Research Article

The Right To Identity of Children Born Through Surrogacy in Peruvian Case Law

Steisy Mishell German Gonzales[1], Rubén Santisteban Seclén[2] , Laleh Massiel Ushiñahua Flores[3]

[1]Student, School of Law, César Vallejo University, Tarapoto Campus, Peru. Email: stgermang@ucvvirtual.edu.pe, ORCID: 0000-0002-7943-0219
[2]Doctor of Law, Faculty Member and Researcher, César Vallejo University, Tarapoto Campus, Peru. Email: santistebans8@ucvvirtual.edu.pe, ORCID: 0000-0002-8396-2437
[3]Student, School of Law, César Vallejo University, Tarapoto Campus, Peru. Email: laushinahuaf@ucvvirtual.edu.pe, ORCID: 0000-0001-8460-4984

ABSTRACT:
Peru lacks a specific law defining the legal identity of children born through surrogacy. This qualitative study, based on grounded theory, investigated how surrogacy affects children's right to identity within Peruvian jurisprudence (2024–2025), drawing on interviews with ten legal professionals and an analysis of two Constitutional Court rulings and six foreign judicial decisions. The tension between genetic origin, gestation, legal parentage (filiation), and family reality stems from a lack of regulations rather than from the technique itself. Peruvian jurisprudence has protected identity only partially and only after a conflict has arisen whereas foreign decisions have applied a variety of different criteria.

Keywords: Surrogacy, right to identity, legal parentage (filiation), best interests of the child, Peruvian jurisprudence.

1. Introduction

Assisted reproduction has transformed who can become a mother or a father, yet the law has been slow to keep pace with this shift. In surrogacy, the gestational carrier, the genetic contributor, and the intended parents may be different individuals; legal categories designed with a single biological mother in mind no longer fit, leaving the child to bear the brunt of this discrepancy. This study examines what happens to the right to identity when such a discrepancy reaches the courts an inquiry aligned with Target 16.9 of the Sustainable Development Goals (SDGs), which calls for legal identity for all.

Surrogacy is a practice in which a woman carries a child for others, for altruistic reasons or for payment (Dobernig, 2022); its validity depends on each state's legal order (Santamaría et al., 2025). We do not settle the debate over its desirability (Bernal & Gamboa, 2023; Vergallo et al., 2025); our concern is the child already born.

Peru has no specific rules on surrogacy. The General Health Law recognizes assisted reproduction only when the genetic and gestational mother coincide (Ley N.° 26842, 1997), and the state keeps no count of other arrangements (UNICEF, 2026; RENIEC, 2025). Families turn to slow courts with non-uniform criteria, leaving children for years without stable legal identity, which sits poorly with the best-interests principle of Law 27337 (Ley N.° 27337, 2000).

We therefore asked how surrogacy affects children's right to identity in Peruvian case law (2024-2025), how comparative law determines filiation, and which criteria the Constitutional Court applied in Cases No. 00882-2023-PA/TC and No. 01367-2019-PA/TC.

1.1 Previous research

The literature agrees that where surrogacy lacks coherent rules, the child's identity is exposed first (Baron et al., 2024; Nagy, 2024; Patreider & Rosani, 2023; Sukjit & Umpai, 2023; Terec, 2023). Peruvian studies reach the same diagnosis: legislative gaps, ambiguous frameworks and uneven decisions (Huaclla, 2022; Garaycochea, 2023; Ortiz & Menacho, 2024; Avalos, 2024; Reyes, 2025; Córdova, 2026).

1.2 Theoretical framework

We understand the right to identity as covering name, nationality, filiation and biological origin (Ojeda et al., 2025), plus the ability to know one's family ties and personal history (Cuadros, 2024). It obliges the state to register births and guarantee truthful information about origin (Álvarez & Machin, 2024). We distinguish three dimensions: biological identity (genetic origin), legal identity (name, nationality and filiation, made real through RENIEC registration) (Constitución Política del Perú, 1993) and personal identity (history, relationships and self-perception).

Interpretation drew on principlist bioethics (Beauchamp & Childress, 1979, as cited in Silgado et al., 2023), Kant (1785, as cited in Iracheta, 2022), Ferrajoli (1999, as cited in Sánchez, 2024), the best interests of the child (United Nations, 1989; Rojas, 2025), Erikson (1968, as cited in Carrillo et al., 2025) and the contract tradition (Ródenas et al., 2023).

2. Methodology

2.1. Design

Basic research with a qualitative approach, an explanatory level and a grounded theory design (Romero et al., 2022; Bryda & Costa, 2023; Rodríguez, 2025), suited to a topic in which the norms are missing or disputed.

