

# The right to breastfeeding of minors born through surrogacy: a biolegal and bioethical analysis

## El derecho a la lactancia del menor nacido de maternidad subrogada: un análisis biojurídico y bioético

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*Breastfeeding is a vital, nutritional bond  
between mother and child;  
to deny this connection is an  
irreparable disservice to the child's well-being.*

### Abstract

This article legally and ethically analyzes the right to breastfeeding in surrogacy, addressing its complexities from a comprehensive perspective. It highlights the need to regulate surrogacy at the federal level in Mexico, protecting the rights of the minor and his or her right to breastfeeding. Affective parenting and the creation of new bio-legal norms are promoted considering the jurisdiction and requirements of the parents. The promotion of breastfeeding in surrogacy is based on the ethical

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benefit of the child. The importance of comprehensive care during the puerperium and breastfeeding is highlighted, valuing mental health and guaranteeing adequate breastfeeding. Clauses in surrogacy contracts are recommended to extend their duration and ensure breastfeeding and the healthy development of the child.

*Keywords:* regulation, mother-child bonding, affective parenting, child welfare, surrogacy contracts.

## 1. Introduction

Surrogate motherhood<sup>1</sup> is a highly relevant topic in the field of Bioethics, raising numerous legal and ethical issues worldwide (1). This practice has generated intense academic and social debate due to its complexity and implications for all parties involved. The present paper aims to contribute to the academic debate on bioethical issues.

Surrogacy has become a lucrative business worldwide, with options Available at different countries (2). However, in many cases, women who participate in this practice find themselves in situations of economic and social vulnerability, which exposes them to possibilities of exploitation and commercialization of their bodies (3). This reality raises serious violations of rights and legal goods associated with surrogacy, such as the abandonment of children in specific situations and selective selection based on the child's gender or health conditions (4). These troubling situations reveal the ethical and legal complexities surrounding surrogacy, as well as the need to address and debate these issues from a perspective that safeguards the rights of all parties involved.

In this context, a fundamental question arises that takes on special relevance in the context of children's rights and debates on the

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<sup>1</sup> Surrogacy, also known as womb surrogacy or surrogate motherhood, is an arrangement in which a woman carries and delivers a baby on behalf of another person or couple. There are two types: traditional, where the surrogate provides the egg and uterus, and gestational, where the embryo is transferred into the surrogate's uterus.

protection of their welfare: what is the right to breastfeed a surrogate child? The right to breastfeed refers to the inherent right of the child to receive nourishment and nutritional benefits provided through breastfeeding. This right implies the establishment of an emotional bond and connection between the child and the biological mother, as well as the health and developmental benefits of breast milk for the child (5).

In keeping with its mission to strengthen the human-centered bioethics-based view, this article addresses the legal and bioethical challenges posed by surrogacy in relation to the recognition of the rights of all parties involved, including the child's right to breastfeed. In addition, the importance of breastfeeding for the baby's health and well-being (6) will be highlighted, as well as the need for adequate support and guidance during this process.

Through this article, we seek to generate an interdisciplinary dialogue on relevant and topical issues in the health and life sciences, thus contributing to the dissemination of academically sound knowledge and the promotion of scientific debate in the field of bioethics (7).

In this context, a fundamental question arises: what is the right to food, including breastfeeding, of the child born from surrogate motherhood? This question becomes particularly relevant in the context of children's rights and debates on the protection of their welfare. The right to food, which encompasses breastfeeding, refers to the inherent right of the child to receive adequate nutrients and nutritional benefits for healthy growth and development (4). This involves the establishment of an emotional bond and connection between the child and its biological mother, as well as the health and developmental benefits of breastfeeding for the child (5).

Surrogacy poses legal and bioethical challenges regarding the recognition of the rights of all parties involved, including the child's right to adequate nourishment, including breastfeeding. On the other hand, adequate nourishment, especially through breastfeeding, is of utmost importance for the health and well-being of the infant (6). The need for early initiation of breastfeeding is emphasized because

of the many benefits to both the infant and the mother. However, it is also important to recognize that problems and difficulties may arise during this process, so appropriate support and guidance are essential (7).

