



## Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

### Náhradné materstvo – komparácia trestnoprávnej úpravy v Českej republike vs. Slovenskej republike

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#### Abstract:

*For a long time now, it is not only in professional circles that the issue of surrogacy is being discussed. The Czech and Slovak Republics do not have a regulation on surrogacy in the area of private law, or only marginally. The Slovak Republic is "stricter" and considers surrogacy agreements invalid. This also unreels criminal law, which is also "stricter" because it enables the prosecution of persons who, contrary to the Family Law, would entrust a child to another for adoption. It states that it is a criminal act, although a financial amount (reward) has not been transferred.*

**Keywords:** *crime, surrogacy, illegality, social harmfulness*

#### Abstrakt:

*Už dlhšiu dobu sa diskutuje nielen v odborných kruhoch, ako uchopiť náhradné materstvo. Česká republika aj Slovenská republika nemajú inštitút náhradného materstva v súkromnoprávnej oblasti regulovaný alebo len veľmi okrajovo. Slovenská republika je v tejto súvislosti „prisnejšia“, keď považuje zmluvy týkajúce sa náhradného materstva za neplatné. Od tejto skutočnosti sa tiež odvíja trestnoprávna úprava, ktorá je taktiež „prisnejšia“, pretože umožňuje postih osôb, ktoré by v rozpore so zákonom o rodine zverili dieťa do moci iného na účel adopcie, za trestné bez toho, aby muselo dôjsť k prevodu za odplatu (odmenu).*

**Kľúčové slová:** *trestný čin, náhradné materstvo, protiprávnosť, spoločenská škodlivosť*



## **Introduction**

Surrogacy is one of the most complex procedures of so-called assisted reproduction. The complexity of the procedure brings many problems in the field of both civil and criminal law, but also in relation to the actual implementation in practice. The area of civil law, and therefore the actual implementation in practice, includes, e.g., issues related to the determination of legal parenthood, the enforceability of agreements concluded before the birth of a child or before treatment, the acceptability of ways of obtaining a surrogate mother, the acceptability of compensation. In the area of criminal law, issues related to the criminal liability of a surrogate mother, a client couple - applicants, or a mediator. There are different approaches to this issue in different countries around the world. The purpose of this article is to find out which approach the Czech Republic and the Slovak Republic have chosen, i.e., what the differences are in these approaches, especially from the point of view of criminal law. The results will be achieved by analysing the legislation and available literature – and comparing the results of these analyses.

### **1. Basic concepts**

**Surrogacy** – is a method of assisted reproduction, in which an embryo from the genetic material of a couple (applicants) who cannot have a child naturally, is inserted into a woman's (a surrogate mother's) uterus, or an embryo derived from an egg donated by an anonymous donor and the sperm of a man from a couple who cannot have a child naturally. The surrogate mother undergoes pregnancy by the agreement with the applicant and gives the child to the client couple after birth – and the applicants become legal parents.[1] Otherwise, we can say that surrogacy is a procedure where a woman undergoes assisted reproduction, pregnancy, and childbirth in order to give up the newborn child. If childbirth gives rise to parental rights and obligations in the given country (the mother is the woman who gave birth), she transfers these rights and obligations to someone else as agreed in advance.[2]

**Assisted reproduction** – artificial insemination is a medical procedure and method used to treat infertility that directly manipulates germ cells, i.e., an egg and/or sperm, or an embryo. It is thus a medical intervention that helps human reproduction. A specific type of assisted reproduction are procedures using parts of other people's bodies, such as donated sperm, eggs, uteri, etc. In English-speaking countries, the term 3rd-party reproduction has been used for this.[3]

### **2. Approaches to surrogacy in the world**

There are different approaches to surrogacy in different countries. We can say that there are three basic approaches: an absolute ban on surrogacy, its permission under specified conditions (legal regulation), and a certain tolerance without legislation or very strict legislation. An absolute ban on surrogacy applies in Germany, Italy, Austria, or Poland. Surrogacy is permitted under specific conditions, e.g., in the Netherlands, Great Britain, Greece, Ukraine, or, most recently, in Portugal. Tolerance without complete legislation or a very strict approach is, e.g., in the Czech Republic or Slovakia. Despite the fact that the two mentioned countries fall into the category without legislation, there are certain

# Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

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differences between the Czech Republic and the Slovak Republic in certain respects – in the fields of both civil and criminal law.

