theories: the theory of intention, which focuses on the deliberate will to procreate, and the theory of genetic filiation, which addresses the legal and ethical implications arising from biological kinship. (Mendoza, 2017) Both theories influence how we understand and apply procreative volition in different legal and ethical contexts.

In the context of procreation assisted by scientific advances, the procreational will takes on crucial importance in the establishment of filiation. When the genetic and biological elements of a person do not coincide, it is considered that the will must prevail. In other words, more importance is given to consensual paternity or maternity than to genetics. This scenario has given rise to what some authors describe as new realities, which imply a "de-biologization and/or de-genetization of filiation". (Esparza, 2019) In this context, the concept of filiation has acquired new nuances, and the notion of "procreational will" has emerged This manifestation of will must be understood as the free and consensual expression of a person who assumes the consequences of an act, similar to what occurs in cases of adoption.

The procreative will must be determinant to attribute or not filiation in cases where the parental link goes beyond genetic or biological ties, as in the case of surrogacy. In Ecuador, there is no specific regulation as to how this will should be expressed, however, the Constitution of the Republic of Ecuador is clear in instituting the right to sexual freedom, which is part of the rights to freedom where it recognizes

"The right to make free, responsible and informed decisions about their health and reproductive life and to decide when and how many daughters and sons to have" (Art.66 Num.10; Art.66 Num.10; Art.66 Num.10). (Art.66 Num.10; CRE).

The right to sexual freedom

The right to sexual freedom is a fundamental aspect of human rights that recognizes the autonomy and dignity of individuals in the sphere of their sexual lives. This right implies that all people have the right to make free and autonomous decisions about their own sexuality, without discrimination, coercion or violence. (Herrera, Prieto, & Goetschel, 2020). It includes the right to gender equality and sexual orientation, as well as the right to privacy, reproduction and informed consent in all interactions. It is attached to the same reproductive rights that give way to both men and women to choose the prudent time or maturity necessary to begin reproductive life. From this is born the term "sexual autonomy" which refers to the possibility of making one's own decisions regarding control, pleasure and reproduction.

This right also encompasses the freedom to make informed decisions about pregnancy, childbirth and parenting, as well as the right to receive safe and quality health care throughout the reproductive process. (National Assembly, 2008) In addition, it involves protecting individuals against coercion, forced sterilization, obstetric violence and any form of discrimination related to their reproductive decisions. Proponents of surrogacy argue that it can provide an additional reproductive option for people who cannot conceive naturally, while critics raise concerns about the exploitation of surrogate mothers, the commodification of the human body, and the possible negative impacts on the rights and welfare of the people involved.

Recognizing the reproductive right and this being an act carried out within the family nucleus, it is necessary to consider what is established in the Constitution of Ecuador; art. 67, which alludes to the family, mentioning that "The family in its various types is recognized. The State shall protect it as the fundamental nucleus of society and shall guarantee conditions that favor integrally the achievement of its ends..."

Surrogacy is a legal arrangement in which a woman (the "surrogate mother") agrees to carry a pregnancy to term with the intention that the child will be raised by another person (the "intended parents"). This process can be carried out in different ways, such as gestational

surrogacy, in which the egg is from the intended mother or a donor is fertilized with the sperm of the intended father or a donor, and then implanted in the surrogate mother. (Espinoza, Erazo, Ormaza, & Cecilia, 2019) This point intertwines us to the procreational right in which, beyond genetics, there is the intention to generate a bond that in any case is familiar.

Both the right to family and sexual freedom are fundamental aspects that must be protected and regulated by the legal framework of a country. The right to the family seeks to guarantee the protection of family relationships, the rights of family members and the fair resolution of family conflicts, promoting well-being and harmony within the family. On the other hand, sexual freedom is a fundamental human right that implies autonomy and the free exercise of people's sexuality, always within a framework of respect, consent and dignity. Sexual freedom includes aspects such as sexual orientation, gender identity, the right to decide on reproductive issues, among others.

The legal framework related to the right to procreation must guarantee that individuals have the freedom to make informed decisions about their fertility, protection against forced sterilization, access to contraceptive methods, reproductive health counseling, and in general, respect for their autonomy in matters related to reproduction. In short, the right to procreation is an important component of reproductive freedom and must be protected by the legal framework to ensure that individuals can exercise their decision-making capacity in matters related to their fertility and family formation.

