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Determination of Parenthood. Surrogacy. Adoption.



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Chapter 1

Definition of Parent, Parentage, Parenthood and Parental Responsibility



Definition of Parent, Parentage, Parenthood and Parental Responsibility

Fundamental concepts to be distinguished

Parent = a person in a parental relationship with a child

Parentage = the identity and origins of one's parents

Parenthood = the state of being a parent (in broader sense, not only legally)

Parental responsibility = set of duties and rights of parents



Definition of Parent, Parentage, Parenthood and Parental Responsibility

Parenthood = the state of being a parent

legal status of a person characterized by being in a parental relationship with a specific child

Motherhood = relationship between a child and their mother, or the status of a woman as a parent

Fatherhood = relationship between a child and their father, or the status of a man as a parent

(Today not necessarily linked with sex: Parent 1, Parent 2)



Definition of Parent, Parentage, Parenthood and Parental Responsibility

Different meanings of Parenthood

Biological parenthood = who is designated as a parent in accordance with the biological principles of human reproduction

Social parenthood = who exercises the social role of a parent

Legal parenthood = who is determined as a parent by the operation of law

(Psychological parenthood) = who feels himself/herself emotionally as a parent, who has the experience being the parent...



Definition of Parent, Parentage, Parenthood and Parental Responsibility

Legal parenthood = who is determined as a parent by the operation of law

Basic rule:

Legal parenthood should (in principle, in general) correspond to biological parenthood

Exception:

Legal parenthood can be exceptionally based on other facts

Social parenthood = Adoption

Assisted reproduction: consent of man to artificial insemination of his wife/partner



Definition of Parent, Parentage, Parenthood and Parental Responsibility

Biological parenthood and genetic parentage

Q: Are these two synonyms or not?



Definition of Parent, Parentage, Parenthood and Parental Responsibility

Biological parenthood and genetic parentage

Q: Are these two synonyms or not?

Biological principles of reproduction – forming together biological parenthood:

- 1) Gametes (carry genetic information) (genetic parentage)
- 2) Conception
- 3) Pregnancy
- 4) Birth



Definition of Parent, Parentage, Parenthood and Parental Responsibility

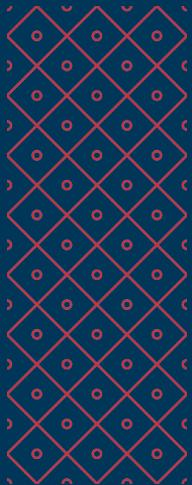
Biological parenthood and genetic parentage

Q: Are these two synonyms or not?

Genetic parentage **is one of several biological aspects** of human reproduction

As a result, biological parenthood and genetic parentage **are not synonyms**.

To avoid misunderstanding, it is recommendable to distinguish between biological parenthood and genetic parentage.



Chapter 2

Right to know



Right to know

Convention on the Rights of the Child (Art. 7 para 1):

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and **as far as possible, the right to know** and be cared for by his or her parents.

right to know = right to know who are the parents of the child, i.e., right to know the parentage (right to know its origin)



Right to know

ECtHR: Odièvre v. France (Application no. 42326/98, decided 2003)

Applicant sought identifying information about her mother (anonymous birth)

Alleged violation of Article 8 (right to private life)

Loi n° 2002-93 du 22 janvier 2002 relative à l'accès aux origines des personnes adoptées et pupilles de l'Etat (on access by adopted persons and wards of the state to information about their personal origins)

established *Conseil national pour l'accès aux origines personnelles* (National Council for Access to Personal Origins)

Disclosure of origin possible for a child with consent of both child **and mother**.



Right to know

ECtHR: Odièvre v. France (Application no. 42326/98, decided 2003)

47. [...] In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that **States must be afforded a margin of appreciation** to decide which measures are apt to ensure that the rights guaranteed by the Convention are secured to everyone within their jurisdiction.

48. The Court observes that in the present case **the applicant was given access to non-identifying information about her mother and natural family** that enabled her to trace some of her roots, while ensuring the protection of third-party interests.