### 3. Civil-legal (non) regulation in the Czech Republic

In the Czech Republic, surrogacy is not legally regulated, it is only mentioned in the provision of § 804 of Act No. 89/2012 Coll., which states that *"adoption is excluded between direct relatives and siblings. This does not apply in the case of surrogacy."* We will not find any other reference to surrogacy in the Czech legal system. Even the creators of the new Civil Code did not want to regulate the issue of surrogacy more – as the explanatory memorandum to the new Civil Code states: *"The current theoretical and practical justification of the elimination of the closest relatives from the circle of possible adopters should be expressed explicitly. The exception in the second sentence applies to surrogacy, in which a child is born to a woman who is not his/her biological mother. However, the old Roman principle 'the mother of a child is the woman who gave birth to the child' will continue to apply. However, the Civil Code must also consider the progress of medical science, which enables introducing a fertilized egg into the uterus of another woman. The relationship between the woman who provided her germ cells (the biological mother) and the child can be adjusted through adoption. Foreign experience and previous experience in the Czech Republic indicate that the greatest interest in surrogacy will be among women who are related to each other."*[5] The greatest interest on the part of related women could certainly be debated, as in practice most mothers were found through the Internet (as research has shown).

### 4. Civil-legal (non) regulation in the Slovak Republic

At present, the Slovak legal regulation of assisted reproduction and its most used technique – the in vitro fertilization method – is absent in the Slovak legal system. Some aspects of assisted reproduction have fragmentarily or insufficiently been regulated in the Slovak legal system (artificial insemination, gamete donation, freezing and storage of embryos). Others do not reflect the legal system at all (embryo donation, research on embryonic cells) despite the fact that these acts are common practice of assisted reproduction centres in the Slovak Republic.[6]

In the Czech Republic and Slovakia, there is the principle of *mater semper certa est*, which means that the mother is the woman who gave birth to the child. Deviating agreements and contracts are regulated differently. Legislators explicitly resolved this issue by stating in the provision of § 82 paragraph 2 of Act No. 36/2005 Coll., on the family and on the amendment of certain acts, that: *"Agreements and contracts that are in conflict with paragraph 1 are invalid."* This provision can be interpreted as an indirect exclusion of surrogacy.[7]

Invalidity would thus penalize surrogacy contracts that contain, e.g., a provision that the legal mother after the birth of a child is the woman from the client couple. In contrast to the legislation in the Czech Republic, where the invalidity of these contracts is not explicitly enshrined in any provision of the Civil Code and needs to be deduced from the general provisions defining mandatory norms and the invalidity of legal acts, the Slovak legislation contains a clear rule. However, we can assume that this provision would be redundant in the Civil Code, as the same conclusion can be reached without it.[8]

## **5. The perspective of the Czech criminal law**

Even though it is not essentially regulated in the Czech Republic, surrogacy is a reality in the Czech Republic. However, this does not mean that if it were implemented in ways that would be in the interests of society, it could not be criminalized. If it were carried out for a fee, it could be considered the criminal offense of Entrusting a child to another according to § 169 of the Criminal Code's Act No. 40/2009 Coll. (hereinafter "CC") (*"One who entrusts a child to another for the purpose of adoption or for another similar purpose, shall be punished by imprisonment for up to three years or a ban on enterprise."*) Other authors have already commented on this issue. For example, according to Burešová, the criminal law level of surrogacy is a very sensitive topic for all involved. Assisted reproduction clinics usually do not participate in compensation agreements between surrogate mothers and their clients. The reason is the criminal law aspects. Clinics are thus completely legally uninvolved and play a purely medical role in the whole process, which is practiced in accordance with the relevant legal regulations. Any agreement remains between the surrogate mother and the client. In cases where the surrogate mother is related to her client, she will probably receive only compensation for the agreed expenses, costs, and lost wages (profit). However, we can only hardly imagine the same in the case when a surrogate mother does not know her client at all, and the agreement is based on the acquaintance through advertising.[9] Burešová states that by arranging a reward for surrogacy, both parties would be exposed to the risk of criminal liability and the consequences associated with it, which is tied to the moment of Entrusting (i.e., handing over) the child. A woman should take on the role of a surrogate mother only with a willingness to help an infertile couple. Surrogacy should not serve surrogate mothers to secure funding. Reimbursement of the costs incurred by the surrogate mother as a result of pregnancy and childbirth, which is her legal claim, cannot be included in the concept of criminal offense.[10]

