

Legal Certainty and Bioethics Regarding Artificial Insemination and Surrogacy: A Comparative Review

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ABSTRACT

Background: Legal security and bioethics are relevant frameworks of comparative legal analysis for determining maternal-biological affiliation from the perspective of artificial insemination and surrogacy within the epistemological context of the right to identity in the contemporary legal world, especially given scientific advances in genetics and the new concept of the reproductive revolution.

Objective: The objective was to analyze the legal patterns of security and bioethics from the perspective of artificial insemination and surrogacy within the context of comparative law.

Method: The methodology used was a scoping review based on a synthesis of the exploratory review, using a qualitative approach and a basic hybrid (inductive-deductive) method.

Results: The results obtained show a high rate of families who need to legalize surrogacy for strictly reproductive health reasons and are unable to procreate thereby hindering their inherent right to form a family. Among other things, there are diverse regulations in comparative law that require a structured approach based on legal certainty and bioethics, both for the exercise of reproductive rights to motherhood, resorting to infertility treatment as an inherent right, within the framework of human rights as protection of the child's right to identity.

Conclusion: It is concluded that some countries, specifically Peru, lack updated regulations on bioethics and safety in assisted reproduction, including surrogacy. This requires regulations consistent with scientific advances in genetics, reproduction, and the best interests of the child.

Keywords: gestation, bioethics, artificial insemination, genetics, human rights, Scoping review.

RESUMEN

Fondo: La seguridad jurídica y bioética son patrones relevantes de análisis jurídico comparado para determinar la filiación materno biológica desde la inseminación Artificial y la gestación por sustitución en el contexto epistemológico del derecho a la identidad en el mundo jurídico contemporáneo, en especial razón a los progresos científicos en genética y al nuevo concepto de revolución reproductiva.

Objetivo: El objetivo fue analizar los patrones jurídicos de seguridad y bioética desde la inseminación artificial y la gestación por sustitución desde el contexto de derecho comparado.

Método: La metodología realizada fue de un Scoping review a partir de una síntesis de la revisión exploratoria basado en un enfoque cualitativo, método híbrido (inductivo-deductivo) de tipo básico.

Resultados: Los resultados obtenidos evidencian que existe un alto índice de familias que requieren legalizar un vientre de alquiler por circunstancias estrictamente de salud reproductiva quienes se ven imposibilitadas de procrear, para lograr un derecho ínsito a constituir una familia. Entre otros, el derecho comparado existe normatividad diversa que requieren ser estructurada desde la seguridad jurídica y la bioética tanto para el ejercicio de los derechos reproductivos a una maternidad recurriendo al tratamiento de su infertilidad como un derecho inherente, en el marco de los derechos humanos como protección del derecho de identidad del niño(a).

Conclusión: Se concluye que existen en algunos países específicamente en el Perú, que carecen de una regulación actualizada sobre bioética y seguridad en la reproducción asistida, incluyendo la maternidad subrogada, lo que exige una normativa acorde con los avances científicos en genética, reproducción e interés superior del niño.

Palabras claves: Gestación, bioética, inseminación artificial, genética, derechos humanos, Scoping review.

I. INTRODUCTION

Scientific advances in the field of genetics have generated a profound transformation in the understanding of maternal-biological filiation and the right to identity, especially through surrogacy and bioethics, called "reproductive revolution", which has allowed the definitive dissociation between reproduction and sexuality, which has been overcoming traditional legal structures that require regulations that enhance legal certainty. In this regard, Flores (2014) mentions that this phenomenon forces necessary legal modifications to be made with respect to the current genetic reality. Likewise, changes in union patterns and population aging have weakened the relationship between marriage and childbirth (Naciones Unidas, 2018).

In this regard, Lam (2021) emphasizes the circumstances of surrogacy, go beyond the current legal regulations and affirms that it is necessary to consider the personal situations of families suffering from physical, genetic or structural deficiencies in order to conceive children. In fact, the idea of reproductive rights was consolidated in Cairo in 1994 and ratified by the Fourth International Women's Congress in Beijing in 1995. These international references legitimized reproductive rights, also establishing the natural form of reproduction without discrimination, coercion or violence (Martínez-Muñoz y Rodríguez-Yong, 2021; Ortiz & Menacho Ulloa, 2024).

Contextualizing infertility and access to health, we have the Organización Panamericana de la Salud (OPS) y la Organización Mundial de la Salud (OMS) 2023, who define infertility as the inability to achieve a clinical pregnancy after 12 months or more of unprotected intercourse. This condition, according to Zegers-Hochschild (2020), who states mentions that it should be understood in a broad sense that includes the right to a full sexual life and the freedom to decide the frequency of procreation. Globally, the OMS estimates that 15% of couples face difficulties conceiving, while in Peru, data indicate that up to 42% of couples experience infertility problems (Zegers-Hochschild, 2018),

Despite these figures, the Peruvian public health system does not categorize infertility as a disease of preventive concern, which causes those affected to be socially marginalized (INEI, 2023). In addition, care is fragmented between the Integrated Health System (IGS), Social Health Insurance (SHI), military and police health services (MINSA, 2021). Although the Special Health Insurance Plan is approved, the coverage, which is minimal, is usually insufficient for highly complex treatment.

Assisted reproduction techniques (ART) and the socioeconomic gap, in view of this, ART includes procedures such as In Vitro Fertilization (IVF) and embryo transfer, however, they exclude simple artificial insemination (Bladilo et al., 2017). In view of this, the Inter-American Court of Human Rights recognizes these techniques as essential medical

treatments linked to the right to privacy and reproductive freedom. At the national level, the Permanent Civil Chamber of the Supreme Court (Casación 4323-2010-LIMA) ratifies that ART are alternative methods for procreation.

