SURROGACY WITH RESPECT TO CRIMINAL LAW

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Abstract: *Surrogacy is one of the most complicated procedures of assisted reproduction. The complexity of the procedure brings many legal problems, the main ones are determination of legal parenthood, enforceability of agreements, registration of the newborn, acceptance of the ways of recruiting a surrogate mother, acceptance of compensation, conditions of approach to the procedure, and circumstances of its implementation. The purpose of this paper is to describe this procedure with respect to criminal law. Considering the cases connected with surrogacy we usually somehow "quench" the results – a child is already here, despite being received in problematic ways, then we shall solve his or her interest. However, this child did not occur by chance, through a - problematic – act of an individual. The child was born because of the possibility of technology, and the application of technology is supervised by an institution. Society has a liability that must clearly delimitate the boundaries and possibilities of the use of technology, and consistently prosecute their possible violation.*

Keywords: *surrogacy, criminal law, liability, civil law, medical law, agreements, enforcement, parentage*

I. INTRODUCTION

Surrogacy is one of the most complicated procedures belonging to so-called assisted reproduction (ART, the professionals currently more often use the term "medically assisted reproduction", MAR). The complexity of the procedure brings many legal problems, the main ones are determination of legal parenthood, enforceability of agreements concluded before the child's birth or before beginning of the treatment, registration of the newborn, acceptance of the ways of recruiting a surrogate mother (mediating agencies, the use of media for advertising, etc.), acceptance of compensation, conditions of approach to the procedure, and circumstances of its implementation.[2] The endeavour to legally determine surrogacy in the Czech Republic repeatedly appears and then disappears again. Significant interest appeared in the summer of 2015 after the publishing of the case of the labour of a very disabled boy by the surrogate mother, and the refusal of the intended pair to hand him over[3] (they were both the genetic parents of the newborn). This paper is one of many analyses resulting from the research project GA ČR 17-07753S. The purpose of this paper is to describe this procedure according to the analysis of the present sources, especially with respect to criminal law.

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[2] KONEČNÁ, H. et al. *Rodičem kdykoliv a jakkoliv? Průvodce asistovanou reprodukcí a náhradní rodinnou péčí.* Praha: Mladá fronta, 2017, p. 146.

[3] The case is described in detail here: PEKTOROVÁ, M., VENTRUBA, P. Surogace, ano či ne? Kazuistika. *Čes. Gynek.* 2015, Vol. 80, No. 4, pp. 299–301.

II. SURROGACY – DEFINITION

There is usually an implicit presumption in Czech papers dealing with surrogacy that a heterosexual couple applies for this procedure and that an embryo (or embryos) used to fertilize a surrogate mother came from the egg and sperm of this intended couple. This procedure is defined in this way, for example, by Právní zpravodaj[4] (2009) which informed about the intention of the Ministry of Health and Ministry of Justice to determine this procedure legally in the Czech Republic, or in the journal Česká gynekologie.[5] The European Society of Human Reproduction and Embryology, ESHRE, defines surrogacy through its special group for ethic and law as follows: *"A 'surrogate' is a woman who becomes pregnant, carries and delivers a child on behalf of another couple (intended or commissioning parents)."*[6] This document also mentions an intended couple, although not just a heterosexual one. However another, newer document, with a similar importance (the opinion of a professional society), accepts another possibility as an applicant for assisted reproduction (and so also a surrogacy):[7] *"Medically assisted reproduction in non-standard situations is morally sound in many cases. There is no good reason to a priori dismiss access in these situations—such categorical dismissal would imply discrimination."* The American Society for reproductive medicine, ASRM, also takes into account not only heterosexual couples, but also homosexual couples and single people:[8] *"A gestational carrier is a woman who bears a child who is genetically unrelated to herself for an individual or a couple who intends to be the legal, rearing parent(s) of the child. This process is known as gestational surrogacy. Initially, gestational surrogacy was applied to cases of intended opposite-sex parents who had fertility or medical problems that precluded the female partner from carrying the pregnancy. Now, the process also is used for individuals and same-sex couples who desire to become parents."* Because neither artificial eggs nor sperm are used clinically, it must result, in the opinion of the leading world professional societies, that they take into account the use of donated gamete. In the Czech Republic only heterosexual couples are allowed to use assisted reproduction, however there are not any demands for a partner or another status[9], i.e. even a surrogate mother and an applicant – a single homosexual or one half of a homosexual couple – may apply for this procedure. "Nonstandard" applicants have already appeared in Czech solicitors' offices providing counselling for this procedure.[10]

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[4] *"These are cases when a child of a married couple is carried and delivered by another woman."* See Spolupráce ministryní spravedlnosti a zdravotnictví v oblasti náhradního mateřství. *Právní zpravodaj*. 2009, No. 342, [2018-09-25]. Available at: <https://www.beck-online.cz/bo/document-view.seam?documentId=nrptembqhfpxa6s7gm2de&groupIndex=2&rowIndex=0>.

[5] PEKTOROVÁ, M., VENTRUBA, P. *Surogace, ano či ne? Kazuistika.* pp. 299–301.

[6] ESHRE. TF 10: Surrogacy. *Human Reproduction.* 2005, Vol. 20, No. 10, pp. 2705–2707.

[7] ESHRE. TF 23: medically assisted reproduction in singles, lesbian and gay couples, and transsexual people. *Human Reproduction.* 2014, Vol. 29, No. 9, pp. 1859–1865.

[8] ASRM. Ethics Committee of the American Society for Reproductive Medicine. Consideration of the gestational carrier: A committee opinion. *Fertility and Sterility.* 2013, Vol. 99, No. 7, pp. 1838–1841.

