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The status rights of the child and the search for a new paradigm of parenthood in Czechia**

ABSTRACT: The traditional concept of the status rights of a child, which is based on the concept of natural law that the mother of the child is the woman who gave birth to the child and the father is the man determined by the time-honoured presumption of paternity, has been disturbed in recent years. Many States are now faced with requests from their citizens to register a foreign-born child, particularly through surrogacy. These often involve not only married or unmarried couples, both heterosexual and homosexual, but also individuals. Assisted reproduction, and the “reproductive tourism” frequently associated with it, is a challenge, not only for the “conservative legislator” but also for the “old-world registrar” recording the birth of a child in the public registers, or for the “rigid judge” deciding on the recognition of a foreign public document when the registry office “sticks to” the old order. However, it encompasses not just the controversial issue of assisted reproduction, or surrogacy, but much more: a fresh perspective on family law, family life, parenthood, human rights – including the rights of the child, or the best interests of the child – in the context of public policy, or public order.

KEYWORDS: assisted reproduction, surrogate motherhood, mother, father, gender neutral parenthood, child, rights, status, foreign decision, recognition, public order, case law, Constitutional court, designed law.

1. Introduction

This study aims to highlight “the burning issue” in the field of family law, which breaks the age-old principle that only the woman who gave birth to the child is the mother of the child, as well as the possibility of “double motherhood” or “double fatherhood” under some legal systems. The matter

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of “gender-neutral parenthood” is not alien to the Czech environment either. It can be assumed that the practice related, *inter alia*, to the development of possibilities in the field of assisted reproduction, as well as to the changes in marital or partnership relations, cannot be ignored. Moreover, the reality of “open borders” and, in this connection, the issue of the recognition of “legal facts” arising abroad must be considered.¹

New phenomena are not only faced by legislators but also by the courts and civil registrars. This study therefore focuses mainly on a key decision of the Constitutional Court of the Czech Republic, which has traditionally been considered rather conservative in matters of family relations. The ground-breaking decision suggests that the existence of a child’s two legal fathers—conceived with the help of assisted reproduction technologies and delivered by a surrogate mother abroad—and their registration on the child’s birth certificate cannot be unrecognised based on a conflict with public policy or public order. On the contrary, it was held that ‘the non-recognition of a foreign decision, which was to determine parenthood of a child of two persons of the same sex in a situation where the family life had been effectively and legally constituted between them in the form of surrogacy, on the ground that Czech law does not permit parenthood between two persons of the same sex, is contrary to the best interests of the child protected by Article 3(1) of the Convention on the Rights of the Child’.²

The author of these lines foreshadows that if a child born to a surrogate mother abroad was “acquired” in accordance with foreign law, that is, legally, the conservative regulation of family status rights and established orders must “give way” in favour of this child, his or her rights to continuity of civil and family status. The rights of the child must not be seen only as abstract rights arising in particular from the Convention on the Rights of the Child (in the Czech Republic published under No 104/1991 Sb.) but as concrete rights to be protected.³

Furthermore, the author of this article asks what “face” Czech family law should take, whose key source – the Civil Code – has only recently been

¹ Wells-Greco, 2016.

² See the Ruling of the Constitutional Court of the Czech Republic from 29th June 2017, No I. ÚS 3226/16. It is available at <http://nalus.usoud.cz/Search/Search.aspx> (only in Czech).

³ The relevant decision of the Constitutional Court aroused a lot of emotions and was met with a negative evaluation. For instance, see Telec, 2017, p. 670 ff.

adopted (Act No 89/2012 Sb., as amended, further “Civil Code” or “CC”).⁴ Its main drafters, as well as the professional public, have favoured the preservation of the traditional concept of status rights of the child in the Czech Republic.⁵ However, nothing is immutable. Surprisingly, following the above-mentioned case law of the Constitutional Court of the Czech Republic and the relevant practice of the Supreme Court of the Czech Republic, the traditional concept of status rights is gradually being eroded by amendments to public law.⁶ Should the concept of status rights regulated by the Civil Code be fundamentally changed in the spirit of these developments? Is it constitutionally consistent or desirable to allow a child to have two “legal mothers” or two “legal fathers”, or for “gender-neutral parenthood” as well as marriage for “same-sex couples”? Furthermore, what about surrogacy as a “method of treatment for infertility”?