However, there is a notable economic inequality in access, while in the private sector IVF costs between 12 and 20 thousand dollars, in the public sector it is mostly limited to low-complexity techniques (Congreso de la República, 2018), in this sense, initiatives such as the "Incubator Mother" method (IVF or INVO), seek to favor people with fewer resources, reducing the cost to approximately 6,500 dollars.

The Peruvian legal framework and its critical limitations, in the current Peruvian legislation, presents contradictions identified in the sources, according to the General Health Law (Ley 26842, Art. 4) this recognizes the right to treatment but requires that the genetic mother and the gestational mother be the same person, implicitly prohibiting surrogacy, in addition to the Child and Adolescent Code (Law 27337), this law protects life from conception and prohibits genetic experiments or manipulations contrary to the development of the child. On the other hand, the Penal Code (DL. 635) punishes conceived harm (Articles 124, 124-A) and regulates sentimental and eugenic abortion, although it is considered to impose light penalties that limit the prevention of illicit conduct. In this sense, jurisprudence has had to fill legal gaps, such as, in case 1486-2007 in Cajamarca, where the Corte Suprema de Justicia (2010) recognizes the legitimacy of acting of a conceived child who suffered damage due to environmental pollution due to the spill of mercury.

Analysis of Comparative Law and Surrogacy, in the International Context, Berger et al. (2015) they argue that it is essential to regulate these techniques within the framework of human rights, considering that surrogacy is already allowed in countries such as Greece, England, Ukraine and Canada (Lafferriere, 2017), also in Latin America, Argentina stands out as a pioneer in adopting the principle of procreative will (Martinez-Muñoz and Rodriguez-Yong, 2021).

However, in Peru, the lack of regulation means that children born through surrogacy face identity problems when they are registered with the surrogate mother's data on the live birth certificate (Lazaro, 2019). In addition, Varsi (2013) It points out that there is no regulation on "partial maternity".

In terms of legislative proposals and research trends, it is identified that based on Scopus data it shows that interest in surrogacy or surrogacy rose from 56% in 2021 to 84% in 2023. In addition to Bill No. 3404/2018-CR, it proposes to amend Article 7 of the General Health Law to allow this condition of genetic and gestational mother to fall on different mothers, based on the autonomy of the will and Article 6 of the Constitution (Congreso de la Republica 2018). Under analysis, this proposal seeks to promote a legal framework that protects the right to identity under the principle of the best interests of the child (Ciri6n, 2018; Zannoni, 2018; Vela, 2011).

Therefore, the condition of genetic, biological and gestational mother can be attributed to the same pregnant woman or third person as long as the infertility problems are evidenced by a previous diagnosis, certified and supported by the treating specialist doctor. To do this, the parents must decide with autonomy of will to sign a prior notarial agreement with that voluntary pregnant woman to accept the registration of the live birth by the RENIEC with the surnames of the genetic parents, in accordance with Article 6 of the Political Constitution of Peru.

This allows us to formulate the following research question: How do comparative normative regulations on surrogacy contribute to guaranteeing dignified motherhood, adequate determination of maternal-biological filiation, legal certainty and bioethical principles, to protect the right of identity of the child born alive?

Therefore, the main objective of the study was to review the background of a scope review of the normative regulation from comparative law towards dignified motherhood from

surrogacy, with an adequate determination of maternal-biological filiation, legal and bioethical security, in order to guarantee the right to identity of the child born alive.

II. METHOD

This qualitative approach study was elaborated from a comparative exploratory critical review of the literature using the state-of-the-art scoping review model, with criteria for the inclusion and exclusion of articles from preferred indexed journals on maternal and biological filiation by artificial insemination and surrogacy that focus on legal and bioethical security in the face of the state of the art of comparative law adapting the analysis of the similarity theory of Guteridge, Litré and Capelleti (Codina, 2020; Piñero Martín, et al. , 2019; Bonilla and Crawford, 2019).

Evaluation of study quality: The results evaluated result from a critical analysis of the development of the results presented in narrative form in contrast to the COREC checklist.

III. Results

In view of the thematic and national background, Magan (2018) warns that reproductive incapacity is not new and that, according to the natural law school, it is innate to the human being; in this sense, what is new are the procreative problems that arise when States, respecting fundamental rights, must intervene normatively.

In addition, from a legal perspective, it is important to emphasize that in a surrogacy contract, whether with or without financial compensation, in which a woman renounces her maternal filiation in favor of the contracting party or a third party, this will be considered null and void in most jurisdictional judgments, Even with a criminal connotation for certain actions related to surrogacy, such as the concealment or delivery of a child to third parties to alter or modify its filiation, it is the very delicate issue in the dilemma of maternal filiation (Mardini, 2018).

It should be noted that Valencia (2019) It evaluated the free development of the family from normative regulation to surrogacy. In addition, the study proposed a regulatory model that allows clear positions to be adopted in cases of surrogacy. On the other hand Motta (2021), Based on a documentary analysis and jurisprudential trends on surrogacy, he presented two approaches: one focused on knowledge, which shows a high level of understanding and focus on the technique; and another focused on the importance of surrogacy as an alternative procedure to achieve fundamental rights, such as procreation and family; However, the study noted that the lack of national legislation discourages and impedes this effort.

For its part, Lam (2021) It emphasizes the circumstances that go beyond the current legal regulations and affirms that it is necessary to consider the personal situations of families that suffer physical, genetic or structural deficiencies in order to conceive children.