According to Mark, surrogacy (in general) is not considered illegal. However, commercial surrogacy (the provision of a reward for the pregnancy and delivery of a surrogate mother and the handing over of the child to the couple who have ordered it) fulfils the features of the criminal offense of Entrusting a child to another.[11] According to Šámal et al., § 169 (1) of the CC states that whoever receives remuneration for entrusting a child to another for the purpose of adoption or for another similar purpose will be punished by imprisonment for up to three years or a ban on their enterprise. The fact that this conduct is usually carried out for a financial reward and the subject is a child led the legislators to mark this unethical conduct as a criminal act.[12]

According to Mitlöhner, we can find opinions that say that forcing a woman to be a surrogate mother could be considered human trafficking (according to § 168 CC.) Mitlöhner further states that if a woman is not forced into surrogacy, the ordering couple could be criminally liable as participants in the crime in the form of instructions, which seems very likely, as the surrogate mother is forced to commit a criminal offense (Entrusting a child to another).[13]

According to Zemandlová, the reimbursement of costs to a surrogate mother due to pregnancy and childbirth that were agreed in the surrogacy contract cannot be considered remuneration as set by provision § 169 of the Criminal Code. If a surrogate mother is single, it is a statutory claim expressed in provision § 920 of the Civil Code entitled *"Maintenance and securing the reimbursement of certain costs to an unmarried*

## Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

---

*mother*".[14] According to Elischer, this provision implies the rights of a child's mother and the rights of a pregnant woman. The purpose of the regulation is to protect an unmarried mother, whose economic situation is difficult due to pregnancy and childbirth.[15]

### **Criminal liability of a surrogate mother**

We can say that if the surrogacy were carried out for a fee (remuneration), we could consider it as the criminal offense of Entrusting a child to another according to § 169 paragraph 1 CC. According to the provisions of the said factual substance, a criminal offense is committed by a person who receives remuneration for entrusting a child to another for the purpose of adoption or for another similar purpose. If a couple who cannot have the desired child in the standard way uses surrogacy and provides remuneration in addition to the costs associated with carrying the child and giving birth, they may fulfil the characteristics of this crime.

According to Šámal et al., the crime of Entrusting a child to another was included in Part 1 of Chapter II with regard to its connection to the criminal offense of human trafficking (§ 168), whose scope was extended compared to the previous regulation in the Criminal Code. The factual custody of a child to another relates only to the custody of a child for adoption or for another similar purpose (e.g., foster care or similar care, including abroad). It is a privileged factual provision for human trafficking (§ 168), which ensures significantly stricter sanctions in child trafficking for any of the purposes listed in paragraph 1a) to e) § 168. This corresponds to the significantly lower rate of imprisonment defined in § 169, including the relevant circumstances, particularly aggravating ones.[16]

In determining whether or not it is the crime of Entrusting a child to another, it is necessary to proceed from the definition of a crime, which is contained in § 13 paragraph 1 of the Criminal Code: *"A criminal offense is an unlawful act which the Criminal Code designates as criminal, and which has the characteristics specified in such a law."* Provision § 12 paragraph 2 of the Criminal Code states: *"The criminal liability of the offender and the criminal consequences associated with it may be applied only in socially harmful cases in which the application of liability under another legal regulation is not sufficient."* This definition must be supplemented by the provision § 111 of the Criminal Code: *"An offense is identified as criminal unless individual provisions of the Criminal Code do not imply otherwise; it also includes preparation for a criminal offense, attempted criminal offense, organization, instruction, and assistance."* From the definition of a criminal offense contained in the CC, we can conclude that in order for it to be a criminal offense, the act must be illegal, and there must be indicators of a criminal offense as well as a degree of social harm - seriousness must reach a certain intensity.

