

Systematic review of de facto custody under family law in Peru

Revisión sistemática sobre la tenencia de hecho en el marco del derecho de familia en Perú

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Abstract

This research addresses the issue of de facto custody in Peruvian family law, placing special emphasis on the regulatory gaps affecting children over three years of age when there is no agreement between the parents or a court decision, which violates the best interests of the child. The main objective was to examine how this lack of regulation influences legal protection and the socioeconomic conditions of the families involved. To this end, a systematic literature review was conducted following the PRISMA methodology, with searches in databases such as Scopus, Web of Science, SciELO, Dialnet, and institutional repositories. Inclusion criteria were applied that considered studies published between 2019 and 2024, in Spanish, English, or Portuguese, related to de facto custody in Latin American contexts, prioritizing research with academic rigor and a socio-legal approach; documents without direct relevance or scientific validity were discarded. Of a total of 247 documents identified, 37 were selected for qualitative analysis. The results revealed significant regulatory gaps that create situations of lack of protection and perpetuate cycles of economic and social vulnerability, especially among mothers who are caregivers. In conclusion, it is urgent to implement specific regulatory frameworks that establish clear and multidisciplinary criteria to guarantee comprehensive child protection and family stability in parental separation proceedings.

Keywords: de facto custody, parental separation, best interests of the child.

Resumen

La investigación aborda la problemática de la tenencia de hecho en el derecho de familia peruano, poniendo especial énfasis en los vacíos normativos que afectan a niños mayores de tres años cuando no existe acuerdo entre los progenitores ni una decisión judicial, lo cual vulnera el interés superior del menor. El objetivo principal

fue examinar cómo esta falta de regulación influye en la protección jurídica y en las condiciones socioeconómicas de las familias involucradas. Para ello, se realizó una revisión sistemática de la literatura siguiendo la metodología PRISMA, con búsquedas en bases de datos como Scopus, Web of Science, SciELO, Dialnet y repositorios institucionales. Se aplicaron criterios de inclusión que consideraron estudios publicados entre 2019 y 2024, en español, inglés o portugués, relacionados con la tenencia de hecho en contextos latinoamericanos, priorizando investigaciones con rigor académico y un enfoque sociojurídico; se descartaron documentos sin relevancia directa o validez científica. De un total de 247 documentos identificados, se seleccionaron 37 para el análisis cualitativo. Los resultados revelaron vacíos normativos significativos que generan situaciones de desprotección y perpetúan ciclos de vulnerabilidad económica y social, especialmente en madres cuidadoras. En conclusión, resulta urgente la implementación de marcos normativos específicos que establezcan criterios claros y multidisciplinarios, con el fin de garantizar la protección integral del niño y la estabilidad familiar en los procesos de separación parental.

Palabras clave: tenencia fáctica, separación parental, interés superior del niño.

Introduction

The legal protection of the family, recognized in the Political Constitution of Peru as one of the fundamental pillars of social order, has been repeatedly emphasized by scholars as an unavoidable duty of the State. As noted by Castillo (2021), this protection transcends the mere safeguarding of family structure and extends to ensuring that its members, particularly minors, can develop in a safe and stable environment. This principle aligns with the international commitments undertaken by Peru within the framework of the Sustainable Development Goals, particularly Goal 16, which promotes peaceful, just, and inclusive societies.

However, the lack of specific regulation regarding *de facto* custody, especially for children over three years old in the absence of parental agreement or a judicial decision, has been identified by Ticona (2022) as one of the main deficiencies of the family protection system in the country. This regulatory gap generates uncertainty and fosters diverse judicial decisions that affect equality before the law and undermine the best interests of the child.

The judicial experience described by García-Bermejo (2020) reveals that, in the absence of a clear regulatory framework, judges apply disparate criteria that may favor or disadvantage minors depending on the personal interpretation of the magistrate. This situation increases the likelihood that parental interests will take precedence over child welfare, prolonging scenarios of emotional and economic instability.