[9] Act. No. 373/2011 Col., on specific health services, § 6 (1): *Artificial insemination can be performed by a woman of childbearing age if her age does not exceed 49 years, at the written request of the woman and the man who intend to undergo this health service together.*

[10] PRUDILOVÁ, L. Náhradní mateřství v České republice – zkušenosti z praxe. *Sympozium pro odborné pracovníky z center asistované reprodukce.* Parkhotel Plzeň, 17.–18. 5. 2018.

For the purposes of our paper we propose this definition: **Surrogacy is a procedure when a woman undergoes assisted reproduction, pregnancy and childbirth with the aim to give up the newborn, and – if her parental rights and duties arise because of the fact of her labour in the given country (a mother is the woman that the gave birth) – then these rights and duties transfer to someone else, agreed upon in advance.** An adoption (addressed or direct), is usually used to hand over a child, of course in some countries the applicant/applicants for this procedure are already directly entered into the birth certificate of the child.

Because assisted reproduction distinctly extended the number of potential "parents", we suggest (not only in this paper) using the following terminology:

The genetic father is the man whose sperm was used for the childbirth.

The genetic mother is the woman whose egg was used for the childbirth.

The biological mother is the woman who was pregnant with the baby and gave birth.

The legal father is the man who is legally recognized as the father.

The legal mother is the woman who is legally recognized as the mother.

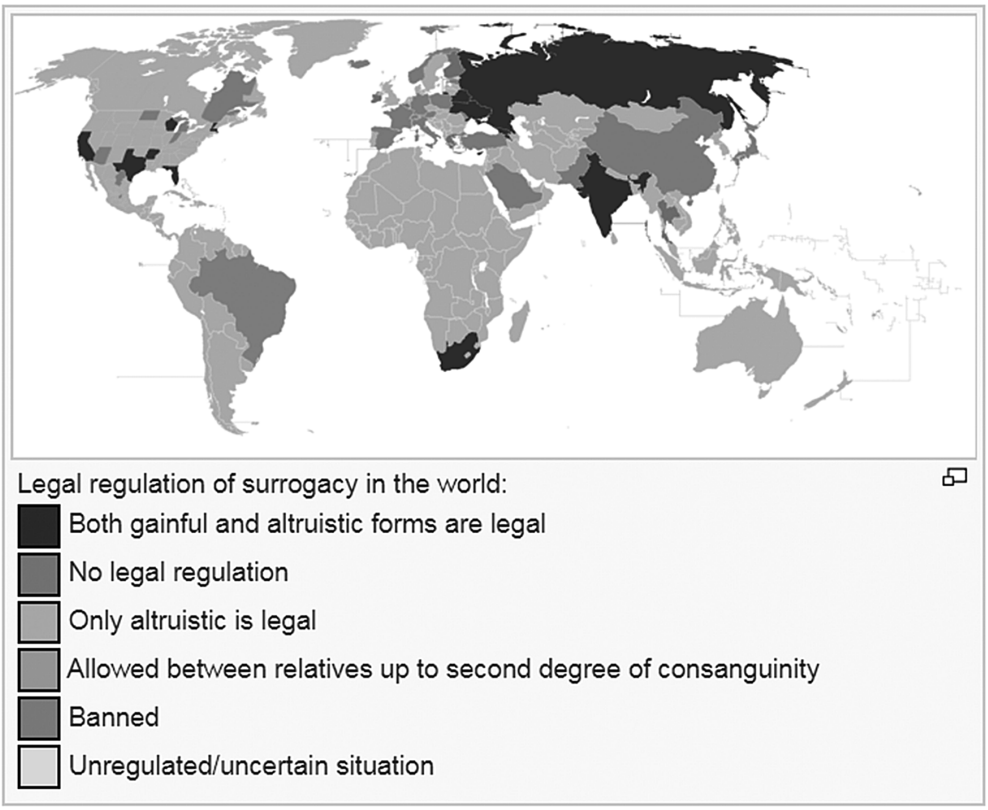
Under usual circumstances, the listed persons mean only two, however under "unusual" circumstances it can be much more complicated; we can still have a donator of the uterus or mitochondria, as well as psycho-social parents, i.e. the persons who the child perceives to be his or her parents. We will not complicate things for the purposes of this paper, but those who are interested can refer to the book "Rodičem kdykoliv a jakkoliv?" (A parent, any time and anyhow?).[11]

III. SURROGACY REGULATION

Different countries vary in their approach to surrogacy. It is possible to say that there are three basic approaches, in particular an absolute prohibition of surrogacy, its explicit legal acceptance under specified conditions – legal regulation, and its certain tolerance without legal regulations. There have been very fast changes in this area, but at this moment (August 2018) it is possible to say that there is absolute prohibition of surrogacy in, for example, Germany, Italy, Austria, and Poland. It is also in France; however, a new regulation of assisted reproduction which takes surrogacy into account has just been prepared. A surrogacy is allowed under specific conditions, for example, in the Netherlands, Great Britain, Greece, Ukraine, and Portugal. Tolerance without complete legal regulation is, for example, in the Czech Republic and Belgium. The regulation of surrogacy is very clearly described in Wikipedia, and in our opinion correctly (August 2018).[12]

[11] KONEČNÁ, H. et al. *Rodičem kdykoliv a jakkoliv? Průvodce asistovanou reprodukcí a náhradní rodinnou péčí.*

[12] Although Wikipedia is not considered to be a reliable source, it has its advantages – contrary to professional texts – its content is regularly updated.



