

ON SOME LEGAL ISSUES OF ASSISTED REPRODUCTION IN THE CZECH REPUBLIC

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Abstract

The objective of this article is to point out some shortcomings of legal regulations governing assisted reproduction in the former Czechoslovakia and in the Czech Republic that have been accompanying infertility treatment since the time when the related methods were discovered. For many years a relevant legal regulation was missing completely and since 2006 it has been affected by insufficient interconnection of the regulation of assisted reproduction under the public law with the Family Act and civil law in general, including observation of international legal documents applicable to the Czech Republic, particularly the Convention of the Rights of the Child.

Key words: *assisted reproduction; infertile couple; methods of assisted reproduction; genetic material; Convention on Human Rights in Biomedicine; Convention of the Rights of the Child; Charter of Fundamental Rights and Freedoms*

INTRODUCTION

The fact that in late 1970s medicine managed to perform an artificial insemination in a female using the methods of assisted reproduction mentioned below was reflected in the then Czechoslovak body of law in a completely nonstandard manner. With the effect from 1 April 1983 a new paragraph 2 was introduced into the Section (§) 58 of the Family Act, which regulates denial of paternity, reading as follows: “Fatherhood to a child born during the period between the one hundred and eightieth day and the three hundredth day from artificial insemination executed with the consent of the wife’s husband cannot be denied. However, the fatherhood can be denied if the petitioner proves that the child’s mother became pregnant otherwise” (Act No. 94/1963 Coll.).

“Conditions for the performance of artificial insemination were then regulated

only with a directive by the Ministry of Health No. 18/1982, registered in Section No. 8/1983, published in the Bulletin of the Ministry of Health of the Czech Republic. Although the directive was a part of subordinate legislation, it established, among other things, that artificial insemination may be performed only in married women. Following the issuance of the Charter of Fundamental Rights and Freedoms it became absolutely obvious that this was a case of discrimination against unmarried women” (Radvanová 2007). One remark should be added to the effect that issuance of ministerial directives without a previous legal empowerment shall be generally deemed impermissible.

This regulation of assisted reproduction, if one may call it that way at all, was taken over on 1 January 1993 by the Czech Republic as the successor state of the former Czechoslovakia. Considering the fact that a new constitution was valid

from the same day and that the Charter of Fundamental Rights and Freedoms and the Convention of the Rights of the Child had been adopted before, to name just the most fundamental and constitutional and international law documents, it is beyond doubt that the legal regulation of artificial insemination was in conflict with the those legal standards of the highest legal power. Nothing changed even after the Family Act had been amended in 1998 (executed by the Act No. 91/1998 Coll) and thus only a few years later a new term of “assisted reproduction” was introduced into the Czech law on 1 June 2006. This was done through the Act No. 227/2006 Coll., on Research on Human Embryonic Stem Cells and Related Activities and on Amendment to Some Related Acts, or more specifically, through the indirect amendment of a years-old Act No. 20/1966 Coll., Act on Public Health Care, contained therein, i.e. beyond any doubt a public law regulation.

I cannot conceal my serious objections against such a legislative procedure because in my opinion assisted reproduction has a very important impact on fundamental human rights and private law, which has been continually neglected, let alone the ethical aspect of the issue mentioned by many other authors.

According to the wording of the act, assisted reproduction is defined as “procedures and methods that involve manipulation with embryonic cells or embryos, including their storage, for the purposes of infertility treatment in women or men. The procedures and methods include:

- a) collection of embryonic cells
- b) artificial insemination in women, specifically
 1. fertilization of an egg with a sperm outside the woman’s body,
 2. transfer of an embryo into the woman’s reproductive organs,
 3. introduction of embryonic cells into reproductive organs of the woman” (Act No. 20/1966 Coll.).

At the very beginning of this section it should be noted that, although the legal regulation of assisted reproduction has existed in the law of the Czech Republic since 2006, no broad consensus on the issue of assisted

reproduction exists, not only worldwide but also in EU countries. The current status is described in detail by Dostál (2007).