First, however, let us present a brief discussion on the concept of status law in the Czech Republic.

2. Law in books: Background to the legal regulation of family status rights⁷

2.1. Marriage, registered partnership, and partnership as forms of family life

It can be said that the inner Charter of Fundamental Rights and Freedoms (Act No 2/1993 Sb., hereinafter “Charter”) is entirely congruent with the wide concept of family life guaranteed by international instruments, especially by Article 8 of the Convention for the Protection of Human Rights and Freedoms, which protects the right to respect for private and family life for all individuals (in the Czech Republic published under No 209/1992 Sb.). The Charter contains general rules stating, ‘Parenthood and the family are under the protection of the law’ (Article 32, Section 2, Charter). No established definitions exist for either parenthood or family.

Although the Civil Code guarantees the right of all individuals to freely choose their own way of life and to take charge of their own and their

⁴ Radvanová, 2015, p. 1 ff.

⁵ See Eliáš and Zuklínová, 2001 and 2005.

⁶ See the Decree of the Ministry of the Interior No 174/2023 Sb., which amended the Decree implementing Act No 301/2000 Sb., on Civil Registers, Names and Surnames and on amendments to certain related acts, as amended.

⁷ Previously in more detail Králíčková, 2021, p. 77 ff.

family's happiness, it provides increased protection for the family established by marriage. Systematically, the protection of marriage is enshrined at the beginning of "Book Two" – "Family Law". Let us stress that the Civil Code allows marriage to be solemnised only between a man and a woman (§ 655, CC).⁸ "Gender-neutral marriage" was not even discussed during the preparation of the Civil Code despite recent developments in many European countries.⁹ Nevertheless, a group of deputies lodged a pending draft in the Parliament of the Czech Republic in the last parliamentary term, which was in favour of "gender-neutral marriage".¹⁰ The draft could be seen by some as progressive and modern; others would view it as a step undermining the traditional family values or "traditionally marriage-centric family laws with fixed perceptions of gender roles".¹¹ As this legislative proposal was not approved in the last legislature, a new legislative proposal submitted to the Parliament of the Czech Republic in the current legislature has built on its theses.¹² The question is whether it will be turned into law. Perhaps as a kind of "step forward" on the road to "gender-neutral marriage", the legislature recently passed a law amending the Civil Code (Act No 123/2004 Sb., effective since 1 January 2025). Thus, in addition to marriage, the Civil Code as amended will also regulate partnerships for same-sex couples. Recently, same-sex persons entering a partnership will have the same rights and obligations as spouses, including, for example, community property, family dwelling protection, etc. However, same-sex partners will not be allowed to become "common parents" of the child (see new § 3020, para 2, CC). Finally, this amendment to the Civil Code repealed key provisions of the Act on Registered Partnership adopted for same-sex couples after many vicissitudes and regulating only a few rights and obligations, for example the right to maintenance (Act No. 115/2006 Sb., on Registered Partnership, as amended).¹³ The change means that registered same-sex partnerships under a separate law are preserved but can no longer be concluded. If these individuals registered under a special law want more rights, they can enter a

⁸ Králíčková et al., 2020, p. 1 ff.

⁹ Scherpe, 2016, p. 40 ff.; Sörgjerd, 2012, p. 167 ff.

¹⁰ Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No 201/0.

¹¹ Scherpe, 2016, p. 133.

¹² Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. IX., Draft No 241/0.

¹³ Holub, 2006, p. 313 ff.

partnership under the Civil Code, which can be concluded in the same way as a marriage. However, it will not be a marriage.

2.2. Motherhood, fatherhood or simply parenthood

The Czech Civil Code states that a child can only have one “legal mother” and one “legal father” in the case of parenthood. The “legal parenthood” should be, in principle, in harmony with the biological and social reality.¹⁴ The Civil Code regulates the establishment of family ties by stating that ‘Kinship is a relationship based on a blood tie or originated by adoption’ (§ 771, CC).

Similar to most European countries, under Czech law, the mother of the child is the woman who gave birth to the child (§ 775, CC).¹⁵ This has been clearly the case in the Czech Republic since 1998 as a result of a major amendment to the Act on the Family (cf. § 50a, Act No 94/1963 Sb., as amended).¹⁶ This concept was also the basis for earlier legislation in the Czech territory. They were based on the “natural law school”, on which the Austrian General Civil Code (“ABGB”) of 1811 was built.¹⁷ The latter

¹⁴ Králíčková, 2008, p. 275 ff.