From a social perspective, Pérez-Jaraba (2019) warns that separations and couple conflicts frequently lead to custody disputes, which are exacerbated by factors such as domestic violence or economic violence. The latter, characterized by the evasion of financial obligations towards children, directly affects the material security of minors and compromises their overall development.

Furthermore, Alarcón (2023) analyzes that mothers who assume *de facto* custody face numerous barriers to formalizing it, including limited economic resources, lack of knowledge about legal procedures, and the burden of domestic and work responsibilities. This combination, referred to as the "triple shift," significantly limits their access to justice and contributes to the perpetuation of informality.

Additionally, Bravo-Zambrano (2023) notes that informality in custody arrangements has long-term consequences, as it restricts access to fundamental rights such as child support, regulated visitation rights, and psychosocial support. In practice, the rights of the minor are then subordinated to the will and availability of the parents, while the State lacks effective tools for intervention due to the absence of an adequate normative framework.

In this regard, López (2020) emphasizes that the lack of regulation affects the application of the principle of progressive autonomy for minors, which recognizes their right to participate in decisions affecting their lives based on their age and maturity. In *de facto* custody scenarios, this voice becomes invisible, subordinated to adult disputes that are often influenced by gender stereotypes assigning caregiving exclusively to mothers.

From a comparative perspective, Ramírez-Machaca (2022) documents that countries such as Ecuador and Spain face similar challenges regarding *de facto* custody; however, they have made progress in standardizing judicial criteria and implementing alternative conflict resolution mechanisms. These experiences demonstrate that the absence of uniform regulation generates inequities and reproduces discriminatory patterns, although they also show that it is possible to overcome these issues through legislative reforms and clear protocols.

Finally, the specialized literature agrees that custody processes require rigorous psychological and social evaluations to ensure that decisions reflect the best interests of the minor (Barrios-García & Morales-González, 2021). However, in contexts of *de facto* custody without judicial intervention, such mechanisms do not exist, exposing children to undetected risks.

In light of this reality, the present study aims to analyze from a socio-legal perspective the normative gaps affecting the regulation of de facto custody for children over three years old, as well as to assess the impact of these gaps on the effective exercise of their rights. In line with Delgado's (2022) reflections, it is argued that having a clear and coherent regulatory framework would not only prevent the violation of rights but also strengthen family cohesion and ensure compliance with the best interests of the child, in accordance with international child protection standards

Methodology

The design of this research involved a systematic literature review, conducted following the PRISMA methodology (Preferred Reporting Items for Systematic Reviews and Meta-Analyses), which is widely recognized internationally as a methodological guide for the rigorous conduct and reporting of systematic reviews. This methodology allows for the identification, evaluation, and synthesis of all available evidence on a specific topic, while also ensuring transparency and reproducibility in the research process.