Surrogacy can be analyzed from the perspective of a legal act, since it implies the creation of legal rights and obligations between the parties involved. The agreement between the surrogate mother and the surrogate parents, as well as the recognition of surrogacy by laws and regulations, constitute legal acts that generate specific legal effects. (Robles, Matute, & Verdugo, 2023). This analysis can address issues related to the validity and enforcement of contracts, as well as the rights and responsibilities of the parties in the surrogacy context.

In Ecuador, surrogacy is a practice that is in force, but it is not currently regulated. At present, the National Health Bioethics Commission states that there are 15 known cases in which pregnant surrogate women have refused to hand over the child to the biological parents. Only 4 of these cases have succeeded in obtaining custody of their children. (National Commission on Bioethics in Health, 2017).

The importance of regulating it centers on the risks, both medical and legal, that can arise due to lack of regulation. The National Commission of Bioethics in Health has identified some bioethical dilemmas present in the process of surrogacy in Ecuador. Therefore, this section will analyze the legal regulations and the influence of jurisprudence.

The existence of regulations and laws that establish the rights and obligations of the parties involved, as well as the procedures to be followed in the event of conflicts or non-compliance, provides a legal framework that gives legal certainty to all parties. Adequate regulation can also address ethical, medical and legal issues related to surrogacy, which is essential to protect the interests of all parties involved. Regulating surrogacy in Ecuador is a challenge, for this it is necessary to consider the key points developed by. (Hernández & Santiago, 2011):

Protection of the rights of all parties involved, including the surrogate mother, the surrogate parents and the baby(s) born through this process.

Establishment of clear and strict requirements for participation in surrogacy, including age, physical and mental health, as well as informed consent of all parties.

Regulation of financial compensation for the surrogate mother, ensuring that it is fair and equitable without constituting a form of exploitation.

Creation of a legal and transparent process for the recognition of paternity/maternity of surrogate parents, guaranteeing the legal security of the baby born through this method.

Establishment of an ethical framework that addresses issues related to the physical and emotional health and well-being of all parties involved.

These points would be fundamental to regulate surrogacy in Ecuador, protecting rights and establishing clear guidelines for its practice in the country. Considering this, the following norms are analyzed:

Childhood and Adolescence Code

Filiation refers to the legal and biological bond that unites a child with his or her parents, either by blood relationship (biological filiation) or by legal act, such as adoption. Filiation is fundamental for the child, as it establishes his or her identity, inheritance, care, and emotional and material support. Filiation provides the child with a sense of belonging, security and emotional stability by knowing his or her origins and having the certainty of who his or her parents are. In addition, filiation is also crucial in legal terms, as it determines the rights and responsibilities of both parents and the child in areas such as child support, inheritance and access to health services.

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This regulation is in charge of regulating the fundamental rights of minors, including the right to equality and non-discrimination in filiation. Among the rules of identification, article 36 mentions that "When the identity of one of the parents is unknown, the child or adolescent will carry the surnames of the parent who registers him/her, without prejudice to the right to obtain recognition". This rule is an opening to filiation in cases of Assisted Reproduction Techniques when there is only one filiation, either maternal or paternal. On the other hand, it is necessary to recognize that Art. 99 establishes the Unity of Filiation, which allows recognizing that "All children are equal before the law, the family and society. Any indication that establishes differences of filiation is prohibited, as well as the requirement of declarations that indicate its modality".

The Code of Childhood and Adolescence in Ecuador establishes that the filiation of minors is governed by the principle of the best interests of the child, guaranteeing their right to know and be cared for by their parents. The code recognizes that filiation can be legally established through different mechanisms, including biological filiation, adoption and other legal processes. In the specific case of surrogacy, the Code of Childhood and Adolescence does not recognize this method as a valid way to establish the filiation of the minor. Therefore, children born through surrogacy would not be legally recognized as children of the surrogate parents under Ecuadorian law.

The determination of filiation should be based on what is stipulated in the contract, rather than on presumptions of maternity or paternity. It is suggested to give priority to genetic or intentional filiation over the simple fact of childbirth, which implies a change with respect to the maxim "mater semper certa est". (Regalado, 2016) In addition, the

possibility of establishing a differentiated legal treatment for filiation in cases of surrogacy is raised, considering the different contributions of gametes by the commissioning parents, the gestational mother and the donors. This could result in a natural filiation determination in one case, and in a filiation analogous to adoptive filiation subject to requirements similar to those of adoption in the other case.