Picture 1. The legal regulation of surrogacy in the world. Source: https://en.wikipedia.org/wiki/Surrogacy_laws_by_country, last updated: 24 September 2017

In the Czech Republic, surrogacy is not legally regulated, only in the provision of Section 804 Act No. 89/2012 Coll., Civil Code, as amended (hereinafter "Civil Code" or "CC") is mentioned concerning adoption – specifically that *an adoption is impossible between the closest family and between siblings. This does not apply in the case of surrogacy.* We cannot find another reference to surrogacy in our legal order. Even the authors of the new Civil Code did not want to regulate the problems of surrogacy more when the Explanatory Report to the new Civil Code states:[13] *"The existing correct theoretical and practical elimination of the closest relatives from the range of possible adopters is to be clearly expressed in the future. The exemption in the second sentence applies to the case of surrogacy, in which a child is born to a woman who is not their biological mother. However, the old Roman prin-*

[13] Explanatory Report to the new Civil Code. In: *Nový občanský zákoník* [online]. 3. 2. 2012 [2018-09-20]. Available at: <http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>. See p. 199.

ciple will remain that the mother of the child is the woman who gave birth to the child. Physiological conditions for the performance of assisted reproduction are regulated by Act No. 20/1966 Coll., on care of public health [now replaced by Act No. 372/2011 Coll., on health services and the conditions for their provision (Health Service Act)]. However, the text of the Civil Code shall take into account, in its provisions, the progress of medical science that allows the bringing of a fertilized egg of a woman to the uterus of another woman. Relations between the woman who provided her germ cells (biological mother) and the child can be regulated by the adoption process. Foreign experience and current experience in the Czech Republic show that the biggest interest in surrogacy will be found among female relatives."

We do not know the source used by the authors of the Explanatory Report concerning the information that S will be realized primarily among female relatives. According to our sources, the female relatives are more an exception (concerning surrogacy). For example, the British authors of the report on a 10-year-monitoring of families that arose out of surrogacy write that only 4 of the twenty interviewed surrogate mothers knew the intended couple in advance.[14] It is also necessary to take into account the methodology of that research. The file is not representative; interviews can be made only with those who want them. It is possible to presume that the more willing respondents were surrogate mothers from the close surroundings of the intended couples because there was a likely altruistic motivation. A small representation of female relatives also appeared in our research,[15] and most surrogate mothers were found on the Internet. Even Czech doctors from the assisted reproduction confirm this: *"Ninety- nine percent of our clients seek (a surrogate mother) on the Internet. … Typically it is a single mother, a single parent. Here I shall state a legitimate argument of the critics that many of these moms do it because of social poverty. Of course, they do not express cravings for money in the surgery. It is always like they want to help. However, they are also mostly not women from a secure family."*[16]

The section of assisted reproduction of the Czech Gynaecological Society, ČSL JEP, published two recommendations concerning surrogacy in 2012 and 2016.[17] However, these recommendations are not generally binding, and we will not pay attention to them in this paper.

IV. CRIMINAL ASPECT

Surrogacy, despite not being regulated in our country, is a fact in the Czech Republic. However, this does not mean that surrogacy should not be punished if it is realized in

[14] JADVA, V., IMRIE, S., GOLOMBOK, S. Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child. *Human reproduction*. 2015, Vol. 30, No. 2, pp. 373–379.

[15] NOVÁKOVÁ, K., KONEČNÁ, H., SUDOVÁ, M. Náhradní mateřství v České republice: způsoby hledání náhradní matky. Surrogate motherhood in the Czech Republic: ways to seek a surrogate mother. *Časopis zdravotnického práva a bioetiky*. 2018, Vol. 8, No. 2., pp. 32–42.

[16] Quote is from the article "Do you give us a baby please?". See Porodíte nám děťátko, prosím? In: *IVF Zlín* [online]. 6. 12. 2012 [2018-09-20]. Available at: <https://www.ivf-zlin.cz/25770n-porodite-nam-detatko-prosim>.

[17] SEKCE ASISTOVANÉ REPRODUKCE ČGPS ČLS JEP. Všeobecné podmínky pro výběr náhradní matky. See Náhradní (surogátní) mateřství. In: *IVF Zlín* [online]. 2016 [2018-09-20]. Available at: <http://www.ivf-zlin.cz/24903-surogatni-materstvi>; SEKCE ASISTOVANÉ REPRODUKCE ČGPS ČLS JEP. Stanovisko k náhradnímu mateřství. Agreed on April 27, 2012 in Benice.

a way that is contrary to the interests of the society. This problem has already been discussed by other authors, see further.

According to Burešová,[18] the criminal level of surrogacy is a highly sensitive topic for all those concerned. Clinics of assisted reproduction typically do not participate in the agreement on compensation between the mother and the intended parents. The reasons for this are the criminal aspects and the clinic stays intentionally fully out of them. A clinic plays only a health role in this whole process, which is realized in accordance with the relevant legislation. Then a possible agreement remains between the surrogate mother and the intended parents. In cases when the surrogate mother is connected with the intended parents, in particular concerning the closest relatives, it is possible to imagine that she actually receives from the intended parents only compensation of the agreed expenses, costs and wage (income). However, this would hardly be the case of the surrogate mother who does not know the intended parents at all, and in which the agreement on surrogacy is concluded through an advertisement. Despite of it, women who bear a child for other couples from pure altruism really exist.

The problems of (no) regulation of surrogacy is also mentioned, among others, by Blažek,[19] who states that the failure of our legal regulation of artificial fertilization is that some forms of behaviour which are expressly prohibited abroad (see e.g. Section 2 German Act on protection of human embryos) or on the contrary the forms which are expressly allowed (see British Act on agreements on surrogacy) do not have any appropriate legal response in our legal order. In this sense – according to the available information – surrogacy applied in the centres of assisted reproduction remains without any legal regulation, which, unfortunately, in terms of presumption of legal licence, opens up a space for the minimally latent commercialism of this institute.