## 2. Methodology

Through a legal and ethical analysis, this article aims to contribute to the debate on surrogate motherhood and to offer a comprehensive view of the right to breastfeeding of the child born in this context. To carry out this study, a literature review and dissertation were used as a methodology. Reflection on this topic is essential to promote the comprehensive protection of the rights of the child and to seek solutions that consider both the child's welfare and the rights of the other parties involved in this complex legal and ethical framework.

## 3. Development

### *3.1. Surrogate motherhood from a bio-legal perspective*

Bio legal is the discipline that analyzes and regulates the legal and ethical aspects related to biomedicine, scientific research in health and technological advances in biology and medicine. Its objective is to establish regulatory frameworks that protect the rights and dignity of individuals, considering ethical and moral principles, as well as the legal, social and political implications of scientific advances in these fields (8).

Within the Mexican context, the regulation of surrogacy has been the subject of discussions and proposals. It is relevant to note that the lack of uniform regulation at the federal level has generated disparities in state regulations. At the state level, the legal framework surrounding surrogacy, also known as womb surrogacy or surrogacy, varies. It is important to keep in mind that laws and regulations may

differ between states, and some states may not have specific legislation on this topic.

Some states, such as Tabasco, Mexico City, Sinaloa, and Veracruz (9), have implemented specific laws that allow altruistic surrogacy under certain conditions and legal safeguards.

For example, in the state of Tabasco, according to its civil code, rigorous requirements are established to carry out surrogacy. These requirements include the existence of a medical impediment for the surrogate woman to carry out the pregnancy, the need for a written agreement between the parties involved, the intervention of a judge to authorize the process and the impossibility of obtaining an economic benefit on the part of the surrogate woman (10).

However, other states in Mexico do not have specific legislation on surrogacy, which creates a legal vacuum and generates uncertainty regarding the rights and responsibilities of the parties involved. This situation poses significant challenges for those who wish to resort to surrogacy as an option to form a family.

In those countries where surrogacy is permitted, the recognition and registration of foreign titles establishing parentage of children born through this method can pose significant challenges. For example, in Spain, the lack of a clear legal framework creates uncertainty as to the legal recognition of these foreign titles in the Spanish Civil Registry. This situation is further complicated by the phenomenon of reproductive tourism, in which people travel to countries where surrogacy is permitted to access this method of family formation (11).

At the international level, surrogacy has been the subject of various conventions and declarations that seek to address the ethical and legal aspects related to this practice. For example, the United Nations Convention on the Rights of the Child (12) and the Universal Declaration on Bioethics and Human Rights establish principles and guidelines<sup>2</sup> to protect the rights and welfare of children born through surrogacy (13).

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<sup>2</sup> The United Nations Convention on the Rights of the Child establishes a number of fundamental principles and guidelines to protect the rights and welfare of children in

However, as in Spain, the legalization and regulation of surrogacy in Mexico also entails challenges and risks, especially in relation to the possible exploitation of the surrogate women (14). To safeguard the rights and dignity of all parties involved, it has been suggested that, in the case of regulating surrogacy, only the altruistic modality should be allowed. In this type of surrogacy, the surrogate would not receive financial compensation beyond the expenses directly related to the gestation. Despite this, there is still a problem regarding the deprivation of breastfeeding for the child, which has not yet been resolved.

From an international perspective and when carrying out a comparative analysis with other countries, it is relevant to highlight the different positions in relation to the right to breastfeeding in cases of surrogacy. Some advocates argue that this right should be recognized and safeguarded, since the act of breastfeeding establishes a fundamental bond between mother and child, being an essential element of mother-child care (6). This position is based on the conviction that breastfeeding provides significant emotional, physical and nutritional benefits for the child, thus promoting its well-being and optimal development. Therefore, addressing this issue from an international perspective makes it possible to examine the different legal and ethical approaches adopted in relation to breastfeeding in surrogacy cases, in the interest of seeking a balance between the rights and needs of all parties involved.