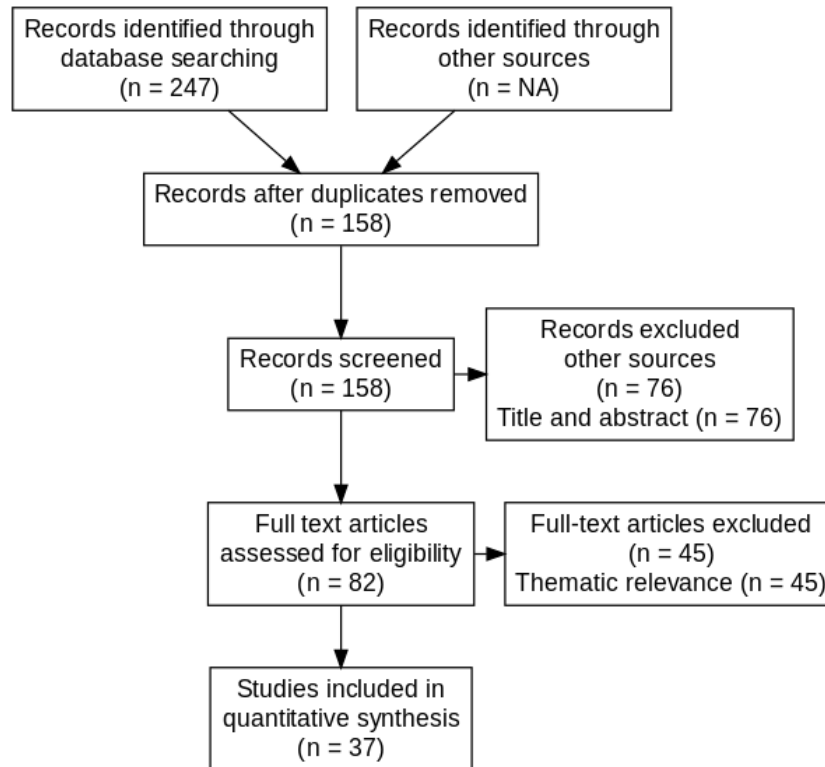
The search strategy was implemented across various academic databases, such as Scopus, Web of Science, SciELO, and Dialnet, as well as institutional repositories from Peruvian and Latin American universities. To optimize the retrieval of relevant information, specific search terms were employed—among them, "de facto custody," "factual custody," "de facto guardianship," "parental separation," "best interests of the child," "family law," and "legal protection"—combined with Boolean operators (AND, OR).

The established inclusion criteria considered: (a) studies published between 2019 and 2024, to ensure the relevance of the information; (b) research in Spanish, English, and Portuguese; (c) scientific articles, postgraduate theses, specialized books, and normative documents related to de facto custody; (d) studies specifically addressing the issue of custody without parental agreement or judicial resolution; and (e) research situated in the Latin American context, with a special emphasis on the Peruvian legal system.

Conversely, exclusion criteria were defined to encompass: (a) studies prior to 2019, except for those of fundamental historical relevance; (b) research that did not directly address de facto custody; (c) documents lacking academic or scientific rigor; (d) duplicate studies; and (e) research focused on legal systems not applicable to the Latin American context.

The selection process followed the phases established by PRISMA: identification, screening, eligibility assessment, and inclusion. During the identification phase, 247 documents were retrieved from the consulted databases. In the screening phase, 89 duplicate documents and 76 that did not meet the inclusion criteria were eliminated after reviewing titles and abstracts. Subsequently, in the eligibility assessment, 82 full texts were analyzed, of which 45 were excluded for not specifically addressing the studied issue. Finally, 37 studies were included for qualitative analysis

Figure 1
PRISMA diagram



Results

De facto custody represents a widely prevalent social reality in Peru, characterized by one parent assuming the daily care of the minor without a formal judicial resolution. Despite its high prevalence, this situation lacks clear regulation, especially in cases involving children over three years old when there is no agreement between the parents, leading to significant legal gaps that directly affect the best interests of the child and family stability. This phenomenon poses a challenge to the constitutional mandate for family protection established in Article 4 of the Political Constitution of Peru, as well as the fulfillment of Sustainable Development Goal 16, which seeks to build just and inclusive societies. The absence of a specific regulatory framework has resulted in disparate judicial criteria and the violation of fundamental rights (Rodríguez-Aquino & Torres-Mamani, 2024).

Moreover, various factors complicate this issue, such as the transformation of contemporary family models, crises stemming from parental separations, and minors' exposure to both domestic violence and economic violence perpetrated by the non-custodial parent (Olmedo-Poveda et al., 2023; De Carlucci, 2023). The latter, coupled with socioeconomic precariousness, frequently places mothers who assume de facto custody in highly vulnerable situations, limiting their access to justice and perpetuating a cycle of disempowerment (Ampuero et al., 2024).