At the international level, Godoy-Vásquez (2018) analyzes surrogacy from a legal and human rights perspective, focusing on the obligations of States under the European Convention on Human Rights, with the aim of examining the implications of the jurisprudence of the European Court of Human Rights in relation to surrogacy and how it affects the legal system. It suggests adopting a self-containment judicial approach, meaning states have some freedom to regulate this practice. In summary, the article highlights the need for proper regulation and increased public awareness.

On the other hand, Correa da Silva (2021) He argues that this issue of surrogacy has grown exponentially at the international level and has been understood in multidisciplinary research that leads to different edges of interpretation, resulting in the impact of medical science on law. According to Arvidsson et al. (2015), The discussed thematic analysis of the social constructivist approach to surrogacy determined that there is no regulatory norm from the South American systematics. Similarly, Cedeño et al. (2022) They point out that

the perception of the law allows subrogation contracts to be interpreted from a new paradigm based on the economic utilitarianism of economic consideration.

The position of Lázaro (2019) It states that the judgments reveal a restrictive and heteronomic conception of the person, which is opposed to the idea of a European identity based on dignity and freedom. In view of this, he proposes an alternative conception of the person as a relational and autonomous being, capable of deciding his or her own life project. According to Igareda (2020), It mentions that international surrogacy poses legal, political and ethical challenges between countries and puts both intended and surrogate parents at risk and can leave the children of these arrangements vulnerable in a variety of ways, including parentage, immigration and citizenship status, and proposes the need to reach a minimum legal framework at the international level. with the aim not of standardizing but of offering common legal solutions to people who feel the need to travel abroad to have a child through surrogacy.

Among others, Patrão (2022) analyzes the current legal framework in Portugal, which prohibits surrogacy, and the efforts to introduce a legal initiative that allows surrogacy. Her article examines ethical considerations around surrogacy, including concerns about the exploitation and commodification of women's bodies, as well as the potential benefits for infertile couples and surrogates. It also addresses the regulatory challenges of implementing a legal framework for surrogacy, including issues related to the selection of surrogate mothers, the establishment of legal parentage, and the protection of the rights of all parties involved. Taken together, the article offers a comprehensive overview of the complex legal, regulatory, and ethical issues surrounding surrogacy in Portugal.

The author, Hibino (2022), discusses the continued commercialization of surrogacy due to the globalization of the reproductive market before and after the pandemic. In addition, it argues that scientific globalization has increased assisted reproduction processes and that the pandemic has aggravated this trend by making international travel more difficult and expensive. It discusses the ethical and legal challenges associated with commercial surrogacy, including the exploitation of women and the lack of adequate regulation in some countries. Given this, he suggests that protectionist measures are needed.

According to Swain and Rogerson (2021), They address the legal issues in cross-border surrogacy, including current issues and trends. The authors discuss the legal challenges faced by couples seeking surrogacy abroad, including the lack of regulation in some countries and the complexity of paternity and citizenship laws in different jurisdictions. In addition, they examine current trends in the regulation of cross-border surrogacy, including the growing demand for international regulations and the adoption of stricter laws in some countries. Therefore, they suggest that measures are necessary to protect the rights of parents and children born through cross-border surrogacy, including the creation of international agreements and the harmonization of paternity and citizenship laws.

And it concludes the challenges that arose in cross-border surrogacy, especially during the pandemic, and how lawyers have had to adjust their approaches to address these issues and protect everyone involved, including the parental rights of children born through surrogacy. The complexity of these cases and the need to take into account multiple interprofessional factors to resolve them are emphasized.

The researcher Zaouaq (2020) It approaches surrogacy from an ethical and legal perspective. Where he analyzes the ethical challenges in the face of the commodification of the human body. It also examines legal challenges, including the lack of regulation in some countries and the complexity of parentage and citizenship laws in different jurisdictions. The author suggests that corrective measures are needed from a critical point of view.

According to Arroyo (2020), Surrogacy is a practice that violates the human dignity of women acting as surrogate mothers, as they are treated as mere instruments of the

biological parents and suggests that legal and global responses to surrogacy should be determined.

Wade et al. (2023) They established an evaluation of participatory informed consent for surrogate mothers, looking for the efficacy of the measure to improve randomized consent. The results of the study showed that it did indeed improve the understanding of surrogacy issues compared to standard informed consent. In summary, this study is important because it highlights the importance of informed consent in randomized bioethical cases and provides an effective measure to improve understanding and satisfaction, which is beneficial for researchers and participants.

Zondag et al. (2023) suggest a bioethical analysis before controlling significant biases in the participation of key informants and the researcher himself. The study was conducted in the Netherlands and the results showed that the intervention group that received informed consent had a significantly lower participation rate than the control group that did not receive informed consent. Overall, this study is important because it highlights the internalization of risk and significant biases in participation. The results of the study may be useful to inform future bioethics policies and practices regarding surrogacy and surrogacy.

Verastegui et al. (2023) focused on developing a tool called the Informed Consent Form Navigator to produce readable and genuine informed consent and review documents on bioethical issues. The main objective of the study was to evaluate the effectiveness of the tool in improving the readability and compliance of documentary sources. The study was conducted in the United States and was used on a sample of papers evaluated by a group of experts in comparative analysis.

The results of the study showed that documents produced with the tool were significantly more readable and authentic than documents produced without the tool. Overall, this study is important because it highlights the importance of bioethically readable informed consent and provides an effective tool to improve readability and compliance when reviewing documentary sources on surrogacy.