Identity is a constitutional right that is attached to the name and citizenship, which protects the integral development of the individual. In order for the birth to be registered in the civil registry, it is necessary the statistical report of live birth, which allows the creation of the Unique Identification Number (NUI), as well as specifying the parental links. (National Assembly of Ecuador, 2016) The filiation on its part according to art. 45 of the norm under analysis, is only demonstrated with the presence of the father or the mother, that is to say, as long as there is a relationship within the DNA. It is here where filiation should be considered as a fact that goes beyond genetics or biology, which seeks to ensure that people have control and autonomy over their reproductive capacity, as well as to protect the rights of children born through different methods of reproduction.

The analysis of Hernández Ibáñez (1998) should be acknowledged:

The filiation must correspond to the principals for many reasons: first of all, because they are the ones who wished to have the child. [...]. Secondly, because the pregnant woman has voluntarily agreed to it, renouncing any right over the child [...]. Thirdly, she believes that it is not possible for the pregnant woman, once she has given birth, to allege sentimental motives and bonds of affection with the child she has carried in her womb for nine months, because while it is true that these exist, it is also true that all these details have been made known to her before she agreed to comply with this type of pact. Fourthly, because the woman who has carried out the gestation knows that her mission in this type of technique is to give birth, in order to subsequently hand over the child to the woman who has entrusted it to her.

In Ecuador, it is important to discuss new forms of filiation that are based on a relational logic, that do not discriminate and that, on the contrary, expand the rights of children. Assisted Human Reproduction Techniques (AHRT) have allowed many families, and even single persons, to resort to them as an adequate means to have offspring (as is the case in Brazil and Argentina). In this sense, it is necessary to

mention one of the fundamental elements in the context of paternity and maternity: the procreational will. This refers to the intention to have children and, therefore, to become a father or mother and assume the responsibilities that this entails.

Civil Code

Most of the concepts about surrogate motherhood begin with "It is a contract"; that is to say that in order to comply with the process of this assisted reproduction technique, a contract that regulates the actions of the parties is relevant, with the intention of not affecting the dignity of the gestational mother, as well as giving legal security to the minor. The medical, legal and social risks faced by the pregnant woman are aggravated by unforeseeable circumstances, such as when the surrogate or intended parents refuse to assume paternity. (Regalado, 2016) In some cases, children are born with severe genetic conditions, intended parents divorce and refuse to fulfill their obligations or contribute financially, abandoning pregnant women mid-pregnancy, among other egregious and undesirable actions that reveal the darker side of surrogacy.

At present, the Latin American Network of assisted reproduction within the medical centers it has in Ecuador has made it possible to generate greater legal security by subjecting the parties to a contract. (Cárdenas, Solano, Álvarez, & María, 2021). However, this contract does not ensure the filiation of the minor, since it is not regulated in the Civil Code, as is the case of Adoption itself, which determines that "a person, called the adopter, acquires the rights and assumes the obligations of a father or mother, as indicated in this Title, with respect to a minor who is called adopted" (Art.314, Civil Code). (Art.314, Civil Code)

The surrogacy agreement is the element that gives validity to the agreement of wills between the parties involved in this reproductive practice. The classification of this agreement has been the subject of several interpretations, as an atypical legal business in the field of family law (specifically in relation to the recognition of the child), a unilateral promise, or a contract for the benefit of a third party, among others. However, most of the doctrine considers it as a type of contract. (Regalado, 2016) In this sense, it could be argued that the surrogacy contract is similar to a contract of sale regulated in art.1732 of the Civil Code, since "one of the participants undertakes to deliver a specific

good (the child after delivery) and the other to pay an agreed price in advance (the compensation agreed by the parties).

However, it could also be interpreted as a work or service contract, given that one of the participants (the surrogate mother) "undertakes to perform a work or provide a service in exchange for a specific price" (the child resulting from the surrogacy process) according to article 1856 of the Civil Code. Therefore, it could be understood that the liberal contractual approach that characterizes this type of reproductive practice equates compensation for any material good with making up for the inability to conceive experienced by a particular couple or individual.