Right to know

ECtHR: Odièvre v. France (Application no. 42326/98, decided 2003)

49. [...] The French legislation **thus seeks to strike a balance and to ensure sufficient proportion between the competing interests**. The Court observes in that connection that the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests. **Overall, the Court considers that France has not overstepped the margin of appreciation** which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.

Consequently, there has been no violation of Article 8 of the Convention.



Right to know

ECtHR: Godelli v. Italy (Application no. 33783/09, decided 2012)

The applicant, Ms. Godelli, was adopted after being abandoned at birth by her mother, who did not consent to her identity being disclosed.

Unlike in France, the applicant had no (even potential) possibility of obtaining any (i.e., even non-identifying) information.

57. The Court notes that, **unlike the French system examined in *Odièvre*, Italian law does not attempt to strike any balance between the competing rights and interests at stake**. In the absence of any machinery enabling the applicant's right to find out her origins to be balanced against the mother's interests in remaining anonymous, blind preference is inevitably given to the latter. [...].



Right to know

ECtHR: Godelli v. Italy (Application no. 33783/09, decided 2012)

58. In the present case the Court notes that where the birth mother has decided to remain anonymous, **Italian law does not allow a child** who was not formally recognised at birth and was subsequently adopted **to request either access to non-identifying information concerning his or her origins or the disclosure of the mother's identity**. Accordingly, the Court considers that the **Italian authorities failed to strike a balance and achieve proportionality between the interests at stake and thus overstepped the margin of appreciation** which it must be afforded.

59. **There has therefore been a violation of Article 8 of the Convention.**



Right to know

It is not an absolute right

i.e., it may be limited by the rights of others

However, it must be respected as a universal principle (to the greatest extent possible).

In the event of a conflict with other rights (protected interests), it is **necessary to seek balance, adequacy, and proportionality** within the scope of discretion (margin of appreciation).

Legislation should not deliberately create obstacles to the exercise of this right



Right to know

When it comes to question:

- 1) Assisted reproduction with anonymous donors
- 2) Surrogacy (including for same-sex couples)
- 3) Abandoning children and Baby-boxes
- 4) Anonymous births and secret (confidential) births



Chapter 3

Methods of determining parentage



Methods of determining parentage

1) Gynaecology

2) Sexology

3) Haematology (so-called blood tests)

4) Human genetics

4.1) Anthropological analysis

4.2) DNA analysis

Picture source: <https://www.vitalia.cz/clanky/dejiny-gynekologie/>



Methods of determining parentage

1) Gynaecology

- = answers whether the woman is pregnant or not
- = and if yes, when the child has been conceived

2) Sexology

- = answers whether the man/woman is fertile (is able to conceive a child)