Xiao et al. (2023) consider improving the bioethical understanding of surrogacy through the use of an AI-powered chatbot, which required participants to fully understand the risks and benefits before giving consent. Such AI used natural language processing techniques to interact with participants and answer their questions, providing definitions of technical terms and examples to help participants Understand the form instrument better. The results of the study showed that participants who used the chatbot had a better knowledge of the instrument and also reported that the chatbot was useful and easy to use, concluding that the pilot study suggests that this solution can be effective and useful for participants in bioethics research.

Гамбарарян (2021) mentions that surrogacy is not regulated in Armenian public law based on a detailed analysis of the relevant laws and regulations through a deductive method of study. Parmigiani (2020) se centra en la teoría de Locke y analiza cómo el consentimiento tácito se justifica a partir de la bioética, concluyendo que resulta ser una forma de consentimiento implícito derivada del beneficio de vivir en sociedad. Según Locke, el consentimiento tácito está justificado porque los individuos obtienen beneficios de vivir en sociedad, como la protección de sus derechos y la seguridad jurídica en casos bioéticos de gestación subrogada. Además, señala que el consentimiento tácito no es una forma de consentimiento explícito, sino que deriva de la lógica del beneficio. En general, su artículo ofrece interesantes perspectivas sobre la filosofía política de Locke.

Uberoi et al. (2023) It contextualizes how implementation science can help civil society improve reproductive rights-based health policies, as science proves to be a valuable tool for civil society. In the field of genetic law, two paradigmatic perspectives are considered: the right to identity through surrogacy and the justice recognized from natural law regarding surrogacy and surrogacy.

Sandel (1953), American philosopher and advocate of critical thinking as a method to learn philosophy, he approaches surrogacy from the perspective of values and rationalism. In this approach, he seeks to connect current ethical issues with the reflections of classical philosophers. His contribution was to illustrate ideas about predominant values and axiology in contrast to the normativity and legality defended by legal positivism.

From a utilitarian perspective, surrogacy is simply because it maximizes overall well-being. Women who offer their services as surrogates obtain a financial benefit, and couples who are looking for a child find a solution to their infertility (Bentham, 2008).

From an egalitarian liberal perspective, surrogacy can be unfair if the women who offer their services do not do so freely. The egalitarian liberalism of Rawls (1970) proposes that the State should remain neutral and away from moral issues; however, Sandel (1953) he already criticized this vision of undue freedom and considered that the State should intervene in reproductive and moral matters.

As for the state of the art, there is a marked globalized tendency to address the subject of study. However, most studies focus on Western countries, without reform criteria based on legal certainty, bioethics or state policies (Correa da Silva, 2021).

The ontological basis of the research focused on the perception of the need for protection with respect to conception, identity and the family. In this sense, from the perspective of the problematic reality, it is necessary to understand the issues related to surrogacy and the inherent rights of the newborn. As a result, within the epistemological context, the right to one's own body is considered, understanding the objectification of the female body as a historical constant, and the rights over one's own body as a claim (Redondo, 2017). The leading theories are the dissociation of motherhood from intention-based genetic theory, which seeks to create genetic material of interest for sharing similar genetic traits with parents. This theory has detractors who criticize its emphasis on masculinity; However, those who consider the theory adequate establish that science and genetics determine the extent of gestation, although it has drawbacks in cases where a third person, a woman, donates the egg. In any case, the interpretive current is directed more towards DNA matching than the purpose of donating and, through it, provides an opportunity for life and happiness to the family that needs it (Rigon y Chateau, 2016).

Ciri6n (2018) it mentions the principle of judicial self-restraint, which means that States have some freedom to regulate this practice, based on the need for proper regulation and greater public awareness. Quoting her own text, she states: "I believe that surrogacy is not exempt from promoting legal virtues and even values. In this regard, we should keep our watchtower clear so that we can perceive when the time would be right for the legislator to step in, hopefully not too far in the future, and open the door to surrogacy."

Atienza (2022), Professor of Philosophy of Law at the University of Alicante, writes in his journal of bioethics and law about surrogacy. Another twist highlights: "It should be clear that, in raising, in a reasonable way, surrogacy based on the principle and value of human dignity, I believe that it is important from the Kantian sense" as a principle of identity from the supranational development of the best interests of the child and bioethics, as well as the Theory of the Will in the context of human rights to decide to have a baby in circumstances of assisted reproduction with surrogacy.

In this context, from a conceptual perspective, surrogacy will always generate controversy; For the detractors, it constitutes a morally unacceptable commercialization; However, for its supporters, surrogacy seeks a new family model, free of moral prejudices regarding cutting-edge scientific reproductive procedures. (Hernández, 2018), which is even legalized through a contract in which a woman offers to inherit, with or without providing her egg, in exchange for financial compensation, generally for the inconvenience and expenses involved, and in some cases for altruistic purposes (Arroyo, 2020).

Based on comparative law, following the legal comparative analysis framework of Guteridge, based on the theory of similarities supported by Litre (2000), on the simultaneity

of similarities and differences, as well as on the work mentioned by Capelleti (2000), Spain accepts surrogacy only if the procedure is performed abroad. Once back in Spain, the children are registered as the children of the intended parents if the established requirements are met or if an adoption process is carried out (Beorlegui, 2014), following the premises of the best interests of the child (Ysla & De Piérola, 2023).

In the United States, unrestricted surrogacy arrangements are allowed. New York has already approved surrogacy paid for by contract, backed by insurance. The Baby M case is one of the most well-known in the United States, as it determined that, although the surrogacy contract was illegal and ineffective, it was not in question. The priority was the life, health and well-being of the child. They became non-biological parents with the intention of providing a dignified life and a strong family.