Labor Code

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This norm becomes a means to regulate surrogacy as an individual employment contract. From this perspective of Rosales Valeria (2018) surrogacy would be considered a form of work in which the surrogate mother establishes a contract with the surrogate couple, in which she would receive remuneration in exchange for conceiving and delivering the child. This contract, which constitutes the employment relationship between the surrogate mother and the surrogate couple, would be based on Article 66 of the Constitution, which recognizes and guarantees the right to freedom of contract, as well as the right to freedom of labor. Therefore, it will be completely voluntary for the woman to become a surrogate mother and for the surrogate couple to choose her as the person who will conceive their child, respecting and taking into account the labor rights she deserves.

In Ecuador, Article 33 of the Constitution establishes that work is both a right and a social duty, as well as an economic right that constitutes a source of personal fulfillment and the basis of the economy. In addition, the same regulation guarantees that the exercise of work will be carried out with full respect for human dignity. According to the Labor Code, once the labor relationship between the surrogate mother and the surrogate parents is established, a series of obligations will arise that must be fulfilled in order to guarantee the rights acquired by the worker, i.e. the surrogate mother. These obligations, in accordance with the provisions of the aforementioned Code, would include the payment of the remuneration agreed in the employment contract, fair and considerate treatment, as well as registration with the Ecuadorian Institute of Social Security.

The surrogate mother can be equated to the figure of the worker, as defined in Article 9 of the Labor Code as "The person who undertakes to provide the service or to perform the work". The rendering of services, in labor terms and according to Ecuadorian jurisprudence, must involve "lawful and personal services", that is, the legal commitment that the worker acquires voluntarily to carry out the agreed lawful activities in a personal manner. According to this definition, the surrogacy contract should be express and in writing, since it is necessary for the contracting parties to record the will of the surrogate mother and the acceptance of the surrogate parents, including the recognition of a remuneration. In addition, such contract must comply with the requirements established for written contracts according to article 21 of the Labor Code, and must be registered before the Labor Judge with jurisdiction in the place where the worker renders her services.

Materials and Methods

On March 8, 2012, Helen Louise Bicknell and Nicola Susan Rothern, together with the Ombudsman's Office (DPE), initiated a legal process due to the refusal to register the name of their daughter, Satya Amani Bicknell Rothern, with the surnames of both mothers, by the general director of the Civil Registry of Ecuador. This action was filed before the Fourth Court of Criminal Guarantees under number 17254-2012-0584. On May 25, 2012, the judge of first instance rejected the action, which led the plaintiffs to file an appeal.

The appeal case was reviewed by the Third Criminal Guarantees Chamber of the Provincial Court of Justice of Pichincha under case No. 17123-2012-0223. On August 13, 2012, the Chamber dismissed the appeal and upheld the initial judgment. Subsequently, on September 12, 2012, Helen Louise Bicknell and Nicola Susan Rothern, together with the DPE, filed an extraordinary action for protection against the judgment issued on August 13, 2012. This new lawsuit gave rise to case No. 1692-12-EP.

On May 29, 2018, the Constitutional Court of Ecuador issued the sentence No. 184-18-SEP-CC as a restitution measure requested the General Directorate of Civil Registry, Identification and Identification, through its legal representative to execute the registration as Ecuadorian of the girl Satya Amani Bicknell Rothern, where she would be recognized as the daughter of Helen Louise Bicknell and Nicola Susan Rothern. As a measure of non-repetition, the Court ordered the

National Assembly to adopt all the legal dispositions to regulate the medical procedures of assisted reproduction, this in the term of one year as long as they are in accordance with the Constitution of Ecuador with the intention of making effective the rights of reproductive freedom and the right to form a family.

On December 4, 2019 the Court found that the National Assembly had not been notified in a timely manner, so it was only notified on December 17. On August 25, 2020 the National Assembly with 79 votes in favor approved the bill called "Organic Health Code (COS) ". However, on September 25, the President of the Republic objected to the entire bill and therefore, according to Article 138 of the Constitution of the Republic of Ecuador, the Assembly must take it into account after one year by means of a single debate.