A broad consensus may be perhaps found on the issue of permissibility of assisted reproduction methods that use the own genetic material of the infertile couple, while the possibilities to use reproductive cells from donors have been generally considered more controversial and in some countries they have been even banned (e.g. the Austrian legal regulation prohibits use of donor’s reproductive cells for assisted reproduction).

I personally believe that, from the viewpoint of valid legislation, in case of embryos it is necessary to discern between the *in vitro* and *in vivo* stages. While in the former case the embryo and its handling is protected particularly by the Convention on Human Rights in Biomedicine, once the embryo is placed into the woman’s reproductive organs, i.e. during the *in vivo* stage, it becomes a nasciturus and its rights are protected by other legal regulations. According to the Charter of Fundamental Rights and Freedoms, everybody shall be entitled to life, while the human life is worthy of protection even before the birth. The Civil Code establishes that even a conceived child has the capacity to exercise rights and obligations, as long as it is born alive (Civil Code No. 40/1964 Coll.). This capacity to exercise rights and obligations is understood in the legal theory as conditional and therefore it does not arise if the conceived child is not born or is born dead.

Legal aspects of assisted reproduction

In the introductory section I have mentioned my objections against the Czech legal regulation which regulates assisted reproduction in the public law in terms of “how the assisted reproduction is performed”, without the much needed more detailed links to fundamental rights of the involved persons in various “positions” in respect to assisted reproduction, not to speak about the rights of a child conceived or born in this way.

I started writing an article on this topic in November 2011 based on an available governmental proposal of the Act on specific health services, which contained new legal regulations of assisted reproduction, and also based on a governmental proposal of the new Civil Code. At that time I was considering

very carefully whether I should compare the then valid legal regulations for assisted reproduction with those governmental proposals or not. Due to the usual course of the legislative process I decided not to compare them and used the currently valid legal regulations. In the course of the reviewing process the mentioned proposals were approved by the Czech Republic's Parliament and I was given the opportunity to finalize my article. Therefore the section 2 presents the legal regulations as they were in effect until recently and that are now repealed and notes about the new legal regulations are provided where required as a result of the approved changes. Actually, the changes are not many. In section 4 I have presented my opinion of the newly adopted legal regulations which came into effect on 1st April 2012 in the case of assisted reproduction and in the case of the Civil Code the legal effect will start only on 1st January 2014.

The previously valid and now repealed definition of an infertile couple was that of man and woman who have filed a written application for assisted reproduction to the authorized medical facility, in which the couple expressed their will to be jointly treated for their infertility.

Excluded from infertility treatment are only infertile couples with an obstacle to the marriage, i.e., although not expressly stated, it means beyond any doubt the obstacle of kinship, which means that the man and woman who form the infertile couple shall not be first-degree relatives in direct line of descent or siblings.

The original precondition set in 1982 that the infertile couple shall be married was no more present in the Act on Public Health Care approved in 2006, however, without adequate consequences in the Family Act, which means the denial of paternity of a child born within the time specified by the act after in vitro fertilization **by the husband** of the mother, who agreed with the fertilization, is excluded (with the exception of cases where evidence is submitted to prove that the women got pregnant otherwise), while the denial of paternity by a man who agreed with artificial insemination and who is not the mother's husband, is not expressly regulated in the act. As a result, the specialized literature sometimes states the so-called first and half

presumption of paternity of the man who agreed with the artificial insemination of the woman and who is not her husband; nevertheless, from a legal point of view those issues should be considered highly arguable (Hořínová 2007). Although provisions of Section (§) 787 of the new Civil Code No. 89/2012 Coll. have corrected this condition and excluded the option to deny paternity for a man who had given his consent to artificial fertilization and who is not the husband of the mother, we will need to wait until it comes into legal effect on 1st January 2014.