As far as **illegality** or illicitness is concerned, provision § 169 CC does not explicitly mention this feature. How, then, to infer that illegality? According to Solnař et al., illegality has two meanings: the so-called formal illegality, i.e., the conflict with the entire legal order, and material illegality, which is expressed in the very nature of the crime. Formal illegality can be understood as a violation of the norm, while material illegality is an act violating or endangering the interests protected by a criminal norm.[17] Here we can conclude that the illegality of the criminal conduct of Entrusting a child to another for remuneration, i.e., a conflict with the entire legal order, can be

## Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

---

inferred from the violation of, e.g., § 798 of the Civil Code, which states that *"No one should make an undue profit from adoption-related activities"*, or from the violation of Article 21 of the Convention on Human Rights and Biomedicine No. 141, which was promulgated under No. 96/2001 Coll. m. s., where it is stated that *"The human body and its parts must not be a source of financial benefit as such."* Material illegality results directly from the features of this crime, which are contained in a special part of the Criminal Code. Thus, both concepts of illegality are fulfilled here.

What about the social harmfulness of this action? As stated above, in order for an act that is unlawful and fulfils the elements of a criminal offense to be considered a criminal offense, it must achieve a certain degree of social harm. Harm is an expression of the material nature of a crime. The opinion that prevails [18] (in connection to this, the explanatory report of the Criminal Code mentions that social harmfulness is determined by the nature and seriousness of the crime) is that harmfulness, also from the point of view of guilt, can be assessed using § 39 par. 2 of the CC, i.e., using the general principles laid down for the imposition of a sentence. According to this provision, the gravity and nature of an offense are determined in particular by the importance of the protected interest affected by the offense, the manner in which the offense was committed and its consequences, the circumstances in which the offense was committed, the perpetrator, the degree of culpability and its motive. It is, in essence, an assessment of the individual features of the facts and, moreover, the circumstances in which the act was committed.

### **Criminal liability of clients - applicants**

Let's start from the beginning. First, it is necessary to find an adept for a surrogate mother. There are currently no agencies in the Czech Republic focused on finding surrogate mothers and matching them with applicants. For the time being, assisted reproduction centres and law firms also avoid this "service" because they are aware of the criminal risks. The applicants in the Czech Republic must find a surrogate mother themselves. The research clearly shows, as stated above, that it is only in exceptional cases that a woman comes from the immediate vicinity of the applicants – and she is usually from a lower socio-economic stratum, or a woman on maternity leave.

As indicated above, if all the characteristics of the crime of Entrusting a child to another were met, then a surrogate mother would be prosecuted for this crime. However, what would be the position of the clients on this crime? In cases where the clients apply, e.g., through advertisements, for a surrogate mother, they could be suspects in committing the criminal offense of Entrusting a child to another as partakers - an inducer by § 24 of CC: *"Who intentionally arouses the decision to commit a crime in another (inducer)..."* However, the inducer would be a male applicant if we acknowledge that he became a father during pregnancy - by § 779 of the Civil Code, which states that: *"The father is a man whose paternity was determined by the consent of the mother and this man."* If this man became a father during pregnancy, he would no longer be "another" person, as required by the provision § 169 of CC *"who entrusts a child to another for adoption for remuneration, or another similar purpose..."* In such a construction, the man would not be an inducer. Only a woman - the client - would become one because she would be the other person until the adoption.

### **Criminal liability of the intermediary**

In the case of an intermediary agency, i.e., a legal entity that would mediate a surrogate mother for the applicant, the person referred to in § 8 par. a - d of Act No. 418/2011 Coll., on the criminal liability of legal entities and proceedings against them (ACLLE), that acted in the interest or within the activities of this legal entity, i.e., mediated a surrogate mother for the customer, and this person would know that the surrogate mother will receive remuneration for her actions from the clients, they could be suspected of the crime of Entrusting a child to another as a participant and assistant under the provision § 24 par. 1 letter c of CC, as they intentionally allowed or facilitated another criminal offense. Here, the helper would have to be proven to have known that the child would be entrusted to another person for remuneration for the purpose of adoption or another similar purpose. Thus, a possible intention would be sufficient. A legal entity - an intermediary - could then be criminally responsible for the criminal offense of Entrusting a child to another because provision § 7 of ACLLE does not exclude the criminal offense of Entrusting a child to another from the criminal liability of legal entities.