Methods of determining parentage

3) Haematology

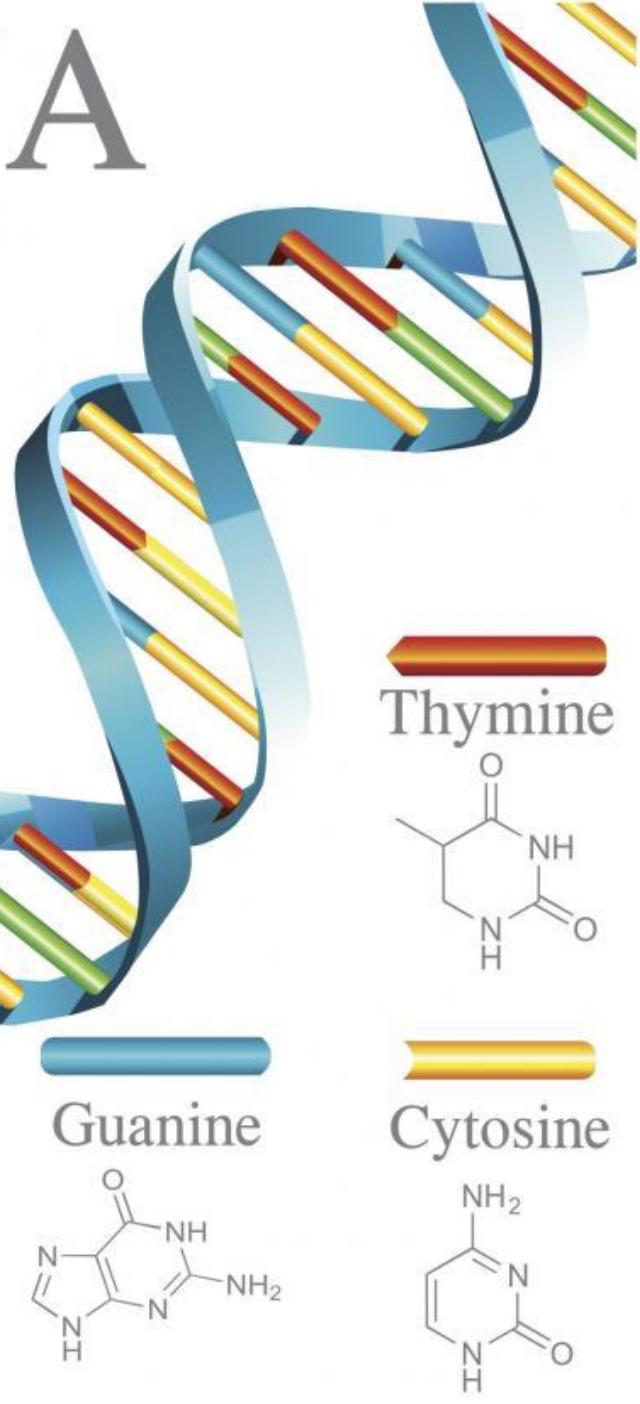
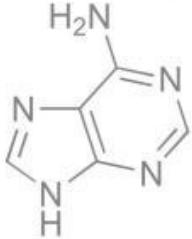
- = determining the parentage based on “blood-tests”
- = determination based only on probability
- = replaced by DNA analysis (DNA Fingerprint)

4.1) Anthropological analysis

- = comparison of the shape of certain parts of the human body, e.g., ear lobes
- = very unsure, determination based only on probability
- = replaced by DNA analysis (DNA Fingerprint)

DNA

Adenine



Methods of determining parentage

4.2) DNA Fingerprint

DNA cell:

46 human chromosomes (2 meters of DNA)

3 billion DNA subunits (the bases: A, T C, G)

Approx. 30 000 genes code for proteins performing most life functions

Picture source:

<https://empoweryourknowledgeandhappytrivia.wordpress.com/2014/09/16/dna-molecule-of-life/>



Charles
University



Methods of determining parentage

4.2) DNA Fingerprint

DNA analysis

Phase 1:

- a) Parenthood **is excluded (with certainty)**, or
- b) Parenthood cannot be excluded; then Phase 2 follows

Phase 2:

Calculation of probability = how likely paternity is



Methods of determining parentage

4.2) DNA Fingerprint

DNA analysis

Phase 1:

- a) Parenthood **is excluded (with certainty)**, or
- b) Parenthood cannot be excluded; then Phase 2 follows

Phase 2:

Calculation of probability = how likely paternity is



Hummel's Verbal Predicates

Percentage posterior probability when $Pr = 0.5$	Paternity Index (PI)	Verbal Predicate
99,75% –	> 399	Paternity practically proven
99,00% – 99,74%	99,00 – 383,6	... highly likely
95,00% – 98,90%	19,00 – 89,9	... very likely
90,00% – 94,90%	9,00 – 18,61	... likely
80,00% – 89,00%	4,00 – 8,09	indication of paternity
70,00% – 79,00%	2,33 – 3,76	only formally indicates paternity

<https://dna-view.com/hummel.htm>



Chapter 4

Mater semper certa est...



Mater semper certa est...

Roman Law:

Mater semper certa, pater incertus.

The mother is always certain, the father uncertain.

Pater est, quem nuptiae demonstrant.

The father is he whom marriage to the mother indicates.



Mater semper certa est...

Relativization of the facts related to the parentage

Genetic aspect

= relativized by the possibilities of modern medicine

Sexual intercourse

= relativized by frequent references to its obsolescence

Uterine motherhood

= stable, NOT relativized



Mater semper certa est...