From the objective point of view, one of the following conditions has to be met for the use of assisted reproduction methods: either it is little probable or totally impossible for the woman to get pregnant naturally due to health reasons or there is a documented risk of genetic-based diseases and disorders.

The legislator thus absolutely insufficiently formulated preconditions for the potential use of assisted reproduction methods, particularly it did not deal with the negative definition, when such methods cannot be used for various reasons; as examples we can present cases when the woman is able to conceive, either naturally or by means of assisted reproduction methods, but the fetus dies at a certain stage of the pregnancy due to spontaneous abortion, the woman has a history of intrauterine pregnancy or other cases.

The application or non-application of assisted reproduction methods in a particular case of an infertile couple is thus left completely to a professional judgment of the authorized medical establishment and the new legal regulation has not changed the situation very much either.

An application for infertility treatment made by an infertile couple shall include, among other things, the man's approval with the artificial insemination of the woman and the approval needs to be repeatedly expressed before performance of each artificial insemination, while the application shall not be older than 24 months and it shall be a part of the woman's medical records. The issue of the approvals is addressed in detail by Frinta (2007). On changes in this field see the section 4 hereof.

I have analyzed possible options for an infertile couple planning to undergo infertility

treatment; in this country the two people do not have to be married while in some other countries marriage, or at least a stable relationship between man and woman, is required as a precondition (Dostál 2007, table, p. 57), so I have come to the inevitable conclusion that the valid legal regulation of assisted reproduction also absolutely fails to discern between biological parenthood and legal parenthood; the differences are implied only indirectly from a list of individual legally regulated methods of assisted reproduction. The methods may either use genetic material of the infertile couple exclusively or use genetic material of one of the persons only (egg or sperm) and naturally it is also possible to use exclusively “foreign” genetic material, i.e. from anonymous donors. Due to the legally guaranteed strict anonymity of donors of genetic material the Czech legal regulation of assisted reproduction in the last mentioned case totally disregards the right of the child to know its parents, as granted under the Convention of the Rights of the Child signed by the Czech Republic. Although the Convention of the Rights of the Child grants to the children the right to know their biological parents, if this is possible, I do not think that the option to know one’s biological parents may be *a priori* excluded by a national law which requires keeping confidential the identity of donors of genetic material. A detailed analysis of legal aspects of the national legal regulations of assisted reproduction has been completed by Haderka (1996).

With regard to maternity, a legal fiction clearly applies that the mother is the woman who gave birth to the child, regardless of whether the genetic material was hers or donated, and the father is always the man who agreed with her insemination with the said methods. The paternity determined in this manner cannot be legally denied by the husband of the mother, unless it has been demonstrated that the concerned woman got pregnant otherwise; in absence of a positive legal regulation, for a man who is not married to the mother, the possibility to deny paternity may be inferred only *per analogiam iuris* and after 1st January 2014 according to the above-mentioned provisions of the new civil Code.

I identify myself with the view that it would be very difficult to bear the burden of proof in respect to “got pregnant otherwise”

in a potential court dispute about denial of paternity or sometimes even absolutely impossible with regard to the confidentiality of the sperm donor, as mentioned earlier by Hrušáková (2005). Not even the new Civil Code has been able to change this apt view.

As for a donor of genetic material, the law establishes that an egg shall not be fertilized with sperms that are known to come from a man who is a relative in a direct line or sibling, uncle, cousin or child of a cousin of the woman whose egg is to be used for the assisted reproduction or the egg recipient. The obstacles are thus much stricter than legal obstacles of treatment of the infertile couple and they are practically identical with obstacles to a marriage under a long-reversed general civil code (General Civil Code of 1811 No. 974 Coll.). The new Act No. 373/2011 Coll., on specific medical services, brings a truly breakthrough change into this filed – for more details see the section 4 hereof.