Some countries, such as Belgium (15), Cyprus, Ireland and Brazil (16), have no specific regulation on surrogacy. In these cases, legal filiation is generally attributed to the woman who gives birth to the child, and surrogacy contracts have no binding legal effect.

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general. Some of the principles and guidelines relevant in the context of surrogacy are: 1) the principle of the best interests of the child, 2) the right to identity, 3) the right to non-discrimination. On the other hand, the Universal Declaration on Bioethics and Human Rights, issued by the United Nations Educational, Scientific and Cultural Organization (UNESCO), also contains principles and guidelines relevant to surrogacy. Some of them are: 1) the principle of respect for human dignity, 2) the principle of free and informed consent.

In Belgium, although its legislation is neither for nor against surrogacy, legal motherhood is recognized only to the woman who gives birth, and the commissioners must resort to an adoption process to obtain filiation. In Ireland, surrogacy is carried out without specific legal regulation, and the contracts entered have no binding legal effect. Filiation is recognized in favor of the gestational carrier and the biological father, although there are legal presumptions that may apply. In Cyprus, altruistic surrogacy is allowed, but the contracts have no binding legal effect. Parentage is attributed to the surrogate and her husband, although in some cases the intended father may claim biological paternity.

On the other hand, some countries prohibit surrogacy, such as Germany, where it is expressly forbidden by law (16). Surrogacy contracts are void and are not legally recognized. Surrogates can only obtain paternity through adoption proceedings. German citizens often turn to foreign countries that allow surrogacy to carry out this process.

In the context of surrogacy, there are countries that allow commercial surrogacy, i.e. agreements are permitted in which the surrogate receives financial compensation for her services. In Russia, surrogacy was legalized for heterosexual couples and single women in the Family Code of 1995 (11).

Russian law recognizes the legal motherhood of the woman who gives birth to the child born through surrogacy, so the surrogate can decide whether to give up the child after delivery. The commissioners require the express consent of the surrogate mother in order to establish filiation in her favor. In Ukraine, surrogacy has become popular in reproductive tourism and the Ukrainian legislation recognizes the parentage of the principals who provided their gametes in the case of surrogacy. In addition, the surrogate mother cannot contest the maternity of the child when there is a genetic link to the intended parents. The surrogate mother is required to have a child of her own and meet certain medical requirements. In Ukraine, financial consideration to the surrogate is not prohibited, which allows

commercial surrogacy. Other countries that also allow commercial surrogacy are Belarus, Georgia and Kazakhstan.

Surrogacy presents a diversity of regulations in different countries, from those that do not expressly regulate it to those that prohibit it. This has led to legal conflicts and the need for principals to look for options in foreign countries to carry out surrogacy.

### *3.2 The right to breastfeed the child born of surrogacy*

The puerperium or breastfeeding period is of utmost importance in a woman's life. During this stage, the woman undergoes a series of physical, emotional and hormonal changes that require comprehensive attention and adequate care (17). In addition, breastfeeding plays a fundamental role in the development and well-being of the baby, in addition to strengthening the emotional bond between mother and child. For this reason, it is necessary to emphasize that the psychological dimension should be incorporated into the process of pregnancy, childbirth and puerperium control with a preventive perspective (17). In this sense, it is essential to recognize that the puerperium and breastfeeding are sensitive moments in a woman's life. Therefore, adequate support is required to live them in a connected, conscious and healthy way. Breastfeeding is a key aspect that must be approached from an integral point of view, considering both the physical and emotional aspects. During the puerperium and breastfeeding period, it is crucial to provide women with the necessary support both physically and emotionally. This will allow them to live this stage in a healthy way and establish a deep connection with their baby through breastfeeding.