Ampthill Peerage Case [1977] AC 547
(Ampthill baby case; Russell case)

In the divorce proceedings, John Hugo Russell challenged the legitimacy of his son, Geoffrey Denis Erskine Russell, 4th Baron Ampthill (b. 1921), claiming that his marriage to Christabel Hulme Hart (his third wife) had not been consummated.

[M]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition

Ampthill Peerage Case [1977] AC 547, per Lord Simon o'Glaistdale at 577.



Mater semper certa est...

**European Convention on the Legal Status of Children Born out of Wedlock
(Strasbourg, 1975)**

Art. 2

Maternal affiliation of every child born out of wedlock shall be based **solely on the fact of the birth of the child**.

Sect. 775 Czech Civil Code: A mother is a woman **who has given birth to a child**.



Mater semper certa est...

Children Act 1989

2 Parental responsibility for children

(1)Where a child's father and mother were married to, or civil partners of, each other **at the time of his birth**, they shall each have parental responsibility for the child. [...].

(2)Where a child's father and mother were not married to, or civil partners of, each other **at the time of his birth** —

(a) the mother shall have parental responsibility for the child; [...].



Mater semper certa est...

Human Fertilisation and Embryology Act 2008

33 Meaning of “mother”

- (1) The woman **who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.**
- (2) Subsection (1) does not apply to any child to the extent that the child is treated **by virtue of adoption** as not being the woman's child.
- (3) Subsection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.



Mater semper certa est...

Relativization of the facts related to the parentage

Genetic aspect

= relativized by the possibilities of modern medicine

Sexual intercourse

= relativized by frequent references to its obsolescence

Uterine motherhood (Partus – non ovum – facit maternitatem)

= stable, NOT relativized

= used as a fundamental principle both in continental legal system and in common law



Chapter 5

... or not? (Surrogacy)