¹⁵ Although the new maternity legislation is relatively simple, it is quite concise. It is expressed as a mandatory norm, which cannot be derogated from unilaterally (e.g., by so-called abandonment, failure to show interest, etc.) or contractually (whether in a pecuniary or non-pecuniary, altruistic way). Incidentally, even the older literature on this matter discusses the “absolute nature of parental rights” acting *erga omnes*. This is not a presumption, as in the case of paternity.

In particular, the Civil Code provides that arrangements which, *inter alia*, violate the law relating to the status of persons are prohibited (see § 1, para 2, CC). There can be no doubt that the provision governing maternity is a fundamental norm establishing the civil status of a person. The legal regulation of paternity by means of one of the three presumptions of paternity (see § 776 ff, CC) and the broader kinship relationship in general (§ 771 ff, CC) derives from this provision.

Violation of the prohibition on the status of persons is punishable by absolute nullity, which the court will consider *ex officio* (see § 580, para 1, CC, and § 588, CC). A person or his or her civil status may not, by its nature, be the subject of any contract. This must be the basis for answering many questions concerning surrogacy or the (in)validity of a surrogacy contract. Králíčková, 2022, p. 83 ff.

¹⁶ Some foreign legislation expressly provides that agreements and contracts that contravene the mandatory norm that bases maternity on the legal fact of birth are null and void. See e.g., § 82 of the Slovak Act on the Family. For details, see Pavelková, 2013, p. 515 ff.

¹⁷ With this significant action, the enlightened legislator reacted very strongly and categorically to the unfortunate previous practice of application, enshrined in the principles and regulations previously in force, according to which the mother of an illegitimate child

firmly upheld the ancient Roman legal doctrine of *mater semper certa est*, conceiving of maternity based on the child's origin". According to this General Civil Code, the identity of the mother was unquestionable in the spirit of the philosophical basis of the General Civil Code. For its time, the General Civil Code was a progressive work compared with the French Code Civil, which was based not on the fact of birth but on the theory of the recognition of a child born out of wedlock by his or her parents.¹⁸

Surrogacy is not regulated or prohibited in the Czech Republic. However, the Civil Code "mentions" it in the context of adoption (§ 804, CC, for details, see below). In continental Europe, an explicit ban on surrogacy prevails. Surprisingly, the recent intention of the Ministry of Justice of the Czech Republic deals with this matter quite differently from European standards. The intention to explicitly regulate surrogacy by law has been made public, challenging the centuries-old principle that the mother of a child is determined by its birth (see below, part 4).

Many legal systems, including the Czech one, allow assisted reproduction both for a married woman and a woman from an "infertile unmarried couple" (Act No 373/2011 Sb., on Specific Health Services, as amended). There are relevant consequences for the legal regulation of parenthood as regulated by the Civil Code, especially because "new" situations require "innovative" solutions.¹⁹ Donation of genetic material is fundamentally irrelevant, both in the case of the mother and the father of the child. Let us stress that surrogacy is not regulated as a "method of treatment for infertility", unlike several foreign laws. It should be added that some legislation provides for the possibility of dealing with "infertility" just through surrogate mothers. The approach of legislators to how the child's "intended mother" becomes a "legal mother" varies.²⁰ However, in line with the European Court of Human Rights case law and its other activities, adoption is the only legal way to become a "legal mother" in Czechia.²¹

was not obliged to mark not only the name of the procreator but also her name when registering the child at birth.

¹⁸ On the development of this question cf. Judgment of the Grand Chamber of the ECtHR in *Odièvre v. France* of 13 February 2003, Application No 42326/98.

¹⁹ Králíčková, 2014, p. 71 ff.

²⁰ Scherpe, 2019.

²¹ Advisory opinion of 10th April 2019 in Request No P16-2018-001. Available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%5B%5B%22003-6380464-8364383%22%5D%5D%7D> (Accessed: 17 July 2024).