In this article on legal aspects of assisted reproduction I have intentionally disregarded the issue of the woman’s fertility period, which is not currently specified in the valid legal regulation and which is assessed on cases-to-case basis individually by medical specialists. The new act proposal about specific medical services says the methods of assisted reproduction can be used for women up to 55 years of age. I certainly have my own lay opinion of the age limit, naturally negative, as I do not consider the age of the women a legal issue but rather that of medicine or medical ethics. However, the general public responded to the newly proposed act with discussions about “babies for retirement” and similar comments, without considering material provision of such children born to women in the mentioned age and quality and real possibilities of their upbringing until they reach adulthood, not to speak about their position among their peers. I have provided my opinion of the new legal regulation in this field below.

I have also disregarded a deeper analysis of legal issues relating to assisted reproduction in cases where the used genetic material is exclusively from donors and I respect the fact that the Czech legal regulation makes it possible, unlike regulations in some other countries. Essentially, the issue is very similar to the much discussed issue of the so-called

surrogate motherhood, however with one fundamental difference: a surrogate mother gives birth to a child for the prospective parents and the child is subsequently, subject to meeting all applicable conditions, adopted in a respective procedure, while in the case of assisted reproduction a woman gives birth to a child and she becomes its legal but not biological mother.

In the following section I will present a court resolution which clearly demonstrates that the general public in the Czech Republic still fails to understand legal issues associated with assisted reproduction in the entire broad context, including the impacts on personal rights, and that sometimes the lack of understanding is manifested also by medical facilities performing assisted reproduction.

Assisted reproduction in a resolution issued by the Supreme Court of the Czech Republic

The Supreme Court of the Czech Republic in its resolution of 22nd June 2006, Ref. No. 30 Cdo 2914/2005 overruled resolutions by the Town Court in Prague and the High Court in Prague that dismissed an action for the protection of personal rights.

The action was filed by a married couple who had had a child of their own and wanted another. As the husband was about to undergo chemotherapy due to his oncological disease, often leading to loss of fertility, he decided for one of the assisted reproduction methods; a specialized medical facility collected four ejaculate samples from the husband before his oncological treatment and they were frozen for future insemination of his wife by means of *in vitro* fertilization (hereinafter IVF). In 2003 one of the samples was defrosted and it was found out that it could not be used for the purpose, another sample was not available as it had been defrosted previously for “control” purposes and the remaining two samples had a substandard quality. Despite that, the IVF was performed and one fertilized egg was transferred onto the wife’s reproductive organs and fourteen days after the insemination she suffered a spontaneous miscarriage.

In the action the couple claimed that, considering the husband’s infertility after the chemotherapy, the accused medical facility used a non lege artis procedure and

committed unauthorized encroachment upon his personal rights while keeping his frozen ejaculate, destroyed their chances for another child and thus encroached upon in their rights for privacy and family life.

As mentioned above, the courts of the first and second instance dismissed their action and did not find any such encroachment upon the personal rights and the right for privacy and family life, as claimed by the action. However, the Supreme Court of the Czech Republic came to the opposite conclusion in its repealing resolution issued based on an appeal by the plaintiffs. The grounds of the resolution included, among other reasons, the following:

“Pursuant to provisions of Section (§) 11 et seq. of the Civil Code, the body of a physical person-human is an integral part of his/her personality as a legal subject. In this generally accepted concept the human body, its part, product, as well as genetic material, even if separated from the body, shall not be considered a thing in the legal sense of the word. As such, if the genetic material was collected during a medical intervention with the donor’s approval for the purposes of medically assisted reproduction then such material should have been kept and used only in agreement with its purpose. This conclusion may be based on an analogy with the provision of Article 22 Convention on Human Rights in Biomedicine, Section (§) 26, paragraph 4 of the Act on Public Health and Section (§) 12 of the Act No. 285/2002 Coll., Transplantation Act. Medically assisted reproduction represents a medical preventive intervention into the reproductive abilities of an individual and it is recognized by medical science and by law. The purpose of the intervention is to contribute to the attempt to start a family also in those cases where a married couple is unable to conceive a child. It consists in using of procedures and methods that involve manipulations with embryonic cells, i.e. eggs or sperms, and embryos, including their storage. The procedures and methods include collection of embryonic cells, *in vitro* fertilization, transfer of an embryo into reproductive organs of a woman and introduction of embryonic cells into the woman’s reproductive organs. In the mentioned sense, if the medical facility damaged or destroyed during their storage the male embryonic cells donated by the husband