Studies conducted in Ecuador (Briones, 2022; Flores-Romero & Santamaría-Velasco, 2023; Espinoza-Guamán, 2022) and Spain (Matulič et al., 2019; Páez, 2023; González & Pérez, 2021) indicate that this issue is not exclusive to Peru. In both contexts, biases in custody assignment and socioeconomic consequences following separation have been documented, as well as obstacles related to parental disability (Hernández, 2023; Almeida, 2023), regulatory gaps regarding the suspension of parental authority (Bravo-Soto, 2023), and challenges in parental co-responsibility (Esparza-Pijal et al., 2023; Rovira-Sueiro, 2023). Conflicts related to the progressive autonomy of minors (Aguilar, 2022; Cárdenas-Miranda, 2024) and imbalances in family burdens (Velarde, 2023; Mesa, 2023) are also identified.

In this context, Estrada-Vásquez (2022) highlights the importance of conducting psychological evaluations based on scientific and ethical methodologies for custody processes. Other authors have addressed issues such as the breach of spousal duties (Vide, 2023) and the challenges that new family models pose to private

international law (Carrascosa-González, 2003). In Ecuador, Murillo-Céleri and Vázquez-Calle (2020), along with Verduga and Alvarado (2024), criticize the regulatory gaps and practical difficulties surrounding shared custody. Meanwhile, Quevedo-Sacoto et al. (2020) propose strengthening psychosocial evaluation as a protective mechanism. Shinno-Pereyra (2021) analyzes parental alienation and advocates for interdisciplinary approaches, and Bermeo-Cabrera and Pauta-Cedillo (2020) reveal gender biases that, due to stereotypes, favor mothers.

Normative gaps in de facto custody

This study has revealed significant normative gaps in the regulation of de facto custody for children over three years old. According to Rodríguez-Aquino and Torres-Mamani (2024), the lack of specific regulation leads to disempowerment for both children and mothers in vulnerable situations. In particular, Article 84 of the Code for Children and Adolescents does not address the situation prior to judicial intervention, leaving a critical gap without any regulation.

Supreme Court Ruling No. 1961-2012-Lima established that the criterion of remaining with the parent with whom the minor has cohabited the longest is not absolute. However, Palomino-Andrade (2021) warns that this flexibility, while necessary, has introduced uncertainty regarding the applicable parameters in de facto situations, especially during the immediate period following separation. In this regard, Ampuero et al. (2024) argue that the lack of regulation perpetuates a cycle of socioeconomic vulnerability, exacerbated by episodes of domestic violence that expose minors to risks during this legal ambiguity.

On the other hand, Supreme Court Ruling No. 3767-2015-Cusco addressed interpersonal conflicts in similar contexts, a situation that De Carlucci (2023) describes as a "legal paradox," as effective protection is contingent upon the judicial formalization of a scenario that requires immediate attention. Velarde (2023) adds that this situation perpetuates economic and emotional violence, directly affecting the holistic development of the minor.

In Case File No. 02079-2009-PHC/TC, the Constitutional Tribunal established fundamental principles for family protection; however, Hermoza-Calero and Fernández-Torres (2019) point out a notable gap between these principles and their effective application. Maldonado-Manzano et al. (2021) identify three critical dimensions: immediate economic disempowerment, uncertainty regarding parental authority, and obstruction of visitation rights. Deza-Torres (2021) warns that these shortcomings negatively impact the education, health, and emotional development of minors, while Olmedo-Poveda et al. (2023) also indicate that this represents a community social issue. Vázquez (2021) even characterizes this situation as a form of institutional violence against vulnerable mothers.

Finally, in Supreme Court Ruling No. 5677-2018-Ancash, the implicit need for specific regulation is recognized, although concrete normative tools are still lacking. Collectively, these findings underscore the urgency of designing immediate protective mechanisms and establishing clear and applicable criteria during the family separation phase prior to judicial determination regarding custody and visitation rights.