Czech paternity legislation provides that if a child is born to a married woman, her husband is considered the father (§ 776, CC). If the mother of the child is not married, the father of the child is to be the man whose paternity is established by the same declaration of the mother and this man (see § 779, CC) or the man who had sex with the mother of the child during the so-called decisive period and the court decided on his fatherhood (§ 783, CC).²²

The status of paternity in several European countries is based on similar assumptions. The differences are mainly in the (non-)existence of denial periods, their nature, the active legitimacy of the child or the putative fathers to file a petition for the establishment of paternity or denial of paternity, and the consequences caused by assisted reproduction.²³

As regards assisted reproduction in Czechia, the Czech Civil Code stipulates that if assisted reproduction has occurred, the gamete's donation is not decisive. The man from the "infertile couple", married or *de facto*, who consented to the process of assisted reproduction based on informed consent will be registered as the father of the child (see especially § 778, CC). This man can only deny his paternity if he proves that the child's mother became pregnant by "means other than assisted reproduction" (§ 787, CC). In practice, many problems can and do occur; for instance, subsequent marriage to a man other than the man from the "infertile couple". The Civil Code does not have special provisions for these situations. This means that, for instance, in the event of a subsequent marriage to another man, the mother's husband will be considered the father of her child, and it will be up to him (and her) whether he (or she) uses the legal possibility of denying his paternity. It should be added that the child has no right of denial, nor does the right of denial belong to any man apart from the child's "legal father".

Adoption is an alternative method of becoming a "legal parent" in Czechia. It is always a status change. In the case of a minor child, it is a full adoption. Hence, adoption of a minor child must be viewed as an emergency, subsidiary solution to the crisis of the child's family of origin.²⁴ If there are close relatives of the child who are willing and able to provide care for the child personally, preserving family bonds will always take precedence over adoption by a non-relative (§ 822, CC). The law has especially regulated the issue of the "adoptability" of the child and many

²² Králíčková et al., 2022, p. 173 ff.

²³ In details, see Ignovska, 2015.

²⁴ Králíčková, 2022, pp. 83–100.

other conditions since 1998, particularly due to the international conventions.²⁵

Perhaps surprisingly, the Civil Code lifts a ban on adoption among close relatives in the case of surrogacy, although close family ties used to be traditionally a disincentive for adoption. The lawmaker, being under quite a strong pressure, relinquished this natural, social, and legal ban. As stressed above, the main authors of the Civil Code did not intend to regulate surrogacy as such at all.²⁶ However, the Civil Code currently stipulates that adoption is excluded among persons who are relatives in the direct line and siblings, except for kinship based on surrogate motherhood (§ 804, CC). It should be noted that medical law has never regulated surrogate motherhood in Czechia or former Czechoslovakia. However, surrogacy is a reality today. As mentioned above, the child's mother is a woman who delivered the child (§ 775, CC). Hence, adoption is the only "legal way" intended parents can become "legal parents". Of course, if the "intended father" is a "biological father" of the child as well, he can become the "legal father" by using the second presumption of fathership based on the agreement with the child's mother described above (§ 779, CC). Unfortunately, it is sometimes misused in praxis.

It is important to note that in accordance with the Act on Registered Partnership, registered partners of the same sex are prohibited from adopting a minor child jointly (§ 800, CC) or becoming joint foster parents of minors, as only married couples of the opposite sex are allowed to do it (§ 964, CC).²⁷ However, according to the Civil Code's most recent innovation (Act No 123/2024 Sb., effective since 1 January 2025), which established a partnership for same-sex couples, a partner can also become the child's adoptive parent if the other partner is the child's parent (see § 800, para 1, CC, as amended).

²⁵ Králíčková, 2003, p. 125 ff.

²⁶ Eliáš and Zuklínová, 2001 and 2005.

²⁷ The situation of same-sex couples in relation to children has historically been difficult in the Czech Republic. In 2016, some changes were done in this field. The Constitutional Court of the Czech Republic found that the provision that status registration of partners of the same sex (of itself) is an obstacle for the adoption of a minor child by one of the registered partners, is discriminatory. That is why, this provision that prohibited a single adoption by one of the partners during the registered partnership (§ 13, para 2, Act on Registered Partnership), was cancelled. See the Ruling of the Constitutional Court of the Czech Republic from 14 June 2016, No Pl. ÚS 7/15. It is available on <http://nalus.usoud.cz/Search/Search.aspx> (only in Czech). There were dissenting opinions.