for purposes of *in vitro* fertilization of the wife then this represents an encroachment of the reproductive abilities of the donor which are beyond doubt a part of his bodily integrity. If such an encroachment occurred non lege artis, i.e. illegally, then it is objectively capable of encroaching upon his personality in its physical and moral integrity and thus of illegal encroaching upon the personal rights of the couple to their privacy and family life in agreement with Section (§) 13 of the Civil Code” (from the grounds of the resolution by the Supreme Court of the Czech Republic of 22nd June 2006 Ref. No. 30 Cdo 2914/2005). The grounds of the resolution contain some additional conclusions but the quoted excerpt is the most crucial.

Several notes to the new legal regulations dealing with assisted reproduction

As has been mentioned several times above, the new legal regulation of assisted reproduction is contained in the Act on specific medical services, which is a part of the so-called healthcare reform. The act was published under No. 373/2011 Coll. and it came into legal effect on 1st April 2012. With the exceptions described in this article it practically maintains the current status.

In my opinion, its positive aspect is the shortening of the time limit from submittal of an application for artificial fertilization by an infertile couple to its implementation – from the current 24 months to 6 months; the requirement for a repeated consent by the infertile couple before each artificial fertilization remains in place.

The rule continues to apply that methods of assisted reproduction may be used only for infertile couples where no obstacles exist that prevent conclusion of a marriage between the man and the woman. Infertile couples shall not be first-degree relatives in direct line of descent or siblings.

Completely surprising, however, is the fact that the new act leaves out completely, without any replacement, the up to now valid, relatively broadly formulated obstacle to the use of assisted reproduction methods in case of a potential relation between the donors of genetic material and the infertile couple (as quoted in the third paragraph on page 126).

I do not suspect that legislators intended to permit donation of gametes or sperm by relatives of the infertile couple, or even, *ad absurdum*, by relatives in direct line of descent or siblings. However, in my view it is a gross error that the legislators failed to prohibit that explicitly. The need of such a prohibition becomes very obvious particularly in cases when assisted reproduction is used for reasons of a demonstrated risk to the future child's health as a result of genetically transmitted diseases or defects carried by woman or man from an infertile couple.

This applies similarly to the other legally permitted option to use the created embryos, when an infertile couple after artificial fertilization no more requests that the embryos should be kept for their own potential future need and grants its approval that they may be used by another infertile couple. Given the required principle of anonymity of the infertile couple and donors of genetic material, I miss an express rule in the act that before any such embryo is used by another infertile couple it is mandatory to perform tests that exclude family relationship between the infertile couple and donors of the genetic material, naturally based on a previous positive and duly documented approval of such tests by the affected persons.

The act also newly establishes that methods of assisted reproduction may be used with a woman in her fertile age, until the age of no more than 49. The probable intention of the legislators was that both the conditions, i.e. the fertile age of a specific woman and the actually achieved age, should be met at the same time. However, the provision is worded quite unfortunately and so a situation may occur that artificial fertilization may be strongly demanded by a woman who is younger than 49 but who has been found, based on a medical examination of her health condition, not to be in her fertile age; also a completely opposite situation may arise that a woman will be found fit in terms of her health condition but will be older than 49; in my opinion, none of the mentioned cases may be *a priori* excluded. The up to now existing legal regulation, which was based on a professional medical evaluation of each specific woman without specification of an age limit, was therefore in my opinion better. It remains to be seen how medical facilities authorized to

perform reproduction medicine will be able to apply the new regulations in practice, e.g. whether they turn down to examine a woman older than 49 completely or whether they will use methods of assisted reproduction in contradiction with the act, particularly in absence of any sanctions established by the act for such violations.