Surrogacy

Traditional

surrogate's own ovum used

Gestational

no genetic link to surrogate mother

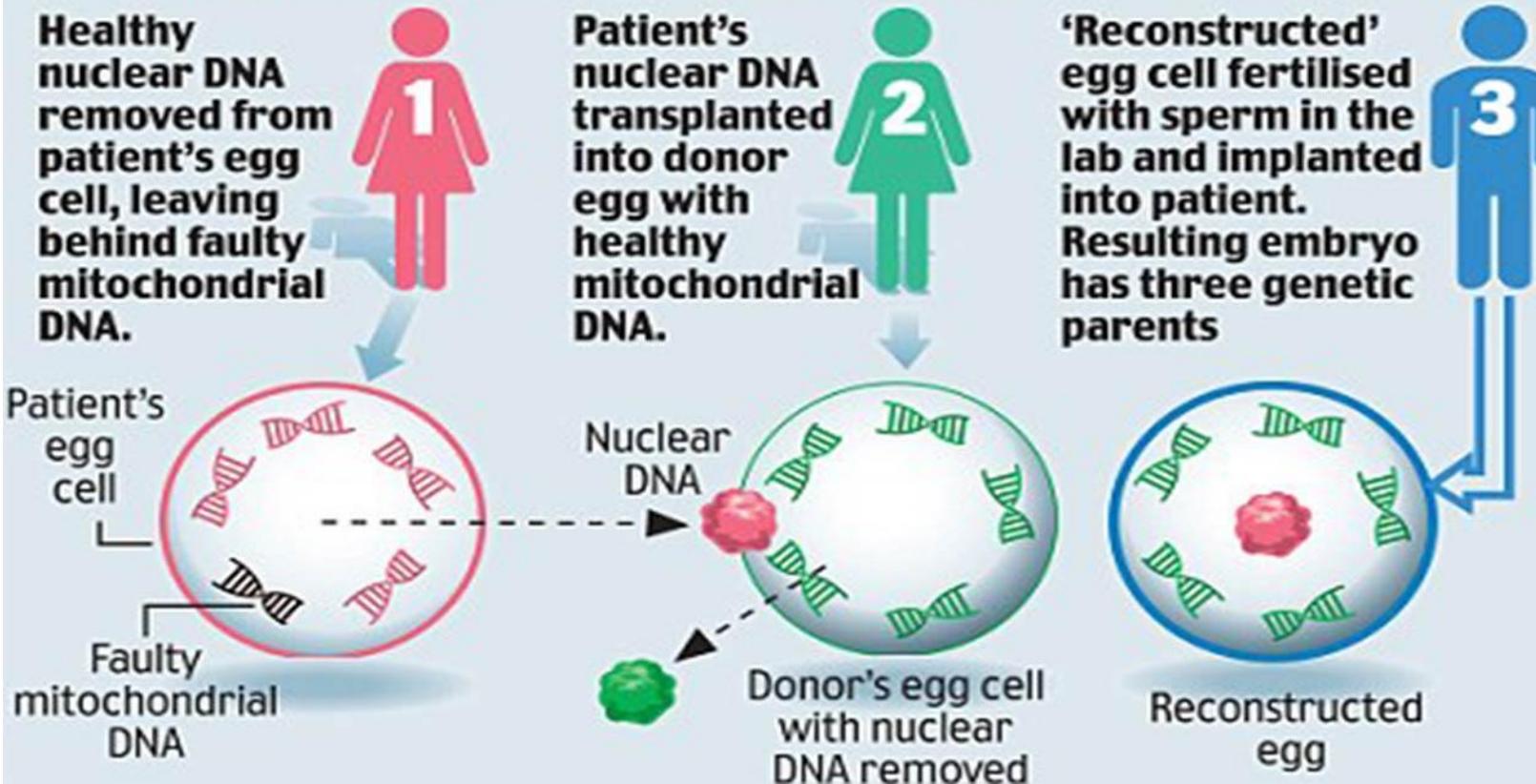
used ovum from

- a) intended (social) mother
- b) donor

Up to 3 women involved (ovum donor, surrogate mother, intended/social mother)

Surrogacy

MAKING A THREE-PARENT EMBRYO



Up to 4 women:

nuclear donor,
mitochondrial donor,
surrogate,
social mother

Picture source:
<https://www.drishtiias.com/daily-updates/daily-news-analysis/mitochondrial-replacement-therapy>



Surrogacy

Q: Which woman has the right to be designated as the (legal) mother of the child?

Q: The one who carried and gave birth to it, or the one from whom the child genetically originates?



Surrogacy

Q: Which woman has the right to be designated as the (legal) mother of the child?

Q: The one who carried and gave birth to it, or the one from whom the child genetically originates?

Partus – non – ovum principle applies!

See above Art. 2 of European Convention on the Legal Status of Children Born out of Wedlock (Strasbourg, 1975)

Q: How to “transfer“ the child to intended/social mother?



Surrogacy

Q: How to “transfer“ the child to intended/social mother?

Where surrogacy is not expressly enacted (e.g. The Czech Republic)

= by the virtue of adoption (other legal procedure necessary, legal uncertainty)

Where surrogacy is expressly allowed (e.g. Georgia)

= by the operation of law

Law of Georgia No. 1139 of 10 December 1997 on health care, art. 143

“2. If a child is born, the couple shall be deemed as parents, with the responsibilities and authorities proceeding from this fact; the donor or the ‘surrogate mother’ shall not have the right to be recognised as a parent of the born child.“



Surrogacy – New Trends

"Surrogate motherhood" (pseudo-surrogate motherhood) for same-sex (i.e., mainly male) couples.

Two people of the same sex are registered abroad as parents.

Sometimes it is known which partner is the father, sometimes not.

In the Czech Republic, **foreign decisions are recognized** (registered by the special registry office in Brno-střed)

2017-2019: approx. 13 cases

2020: 16 cases

By this way we can have parents of the same sex in CZ, despite the fact it is not supposed in general by Civil Code.



Surrogacy – New Trends

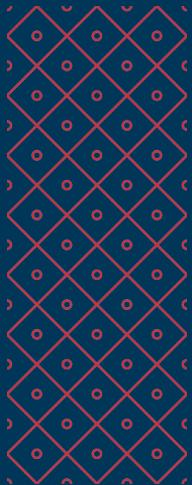
ConCourt Case No. I. ÚS 3226/16:

Two men, one of whom is a Czech citizen, arranged for a surrogate mother in the US (California).