2.3. On the recognition of the family status instruments issued abroad

Here we only briefly refer to selected provisions of the law governing the recognition of foreign status decisions, which is enshrined in the Czech Republic in the Private International Law Act (Act No 91/2012 Sb., as amended, hereinafter “PILA”). This act is a universal regulation (not only) for family law relations with an international (cross-border) element where the facts are not regulated by instruments of international law (international treaties) or directly applicable EU rules (regulations).²⁸ The provisions on the relationship between spouses, parents, and children; the determination of the applicable law and the recognition of foreign decisions on divorce of the marriage and connected issues, and the determination and denial of parenthood or adoption are also relatively traditional and conservative. It is for the Supreme Court of the Czech Republic to declare that decisions on divorce and parenthood are recognised if at least one of the parties to the proceedings is a citizen of the Czech Republic (§ 51, § 55, PILA). Regarding recognition of the decision of adoption (§ 60, PILA), it is up to the district courts (§ 16, PILA). Nevertheless, the apparent conflict with public policy is considered a key provision preventing the recognition of a foreign judgment in general (§ 15, para 1, e, PILA).²⁹

3. Law in action: the Constitutional Court’s case law

As mentioned in the abstract, many states are now faced with requests from their citizens to register a foreign-born child, particularly through surrogacy. These often involve married homosexual couples, as assisted reproduction and its “new forms” present a challenge for all. Surrogacy is not just an academic controversy; it is also a matter of resolving the predicaments of specific people. There is no doubt that the subsequent decision of the Constitutional Court of the Czech Republic was quite crucial for the development of Czech family law, especially for the interpretation of the rights of a child conceived through assisted reproduction and born by a

²⁸ Králíčková, Kornel, 2024, p. 31 ff.

²⁹ The Ruling of the Supreme Court of the Czech Republic from 31 July 2024, No 24 Cdo 2157/2022. Available at: [https://www.nsoud.cz/Judikatura/judikatura_ns.nsf/\\$\\$WebSearch1?SearchView&Query=%5Bspzn1%5D%20%3D%2024%20AND%20%5Bspzn2%5D%3D%20Cdo%20AND%20%5Bspzn3%5D%3D2157%20AND%20%5Bspzn4%5D%3D2022&SearchMax=1000&SearchOrder=4&Start=0&Count=15&pohled=1](https://www.nsoud.cz/Judikatura/judikatura_ns.nsf/$$WebSearch1?SearchView&Query=%5Bspzn1%5D%20%3D%2024%20AND%20%5Bspzn2%5D%3D%20Cdo%20AND%20%5Bspzn3%5D%3D2157%20AND%20%5Bspzn4%5D%3D2022&SearchMax=1000&SearchOrder=4&Start=0&Count=15&pohled=1) (only in Czech) (Accessed: 9 July 2024).

surrogate mother abroad. It is to the credit of the Constitutional Court of the Czech Republic that many of the abstract rules mentioned above on status law and recognition of foreign court decisions have been overcome in practice, in particular cases, in favour of minor children, in their best interest. Now, I present the details of a key decision rendered by the Constitutional Court of the Czech Republic that has influenced the practice or decision-making of the Supreme Court of the Czech Republic in the context of the best interest of the child. The facts of this decision are as follows:³⁰

In 2013, a child was born through a surrogate mother under a contract with two married men as “intended parents” in the USA. The embryo was created through assisted reproduction, with the egg being from an anonymous donor and the sperm of “intended parents”. As the child was conceived through assisted reproduction, neither of the men knew how things were going and were not going to find out. However, by the nature of things, only one of the men was also the “biological or genetic father” of the child. If “legal parentage” is involved, before the birth of the child, the Superior Court of the State of California for Los Angeles County has declared that pursuant to the surrogacy agreement between “intended parents” and the surrogate mother, the surrogate mother is not the “legal parent” of the then-unborn child, and that these two men are “legal parents”. It further ruled that these men would be listed as “legal parents” on the child’s birth certificate when the child was born. Consequently, after the birth of the child, the birth certificate issued by the State of California listed one man in the “father/parent box”, and the other man was listed in the “mother/parent box”. Because one of the men was a Czech state citizen³¹ who regularly visited the Czech Republic with his husband and the child and was interested in maintaining contact with “his country”, he sought to register the child in the Czech Republic as well. It was not only a matter of registering both “legal parents” of the child in the Czech registry office and issuing a birth certificate to the child in accordance with the American birth certificate but also ensuring that the child acquired Czech citizenship. However, the registry office in Prague refused to register the child and advised the parents to appeal to the Supreme Court of the Czech Republic to

³⁰ The Ruling of the Constitutional Court of the Czech Republic from 29 June 2017, No I. ÚS 3226/16. Available at: <http://nalus.usoud.cz/Search/Search.aspx> (only in Czech) (Accessed: 7 July 2024).