On the other hand, it should be appreciated that the new act expressly prohibits use of methods of assisted reproduction, both artificial fertilization and donation of genetic material, to persons with limited or no capacity to enter legal acts or to persons with limited freedom as indicated in the act (e.g. under arrest, serving a sentence etc.). The text of the act also includes a more detailed description of the informed consent. Also in these cases of potential violation the act fails to contain any sanctions; sanctions may be essentially imposed on a medical facility only in case of improper management of embryos or violation of anonymity of persons involved in assisted reproduction. Also, the fine up to 100 000 CZK in case of violation of anonymity of the person by a medical facility does not seem sufficient to me as a preventive measure.

The new Act No. 373/2011 Coll., on specific medical services, does not contain derogation provisions; assisted reproduction has been by now governed by the Act No. 20/1966 Coll., on public healthcare, which has been repealed by the previous Act No. 372/2011 Coll., on medical services.

The medical documentation of infertile couples, but not that of donors of genetic material, shall be maintained in a newly established register of national reproductive health, while the registers and their keeping are not regulated by the Act on specific medical services but by the earlier approved Act No. 372/2011 Coll., on medical services. Medical facilities are under the obligation to retain data about the health condition of donors of genetic material, while maintaining their anonymity, for a period of 30 years, and they shall hand them over to infertile couples if requested and to a person born through a method of assisted reproduction after he/she reaches the legal age.

CONCLUSIONS FROM THE POINT OF THE NEW CIVIL CODE

Changes that may occur in the field of assisted reproduction after adoption of the Act on specific medical services are certainly better predictable than changes brought about after 1st January 2014 by the new Civil Code No. 89/2012 Coll.. After many decades a new integral and very extensive fundamental code of private law will come into effect, which will affect perhaps all well-established practices used in this field. In agreement with the European tradition, its second part also deals with family law issues. Also its legal form is traditional so in the field of assisted reproduction is explicitly corrects only the existing legislative gap by excluding the option to deny paternity for a man who gave his consent to assisted reproduction and who is not the husband of the mother, with the exception that it has been demonstrated that the pregnancy occurred otherwise. Therefore the legal opinion of prof. Hrušáková, quoted on page 126, on practical impossibility to bear the burden of proof in respect to “got pregnant otherwise” does not lose its justification for the future.

In a broader context of the given topic, I need to present one comment here on legal parenthood and rights of the child. The legal mother of a child born through a method of assisted reproduction from donated genetic material is the woman who gave birth to the child and the legal father is the man has given his consent to the use of methods of assisted reproduction. Once the child reaches the legal age he/she shall have the right to obtain information about the health condition of the donors of gametes and sperms. However, his/her legal parents have no legal obligation to inform the child that he/she was born through methods of assisted reproduction.

On the other hand, children adopted based on a final court resolution have also their legal parents (apart from biological parents), i.e. adoptive parents recorded as the parents in the respective register. However, the adoptive parents shall inform the adopted child about the adoption pursuant to Section (§) 836 of the new Civil Code “as soon as it seems appropriate, however by the time the child starts school at the latest”.

Also in the case of the so-called “secret adoption” (Section /§/ 837), when the adoption is kept secret from the original family of the child or, on the contrary, the biological parent and his/her consent with the adoption is kept secret, the court may decide to disclose all those facts, if it is justified by a very serious situation which threatens the life or health of the adopted child.

The new Civil Code correctly remembers to protect the rights of the child. On the contrary, I reprove the Act on special medical services that it respects confidentiality of donors of genetic material and leaves it up

to the infertile couple to decide whether it requests the information about the health condition or not, or that it leaves it up to the child to request the documents after he/she reaches the age limit, i.e. the act does not directly impose the obligation on the medical facility to transmit the information to the infertile couple when using methods of assisted reproduction. The reason is that the rights of the child to the protection of his life and health are guaranteed by international law documents and constitutional laws. i.e. by standards of the supreme legal force.

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