In Mexico, only Sinaloa and Tabasco have contractual regulations for surrogacy, with no liability or guarantees if there are problems or disagreements between either party.

In Canada, the Assisted Human Reproduction Act has allowed the free use of surrogacy since 2004; however, this practice is prohibited in Quebec. In Ukraine, surrogacy contracts are allowed, based on Article 123 of the Family Code and, on the other hand, Article 771 of the Special Health Law. König (2023), which analyzes transnational surrogacy in Ukraine and its relationship to the armed conflict in the country, considers that surrogacy has become a form of resistance and survival for Ukrainian women in times of war.

In Russia, Federal Law No. 5487-1 is in force, granting contractual authorization for reproductive matters to nationals and foreigners, provided that they arise from heterosexual marriages or unmarried women. In Brazil, it is permissible for altruistic reasons after the certification of biological impossibility of gestation, a regulation based on CFM Resolution No. 1-957-2010 and Resolution No. 2-121-2015.

In India, since 2002, regulations have been introduced that favor surrogacy, providing an affordable alternative for these purposes, although many foreigners can have children through this procedure. This regulation was amended by the Surrogacy Regulation Act (2020), which established a ban on foreigners, making it viable only for Indian couples experiencing infertility.

In South Africa, altruistic surrogacy contracts are allowed, although financial compensation is prohibited. In the United Kingdom, contracts for charitable purposes are permissible, although financial compensation is also prohibited.

In Germany, burdensome surrogacy contracts are criminally punishable because they constitute a violation of personal rights. In France, surrogacy is restricted. In Colombia (Muñoz-Gómez, 2018), considers that there is a lack of a legislative system that regulates cases of surrogacy.

In Argentina, the legislation on the subject allows surrogacy to be legitimized with prior informed consent (González, 2014). In Chile, Article 182 of the Civil Code protects surrogacy only for genetic parents; A surrogate mother is not viable.

IV. DISCUSSION

According to a meta-analysis, surrogacy is already legally allowed in Europe and India, with regulations in both common law and civil law in Greece, England, Ukraine, Russia, Canada, the United States, South Africa, Thailand, and Australia.

In Latin America, Argentina is considered one of the pioneers in innovative legal frameworks innovation in the field of surrogacy, which reflects a resolute legal stance acknowledging the reality for this technique. However, regulatory projects on the subject remain scarce in the rest of South America, due to the lack of established parameters of state policy, leading to significant legal ambiguity for citizens facing this problem (Matía, 2019). From the state of the art, there is a debate about the different theories and approaches used in the study of surrogacy, where a predominant aspect is the form of

resistance and survival of women, especially in areas of armed conflict. Secondly, it is noted that transnational surrogacy also assesses ethical-legal issues, such as the exploitation of women and the lack of regulation in some countries.

In general, a priority view of transnational surrogacy is perceived. Thus, the doctrine of surrogacy leads to in vitro fertilization and artificial insemination, thus ensuring the viability of the genetic link between the newborn and the mother who commissions it.

From the state of the art, there are marked tendencies towards the regulation of surrogacy, oriented towards scientificity, compliance with bioethical principles and the guarantee of equity in relation to the rights of those who participate in the protection of essential rights. On the other hand, there is a notable tendency to displace and legally eliminate crimes against civil status and, with it, their world of interpersonal relationships, conceived from a double conception of the protected legal right: civil status and the accuracy of the data registered in the civil registry.

In Peru, there is no well-defined national law. Article 7 of the General Health Law (Law No. 26842) contains, to a certain extent, regulations that are already obsolete in the face of the current scientific and reproductive revolution. It only contains the principle of genetic identity, based on the consent of the biological parents before the biological process. The absence of a Special Law that regulates surrogacy contracts that determine the rights to food, filiation and related assets of the intended parents, as well as the obligations of the parties involved in the contractual relationship, is notable.

An emblematic case in Peru is the case of the Tovar-Madueño couple, of Chilean nationality, (published by LP on August 5, 2016), a couple who for years tried to have children and decided to undergo fertility treatment, traveled to Peru and attended the CONCEBIR Clinic, after the treatment in which a third person intervened: the nurse, and two children were born, however, on their return they were detained at the airport, since the entry of the children had not been registered, so they were criminally prosecuted and deprived of their liberty by a preventive detention ordered against them, justified by article 7 of the LGS; however, with DNA, the biological paternity of the father was demonstrated, with this the decision was revoked. however, the arguments of the court on affiliation were not determined, only the principles of biological truth, the principle of the best interests of the child and the support of the family were taken into account; As a result, the children were immediately handed over to their genetic parents, based on the principle of family coexistence. Other similar cases include the case of Ventura and Navarro in 2016, who legitimized surrogacy through the adoption process. The couple wanted to start a family, but there were several failed attempts due to problems in the mother's womb. Finally, through the Nacer Clinic, the birth was legitimized through a contract, finally granting it the status of adoption.

Another case is the ruling contained in the Fifth Constitutional Court of Lima, Peru, through Resolution No. 5 of file No. 06374-2016-0-1801-JR-CI-05, which establishes that the National Identification Registry (RENIEC) must register spouses as contracting parents through surrogacy and egg donation. The basis for this was centered on surrogacy, upheld by the Inter-American Court of Human Rights in the case of Costa Rica v. Artavia Murillo, as privacy rights are related to independence and reproductive health. The court ruled that the claim was well-founded, ordering the annulment of the registration records and ordering RENIEC to proceed with the registration.