2.2. Participants/Sample

Ten legal professionals in civil law, family law and university teaching (E1 to E10), each with at least five years of experience and knowledge of surrogacy and identity in Peru. The documentary corpus was the two Constitutional Court rulings and six foreign decisions issued in 2024.

2.3. Instruments

An interview guide, validated by three experts, and a document analysis guide.

2.4. Procedure

Two categories: surrogacy (filiation, types of surrogacy, parties involved) and the right to identity (biological, legal and personal dimensions). We reviewed Case No. 00882-2023-PA/TC (Judgment 423/2023) and Case No. 01367-2019-PA/TC (Judgment 176/2025) (Tribunal Constitucional del Perú, 2023, 2025), and the six foreign decisions listed in Table 2.

2.5. Data Analysis

We used the hermeneutic method and triangulation of the interviews, the case law and the literature, organized in tables of convergences and divergences.

2.6. Ethics

The study followed the Code of Ethics of Universidad César Vallejo (Resolution No. 0659-2024/UCV). Interviewees gave informed consent, and their identities and answers were kept confidential..

3. Results

Because the study is qualitative, the aim is to identify gaps, difficulties and prominent positions, not to measure how often they occur.

3.1 How surrogacy bears on the right to identity

The specialists agreed that the problem lies not in the fact that a child is born through surrogacy but in how the legal order responds when several people take part. Eight of the ten saw tension between biological, legal and personal identity, most visibly when the gestational woman, the genetic contributor and the intended parents differ. Four (E1, E8, E9, E10) added that the practice need not harm identity if filiation is stable and information about origin stays accessible (Table 1).

Table 1 Main points of agreement and disagreement among the interviewees

Theme	Where they agreed	Where they differed
Effect on identity	E1–E6, E9, E10: tension between biological, legal and personal identity when the parties differ. E1, E8–E10: identity need not suffer if filiation is stable and origins accessible.	E1, E6: genetic vs. legal identity. E3, E4: break between genetic, gestational and legal. E8–E10: timely recognition strengthens personal identity.
Integral protection	E2–E5, E8, E9: protect origin, filiation, family reality and best interests together.	E2, E5, E6: origin weighs most. E7, E8: distinguish origin from filiation. E9, E10: personal history and stability.
Criteria for courts	All ten: best interests, identity and procreative will, plus biological link, gestational role and case circumstances.	E1: no single element decides. E2–E4, E9: identify each party's role. E10: guard against exploitation.

Note. E1 to E10 refer to the interviewed specialists. Compiled by the authors from the interview data.

In their view, protection must be comprehensive: it should encompass access to information regarding a child's origins, stable family ties, and personal history extending well beyond a mere name or a civil registry entry. The ten experts asserted that courts must weigh the best interests of the child, the right to identity, and the procreative intent of the parties involved, rather than relying on automatic or formulaic responses.

3.2. Protection of identity in Peruvian jurisprudence

The ten specialists agreed that, while Peruvian jurisprudence has protected children's identities in specific cases, such protection remains only partial due to a lack of formal regulation. Six of them maintained that, in the absence of statutory law, judges can protect identity by drawing directly upon the Constitution and international treaties. The issue of biological origins proved to be the most significant gap: all ten experts noted the absence

of clear mechanisms for preserving genetic information, and eight pointed out that judicial rulings cannot serve as a substitute for comprehensive regulation.

3.3. Determination of filiation: interviews and comparative decisions

The interviewees were unanimous in the view that legal parentage should not rest solely on childbirth or biology. All ten favored weighing factors such as procreative intent, consent, genetic ties, and the existing family reality all within the framework of the child's best interests while eight maintained that establishing legal parentage in a timely manner protects a child's identity by providing formal recognition from birth.

The six foreign legal decisions do not follow a single model (Table 2): the United Kingdom, Mexico, and Colombia prioritized protecting the child's identity and stability; Spain took a restrictive stance toward the practice but nonetheless provided protection for the child already born; and Argentina prioritized formal legal compliance.

Table 2 Foreign decisions on surrogacy, filiation and identity reviewed in the study

Decision	Matter and reasoning	Approach
United Kingdom. Re Z [2024] EWFC 304	Parental order after international surrogacy. The court required clarity on applicable law, registration and nationality, and tied identity to preserving information about origin.	Later judicial control for filiation and stability
Spain. STS 1141/2024	Change of birthplace entry for a child born in Kyiv. Filiation came from the paternal biological link and maternal adoption, not the contract.	Restrictive toward surrogacy, protective of the child
Mexico. Amparo en Revisión 63/2024	Refusal to issue birth certificates naming the intended mother. Missing regulation does not justify leaving children unprotected.	Intermediate: procreative will and free consent
Colombia. T-232/24	Girl at risk of statelessness. The Court protected nationality, legal personality and identity.	Preventing statelessness
Colombia. T-127/24	Passport denied after the civil registry was modified. Children born through surrogacy cannot be discriminated against.	Equality and non-discrimination
Argentina. CIV 86767/2015	Intended fathers sought to displace the gestational woman from the registry. Identity follows the filiation system in force, based on childbirth and prior informed consent.	Formal legality and public-order rules

Note. Decisions are listed in the References. Compiled by the authors from the document analysis.