Germ material from one of them was used, without it being known which one. Under California law, both were registered as (legal) parents of the child (parent 1 and parent 2).

The Czech Supreme Court recognized the California decision only with regard to one of the men (without being able to examine whether he was the father or not) and did not address the status of the other man. A constitutional complaint was filed requesting that the second man also be recognized as a parent under Czech law.

► **The Constitutional Court ruled that the Supreme Court's judgment was not in the best interests of the child** and overturned it (both men were registered as parents).



Chapter 6

Pater semper incertus... or not?



Pater semper incertus... or not?

Historical development: 2 models of determination of paternity

Conservative model according to the Civil Code:

Determination is linked to a unilateral act of will

Art. 340 CC: *La recherche de la paternité est interdite.*

(The search for paternity is prohibited.)

Natural law model according to the ABGB:

Sect. 163 ABGB: *Anyone who is proven in the manner prescribed by the rules of procedure to have had sexual intercourse with the mother of the child [...].*

= a basis for a child “right to know” (its parents)



Pater semper incertus... or not?

ECtHR Case Law:

ECtHR found no violation of Article 8 in cases where

the father designated by law knew from the child's birth that he was not the biological father (or had doubts about his paternity)

Yıldırım v. Austria, Application no. 34308/96

Rasmussen v. Denmark, Application no. 8777/79

Kňákal v. the Czech Republic, Application no. 39277/06



Pater semper incertus... or not?

ECtHR Case Law:

ECtHR found a violation of Article 8 in cases where

the father only learned of the facts indicating that he was not the father after the expiry of the period for contesting paternity and did not have an effective remedy available to him

Shofman v. Russia, Application no. 74826/01

Mizzi v. Malta, Application no. 26111/02

Paulík v. Slovakia, Application no. 10699/05



Pater semper incertus... or not?

The Czech Civil Code:

Paternity assumptions:

They form a comprehensive system

They behave similarly to inheritance classes (intestate succession)

= always start with the first assumption and examine whether it applies to the case in question. If not, move on to the next one, and if not, move on to the next one, and so on.



Pater semper incertus... or not?

The Czech Civil Code – Paternity assumptions:

1) Paternity of the mother's spouse

a child is born in a period between the date of entering into marriage and the three hundredth day after the marriage terminated or was declared invalid

2) Artificial Insemination

the man who gave consent to the artificial insemination is presumed to be the child's father

3) Affirmative statement

the man whose paternity has been determined by an affirmative statement of both the mother and the man is presumed to be the father



Pater semper incertus... or not?

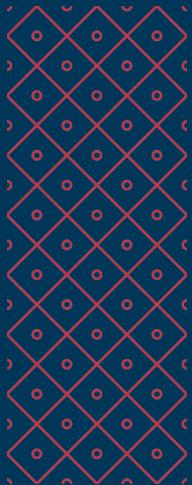
The Czech Civil Code – Paternity assumptions:

4) Paternity proceedings before a court

If paternity is not determined in some way above (1-3), the mother, child as well as the man who claims to be the father may apply o a court to determine paternity.

The man who had sexual intercourse with the child's mother at a time from which at least hundred and sixty days and no more than three hundred days have elapsed until the child's birth is presumed to be the father, unless his paternity is excluded due to serious circumstances.

(DNA Fingerprint can be applied as an evidence – it implies sexual intercourse)



Chapter 7

Child abandonment and baby-boxes



Child abandonment and baby-boxes

"Accordingly, **orphan children** will undergo a **kind of second birth**. How in each case they should be reared and trained after their first birth we have already described; and now we must contrive some means whereby, after their second birth in which they are destitute of parents, their orphan condition may be as free as possible from piteous misery for those who have become orphans. In the first place, to act in the room of their begetters, as parents of no inferior kind, **we must legally appoint the Law-wardens**; and we charge three of these, year by year, to care for the orphans as their own, having already given both to these men and to the guardians a suitable prelude of directions concerning the nurture of orphans."