IV.1 Criminal liability of the surrogate mother

A part of the professional public hold the opinion that surrogacy for remuneration could be understood as an offence of entrusting a child to the powers of another person in accordance with Section 169 Subsection 1 Act No. 40/2009 Coll., Penal Code,[20] as amended, (hereinafter only "Penal Code" or "PC"). According to the provision of the said body of a crime, this crime is committed by *"whoever entrusts a child into the powers of another person for the purpose of adoption or for another similar purpose."* If a couple that cannot give birth to their much longed for baby in the usual way, use surrogacy, and will pay a surrogate mother remuneration (except the costs connected with pregnancy and labour of the baby), will this couple be guilty of this crime? Most likely they can be, but under the fulfilment of certain conditions that will probably not be fulfilled during the classical use of surrogacy.

[18] BUREŠOVÁ, K. Surogátní mateřství a jeho (nejen) právní aspekty. *Právní rozhledy*. 2016, No. 6, p. 193.
[19] BLAŽEK, P. Medicínskoprávní a trestněprávní aspekty asistované reprodukce. *Právní rozhledy*. 2013, No. 9, p. 312.
[20] Act No. 40/2009 Coll., Penal Code. In: *Zákony pro lidi* [online]. [2018-09-20]. Available at: <https://www.zakonyprolidi.cz/cs/2009-40>.

The Explanatory Report to the new Penal Code states the following:[21] *"Considering the general definition of the body of the crime of Human Trafficking, which means that it also relates to child trafficking for the purpose defined in Section 168 Subsection 1, the crime of child trafficking was limited to entrusting a child to the powers of another person (Section 169) for the purpose of adoption or for another similar purpose (e.g. to foster care), because this crime is a privileged body of a crime to provision of Section 168 Penal Code, that provides a significantly stricter punishment for child trafficking for some of the purposes listed in Subsection 1 Letter a) up to e). This conforms to a significantly reduced severity of sentence, including the relevant additional aggravating circumstances that are, in particular: committing a crime as a member of an organised group eventually operating in several states, causing grievous bodily harm or death, and committing a crime with the intention to gain large-scale benefit."* This modification is similarly explained by Šámal et al.,[22] while stating that a crime of entrusting a child to the powers of another person was classified in Part 1 of Head II with respect to its continuity to the crime of human trafficking (Section 168), whose scope was extended (compared to earlier adjustment in the Penal Code). Then the body of the crime of entrusting a child to the powers of another person refers only to entrusting a child for the purpose of adoption or for another similar purpose (e.g. foster care or care of similar type, in particular abroad) and it is a privileged body of a crime to the provision for human trafficking (168), which provides significantly stricter punishment for child trafficking for any of the purposes set up under Subsection 1 Letter a) up to e) Section 168. This conforms to a significantly reduced severity of sentence defined in Section 169, including the appropriate extra aggravating circumstances.

While establishing whether or not the criminal offence of Entrusting a child to the powers of another person was committed, we shall use the definition of a criminal offence in accordance with Section 13 Subsection 1 Penal Code. Then *"A criminal offence is an illegal act identified as punishable by criminal law and which presents the characteristics set out under such a law."* There is further set up, under Section 12 Subsection 2 PC, *"The criminal liability of an offender and the criminal consequences associated with it may only be applied in socially harmful cases where application of liability under another legal regulation is insufficient."* This definition must be still amended by Section 111 PC: *"A criminal offence means an act that is judicially punishable and, unless the individual provisions of the criminal law stipulate otherwise, also preparation for the criminal offence, attempted criminal offence, organisation, guidance, and assistance."* As it results from the definition of a criminal offence according to the Penal Code, to commit an offence means that the act shall be punishable, the elements of an offence shall be accomplished as well as a particular extent of social harmfulness.

Concerning **unlawfulness**, the provision of Section 169 PC does not explicitly mention this element, because surrogacy in particular has not been regulated in the Czech Republic, and foster care in accordance with Section 804 Civil Code, although unlawfulness of this act may be understood in accordance with Section 798 Civil Code. It results from this

[21] Explanatory Report to the Penal Code.
[22] ŠÁMAL, P., et al. *Trestní zákoník*. 2nd ed. Praha: C. H. Beck, 2012.

provision that *no one is allowed to gain an undue benefit from an activity connected with foster care*. According to Solnař et al.,[23] an unlawful act shall be understood in two ways; firstly so-called formal unlawfulness, i.e. contradiction to the whole legal order, and secondly, a material unlawfulness that is expressed in the single body of an offence. Formal unlawfulness is possible to understand as a breach of the standard, while material unlawfulness is an act violating or endangering interests protected by criminal law. According to Cibulka,[24] unlawfulness generally means such an act that is against legal order. Then any act violating some legal statute is also unlawful. Here it is unlawfulness in terms of formality. Cibulka also states that concerning the assessment of unlawfulness of an offence, it is necessary to result in particular from its definition (Section 13 Subsection 1 PC). In this regard there can be a question whether unlawfulness should be reviewed separately in each single case or if it can be reviewed only through formal elements of the appropriate body of the offence stated in a special part of the Penal Code. According to Cibulka, under the mentioned circumstances, two approaches can be applied considering legal qualification of an offender's act to be an offence. These approaches are connected with a concept of a formal unlawfulness of an offence both as a single element, and its concept as an element already included in formal elements of an offence. Firstly, law enforcement authorities can consider an act with respect to the accomplishment of formal elements of an offence, and if this act can be considered as such a socially harmful offence that instruments of criminal law can be applied in a particular case. Then it shall be reviewed separately and independently if there are also circumstances excluding unlawfulness of an act in accordance with Section 28 up to 32 PC. The second approach to the solution of the mentioned topic is that an act of the defendant will be classified according to formal elements of the appropriate body of the offence stated in a special part of the Penal Code, and the reviewing body will consider social harmfulness of this offence through these elements. Then an unlawful element will not be the subject of individual review because it is either directly expressed in the body of the offence, or it is given already, and thereby the specific act of the offender is considered as a criminal (unlawful) offence in the special part of the Penal Code (so-called material unlawfulness).