## **6. Criminal law perspective in the Slovak Republic**

In the Slovak Republic, the criminal law regulation regarding surrogacy is resolved in § 180 of Act No. 300/2005 Coll. of the Criminal Code, where **Entrusting a child to another** § 180 states that:

*"(1) Whoever, in violation of a generally binding legal regulation, entrusts a child to another for the purpose of adoption or who, in violation of a generally binding legal regulation, gains a child for the purpose of adoption, shall be punished by imprisonment for up to three years.*

*(2) The offender shall be punished by imprisonment for four to ten years if they commit the act referred to in paragraph 1*

*a) and thereby obtain a greater benefit for themselves or for another, or*

*b) more serious course of action.*

*(3) The offender shall be punished by imprisonment for a term of ten to fifteen years if, by the act referred to in paragraph 1, they cause serious injury or death or any other particularly serious consequence."*

The name of this criminal offense has changed over time for the following reasons. Since the amendment to the Criminal Code (approved by the National Council of the Slovak Republic on 22 May 2013) entered into force on 1 July 2013, which aimed at transposing the Directive 2011/93/EU of the European Parliament and Council from 13 December 2011 on combating sexual abuse and sexual abuse exploitation of children and against child pornography (which replaces the Council Framework Decision 2004/68/JHA and Directive 2011/36 / EU of the European Parliament and Council from 5 April 2011 on preventing and combating human trafficking and protecting victims, which replaces the Council Framework Decision 2002/629/JHA), the title of § 180 of the Criminal Code has been changed. In the previous legislation, § 180 of the Criminal Code was named "Children Trafficking". As the elements of a criminal offense under § 180 of the Criminal Code by international standards in combating trafficking did not constitute the crime of children trafficking, the name in § 180 was changed to "Entrusting a child to

## Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

---

another". However, the facts have not changed. This amendment to the Criminal Code occurred as a result of the requirements arising from the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the obligations of the Slovak Republic arising from Art. a) of the Directive 2011/93/EU also to change the definition of "child" in the fifth chapter of the Criminal Code. A child is defined as a person under the age of 18. Unlike the previous legislation, a person is considered a child and does not lose criminal protection in criminal proceedings even if he/she reaches the age of majority before the age of 18 by entering into marriage. The changed name corresponds to the name of the crime in the Czech Republic according to § 169 of the Criminal Code.

Regarding the relationship between the criminal offense of "Entrusting a child to another" pursuant to § 180 of the Criminal Code and criminal offenses relating to children trafficking, specifically the criminal offense of "Human trafficking" pursuant to § 179 of the Criminal Code, Čečot states that human trafficking also involves children; this is not a separate category, which was manifested in the Slovak legislation by including the term "illegal adoptions". The criminal offense of "Entrusting a child to another" is closely related to illegal adoptions. In international documents, human trafficking does not apply to illegal adoptions as such. Human trafficking only applies if illegal adoption is a practice similar to slavery. If this is not the case, it is a criminal offense of "Entrusting a child to another." [19]

This view is shared by Malangone et al., who state that § 179 par. 2 of the Criminal Code also criminalizes proceedings that include illegal adoption. However, the explanatory report of the Council of Europe Convention on measures against human trafficking in § 94 states: *"The definition of human trafficking does not apply to illegal adoptions as such. However, if illegal adoption constitutes a slavery-like practice as defined in Article 1 (d) of the Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions, and Slavery-Like Practices, it will also fall within the scope of the Council of Europe Convention."* Thus, in the event that illegal adoption does not constitute a practice similar to slavery, it is a criminal offense of Entrusting a child to another pursuant to § 180 of the Criminal Code. § 180 and § 181 of the Criminal Code have a narrower scope than § 179 par. 2, as the perpetrators of these crimes are people obliged to take care of the child, such as the child's parent or guardian. [20]