V. CONCLUSIONS

The results demonstrate a global trend towards the regulation of surrogacy, with significant advances in Europe, India and some Latin American countries. However, in Latin America, especially in Peru, the lack of clear regulations persists, leading to legal uncertainty and

vulnerability for the parties involved. The need for updated legislation is crucial to ensure legal certainty, equity, and the protection of reproductive and filial rights.

The Peruvian national legal system does not identify legal norms regulated by exegetical norms on safety and bioethics regarding artificial insemination and surrogacy as such. In compliance with comparative law, this requires inherent innovations. This is especially true in the General Health Law, in its seventh article, which is guided by international trends, where a marked prevalence of regulatory norms and doctrines on surrogacy is evident, which implies in vitro fertilization and artificial insemination, which leads to the viability of the genetic link between the newborn and the mother who commissions it. Currently, Peru does not have a well-defined national law, as Article 7 of the General Health Law (Law No. 26842) contains regulations that are somewhat outdated in light of the current scientific and reproductive revolution. The lack of a special law regulating surrogacy contracts in accordance with the principle of the best interests of the child is notable.

VI. References:

1. Atienza, M. (2022). Sobre la gestación por sustitución. Otra vuelta de tuerca. *Revista de Bioética y Derecho*, (56), 107-124. <https://dx.doi.org/10.1344/rbd2022.56.40721>
2. Arroyo, A. (2020). Gestación por sustitución: La dignidad humana en juego. *Estudios de Deusto*, 68(2), 41-73. [https://doi.org/10.18543/ed-68\(2\)2020pp41-73](https://doi.org/10.18543/ed-68(2)2020pp41-73)
3. Arvidsson, A., Johnsdotter, S., Emmelin, M., & Essén, B. (2018). Gauging the interests of birth mother and child: a qualitative study of Swedish social workers' experiences of transnational gestational surrogacy. *European Journal of Social Work*, 21(1), 86–99. <https://doi.org/10.1080/13691457.2016.1256869>
4. Berger, C Milicic, N. Alcala L. Torretti. A (2015) *Programa para el Bienestar y Aprendizaje Socioemocional: descripción y evaluación de impacto* <https://www.redalyc.org/pdf/805/80533065004.pdf>
5. Beorlegui, A. (2014). *La maternidad subrogada en España*. Universidad de Navarra. España.
6. Bentham, J. (2008). *Los principios de la moral y la legislación*. Buenos Aires: Claridad.
7. Bonilla, D., y Crawford, C. (2019). El acceso a la justicia: teoría y práctica desde una perspectiva comparada. *Grou*, 23529(2), 1–45. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471510
8. Bladilo, A., Torre, N., & Herrera, M. (2017). Las técnicas de reproducción humana asistida desde los derechos humanos como perspectiva obligada de análisis. *Revista IUS*, 11(39) Recuperado en 15 de marzo de 2025, de http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-21472017000100002&lng=es&tlng=es.
9. Cedeño Floril, M. P., Machado López, L., & Vivanco Granda, E. C. (2022). La maternidad subrogada: reto normativo frente a la legislación iberoamericana. *Revista Universidad y Sociedad*, 14(S1), 8-19.
10. Cirión, A. E. (2018). La maternidad subrogada vulnera el principio constitucional de la seguridad jurídica. La imperiosa necesidad de buscar una solución al problema español: cambio legislativo o cumplimiento de la ley. *Dilemata*, (28), 123-135. <https://dialnet.unirioja.es/servlet/articulo?codigo=6694798>
11. Correa da Silva, W(2021) Un análisis bibliométrico de la investigación sobre la gestación subrogada: Tendencias actuales y brechas entre el derecho internacional y las nuevas tecnologías. <https://doi.org/10.5354/0719-2584.2021.63742>
12. Codina, Lluís. (2020). Cómo hacer revisiones bibliográficas tradicionales o sistemáticas utilizando bases de datos académica soma de conducto auditivo externo: estudio de una serie de casos. *Revista ORL*, 11(2), 139-153. <https://dx.doi.org/10.14201/orl.22977>
13. Congreso de la República (2018) Informe de investigación: Problemas de política pública y estado situacional de las técnicas de reproducción humana asistida en el Perú.