According to Solnař et al.,[25] in terms of criminal law a formal unlawful act means a contradiction between a human act and legal regulation. In this sense we conclude that only a formal unlawful act is an offence.

According to Kratochvíl,[26] the reason of perceiving an act as being an offence is not only formal unlawfulness. Unlawfulness in this wider context is only a legal term for the material nature (character) of a legal delict, and so even an offence. Therefore, this material nature (character) of a delict can be designated as material unlawfulness. It is content expressed by the body of the offence.

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[23] SOLNAŘ, V., FENYK, J., CÍSAŘOVÁ, D. *Základy trestní odpovědnosti, podstatně přepracované a doplněné vydání*. Praha: LexisNexis, Nakladatelství Orac, 2003.

[24] CIBULKA, K. O některých otázkách trestního postihu ve zdravotnictví. *Trestněprávní revue*, 2010, No. 3, p. 69.

[25] SOLNAŘ, V., FENYK, J., CÍSAŘOVÁ, D. *Základy trestní odpovědnosti, podstatně přepracované a doplněné vydání*. Praha: LexisNexis, Nakladatelství Orac, 2003.

[26] KRATOCHVÍL, V. et al. *Kurz trestního práva, trestní právo hmotné, obecná část*. Praha: C. H. Beck, 2009.

Considering the Penal Code, unlawfulness is expressed partly generally without closer specification, and partly through different wordings specifying the objective part of the body of the given offence. Considering an offence, there must always be unlawfulness because an offence could not even exist without unlawfulness.

Here we can conclude that unlawfulness of an act concerning the offence of Entrusting a child to the powers of another person for remuneration in the formal context (contrary to the whole legal order) can result from a breach of, for example, Section 798 CC. This Section states that no one shall obtain inappropriate benefit from the activities connected with adoption. Even Article 21 Convention No. 141, on human rights and biomedicine, promulgated under No. 96/2001 Coll., m. s., states that the human body and its parts shall not be a source of pecuniary benefit. Material unlawfulness results directly from the elements of the crimes that are contained in a special part of the Penal Code. Then both concepts of unlawfulness are fulfilled.

And what about social **harmfulness** of the said act? As has already been said, an act which is unlawful and accomplishes the elements of the crime, is a crime only while reaching a certain gravity of a case. Harmfulness expresses the material nature of a crime. There is a prevalent opinion – and in this regard mentioned in the Explanatory Report to the Penal Code – (in terms of the Explanatory Report, social harmfulness is determined by the nature and seriousness of a crime), that harmfulness, even in terms of guilt, can be evaluated in accordance with Section 39 Subsection 2 PC, so under the application of general principles to sentencing. According to this provision, seriousness and the nature of a crime are determined in particular by the relevance of the protected interest violated by the offence, the method of commitment and its results, the circumstances under which the offence was committed, the offender, the extent of their fault and their criminal motive, intention or goal. It is essentially evaluation of the single elements of the body of the offence and circumstances under which the offence was committed.

What is the extent of harmfulness concerning **the object** of the offence of entrusting a child to the powers of another person? According to Šámal et al.,[27] the object of the crime is in accordance with 169 PC if the interest in personal freedom (child's freedom), in particular in terms of **decision making on their future** as well as **proper care** which – pursuant to law or an official decision – persons exercise towards a child. There is not a condition that the child should get into worse living conditions, especially an adoption is more likely an opposite situation. A reason of a criminal sanction is a moral principle because this act is condemnable, in particular because it **is executed for money and the subject of this "business" is a child.** The subject of an attack is only a child a posteriori Section 126 PC; that means a person up to 18, if not stated otherwise by the Penal Code.

Concerning children's freedom in terms of making decisions on their fate, what is the harmfulness of the act when adoption practically happens shortly after childbirth? What opportunity concerning their future does a child have at that time? Practically no opportunity, and that is why there are adults longing for this child, who want to determine their first steps, in particular with the best intention for children's welfare. In this sense, there

[27] ŠÁMAL, P., et al. *Trestní zákoník.*

is no harmfulness of this act. As it has been right undermentioned in this paper, a child will certainly have better care because of adoption than they would have with a surrogate mother. The intended parents want the best for their dream child when they have already undergone this suffering. In this regard the harmfulness of the act will be again zero. We can controvert protection of interest, so that adopted children will not be the object of human trafficking, in particular that a surrogate mother will not execute these activities (assistance) for consideration. This should not be any kind of prostitution, or any kind of slavery when, for example, women from poor social conditions assure their source of living through this activity. Certainly in these cases it would be outrageous behaviour. On the other hand, it is necessary to mention another fact. Which surrogate mother would be so altruistic that she would demand no remuneration for that hazard, resulting from pregnancy and delivery? Yes, perhaps in the case of relatives, we might expect an altruistic approach. However, otherwise probably hardly ever. A question will be the amount of money that should be paid, despite the amount covering the costs for carrying a baby and the childbirth (typically it will be reimbursement for loss of earnings, reimbursement for necessary drugs, clothes, special diet, health intervention, stays at hospital). It would be an amount covering the danger connected with carrying a baby and childbirth. The amount of this money, among other things, also determines the gravity of a case. Concerning the amount of remuneration, we can find nothing in our legal order, so it would be important to consider on a case-by case basis. Should the amount conform to the risk connected with carrying a baby and the childbirth, the gravity of a case would be negligible.