³¹ The other one was a citizen of Denmark.

uphold the California court's decision in harmony with the rules settled by the Private International Law Act (see above for details, 2.3.).

In 2015, the Supreme Court of the Czech Republic partially recognised the judgment of the California court on parenthood only in relation to "one father". According to the Supreme Court, it was not contrary to public policy if the child was conceived through surrogacy (sic!). However, from the court's reasoning, it was reported that the parenthood of the "second father" was not recognised as manifestly contrary to public order and thus in breach of law (§ 15, para 1, e, PILA). Granting the application with respect to the recognition of the "second father", parenthood would effectively set up a situation corresponding to the joint adoption of a child by two persons of the same sex, which the Czech status law did not accept (see § 800, CC). The child was subsequently issued a birth certificate with only one "legal father" listed, and the "mother's box" was left blank.

Subsequently, in 2017, based on a constitutional complaint, the Constitutional Court of the Czech Republic overruled the judgment of the Supreme Court of the Czech Republic. The Constitutional Court of the Czech Republic declared a violation of the right of the child to take his or her best interests as a primary consideration in decision-making. Status rights of the child to continuity of the civil status established abroad were stressed, as well as the best interest of the child in the right to family life established on the "legal basis". According to the Constitutional Court's ruling, a foreign judgment establishing the parenthood of a child of two persons of the same sex should be recognised in a situation where the family relation and bounds have already been established between them *de facto* and *de jure* on the basis of surrogacy. It was concluded that 'If family life between persons, established on a legal basis, already exists, all public authorities must act so that this relationship can develop, and the legal safeguards that protect the relationship between the child and his or her parent must be respected'.³²

It should be added that the Supreme Court of the Czech Republic currently recognises foreign decisions on the "legal parenthood" of two men or two women, following the decision of the Constitutional Court of the Czech Republic just analysed. Furthermore, in connection with the case law of the Constitutional Court of the Czech Republic on the recognition of "same-sex parenthood" towards a child born through a surrogate mother

³² Ibid. Paragraph No 55, Conclusion.

established abroad, the public law regulations have been amended. The new decree established the possibility of registering same-sex parents in the birth register where the child is registered. It is now possible for a child to have the “gender-neutral parents” in the birth register and birth certificate: “father/parent” and “mother/parent” instead of “mother” and “father”.³³

However, regarding the adoption of the child by same-sex parents, it should be noted that the Constitutional Court of the Czech Republic has consistently ruled the non-recognition of a foreign adoption judgment as constitutional if the adoption would not be permissible under the substantive provisions of the Czech Civil Code. If parenthood is established via adoption (even after surrogacy), it is not recognised in the Czech Republic because foreign adoption decisions must be scrutinised from the perspective of the rule that a common adoption of a child is possible only by spouses (§ 800, CC). As mentioned above, only a man and a woman may enter marriage in the Czech Republic (§ 655, CC).

4. For and against surrogacy

As the Civil Code explicitly “mentions” surrogacy in relation to adoption (§ 804, CC), a Pandora’s box is gradually opening. Private clinics, particularly, offer surrogacy without any legal regulation. Numerous problems arise from the Czech Republic’s emergence as a “promised land” for surrogacy, even for many women from countries where surrogacy is explicitly prohibited and criminalised. It should be reiterated that the main creators of the draft Civil Code, as well as the professional public, have favoured the preservation of the traditional concept of status rights of the child in the Czech Republic.³⁴ However, near the conclusion of the legislative process, a provision “mentioning” surrogacy was inserted in the legislative draft of the Civil Code. As stated above, the aim was to break the ban on adoption between close relatives, that is, all relatives in the direct line and between siblings. The justification provided was that “in practice it happens”, and it needs to be “legally treated”.

It should also be recalled that surrogacy has never been regulated or prohibited in the territory of the present-day Czech Republic. Nor has it ever

³³ Decree of the Ministry of the Interior No 174/2023 Sb., which amended the Decree implementing Act No 301/2000 Sb., on Civil Registers, Names and Surnames and on amendments to certain related acts, as amended.