- https://www2.congreso.gob.pe/sicr/cendocbib/con5_uibd.nsf/25ADE7B6962521CC0525834A00726952/%24FILE/reproduccion_asisitida_N20.pdf
14. Corte Suprema de Justicia (2010) Sala Civil Permanente. Página 3 de la sentencia. http://genyderecho.com/jurisprudencia/Nac_06_CAS_N4323_2010.pdf
 15. Corte Suprema de Justicia (2010). Sentencia que reconoce la legitimidad para obrar de un ser humano en la etapa de concepción. <http://spij.minjus.gob.pe/juris/civil-pdf/civil-02078.pdf>
 16. Famá, M. (2019) *Maternidad subrogada. Exégesis del derecho vigente y aportes para una futura regulación*. <https://repositorio.unal.edu.co/handle/unal/75516?show=full>
 17. Fuster, D. (2019). *Investigación cualitativa: Método fenomenológico hermenéutico*. Propósitos y Representaciones, 7(1), 201-229. <http://dx.doi.org/10.20511/pyr2019.v7n1.267>
 18. Flores, J. (2014) *El derecho a la identidad del niño en las nuevas formas de familia*. La Ley, Derecho de familia.
 19. Garaycochea Cannon, V. A. (2023). Gestación subrogada, ¿estamos preparados en Perú? Una reflexión desde la ética. *Revista Peruana de Ginecología y Obstetricia*, 69(2), 00011. <https://doi.org/10.31403/rpgo.v69i2518>
 20. Hernández, R., Fernández, C. y Baptista, M. (2018). *Metodología de la investigación*. <https://es.slideshare.net/kyozama/metodologa-delainvestigacin-5ta-edicion-sampieri-38348367>
 21. Hibino, Y. (2022). Ongoing Commercialization of Gestational Surrogacy due to Globalization of the Reproductive Market before and after the Pandemic. *Asian Bioethics Review*, 14(4), 349–361. <https://doi.org/10.1007/s41649-022-00215-4>
 22. Instituto Nacional de Estadística e Informática (INEI, 2009) Perú: Estimaciones y Proyecciones de Población Total, por Años Calendario y Edades Simples, 1950-2050 Boletín Especial N° 17.
 23. https://www.inei.gob.pe/media/principales_indicadores/libro_1.pdf
 24. Igareda, N. (2020). Legal and ethical issues in cross-border gestational surrogacy. *Fertility and Sterility*, 113(5), 916–919. <https://doi.org/10.1016/j.fertnstert.2020.03.003>
 25. Lafferriere, J. (2017). Análisis de la Jurisprudencia sobre Maternidad Subrogada, luego del Código Civil y Comercial. Universidad Católica Argentina. <https://repositorio.uca.edu.ar/handle/123456789/12538>
 26. Lam, E. (2018) *La autonomía de la voluntad en las nuevas formas de reproducción. La maternidad subrogada*. La importancia de la voluntad como criterio decisivo de la filiación y la necesidad de su regulación legal. *Revista de Derecho de Familia*, núm. 50, julio 2011, pp. 107 https://scielo.isciii.es/pdf/bioetica/n24/08_master.pdf
 27. Lam, E. (2021) *Gestación por sustitución. Realidad y derecho*, Indret, *Revista para el análisis del derecho*, pp. 1-49. https://indret.com/wp-content/themes/indret/pdf/909_es.pdf
 28. Lázaro, C (2019) *El concepto de persona como elemento clave de la identidad europea: el caso de la maternidad subrogada*. <https://doi.org/10.18543/ced-02-2019pp189-201>
 29. Magan, J. (2018). El Tratamiento Legislativo de la Maternidad Subrogada en el Perú. Universidad Ricardo Palma.
 30. Mardini, J. (2018) Análisis económico del derecho de los contratos de maternidad subrogada en el Perú, Universidad de Lima,
 31. Martínez-Muñoz, K., y Rodríguez-Yong, C. (2021). *La maternidad subrogada: tendencias de regulación en Latinoamérica*. *Juridicas*, 18(1), 74–90. <https://doi.org/10.17151/jurid.2021.18.1.5>
 32. Matia, F. (2019). ¿Resulta oportuno dar un tratamiento jurídico a la gestación subrogada en nuestro país? In *Revista de Derecho Político* (Issue 105). <https://doi.org/10.5944/rdp.105.2019.25269>
 33. MINSA (2021). Análisis de Situación de Salud del Perú, 2021. <https://bvs.minsa.gob.pe/local/MINSA/6279.pdf>
 34. MINSA (2010). Plan esencial de aseguramiento en salud