Concerning harmfulness in terms of the **objective part**, there is an important act, result and causal relation between them. Act is explicitly stated in the body of an offence, in particular whoever entrusts a child into the powers of another person for the purpose of adoption or for another similar purpose for consideration. The term of entrusting a child into the powers of another person means any way of entrusting the child to any treatment of the child in accordance with this provision. It can be also entrusting through another person (mediator). It must be for remuneration, which is primarily a financial reward, however, it can be also another remuneration, e.g. in the form of a gift (valuable things, gold objects, etc.) The result is endangering the object of a crime. This can be done in many ways and that is why (in terms of an act) the other circumstances determining the harmfulness of a crime can be also considered, in particular the circumstances under which an offence was committed.

The subject of this offence will be the surrogate mother. An offender also determines the harmfulness of an offence. Should a surrogate mother perform this activity repeatedly, or gain inadequate remuneration for the undergone risk with this activity, there would be a considerable extent of harmfulness. A repeated act or gaining a considerable benefit (more than 500,000 CZK) would already mean a qualified body of an offence. Should a surrogate mother perform this activity only once, and for remuneration that would correspond to the danger that she underwent – to what extent would it be harmful?

Concerning **the subjective part**, in this case it must be an intentional offence. Carrying a baby and the childbirth by the surrogate mother, and then the handover to the biological parents for the possibility of adoption, in particular for remuneration, must be done purposely. A negligent act does not come into question at all. There would be volition, a direct intention. If we consider the grounds, intention and goal, it would be necessary to examine

the grounds on which the surrogate mother had to undergo this procedure. Should her reason be just income, the extent of harmfulness would considerably increase. Should her grounds be to help to persons who cannot give birth to a child in the usual way and her remuneration conforms to (except costs) the undergone danger, then we can more likely state that it is a praiseworthy act. While considering the harmfulness of this offence, the grounds, intention and goal will be the most significant – and these facts shall be proved.

As can be concluded from the above-mentioned facts, the above-mentioned act would accomplish the element of unlawfulness, and even the elements of the body of the offence of entrusting a child into the powers of another person would be accomplished. However, concerning the extent of harmfulness, the authors are not sure if a situation – when there is no gainful activity on the part of the surrogate mother – would represent a certain extent of social harmfulness. Then there is also a question of whether the provision of Section 169 PC is necessary. Mitlöhner and Sovová[28] also indirectly mention this situation. They know no single case when the surrogate mother was prosecuted in connection with the acceptance of remuneration for carrying a baby, the childbirth and the follow-up handover of a newborn (entrusting a child into the powers of another person). Perhaps the reason is that "there are no surrogate mothers" in the Czech Republic.

However, if we conclude from the situation that the elements of the body of the above-mentioned offence would be accomplished, social harmfulness would be considerably lower, and how should we proceed? This topic is dealt with by Kandová[29] when she states that there can be two approaches that are applied in practice and are "sanctified" by the opinion of the criminal college of the Highest Court of the Czech Republic. As is mentioned in this opinion, two approaches to the principle of subsidiarity of criminal repression in accordance with Section 12 Subsection 2 PC are possible. There is a difference between using this principle *"… as an interpretation rule anywhere, where some indeterminate terms shall be interpreted… (when) in these cases the matter of fact generally is that the interpretation… will set the boundary between an offence and an act…, and between its application … as a corrective to that fact, when no criminal liability is applied, despite commitment of an offence (a less severe offence) …"*. It is possible to infer, according to this opinion, that the current Czech criminal regulations recognize a formal term and a formal-material term of an offence, but not only the formal concept as it was – and still is – proclaimed in the Explanatory Report to the Penal Code and in some comments and textbooks of material criminal law. Even Růžička[30] admitted a dual approach, but only in an era when the material concept of an offence existed and also a procedural corrective was adopted, in particular amendment of Section 172 Subsection 2 Letter c) PC, as amended by the large amendment of the Penal Code No. 265/2001 Coll. At that time, it was a kind of amendment (in terms of process) to the material concept of an offence that enabled the consideration of cases of insignificant (in the young small) degree of danger from an act as no offence. However, it is a fact that there was much stipulation against the combi-

[28] MITLÖHNER, M., SOVOVÁ, O. *Právní problematika umělé lidské reprodukce.* Hradec Králové: Gaudeámus, 2015.
[29] KANDOVÁ, K. Materiální a (nebo) procesní korektiv v trestním právu. *Trestněprávní revue.* 2017, No. 5, p. 111.
[30] RŮŽIČKA, M. K formálnímu pojetí trestného činu s materiálním korektivem z pohledu státního zástupce. *Trestněprávní revue.* 2011, No. 6, p. 159.

nation of the material concept of an offence and the limited application of the principle of opportunity; both concepts were often found incompatible. Even Šámal[31] admits the existence of material and procedural legal correctives when he states that a specific case not to proceed with the prosecution represents Section 159a Subsection 4 – application of discretionary powers of the prosecuting attorney (procedural corrective compared to material corrective in Section 12 Subsection 2 PC) related to the analogical adjustment in Section 172 Subsection 2 Letter c) PC, relating to the end of investigation.