Čečot further states that children who are victims of trafficking, entrustment to another, and illegal adoption are harmed twice. In the first case, when the trade occurred, they were deprived of the right to self-determination and free will, and in the second case, they were betrayed. [21]

The object of the criminal offenses of Entrusting a child to another is generally the personal freedom of the child in the sense of freedom of decision. The object in the narrower sense is the interest in the proper performance of childcare, which belongs to persons who have a duty to care for the child by law or official decision, as well as the protection of children from exploitation and child labour. The obligation to criminalize illegal adoptions of children, the exploitation of children, or the sexual abuse of children arises from international acts. Pursuant to § 180 of the Criminal Code, a person who commits the criminal offense of Entrusting a child to another:

*a) in violation of a generally binding legal regulation, entrusts another child to another for the purpose of adoption,*

## Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

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*b) in violation of a generally binding legal regulation, acquires a child for the purpose of adoption.*

The Criminal Code defines a child as a person under the age of eighteen unless this Act provides otherwise (§ 127 par. of the CC). Entrusting a child to another means any way of handing over the child for the purpose of adoption. The entrustment of a child can be mediated by another person. Based on the facts of this crime, no payment is required for handing over the child. Acquiring a child into the power of another is defined as a way of obtaining a child into one's power for the purpose of adoption. In both forms, however, it must be an act that is in conflict with Act No. 36/2005 Coll., the Family Act, and the Amendment of Certain Acts. Adoption means adoption according to § 97 to § 109 of the Family Act.[22]

### 7. Discussion – summary – comparison of the criminal law in the Czech Republic and Slovakia

Regarding the feature of **illegality**, in the Czech Republic, in the case of the crime of Entrusting a child to another, there is no explicit formal illegality, i.e., a conflict with another legal regulation. This must be derived indirectly from the legal order. In the Czech Republic, formal illegality would probably be inferred from a violation of, e.g., the provisions of § 798 of the Civil Code, according to which *"No one may obtain an inappropriate profit from activities related to adoption"*, or from a violation of Article 21 of Convention No. 141, on Human Rights and Biomedicine, promulgated under No. 96/2001 Coll. m. s., where it is stated that *"The human body and its parts must not be a source of financial benefit as such."* The Slovak legislature is more consistent in this when it directly points out the illegality in fact *"contrary to a generally binding legal regulation..."*. This legal regulation includes the Family Act in particular, in which the issue of adoption is regulated in between § 97 and 109. Material illegality is then contained in both countries in the facts of the relevant criminal offenses.

As for another feature of the crime, namely the existence of a certain degree of **harmfulness - the severity** of the conduct, its content is regulated similarly in both countries. Material corrections particularly include the meaning of the protected interest that was affected by the offense, the manner of carrying out the act and its consequences, the circumstances under which the act was committed, the perpetrator, the degree to which they are to blame, and their motive, intention, or goal. Slovak legislators included a material corrective in the concept of a criminal offense (misdemeanour). § 10 par. 2 of the Criminal Code states: *"It is not a misdemeanour if its severity is negligible given the manner in which the act was committed, its consequences, or circumstances, the offender's degree of fault, and motive"*. Czech legislators do not explicitly state this corrective in the concept of a criminal offense. This must be derived from the provision regarding "Determination of the punishment type and sentence length" according to § 39 par. 2 of the Criminal Code. This fact has been criticized by many experts in the past.