<https://bvs.minsa.gob.pe/local/MINSA/4478.pdf>

35. Motta, Y (2022) Maternidad subrogada, derecho a la identidad y a la verdad en el Perú, 2010-2020 <https://hdl.handle.net/20.500.12692/80888>
36. Muñoz-Gómez, D. (2018). *La omisión legislativa: Una Mirada desde el Caso de la Práctica de la Maternidad Subrogada en Colombia*. Universidad del Rosario de Colombia. Mosteiro, G. M. J., & Porto, C. A. M. (2017) La investigación en educación. Notas teórico-metodológicas de pesquisas em educação: concepções e trajetórias. Ilhéus, BA: EDITUS, pp. 13-40. Doi: 10.7476/9788574554938.001.
37. Naciones Unidas (2018, 5 de diciembre). *Artículo 16: derecho al matrimonio y a fundar una familia*. Noticias ONU. <https://news.un.org/es/story/2018/11/1447221>
38. Organización Panamericana de la Salud (OPS)/ Organización Mundial de la Salud (OMS)(2023). La OMS alerta de que una de cada seis personas padece infertilidad. <https://www.paho.org/es/noticias/4-4-2023-oms-alerta-que-cada-seis-personas-padece-infertilidad#:~:text=La%20infertilidad%20es%20un%20trastorno,relaciones%20sexuales%20regulares%20sin%20protecci%C3%B3n>
39. Godoy-Vásquez, O. (2018). La gestación subrogada en la jurisprudencia del TEDH, TJUE y Tribunal Supremo. *Anuario de la Facultad de Derecho de la Universidad de Extremadura*, (34), ISSN. <https://dialnet.unirioja.es/servlet/articulo?codigo=7044337>
40. Ortiz Muñoz, R. C., & Menacho Ulloa, M. A. (2024). La regulación de la maternidad subrogada y su impacto en los derechos reproductivos en el Perú. *SCIENDO*, 27(1), 79-83. <https://doi.org/10.17268/sciendo.2024.012>
41. Patrão-Neves, M (2022) *Legal initiative for Gestational Surrogacy in Portugal An overview of the legal, regulatory, and ethical issues*. Revista de bioética y
42. derecho, ISSN-e 1886-5887, N°. 56, pp. 55-74
<https://dialnet.unirioja.es/servlet/articulo?codigo=8624793>
43. Piñero Martín, M. L., Esteban Rivera, E. R., Vanga Arvelo, M. G., & Rivera Machado, M. E. (2022). Hacia una reconceptualización de la investigación cualitativa: Towards a Reconceptualization of Qualitative Research. *Revista De Filosofía*, 39, 524-536. <https://doi.org/10.5281/zenodo.7312693>
44. Rawls, J (1970) Una Teoría de la Justicia (2da edición). Trad. María Dolores González. México: FCE. Título de la edición original A Theory of Justice. Cambridge: Harvard University Press. Edición a cargo de Erin Kelly. Trad. Andrés de Francisco. Barcelona: Paidós.
45. Redondo, Filipa et al. (2017). “Surrogacy: A clash of competing rights”. European Judicial Training Network, Brussels.
46. Rigon, A y Chateau, C (2016). “Regulating International Surrogacy Arrangements – state of Play”. Policy Department C: Citizens’ Rights and Constitutional Affairs, Brussels: European Parliament.
47. Sandel, M (1953) Concepciones del maestro sobre maternidad subrogada y iusnaturalismo Editorial Universidad del Norte; Fundación Promigas.
48. Parmigiani, M. (2020). El alcance justificatorio del consentimiento tácito. El problema de Locke y la lógica del beneficio. *Doxa. Cuadernos de Filosofía Del Derecho*, 43, 103–132.
49. <https://doi.org/10.14198/doxa2020.43.05>
50. Swain, M. E., y Rogerson, C. J. (2021). Addressing legal issues in cross-border gestational surrogacy: current topics and trends. *Fertility and Sterility*, 115(2), 268–273.
51. <https://doi.org/10.1016/j.fertnstert.2020.11.031>
52. Uberoi, D., Ojo, T., Sriharan, A., & Lau, L. (2023). What can implementation science offer civil society in their efforts to drive rights-based health reform? *Global Health Research and Policy*, 8(1), 4–10. <https://doi.org/10.1186/s41256-023-00284-4>
53. Varsi, E. (2010) Filiación y Reproducción asistida. En: *DFyP, Familia y Doctrina*. Año 2, n.º 10, 2010, pp. 78-87.

54. Varsi, E. (2013). Derecho Genetico: Principios Generales. *Repositorio Universidad De Lima, 5ta edición* (Derecho Genetico), 353. <https://vozlibre.com/sociedad/paises-legal-la-gestacion-subrogada-19255/>
55. Valencia, M (2019) Regulación de vientre en alquiler en la legislación peruana y el libre desarrollo de la familia, año 2019. <https://hdl.handle.net/20.500.12692/41235>
56. Vela, A. (2011) *La gestación por sustitución o maternidad subrogada: el derecho a recurrir a las madres de alquiler*. Cuestiones sobre régimen registral de la filiación de los nacidos mediante gestación por sustitución <https://dialnet.unirioja.es/servlet/articulo?codigo=3605650>
57. Verástegui, E, Páez, R., & Arrieta, O. (2023). Hacia la objetividad en la valoración ética: legibilidad como parte de la comprensión de los formatos de consentimiento informado. *Gaceta médica de México*, 159(5), 439-444. Epub 20 de febrero de 2024. <https://doi.org/10.24875/gmm.23000256>
58. Wade, J., Humphrys, E., Realpe, A. X., Gaunt, D. M., & Burt, J. (2023). Informed consent in randomised controlled trials: further development and evaluation of the participatory and informed consent (PIC) measure. *Trials*, 24(1), 305. <https://doi.org/10.1186/s13063-023-07296-y>
59. Xiao, Z., Li, T. W., Karahalios, K., & Sundaram, H. (2023). Inform the Uninformed: Improving Online Informed Consent Reading with an AI-Powered Chatbot. *Conference on Human Factors in Computing Systems - Proceedings*, 1, 1–17. <https://doi.org/10.1145/3544548.3581252>
60. Ysla, D. I. & De Piérola, V. (2023). Una visión sistemática de la Importancia del Interés Superior del Niño en Sudamérica. *Regunt*, 3(1), 72-83. <https://doi.org/10.18050/regunt.v3i1.07>
61. Zannoni, E. (2018) *Inseminación artificial y fecundación extrauterina*. Astrea, Buenos Aires. <https://www.abebooks.com/Inseminaci%C3%B3nArtificial-Fecundaci%C3%B3n-Extrauterina-Eduardo-Zannoni/19174932606/bd>
62. Zaouaq, K. (2020). La gestation pour autrui au regard de l'éthique et du droit. *Canadian Journal of Bioethics*, 3(3), 128–133. <https://doi.org/10.7202/1073789AR>
63. Zegers-Hochschild, F (2018) Registro latinoamericano de reproducción asistida: Primer registro multinacional. www.redlara.com/images/arq/RLA%20Panama%20final.ppt.
64. Zondag, A. G. M., Groenhouf, T. K. J., van der Graaf, R., van Solinge, W. W., Bots, M. L., & Haitjemag, S. (2023). Asking informed consent may lead to significant participation bias and suboptimal cardiovascular risk management in learning healthcare systems. *BMC Medical Research Methodology*, 23(1), 98. <https://doi.org/10.1186/s12874-023-01924-6>
65. Гамбарян, А. С. (2021). Молчание и молчаливое согласие в публичном праве Армении: правовая фикция, презумпция или субституция? Вестник Санкт-Петербургского университета. Право, 12(3), 728–751.