³⁴ See Eliáš and Zuklínová, 2001 and 2005.

been anchored as a “method of treatment for infertility” by health regulations. However, it must be noted that the courts in the Czech Republic have addressed the problems associated with surrogacy, which has been extensively critiqued in the literature.³⁵

In the context of the European reality,³⁶ that is, legal regulations mostly prohibiting surrogacy, the Czech legislator is also trying to regulate this “burning issue”.³⁷

In 2023, a proposal to amend the Civil Code and the Criminal Code was filed by a group of MPs.³⁸ According to the authors, the bill’s objective is to prevent surrogacy as a specific form of human trafficking, both of women who are used as surrogate mothers and of the children they give birth to. As far as the Civil Code is concerned, a proposal was made to abrogate the provision allowing adoption between relatives if surrogacy was used (see § 804, CC). It is surprising that a few entities, such as the Supreme Court of the Czech Republic and the Ministry of Justice of the Czech Republic, supported the proposal. Other bodies had negative opinions. Subsequently, the government of the Czech Republic discussed and considered the draft law and finally adopted a dissenting stance. A report indicated that a ban on surrogacy may not lead to the desired goal; that is, surrogacy will not be implemented, as intended parents will be able to undergo surrogacy abroad, often in countries that have very benevolent or no regulation of surrogacy. Such “reproductive tourism” then entails additional difficulties and legal uncertainty not only for the “intended parents” and the surrogate mother but above all for the child born through surrogacy. In this connection, it was further pointed out that, when considering an application for the recognition of parenthood established abroad, the Czech Republic is bound by the *advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, issued by the Grand Chamber of the European Court of

³⁵ For details critically Haderka, 1986, pp. 917–934.

³⁶ Garayová, 2022, p. 65 ff.

³⁷ For more see Valc, 2024, pp. 24–40.

³⁸ Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. IX., Draft No. 424. For the original text see <https://odok.cz/portal/veklep/material/ALBSCR7AXEQM/> (Accessed: 12 August 2024).

Human Rights.³⁹ The conclusions of this opinion imply that the state is obliged to consider the best interests of the child as a primary consideration when deciding on the legal recognition of an existing relationship between the “intended parent” and the child. A general and absolute prohibition on the legal recognition of the “intended parents’ parenthood” is incompatible with the best interests of the child, which requires that each situation be examined considering the individual circumstances of the case.⁴⁰

Subsequently, in 2024, the Ministry of Justice of the Czech Republic announced on its website that the Minister of Justice had submitted a plan for comprehensive legal regulation of surrogacy called “Analysis of the Institute of Surrogacy” to the Government of the Czech Republic. According to the press information, ‘The aim of this initiative is to create a clear and legally secure framework for surrogacy, which still lacks explicit legal regulation in the Czech Republic’.⁴¹ It was stressed that ‘surrogacy represents an important alternative for couples who cannot have a child naturally to become parents’. It was admitted that ‘the Czech legal order does not prohibit surrogacy, but the lack of explicit legal regulation means that surrogacy is implemented in practice in a kind of legal vacuum. This then has a negative impact on the intended parents, the surrogate mother, other entities involved in the implementation of surrogacy (especially health service providers) and, above all, on the interests of the child born from surrogacy’.⁴² The Minister of Justice added that ‘We have prepared material which contains not only a detailed analysis of the current legal situation in the Czech Republic but also a proposal for a solution suitable for the Czech environment, taking into account the case law of the European Court of Human Rights’. He underlined that the material was reviewed by the working group, with experts from the Ministry of Health, the Ministry of Labour and Social Affairs, the Ministry of the Interior, and with the

³⁹ Advisory opinion of 10 April 2019, in Request No. P16-2018-001. Available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22003-6380464-8364383%22%7D> (Accessed: 17 July 2024).

⁴⁰ For more <https://odok.cz/portal/veklep/material/ALBSCR7AXEQM/> (Accessed: 12 August 2024).

⁴¹ The Government discussed the material on Wednesday, 21 August 2024. For more see <https://justice.cz/web/msp/rozcestnik/-/clanek/pavel-bla%C5%BEek-p%C5%99edlo%C5%BEil-vl%C3%A1d%C4%9B-z%C3%A1m%C4%9Br-pr%C3%A1vn%C3%AD-%C3%BApravy-n%C3%A1hradn%C3%ADho-mate%C5%99stv%C3%AD> (Accessed: 18 September 2024).