According to the first approach – that the missing required extent of social harmfulness results in the fact that despite accomplishment of all formal elements of an offence, the act will be considered as no offence – Section 159a Subsection 1 of the Act No. 161/1961 Col., on criminal proceedings as amended (hereinafter "Code of Criminal Procedure" or "CP") should be applied within examining and the case should be terminated. The police bodies (prosecuting attorney) would not proceed with the prosecution because there would be no suspicion of an offence in this instance and the case should not be processed otherwise. Otherwise, to process a case means, in particular, to transfer the case to a competent authority to hear an administrative minor offence, or to transfer the case to a competent authority for disciplinary proceedings. This submission would not come into question because the corresponding minor offence or another unlawful act except an offence entrusting a child into the powers of another person that our legal order (concerning surrogacy) does not recognize. Should prosecution begin, then the prosecuting attorney would discontinue the case in accordance with Section 172 Subsection 1 Letter c) CP because the act would not be an offence and there would be no grounds for submission.

The second approach consists of considering an offence under the application of the philosophy of a formal concept of an offence, when a corrective is applied in order not to apply criminal liability, despite the commission of a less severe offence. In such a case it would be an offence because all the formal elements of an offence would be accomplished, but because of the failing required extent of harmfulness, the prosecution would be terminated. In such a case, criminal proceedings in accordance with Section 158 Subsection 3 CP, should be commenced and the material part of the offence – the extent of its harmfulness – should be considered during the examination. Should a police body come to the conclusion that the act accomplishes the elements of an offence is unlawful, the required extent of harmfulness fails, the case would be submitted to the prosecuting attorney who could apply a corrective (discretionary powers) and in accordance with Section 159a Subsection 4 CP the case would be postponed because in accordance with Section 172 Subsection 2 Letter c) CP a criminal prosecution is inappropriate. In particular, *"A prosecuting attorney shall postpone the case if it results from the results of examination that the circumstance in accordance with Section 172 Subsection 2 Letter c) occurred."* – *"If given the importance and extent of the breach or threat to a protected interest that was affected, the manner in which the act was performed and its consequences or the circumstances under which the act was committed, and given the conduct of the accused after committing the act, particularly their effort to reimburse for damages or to eliminate other*

[31] ŠÁMAL, P., et al. *Trestní zákoník.*

harmful consequences of their act, it is clear that the purpose of criminal proceedings has been reached." Despite this gritty process, postponing a case while already examining seems to be a more suitable option than application of the provisions of Section 172 Subsection 2 Letter c) CP after commencement of prosecution, when the prosecuting attorney may terminate criminal prosecution of the particular person. However, this second option does not seem to be suitable because the psychical load on the accused is already considerable, something already mentioned several times by the Constitutional Court.

We shall also think about the **circumstances excluding unlawfulness**, with respect to the act of the surrogate mother. In the above-mentioned cases, the intended parents give their approval to the act of the surrogate mother that is contained in a so-called surrogate contract (this contract is not legally enforced). Could the institute of consent of the victim be applied in accordance with Section 30 PC in such a case? This provision is as follows: *"A criminal offence is not committed by those who act with the consent of the person whose interests, which such person is entitled to decide on without restriction, are thus affected by such an act.*" Here there would again be a question, if the customers – the intended parents – have the right to decide instead of the child who should be their own directly after adoption. Considering again the object of this offence, in particular the possibility to decide on the future of the child and on the provision of their care, who else should better decide in the interest of the child than the couple longing for a child – the child's future legal representatives. Concerning the object in terms of immorality – an act is executed for money and the subject of this "business" is a child, then even the handover of the remuneration is contractually secured – the customers gave their consent to it. In accordance with Section 30 Subsection 2 it is also necessary that the consent must be given in advance or during the conduct of the person committing an otherwise punishable act, voluntarily, definitely, seriously and comprehensibly; if such consent is granted after the commission of an act, the offender shall not be criminally liable if they can reasonably assume that the person referred to in Section 1 would otherwise grant such consent due to the circumstances of the case and their personal circumstances. Even here, the surrogate mother acted with the consent granted in advance by the customers. The authors believe that the institute of consent of the victim could be applied in such cases. Then it would not be a criminal offence at all because one of the elements of an offence would fail; in particular, its unlawfulness.

IV.2 Criminal liability of the customers – intended parents

Let's start from the beginning. First it is necessary to find an adept to be the surrogate mother. In our country, no agencies exist that are focused on searching for surrogate mothers and their pairing with the intended parents yet. This "service" is even avoided by the centres of assisted reproduction and the attorney's offices because they are aware of the criminal risks. (However, even in our country there has already been a centre of assisted reproduction, that temporarily offered the applicants "a packet" which included full service – including searching for a surrogate mother and the settlement of all legal formalities concerning the handover of the child). An applicant in the Czech Republic must find a surrogate mother themselves. It is clear from the results of the research (mentioned in Chapter 2) that a woman from the closest family of the applicants is an exception. The research

also shows that these women are more often from the lower socioeconomic class, in our country it is typically a woman on maternity leave.

As has already been mentioned, should all the elements of the offence of entrusting a child to the powers of another person be accomplished, the surrogate mother would be prosecuted for this offence. However, which position would the customers have in terms of this offence? If the customers search for a surrogate mother (for example through advertisement), there could be suspicion of an offence of entrusting a child to the powers of another person, in particular in the position of a participant – instigator in accordance with Section 24 PC – *A person who intentionally instigated the commission of a criminal offence in another person (instigator)*… However, will a man – an applicant – be an instigator if we admit that he already became the father during the pregnancy, in particular in accordance with Section 779 CC that *the father is a man, whose fatherhood has been designated by the consenting declaration of the mother and this man?* Should this man still become the father during pregnancy, he would not already be "another person" in accordance with Section 169 PC: "*Whoever entrusts a child into the powers of another person for the purpose of adoption or for another similar purpose …*". In this way a man would not be an instigator, the instigator would paradoxically be only a woman, because she would be another person until an adoption.