Socioeconomic vulnerability

The legal analysis of de facto custody in contexts of socioeconomic vulnerability reveals that traditional criteria, based solely on cohabitation duration, are insufficient. In this regard, Supreme Court Ruling No. 1961-2012-Lima and Case File No. 02079-2009-PHC/TC emphasize the obligation to protect children's rights from a broader perspective that also considers socioeconomic factors.

The vulnerability of the mother, who typically assumes de facto custody following separation, exposes her to economic violence, significantly limiting her ability to ensure the well-being of the minor. Buitrón (2021) identifies economic barriers as one of the main obstacles to accessing justice. Additionally, Supreme Court Ruling No. 3767-2015-Cusco imposed limits on shared custody in scenarios of family conflict, a situation that Rodríguez-Aquino and Torres-Mamani (2024) argue should be analyzed in light of the mother's real capacity to secure the comprehensive development of the child.

In this context, Palomino-Andrade (2021) proposes three fundamental criteria for evaluating custody: immediate protection capacity, access to basic resources, and emotional stability of the environment. Furthermore, Hermoza-Calero and Fernández-Torres (2019) emphasize the importance of maintaining affective bonds and meeting basic needs above legal formalities. Maldonado-Manzano et al. (2021) warn that the absence of clear criteria perpetuates cycles of inequality.

On another note, Velarde (2023) argues that assessments should extend beyond current economic capacity to include development potential and available support networks. In line with this, Sánchez-Ugarriza (2024) suggests incorporating social protection criteria, while Deza-Torres (2021) cautions that applying exclusively formal approaches, without considering the context, endangers child welfare. Similarly, Vázquez (2021) highlights the need to establish complementary social support mechanisms. Finally, Álvarez (2024) proposes

comprehensive protection criteria that consider both institutional resources and support networks, an approach endorsed by Nonajulca-Córdova & Vera-Córdova (2022).

In summary, findings indicate that the evaluation of *de facto* custody in vulnerable contexts must integrate, at a minimum, the following aspects: (a) socioeconomic evaluation, (b) support networks, (c) immediate protection capacity, (d) access to basic resources, and (e) affective bonds and emotional stability.

Consequences for fundamental rights

The lack of specific regulation negatively impacts the fundamental rights of minors during the interval between parental separation and judicial resolution. Maldonado-Manzano et al. (2021) identify effects such as immediate economic disempowerment, uncertainty regarding parental authority, and difficulties in implementing visitation arrangements, which violate essential rights such as adequate nutrition, physical integrity, and the maintenance of family ties.

Deza-Torres (2021) highlights that this normative ambiguity affects essential aspects such as education, health, and emotional development of children. Vásquez (2021) even characterizes this situation as a form of institutional violence directed towards vulnerable mothers, with very harmful indirect effects on minors. In this same vein, Álvarez (2024) adds that legal uncertainty generates recurring patterns of disempowerment that affect both child development and family stability.

Thus, regulatory shortcomings compromise fundamental rights such as nutrition, integrity, health, education, and comprehensive development, underscoring the urgent need for legislative intervention to effectively address this issue.

Theoretical approaches and emerging perspectives

De facto custody reflects real dynamics of cohabitation and immediate protection for minors, yet lacks solid legal guarantees, which can facilitate parental alienation processes or the predominance of adult interests over the best interests of the child. In this regard, Rodríguez (2022) warns that the lack of regulation generates uncertainty and weakens the protective role of the State in Latin America.

From a phenomenological perspective, the aim is to understand the concrete experience of non-institutionalized parenthood, exploring how parents perceive their role and the legal security of their children, as well as how minors experience this situation in terms of affection, sense of belonging, and stability.

The analysis of law from this concrete experience reveals that many parents do not formalize custody due to factors such as distrust in the system, ignorance of procedures, or economic barriers. Thus, the Peruvian Civil Code and family legislation do not clearly specify the legal implications nor establish an effective transition between *de facto* custody and judicial custody, opening the door to arbitrary decisions and prolonged processes.