In addition, it is important to have mental health professionals, who play a fundamental role in supporting health system users, their families and technical teams (18,19). These professionals play a fundamental role in enriching women's understanding of their postpartum and breastfeeding experience. They help to validate their emotions, provide support and offer tools to face the challenges that may

arise. In addition, they should highlight the need to approach motherhood from a perspective that values and respects women's dignity, promoting adequate and prolonged breastfeeding that benefits both the baby and the mother (20).

The right to breastfeed is widely recognized<sup>3</sup> as a crucial component for the development and well-being of the child. Breast milk, a precious fluid produced by mothers, stands as an invaluable food for newborns and infants (5). It is the ideal food that provides essential nutrients and contributes to the optimal development of the immune system of infants, which contains immunological components present in this unique milk, including antibodies, immune cells and growth factors, which work together to protect the baby against infections, allergies and diseases, thus strengthening its immune defense system.

A highlight is the ability of breast milk to transfer immunity from mother to baby. Through this dynamic and constantly changing fluid, specific antibodies are transmitted that provide vital protection during the infant's first months of life, when his or her immune system is still developing. In this way, breast milk becomes an indispensable ally in strengthening the infant's resistance and helping him or her to fight adversities (21). Experts emphasize the importance of exclusive breastfeeding during the first six months of life. They mention the long-term benefits associated with this practice, such as a lower incidence of respiratory, gastrointestinal and allergic diseases in children (6).

In this sense, the phenomenon of wet nurses at the Bourbon court between 1709 and 1782 invites us to reflect on the intrinsic value of breastfeeding and the fundamental right of the child to receive it (22). During that historical period, wet nurses played a crucial role in providing breast milk to the children of aristocratic and noble

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<sup>3</sup> The recognition of the right to breastfeed is widely supported by various organizations and entities at the international level. The World Health Organization (WHO) and the United Nations Children's Fund (UNICEF), for example, have recognized and actively promoted the importance of breastfeeding as a crucial component of child development and well-being.

families, thus enabling their proper development and nutrition. By analyzing the social, cultural and economic aspects associated with this alternative form of child rearing, the challenges and implications that arise for all parties involved become evident. On the other hand, biological mothers may face emotional and physical separation from their children, while wet nurses assume the responsibility of breastfeeding babies that are not their own. This dynamic raises issues related to identity, bonding and child rearing. It is critical to consider these reflections in the current context of surrogacy. While there are significant differences between historical surrogacy and contemporary surrogacy, both phenomena raise complex ethical and legal issues regarding the welfare and rights of the child. Historical research on wet nurses in the Bourbon court provides a valuable perspective for understanding the evolution of these practices. It allows us to critically examine the benefits and challenges associated with surrogacy, as well as reflect on the rights and welfare of children in the context of contemporary surrogacy. It is essential to approach these issues from an ethical and legal perspective, seeking a balance between the wishes and needs of the parties involved, always prioritizing the best interests of the child (23).

### *3.3. Ethical and social aspects of breastfeeding in cases of surrogacy*

It is essential to emphasize respect for the inherent dignity of the human person in cases of surrogate motherhood. Recognizing and safeguarding the dignity of all those involved in this complex process is essential to ensure the well-being of the child born under this modality. Respect for human dignity implies recognizing and protecting the rights and needs of all parties involved, including ensuring adequate and prolonged breastfeeding for the child (20).

Breastfeeding plays a fundamental role in the development and well-being of the child. Scientific and health recommendations emphasize the importance of exclusive breastfeeding for the first six months of life (24). In the context of surrogacy, respecting the child's right to breastfeed for at least six months is essential. This not

only contributes to its healthy growth and strengthening of the immune system, but also establishes significant emotional bonds with the surrogate mother.

In order to guarantee respect for the inherent dignity of the human person and the right of the minor to receive breastfeeding, it is essential to establish clauses in surrogacy contracts that require extending the term of the contract for at least six months after the birth (20). This measure provides security and guarantees for the minor, ensuring that scientific recommendations are met and that their right to receive adequate and prolonged breastfeeding is respected. In doing so, an ethical and responsible commitment to the integral well-being of the minor in the context of surrogate motherhood is demonstrated.