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Case 949-22-JP

Mr. Angel Ramon filed an action for protection against the General Directorate of Civil Registry, Identification and Identification for refusing to register his daughter with his two last names. (Accion de Protección, 2022) The minor had been conceived by means of assisted reproduction and surrogate gestation (in vitro fertilization), therefore there is no biological mother who can be part of the filiation. In the denial, the entity requested that they would need a certificate of live birth for the maternal filiation, however, due to the application of assisted reproduction techniques in this case there is only one filiation. Referring to sentence No. 184-18-SEP-CC, the respondent informed that the Constitutional Court gave way to double filiation, that is to say, two parental members, in this case it is an exclusive filiation and therefore the aforementioned sentence is not applicable.

On September 3, 2021, the Judicial Unit of Criminal Guarantees accepted the action for protection and declared the violation of the constitutional right to due process; the motivation regarding the refusal to register and the formal and material equality. Said decision was appealed by the defendant, on January 31, 2022 the Criminal Chamber of the Provincial Court of Justice of El Oro accepted it, stating that there was no violation of rights. It is until March 18 that this process reached the Constitutional Court of Ecuador with case number 949-22-JP recognizing that it involves the right of identity of a minor, as well as the present case would become a precedent to expand the application of assisted reproductive techniques, as well as to make effective the right to single parent families.

At present, the National Assembly has not been presented with the issue. Due to the lack of regulation by the legislature, it is possible that actions may occur that go against the law, such as abuses towards surrogate mothers who rent their wombs, or towards those who pay or request this agreement to form a family. However, it is believed that, if there were a regulation on this issue, legal protection in terms of rights, responsibilities and obligations could be ensured, thus avoiding uncertainty for those who seek to realize their dream of forming a family through this process.

It should be recognized that instead of facilitating or ensuring the registration of minors, the Civil Registry created the procedure PRO-GRC-IRN-001, version 7.0, for the registration of filiation. This procedure addresses the registration of children born of same-sex parents through assisted reproduction, in accordance with the decision of the Constitutional Court of Ecuador No. 184-18-SEP-CC Case No. 1692-12-EP. In addition, in point a, the content of the certificate of assisted reproduction is specified, including the names and surnames, as well as the identity card or passport number of the mothers who opted for this method. This is not in accordance with the Court's expectations, since it concludes that assisted reproduction techniques only occur between female couples, leaving aside the male sex or couples of different sexes.

Bill: Organic Health Code (COS) prepared by the Constituent Assembly in response to Ruling No. 184-18-SEP-CC.

This bill becomes an objective tool to face social realities in modern medicine. The COS is a regulation that governs various aspects related to health, such as medical care, patients' rights, health services management, among others. Among the key points, it establishes the right of patients to participate actively in decisions about their medical care and protects their privacy and confidentiality. Allusion is made to the regulation of the surrogate womb, in this it is mentioned in art.196 that,

Surrogate motherhood will be allowed only in those cases in which there are medical circumstances that do not allow the woman to become pregnant; the right of the children to the harmonious development of their personality within the family will be guaranteed. Health service providers must guarantee at all times the care and attention of gestational carriers in order to avoid risks during the fertilization, pregnancy, delivery and postpartum processes.

The aforementioned code allows the execution of assisted human reproduction techniques as long as they comply with the norms and regulations established by the National Health Authority, as well as the universal bioethical principles related to the subject. Likewise, they must be carried out in health establishments that have specific authorization, have informed consent protocols, submit their care protocols to the approval of the National Health Authority and comply with the regulations corresponding to the entire chain of care.

Bioethics in Ecuador

The medicalization of reproduction is one of the most significant biotechnological advances of recent decades. At the end of the 20th century and the beginning of the 21st century, sexuality has been separated from reproduction, which has led to the formation of so-called artificial or multiparental families, composed of the husband, the wife, the sperm donor and the woman who provides her eggs or uterus for surrogacy. (National Commission on Bioethics in Health, 2017). Cases of surrogacy, where another woman's uterus is rented or gametes or embryos are purchased, should be considered. In these cases, donors or gestational mothers become means, contradicting the Kantian maxim: "Things have price and the human being dignity".

Bioethics is a constantly evolving field that seeks to establish ethical standards and principles for the practice of medicine, scientific research and decision-making in health-related issues. It is based on the protection of life, human dignity and respect for the fundamental rights of individuals. Bioethics plays a crucial role in this context, as it involves considerations of human dignity, autonomy, justice and nonmaleficence. In the case of surrogacy, it relates to issues such as the informed consent of all parties involved, the welfare of the child to be born, and the overall social and emotional impact.