IV.3 Criminal liability of an agent

Our analysis would not be complete if we did not pay attention to the liability of the persons who procured a surrogate mother for the intended couple. Should it be a physical person and this person knew that the surrogate mother will receive remuneration from the customers, this person could be suspected of the criminal offence of entrusting a child to the powers of another person, in particular as a participant in form of an accessory in accordance with Section 24 Subsection 1 Letter c) PC, because they intentionally allowed or facilitated the commission of a criminal offence. Here it should be proved that the accessory knew that the child will be entrusted into the powers of another person for the purpose of adoption or for another similar purpose for remuneration, and agreed with it. Then even an eventual intention would be enough.

Should the agent be an institution or legal entity, then criminal liability would be in accordance with Section 7 of the Act No. 418/2011 Coll., on criminal liability of a legal person and proceedings against them, as amended, because a criminal offence of entrusting a child to the powers of another person is not excluded from criminal liability of a legal person.

V. CONCLUSION

It is necessary to identify with the opinion of Císařová and Sovová,[32] according to whom, surrogacy – among persons permanently living in the Czech Republic as well as cross-borders – is a fact that has been brought about by life. Therefore, legislators cannot ignore this

[32] CÍSAŘOVÁ, D., SOVOVÁ, O. Náhradní mateřství v právní praxi. *ČZPB*. 2015, Vol. 5, No. 2, pp. 13–24.

serious fact of human as well as legal life for long. Legal adjustment of surrogacy may solve the currently much discussed question of the right of the child to know his or her parents (Article 7 Convention on the Rights of the Child), and the right to preserve his or her identity. This adjustment will also set clear boundaries of abuse of the human body as a subject of business. Clear delimitation of legal boundaries of surrogacy will also significantly contribute to the fact that criminal law will remain an ultima ratio mean, and it will punish only the acts that violate the essential rights included in the Convention on Biomedicine.

The problems of women without a uterus or without a functional uterus, who are otherwise healthy, could be solved by transplantation of the uterus. These transplantations have already had their first success, and a big project is in progress even in the Czech Republic. The other women with so-called uterine factor, which means it is an impossibility to carry a baby – usually already suffer other health problems, for example they have infertile eggs. It is necessary to discuss if the fact of genetic fatherhood is so significant that such a complex and risky procedure must be undergone. Surrogacy is of course performed with donated embryos: is woman's feeling that she somehow "arranged" the child so worthy to realize surrogacy?

It is also necessary to discuss the definition of a parent. If we stress genetic parenthood, then it is a question of whether application of donor gamete shall be prohibited, not only in surrogacy but also in the other procedures of assisted reproduction. A categorical imperative represents the question of the quality of life of a future child, including his or her right to know his or her parents (who are the parents from the potential list of adepts – an egg donor, a sperm donor, a surrogate mother, an applicant, all of them, etc.?). Another topical legal theme is the commercial usage of the human body; do we avoid the dogma of moral inadmissibility of the sale of our own organs as some Czech experts in bioethics suggest?

The clear delimitation of legal boundaries of surrogacy will also significantly contribute to the fact that criminal law will remain an ultima ratio mean, and will punish only the acts that violate the essential rights included in the Convention on Biomedicine.

A certain regulation would mean that even criminal liability of persons executing surrogacy might be clearer. The wording within the provision of Section 169 Subsection 1 PC could be adopted: *"Whoever entrusts a child into the powers of another person for the purpose of adoption or for another similar purpose contrary to another legal regulation, shall be punished …"*. Legal regulation would regulate the conditions under which it is possible to use a surrogate mother, and should these conditions be violated and should the elements of the body of an offence be accomplished and the required extent of social harmfulness achieved, the above-mentioned criminal offence would be committed.

Significant European institutions give their recommendation not to promote surrogacy. The Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)),[33] issued by the European Parliament, com-

[33] Report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)). In: *European Parliament* [online]. 30. 11. 2015 [2018-09-20]. Available at: <http://www.europarl.europa.eu/doceo/document/A-8-2015-0344_EN.html>. The whole text in Czech is available here: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0344+0+DOC+XML+V0//CS#title1.

ment on surrogacy in Section 114 as follows: *"(the European Parliament) condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments."* Even the European Council refused the institutional guarantee of surrogacy, when refused to regulate international surrogacy, in October 2016.[34] Should this institute be absolutely prohibited then the present criminal adjustment would be sufficient. In both cases (permission under certain conditions as well as prohibition) legal security of surrogate mother as well as the subjects realizing assisted reproduction and the customers or agents would increase.

Considering the cases connected with surrogacy we usually somehow "quench" the results – a child is already here, despite being received in problematic ways, then we shall solve his or her interest. However, this child did not occur by chance, through a – problematic – act of an individual. The child was born because of the possibility of technology, and the application of technology is supervised by an institution. Then the poor surrogate mother who wanted to solve her current distress does not have basic liability (no matter if objectively or subjectively felt). Neither the single applicant nor intended couple have liability – a human hoping that his or her life will be somehow fulfilled, will do everything. Society has a liability that must clearly delimitate the boundaries and possibilities of the use of technology, and **consistently** prosecute their possible violation.

The purpose of this paper was not to impose any opinion on a reader, but to allow the reader to make his or her own judgment pursuant to this acquired information. Another purpose was to show that Czech society should "swing into motion" and start to solve the problems of surrogacy, in an expert manner of course.

[34] The step is commented, for example, at STARZA-ALLEN, A. Council of Europe rejects surrogacy guidelines. In: *BioNews 1* [online]. 17. 10. 2016 [2018-09-20]. Available at: <https://www.bionews.org.uk/page_95737>.