⁴² Ibid.

representatives of the coalition political parties, experts, and representatives of health service providers in the field of assisted reproduction.⁴³

Regarding details, the proposed legislation on surrogate motherhood is based on the following principles:

- altruism, which means that surrogacy will only be possible on a non-commercial basis, with no financial remuneration for the surrogate mother, except for reimbursement of costs associated with pregnancy and childbirth;
- infertility, or adverse health conditions, or health indications or health obstacles on the part of the “intended mother”;
- strict medical and other conditions for the surrogate mother, including age, and the rule that the surrogate mother’s own eggs must not be used to fertilise the surrogate mother;
- genetic link to the “intended parents”, which means that the germ cells of at least one of the “intended parents” must be used;
- the prior court approval of surrogacy, which means that the “intended parents” will be legally recognised as the child’s parents from the moment of the birth, and the surrogate mother will not have a “legal parental relationship” to the child.

The press release concluded with the statement that ‘The adoption of a legal framework for the implementation of surrogacy in the Czech Republic will ensure a uniform approach to the use of this alternative way of becoming a parent. In particular, by setting out the conditions for intended parents in accessing surrogacy and the requirements for a woman to become a surrogate mother. Positive legal regulation of surrogacy will not only provide adequate protection for the rights of all persons concerned but will also ensure legal certainty in their legal position’.⁴⁴

Unfortunately, it was not possible to find more details or specific provisions that would regulate the issue, which should be incorporated into the Civil Code and the Act on Specific Health Services, or into procedural regulations, on the official website. We can only add that this “new approach” of establishing motherhood, or parenthood, will completely change the concept of status law in the Czech Republic as regulated traditionally in the Civil Code. In particular, the fact that the “intended mother” of the child will become the “legal mother” of the child directly on

⁴³ Ibid.

⁴⁴ Ibid.

the basis of a court decision will contradict the concept of legal regulation of status rights not only under the Czech legal system but also with the concepts of legal regulations of neighbouring states, European standards, and finally with the abovementioned advisory opinion of the European Court of Human Rights calling for adoption as the only “legal way” to become “legal parents”.⁴⁵

5. Conclusion

As has already been said, nothing is immutable, not even the forms of family life. It is a question of how the legal order should respond to social changes, people’s needs, and wishes. Assisted reproduction carried out in accordance with legal rules or legal limits undoubtedly helps to address human infertility and the desire for a child. However, the limits must be reasonable.⁴⁶ If they are too strict, they are circumvented. This does no good, especially for children, whose best interests must be a primary consideration. Moreover, when there are no or few limits, more legal problems could arise. It is generally a matter of balancing competing subjective rights proportionally.⁴⁷ Wholly *de facto* conceptual changes to status law as proposed by the Ministry of Justice of the Czech Republic in relation to the legalisation of surrogacy are more likely to cause uncertainty and raise many questions that will be very difficult to answer. The best interests of the child are “side-lined”, as only the desire of “infertile couples” for a child is considered.

However, as highlighted above, the Constitutional Court’s decision on the recognition of foreign decisions based on legal process, social reality, or family life should be upheld.⁴⁸ A child has the right to a continuous civil status if it was acquired through “legal means”, albeit through surrogacy

⁴⁵ Advisory opinion of 10 April 2019, in Request No. P16-2018-001. Available at: [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22003-6380464-8364383%22%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22003-6380464-8364383%22%7D) (Accessed: 17 July 2024).

⁴⁶ Available at: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (Accessed: 1 June 2024).

⁴⁷ Králíčková, 2010.

⁴⁸ See also the Proposal for a Council of Europe Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. Document 52022PC069.COM/2022/695. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0695> (Accessed: 15 September 2024).

implemented abroad.⁴⁹ The registration of two men or two women as parents of the child in a vital register in Czechia is a sensible solution.⁵⁰ Furthermore, as the Constitutional Court of the Czech Republic has ruled, abstract regulations, especially public policy, must “give way” in this case to the rights of the child and his or her best interests.

⁴⁹ Králíčková, Kornel, 2024, p. 31 ff.

⁵⁰ Králíčková, Nový, 2017, p. 524 ff.

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