Synderesis, in the field of bioethics, refers to that innate knowledge that allows us to discern what is morally correct or incorrect (25). When applying this principle to surrogate motherhood and the minor's right to breastfeed, a series of ethical questions arise. Synderesis invites us to question whether surrogate motherhood, as a process in which a woman gestates and gives birth to a child for another person or couple, is intrinsically correct. We must reflect on the emotional, physical and psychological implications for both the surrogate mother and the child conceived through this method. The principle of synderesis also prompts us to consider whether the separation between surrogate mother and child after birth is compatible with our intuition of basic normalcy. Breastfeeding, as part of the biological and emotional relationship between a mother and her child, can be seen as a vital aspect for the development and well-being of the child. Synderesis leads us to ask ourselves if it is ethically correct to deprive a child born through surrogate motherhood of the right to receive breastfeeding. Applying the principle of synderesis in the context of surrogate motherhood and the minor's right to breastfeed leads us to reflect on fundamental values and our deepest-rooted intuitions. It is a reminder that bioethics is not only based on external norms and regulations, but also on our own capacity for

ethical discernment and on consideration of the welfare and rights of all parties involved.

It is important to approach these complex ethical issues with an open and sensitive mind, seeking a balance between different perspectives and valuing the dignity and rights of all individuals involved, especially the child. The application of the principle of *synderesis* allows us to reflect on these issues from an internal perspective, in search of ethical and fair solutions that prioritize the well-being of the most vulnerable.

The bioethical principle of respect for physical life urges us to prioritize the well-being and health of the child in all circumstances (26). The principle of respect for physical life implies that the physical well-being of the child must be a priority in any decision related to surrogate motherhood. This also implies making sure that mechanisms and agreements are established that allow the minor to have access to breastfeeding, when the gestation and delivery have been carried out by a surrogate mother. This may require the implementation of policies and protocols that promote and support breastfeeding, as well as education and support for both the surrogate mother and the biological mother in case of temporary separation after birth (27).

Respect for the physical life of the minor and their right to receive breastfeeding must be considered as fundamental elements in the legal and ethical framework that regulates the practice of surrogate motherhood. The protection and promotion of the health and well-being of the child must be at the center of all decisions and policies related to this issue, recognizing the importance of breastfeeding as an inherent and essential right for their physical and emotional development.

Within the framework of the bioethical principle of justice and in relation to the theories of Rawls and Ferrajoli, surrogate motherhood and the right of the minor to receive breastfeeding can be approached from two complementary perspectives. From Rawls's theory of justice as fairness, the importance of guaranteeing that the

basic principles of society benefit all members, especially the less privileged, is emphasized. In this sense, it can be argued that ensuring access to the right to breastfeeding for all babies, including those born through surrogacy, contributes to promoting equity and guaranteeing the protection of their rights. In the context of surrogate motherhood, this would imply considering the rights of the minor and seeking a fair balance between the interests of the intended parents, the surrogate mother and the baby. Rawls's principles of justice provide a basis for assessing whether the practice of surrogacy conforms to standards of equity and adequately protects the rights and well-being of all parties involved, including the child's right to breastfeed (28).

From the perspective of Ferrajoli's guarantee, which is based on the respect and protection of the fundamental rights of people, the importance of safeguarding the rights of the minor in the context of surrogate motherhood can be emphasized. This would include ensuring that the child's right to breastfeed, if beneficial to their health and development, is respected and protected. Ferrajoli's guarantee emphasizes the protection of fundamental rights and avoiding any form of discrimination or violation of the basic rights of the individuals involved (29).

When considering surrogate motherhood and the right of the minor to receive breastfeeding from the perspective of Rawls' principles of justice and Ferrajoli's guarantee, emphasis is placed on equity resources in the distribution of benefits and benefits, as well as protection of the fundamental rights of all parties involved, especially the rights of minors.