The importance of the terminology used in this field is highlighted, as it implies a specific way of interpreting the facts. She focuses on what happens in Latin America with regard to "embryo donation" and how this is currently referred to as "prenatal adoption". The bioethicist points out that "this is not a neutral term, especially in a region where the embryo often receives more protection than the woman." (Cristina, 2022) The American Society for Reproductive Medicine (2018) suggests that "surrogacy" be considered as a treatment alternative for women who are unable to gestate due to medical impossibility or contraindication, as well as for male couples or single men. This

position is mainly supported by those who have no significant objections to this practice.

Surrogacy is based on the free decision of adults who exercise their rights and prerogatives without harming themselves or others. Therefore, neither the persons who practice it nor the practice itself can be criticized or objected to. However, Aparisi, Angela (2017) gives an emphasis to surrogacy pointing out that it is not, as some believe, a practice agreed between adults that does not harm third parties and necessarily benefits all those involved. On the contrary, it has negative consequences for the most vulnerable parties, especially for the gestating woman. Surrogacy does not respect the dignity of the surrogate mother, since it presupposes a dualistic conception that separates her into two aspects: her feelings, emotions, reason and autonomy on the one hand (if they really concur), and her bodily dimension on the other. From this perspective, the pregnant woman's body becomes a "something", an object available and susceptible to any transaction, and is reduced to playing a purely instrumental role.

In Ecuador, surrogacy has generated ethical and legal debates, as it raises issues related to gestational surrogacy, exploitation of the surrogate woman, the rights of the child born through surrogacy and the commodification of the human body. From a bioethical perspective, surrogacy raises ethical challenges in terms of autonomy, justice, human dignity and equity. Risks to the surrogate woman must be considered, as well as the emotional and legal implications for all parties involved.

Discussions on the commodification, commercialization and precariousness of women's bodies must be addressed in a comprehensive manner, focusing on the protection of their fundamental rights. In this context, legal security for pregnant women takes on extraordinary relevance, as it is imperative to prevent women from being forced to carry out their pregnancies in clandestine or precarious conditions. It is essential to consider a comprehensive approach that fully respects women's human rights, ensuring that they are not exposed to unnecessary risks to their health and well-being.

Conclusions

Fortunately, the advancement of medical science has provided assisted reproductive techniques as alternatives for people who cannot conceive naturally. However, the absence of specific regulation on

surrogacy poses challenges in legal, ethical and protection terms for all parties involved. Inequality is evident in this situation, which justifies the imperative need to regulate these practices in order to provide legal protection to all parties involved in a surrogacy process, especially the surrogate woman who consents to carry out the pregnancy for others, whether in a commercial or altruistic context.

It is important to consider the lack of legal regulation and clear legal frameworks that comprehensively address the rights and protection of both the surrogate mothers and the intended parents. The absence of specific regulations on surrogacy can lead to situations of uncertainty, legal insecurity and vulnerability for all parties involved. In addition, the lack of regulation can generate ambiguity regarding the rights of filiation, the protection of the health and well-being of the surrogate mothers, as well as the legal recognition of the families resulting from this practice. It is essential to establish a clear legal framework that protects the rights and dignity of all persons involved in the surrogacy process in Ecuador.

In the surrogacy context, it is essential to have a detailed contract that clearly states the rights, responsibilities and expectations of all parties involved. This contract should address issues such as compensation for the surrogate, necessary medical care, relinquishment of parentage by the surrogate, and other legal and ethical issues related to the surrogacy process. The contract provides legal certainty for both the surrogate and the intended parents, and can help prevent conflicts or misunderstandings during the process. It is important that this contract be drafted with proper legal advice and in compliance with the laws and regulations of the country where the surrogacy process is being carried out.

The protection of the procreational will is a fundamental aspect in the context of surrogacy. This implies guaranteeing respect for the decision of the intended parents to resort to surrogacy as an option to form a family. It is important that any legal framework or contract related to surrogacy guarantees and protects the procreative will of the intended parents, as long as the rights and dignity of all parties involved, including the surrogate, are respected.

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