3.4 Criteria of the Constitutional Court

In Case No. 00882-2023-PA/TC (Judgment 423/2023, Ricardo Morán), the Court upheld the claim of children born through surrogacy abroad whom the registry had refused to register. It ordered RENIEC to register them with the father's surnames, recognized Peruvian nationality and separated birth registration from the declaration of filiation (Tribunal Constitucional del Perú, 2023). In Case No. 01367-2019-PA/TC (Judgment 176/2025, Amaro), upheld in part, it gave legal effects to an intentional maternal filiation arising from gestational surrogacy, ordered the maternal surname rectified and urged Congress to regulate, weighing procreative will, family reality, best interests and dynamic identity (Tribunal Constitucional del Perú, 2025).

The ten specialists read the rulings alike: all linked the first with registration and legal identity, seven saw procreative will, family reality and dynamic identity as decisive in the second, and nine stressed the call on Congress. E10 summed it up: one case removes a registry barrier, the other opens a discussion on the effects of filiation.

4. Discussion

4.1 Surrogacy and identity: the legal response is what matters

The problem for identity lies not in the technique but in the legal response, or lack of one, to a birth in which genetic contribution, pregnancy and parental intention are split among different people. This fits Baron et al. (2024) and Nagy (2024), who linked missing regulation to identity gaps. Huaclla (2022) held that surrogacy harms identity where legislation is silent; our interviewees were less categorical, as four held that harm is not automatic. Kant's idea of dignity adds that the gestational woman and the child must be treated as rights holders, not instruments, as E10 warned.

4.2 Case law protects, but it arrives late

Peruvian case law has resolved concrete situations where legislation gave no clear answer, but protection depends on each case and comes after the problem appears: the child faces uncertainty first and a judicial solution later, as Patreider and Rosani (2023) saw in Europe. Judicial protection is necessary but not sufficient, since it cannot replace the legislator's duty to create stable mechanisms. We part ways with Garaycochea (2023), who doubted that Peru can fully regulate surrogacy: the two rulings already offer minimum criteria for gradual, rights-based regulation.

4.3 Filiation without a single criterion

No jurisdiction settles filiation in the same way, and the interviews agree that a single criterion is not enough. Procreative will matters but should not act alone; consent, the conditions of the pregnancy, family reality and the child's protection must also be weighed. Reyes (2025) found the same mix of protective models (Colombia, Mexico) and restrictive ones (Argentina, Spain), and without prior rules, judges decide case by case (Córdova, 2026). Surrogacy agreements express adult will but cannot work as private pacts detached from the legal order or the child's essential rights (Ródenas et al., 2023). In Case No. 01367-2019-PA/TC, the Court valued family reality and emotional bonds over a rigid application of the gestational rule (Rojas, 2025).

4.4 The neglected dimension: biological origin

Biological identity is the dimension the current legal response handles least well. Registration settles legal identity at once but does not guarantee later access to information about origin. Complete protection should safeguard that information, allow gradual access to relevant data and balance third-party privacy against the child's interest in knowing his or her history. The English and Spanish courts show that origin can be protected without undoing the family ties that give the child stability.

4.5 Limitations

The results are based on the interpretation of interviews and legal documents and are not intended to be statistically generalizable. The participants were legal experts; consequently, the perspectives of children, families, and pregnant women are absent, and the Constitutional Court's initial ruling predates the period under study.

5. Conclusion

5.1 Key Findings

In Peruvian jurisprudence (2024–2025), surrogacy has impacted children's right to identity by creating tension between biological origin, the gestational bond, legal parentage, and the reality of family life. The root cause is not the medical technique itself, but rather the absence of specific regulations for the legal recognition of the child. This can leave a child in a state of legal uncertainty for instance, when parentage is not established in a timely manner, information regarding their biological origins is not preserved, or the registration process encounters obstacles.

5.2. Recommendations and Future Research

Congress should enact specific legislation on surrogacy that establishes clear criteria regarding parentage, procreative intent, informed consent, the preservation of information on biological origins, and birth registration. Such legislation should prioritize the best interests of the child, ensuring that solutions no longer depend on subsequent judicial proceedings. The Constitutional Court should harmonize its criteria concerning names, parentage, nationality, the reality of family life, and dynamic identity; meanwhile, legal professionals should approach surrogacy cases by looking beyond mere biology and the act of childbirth.

6. Author Declaration

The authors declare no conflict of interest

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