Within the framework of the bioethical principle of solidarity and subsidiarity (20), solidarity in bioethics refers to responsibility and mutual commitment among members of society. In the case of surrogate motherhood, solidarity implies considering the importance of satisfying the needs and protecting the rights of the minor born through this process. The right of the minor to receive breastfeeding is marked in this solidarity, since breastfeeding has significant benefits for their health and proportion. Subsidiarity, for its

part, establishes that decisions and actions must be taken at a level closest to those who are directly involved and affected by them. In the context of surrogate motherhood, subsidiarity implies taking into account the best interests of the minor and considering the role of the intended parents and the surrogate mother in relation to breastfeeding. It should be assessed whether the intended parents have the ability and willingness to provide breastfeeding, or whether the surrogate mother is willing and able to do so.

In this sense, the principle of solidarity suggests that, if the surrogate mother cannot or does not wish to provide breastfeeding, an alternative is sought that meets the needs of the minor and is based on commitment and mutual care. This may include options such as donating breast milk or hiring a lactating wet-nurse to provide lactation for the child.

The right of the minor to receive breastfeeding in the context of surrogate motherhood can be analyzed from the perspective of the bioethical principles of solidarity and subsidiarity. This implies ensuring that measures are taken to meet the needs of the minor and protect their rights, considering the shared responsibility and mutual commitment between the parties involved in the practice of surrogate motherhood.

The conjunction of the bioethical principles of respect for the dignity of the human person, synderesis, respect for physical life, justice, solidarity and subsidiarity supports the idea that what is fair and what corresponds (30) to the minor in the context of surrogate motherhood is that her surrogate mother provides her with breastfeeding. This is the option that guarantees better nutrition and benefits for the child. Given the existence of this type of practice, regulations, laws and contracts must ensure the best interests of the minor, ensuring that this vital resource is available. If the pregnant mother cannot or does not wish to provide lactation, alternatives such as the wet nurse, a breast milk bank or, ultimately, seek to meet the need with baby milk formula should be used. It is essential that regulations and laws in this area protect and safeguard the rights and

well-being of minors, ensuring that the necessary measures are taken to guarantee their adequate nutrition and development.

#### 4. Conclusions

1. Surrogacy is an undeniable reality and a fact of human life. It arises because of scientific and technological advances, but it also raises a series of complex questions. Ideally, this situation would not exist, but we recognize that it is a utopian reflection. In this context, the legal field has the responsibility to address it, since the law has the fundamental role of regulating human reality.
2. Mexican legislation must regulate surrogate motherhood to protect the rights of parents, pregnant women and the well-being of children born under this modality.
3. It is necessary to have will and creativity when creating new rules, considering aspects such as jurisdiction and parental requirements.
4. Surrogate motherhood poses ethical and social challenges, and the rights of the minor must be protected, including their right to breast-feeding and nurturing.
5. The promotion of breastfeeding in cases of surrogate motherhood is based on the ethical principle of seeking the well-being of the minor, since it provides benefits for their health, development and establishment of affective bonds. This action is consistent with respect for the inherent dignity of the human person.
6. Allowing the surrogate mother to participate and support breastfeeding respects the surrogate mother's autonomy, promotes the child's physical well-being, and fosters solidarity and shared responsibility in caring for the baby. In addition, it would be advisable to include in the surrogacy contracts a clause that establishes the obligation to extend the term of

the contract for at least 6 months after the birth, to guarantee the child's breastfeeding and promote their health and development.

7. In the context of surrogate motherhood, it is essential to provide comprehensive care during the puerperium and lactation, assessing mental health and promoting adequate lactation. By recognizing the child's right to breastfeed and allowing the surrogate mother to participate and support this process, her autonomy is respected, the physical well-being of the baby is promoted, and solidarity and shared responsibility in their care is fostered. This helps create a supportive environment where all involved can enjoy a healthy and enriching motherhood experience.

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