Plato (Laws, 926)



Child abandonment and baby-boxes

Ancient Rome: abandonment in public markets

Orphanotrophia: orphanages, since the 1st century (founded by the Church)

Since the 6th century: special windows with a rotating pad (+ possibly a bell) have been built for easy (and anonymous) placement of children in orphanages

Innocent III (1198–1216): ordered monasteries to set up boxes for the safe abandonment of children.

(Reason: drowning of children in the Tiber).



Child abandonment and baby-boxes

Italy: boxes abolished in the mid-20th century, but restored in large numbers since 2006.

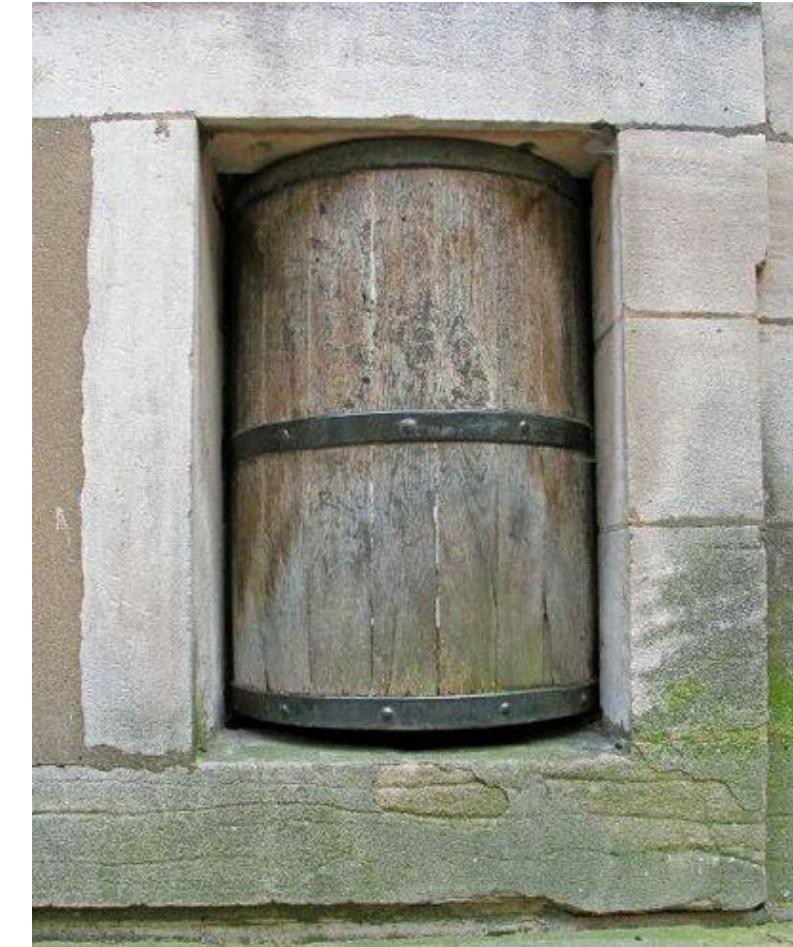
France: "Tour d'abandon" introduced by Vincent de Paul 1904 boxes replaced by the so-called "bureau ouvert" (non-stop) September 2, 1941: law on the protection of births = possibility to give birth anonymously and free of charge = **accouchement sous X**

Hospice de la charité Mâcon ►

Picture

[https://fr.wikipedia.org/wiki/Fichier:Tour_d%27abandon._M%C3%A2con_\(Sa%C3%BBne-et-Loire\)_\(_6368152545\).jpg](https://fr.wikipedia.org/wiki/Fichier:Tour_d%27abandon._M%C3%A2con_(Sa%C3%BBne-et-Loire)_(_6368152545).jpg)

source:





Child abandonment and baby-boxes

Art. 326 Code civil:

Lors de l'accouchement, la mère peut demander que le secret de son admission et de son identité soit préservé.

After the birth, the mother may request that the confidentiality of her admission and identity be preserved.