Regarding the **features of the facts** of the above-mentioned criminal offenses, there is a difference, in that, according to Slovak law, the criminal offense of Entrusting a child to another does not include the feature of "for remuneration" as a basic feature. In this respect, the Slovak legislation is stricter because, in order to fulfil the basic factual basis, conduct that is in conflict with a generally binding legal regulation is sufficient,

## Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

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without it being conducted for remuneration. The Slovak legislature criminalizes acts for remuneration only in the qualified factual matter in paragraph 2, where a particularly aggravating circumstance is "obtaining a greater benefit". We can summarize that in the case of a surrogate mother, in the Czech Republic, it must be proven that she received a reward for childbearing and birth, and Entrusting the child to the ordering couple, that is beyond the necessary costs of childbearing and childbirth. In the Slovak Republic, this fact does not have to be proven; it is enough for the customers to conclude an agreement (surrogate contract) with the surrogate mother, which is in conflict with the Family Act. Section 82 of the Family Act that states: "(1) *The mother of a child is the woman who gave birth to the child. (2) Agreements and contracts which are in breach of paragraph 1 shall be invalid.*" Thus, it would be sufficient for a surrogate agreement to be concluded between the ordering party and the surrogate mother for the future transfer of the child to another (this would, of course, be invalid) and, thus, the facts of Entrusting a child to another could be fulfilled.

As for the criminal liability of clients/applicants in the Slovak Republic, it would depend on the criminal liability of the surrogate mother (as in the Czech Republic), i.e., the main offender. They could also act as inducers. § 21 (1) of the Criminal Code stipulates: "*a participant in a completed criminal offense or in its attempt is a person who intentionally induces another to commit a criminal offense (inducer)...*"

If we compare the possible criminal liabilities of an intermediary agency, there is a significant difference between the legislation in the Czech Republic and the Slovak Republic. In this article, we will not deal with the difference in the regulation of criminal liability of legal persons in more detail, specifically concerning the inference of fault because it has already been addressed in many articles [23], but we will deal with the scope of criminal offenses for which legal persons are responsible. In the Czech Republic, the legislature negatively regulates criminal offenses that can be committed by a legal entity in the provision of § 7 of ACLLE. It, therefore, lists criminal offenses which a legal entity cannot commit. The criminal offense of Entrusting a child to another is not mentioned in this provision, and, therefore, a legal entity may commit it – in our case, as a participant in the form of a helper. Regarding the regulation in the Slovak Republic, the list of criminal offenses that can be committed by a legal entity is expressed positively. The range is considerably narrower than the Czech version. Záhora draws attention to this fact when he states that the legislature chose the "minimum list of criminal offenses" and failed to complement it with certain criminal offenses of legal entities that arise from international obligations, such as copyright infringement pursuant to § 283, obstruction of justice pursuant to § 344 of the Criminal Code or the criminal offense of Entrusting a child to another pursuant to § 180 and § 181 of the Criminal Code.[24] As the criminal offense of Entrusting a child to another is not mentioned in § 3 of Act No. 91/2016 Coll. of ACLLE, a legal entity cannot be held liable for it in the Slovak Republic. However, this does not mean that a person acting on behalf of a legal entity cannot be held liable for it. They could commit the said crime as a participant in the form of an assistant or organizer.

### Conclusion

The purpose of this article was to compare the regulations regarding surrogacy in the Czech Republic and the Slovak Republic – and in particular, criminal law. Despite the fact that both countries are still following the path of non-regulated legality of

# Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

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surrogacy, the Slovak Republic is "stricter" in terms of civil law regulations, as it does not allow the conclusion of surrogate agreements. This fact also leads to a "stricter" criminal law, according to which it is possible to prosecute the partakers in surrogacy without having to prove that they carried out this activity for remuneration.

The future path of both countries is uncertain. The authors of this article agree with the opinion of Císařová and Sova, according to whom surrogacy, both among people living permanently in the Czech Republic and abroad, is a fact that brings life. In the long-term it is, therefore, unsustainable for the legislature to ignore this important fact of human and practical legal life. The legal anchoring of surrogacy addresses the currently much-discussed issue of the child's right to know his/her parents (Article 7 of the Convention on the Rights of the Child) and the right to preserve identity (Article 8 of the Convention on the Rights of the Child), and, last but not least, it sets clear limits for the misuse of the human body as an object of trade. A clear delineation of the legal boundaries of surrogacy will also make a significant contribution for criminal law to remain a means of ultima ratio – and will only penalize acts that violate fundamental rights enshrined in the Convention on Biomedicine.[25]

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## Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic

Ivana HONZOVÁ, Roman SVATOŠ

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