It is noteworthy that current trends incorporate restorative, interdisciplinary approaches with a gender perspective, giving greater prominence to the child's voice, the analysis of prior affective relationships, and psychosocial conditions. Although jurisprudence is beginning to integrate these elements, explicit regulation remains nascent and requires strengthening.

Discussion

The results of this systematic review confirm that *de facto* custody within family law constitutes a structural issue that transcends the Peruvian context and manifests in multiple Ibero-American countries. As noted by Ampuero et al. (2024) and Álvarez (2024), the absence of specific regulation for children over three years old creates a scenario of legal disempowerment that undermines the fundamental principle of the best interests of the child. This reality has also been documented in Ecuador, where Murillo-Céleri and Vásquez-Calle (2020) demonstrate that the lack of clear criteria for assigning temporary custody perpetuates legal insecurity and limits the effectiveness of constitutional principles.

Furthermore, the literature highlights that mothers who assume custody face various barriers, not only economic but also cultural and temporal, which deepen their vulnerability. This is emphasized by Buitrón (2021), Rodríguez-Aquino and Torres-Mamani (2024), and Velarde (2023). These conditions create what Ampuero et al. (2024) refer to as a "vicious circle," in which economic precariousness and lack of access to justice mutually reinforce each other, compromising the comprehensive well-being of minors. In this context, Álvarez (2024) identifies three central legal consequences: legal insecurity, economic disempowerment, and informal custody arrangements. These findings are supported by Maldonado-Manzano et al. (2021), who document negative impacts on the psychosocial and educational development of children.

Complementarily, comparative studies reveal that this problem is not exclusive to Peru. Research conducted in Ecuador and Spain (Verduga & Alvarado, 2024; Quevedo-Sacoto et al., 2020; Matulič et al., 2019;

Páez, 2023) shows that even in contexts recognizing shared custody normatively, similar difficulties persist due to the absence of specific criteria in cases of parental disagreement. Such evidence reinforces the need to adopt interdisciplinary approaches, as suggested by Estrada-Vásquez (2022) and Shinno-Pereyra (2021), who underscore the importance of integrating psychological and social evaluations in custody processes to avoid biased judicial decisions.

Finally, the analysis by Bermeo-Cabrera and Pauta-Cedillo (2020) reveals that gender biases in custody assignment perpetuate inequalities, favoring mothers in 78% of cases. Far from ensuring parental co-responsibility, this dynamic institutionalizes social prejudices within family justice. Collectively, the comparative evidence reaffirms the urgent need to establish clear normative frameworks that recognize de facto custody as an autonomous legal phenomenon, promote gender equality, and ensure comprehensive protection for minors in the context of parental separation.

Conclusions

This research confirms the existence of normative gaps in the regulation of de facto custody within Peruvian family law, particularly in cases where there is no parental agreement or judicial decision regarding children over three years old. This absence of regulation creates a scenario of legal disempowerment that undermines the fundamental principle of the best interests of the child, perpetuates conditions of socioeconomic vulnerability, and highlights structural deficiencies that also arise in other Latin American countries. Additionally, it was identified that mothers who assume custody face multiple barriers—economic, cultural, and access to justice—that form a vicious circle, significantly compromising the comprehensive well-being of minors.

In light of this reality, it is concluded that it is imperative to develop specific normative frameworks that recognize de facto custody as an autonomous legal phenomenon, defining clear criteria for the temporary assignment of custody in the absence of parental agreement or judicial resolution. These frameworks must incorporate multidisciplinary evaluations and a gender perspective in the training of judicial personnel, ensuring that decisions are based on both the socioeconomic vulnerability of the parties and the protection of the best interests of the child. Thus, the goal is to guarantee emotional stability, equity, and the comprehensive development of minors affected by parental separation processes.

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