Child abandonment and baby-boxes

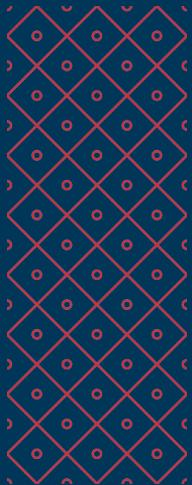
The Czech Republic:

(2025 data): 88 baby-boxes / 272 children
no express provisions in law about baby-boxes (“grey zone of laws”)

Sect. 775 on maternity applies!!!

If the identity isn't determined (e. g. the letter from mother included), it is a child of unknown identity (Sect. 17 Act on Civil Registry)

The court decides on name and surname of the child and appoints him/her a tutor (guardian)



Chapter 8

Adoption



Adoption

Traditional agricultural societies:

fixed number of households
(so-called "houses" – Greek "oikos")

maintaining stability = maintaining a constant number of economic units

= *pater familias* must ensure the continuation of the family line
= the household must not cease to exist

Q: How to ensure the continuation, if there is no (male) offspring?



Adoption

Q: How to ensure the continuation, if there is no (male) offspring?

- a) natural offspring
- b) levirate marriage ("levirate")
- c) adoption
- d) appointment of an heir in a testament



Adoption

Levirate (helps when adoption and testament are not allowed)

Then Judah said to Onan, “**Sleep with your brother’s wife** and fulfill your duty to her as a brother-in-law **to raise up offspring for your brother.**”

Gn, 38, 8 (Judah and his sons)

Levirate = a marriage of the widow of a deceased childless man to his (usually younger) brother



Adoption

The connection between adoption and inheritance law

Solon

allowed *adoptio mortis causa* (adoption in the event of death) if there are no male descendants

= the possibility to appoint a person who is not a blood relative as an heir in a testament developer from *adoptio mortis causa*



Adoption

Original purpose of adoption:

to ensure the preservation of the family line, an unbroken line of descendants (by accepting a stranger as one's own)

i.e., preservation and continuation in
care of the family estate
care of the household cult

= not substitute care for a child



Adoption

Early 20th century:

The original concept of adoption persists: acquiring a legal successor in property matters

Reason for the change in understanding of adoption:

consequences of World War I and II

large number of orphans need to care for them

but public care is not enough

large number of childless couples

New main purpose of adoption:

replacing the child's family, providing comprehensive care and upbringing

property became issues insignificant



Adoption

Countries that did not recognize adoption at all or only recently:

England (Adoption Act 1926, Adoption Act 1949)

The Netherlands (1956)

Portugal (1966)

= Allowing the adoption of children (new concept of adoption)

Countries where adoption of adults was already possible:

France (amendment to the Civil Code, 1966)

Italy (amendment to the Civil Code, 1967)

Switzerland (amendment to the Civil Code, 1971)

= Adoption of minors also permitted



Adoption – The Czech Republic

Act No. 265/1949 Coll., on family law

excluded the adoption of adults

adoption arises on the basis of a court decision
(not on the basis of a contract)

= adoption in the current understanding
(no property matters, but care of the child important)



Adoption – The Czech Republic

Civil Code: Sects. 794 and following

Adoption of a child

Adoption of an adult (again) possible

Court decision needed for adoption (personal status change)

Who can adopt:

married couple (jointly)

a spouse of the parent of the child

a (same sex) partner (if the other partner is the child's parent)

individual person (exceptionally)



List of Sources – Civil Code, Case Law

Relevant provisions of Czech Civil Code:

Sects. 775-793
Sects. 794-854

Case law:

ECtHR: Odièvre v. France, Application no. 42326/98
ECtHR: Godelli v. Italy, Application no. 33783/09
ECtHR: Yıldırım v. Austria, Application no. 34308/96
ECtHR: Rasmussen v. Denmark, Application no. 8777/79
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ECtHR: Mizzi v. Malta, Application no. 26111/02
ECtHR: Paulík v. Slovakia, Application no. 10699/05
CZ: ConCourt Case No. I. ÚS 3226/16
UK, House of Lords: Ampthill Peerage Case [1977] AC 547



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