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# **How to Provide a Legal Safe Harbor for Mothers of Unwanted Newborns\***

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**ABSTRACT:** This article addresses the social problem of unwanted newborns from a criminal law perspective. The article introduces the issue of unwanted infants as one crossing national borders and is common for all countries. The problem is illustrated by legal systems such as Slovakia's, representing the continental civil law system, and Canada's common law system. The authors chose Canada as the comparison model because its legal order is not well known in the United States despite being a neighboring country with similar legal traditions. It could be interesting for the reader to have the problem presented in a system not completely familiar, but still quite close to their own legal system.

The article highlights the problem of unwanted babies and presents a

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**solution acceptable to both sides—mothers and governments. The primary discussion is dedicated to the idea of baby hatches (baby boxes), which the authors think could be introduced in any country facing the problem of unwanted babies. The article aims to attract the attention of authorities worldwide in order to reach a common position on this issue and promote the use of baby hatches, as the legality of this practice has been challenged and disputed at the United Nations Committee on the Rights of the Child. The article provides information about the issue for concerned individuals and also professionals and experts dealing with unwanted newborns in practice.**

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The public is always outraged by reports of dead newborn children dumped in a container, buried in a junkyard, drowned in a bathtub, or even frozen in a freezer. Such events launch social discussion about unwanted infants and the sad fate many of them encounter. The phenomenon of unwanted infants is nothing unusual in any of the countries in the world, even those with developed societies. As many as fifty babies are abandoned in the United Kingdom each year, with some dying from cold or exposure before they are discovered.<sup>1</sup> Experts believe the reason some mothers abandon their babies is primarily because the “mother feels herself in crisis, alone, without family support, without a life partner and in a difficult psycho-social situation. Mothers face several problems such as housing, low income, broken family ties, stress and worries about the future, and maintaining conditions for a baby not yet born.”<sup>2</sup>

In Germany, a survey was made with a sample of mothers who had terminated their unwanted pregnancies. The results show why these pregnant women had no desire to be mothers:<sup>3</sup>

- 46% had no steady partner;
- 73% were afraid of the reaction they would receive their partners, families or relatives;
- 61% felt their financial situation was not good enough to have children;
- 38% felt a child would cause them to lose a job or drop out of school;
- 38% were unhappy in their relationship;
- 33% knew their partner wanted no (more) children; and

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<sup>1</sup> E. Ailes: Call for ‘baby boxes’ for abandoned newborns, April 12, 2013, available at <[https:// www.bbc.com/news/uk-scotland-22123366](https://www.bbc.com/news/uk-scotland-22123366)> (last visited February 20, 2017).

<sup>2</sup> M. Mojtová, “Reflection of university students on the issue of abortion vs. anonymous birth – function of baby hatch from the perspective of future social workers,” *Proceedings of the international conference Child is a Gift, Bratislava, Slovakia, September 25-26, 2014* (2014): 18-27, at 24.

<sup>3</sup> S. Wolpert, “A retrospective about baby hatches and anonymous birth in Germany: Yesterday, today, tomorrow. On the example of the project Findelbaby,” *Proceedings of the international conference Child is a Gift, Bratislava, Slovakia, September 25-26, 2014* (2014): 67-75, at 74-75.

- 25% felt themselves too young to have children.

The survey also shows how their background played a role in the decision to abandon the baby: 51% decided shortly before the baby was born; 63% decided by themselves; and only 39% told the child's father of their intention.

A similar anonymous survey was also made in Slovakia by *Šanca pre nechcených* ("Give the Unwanted a Chance"), with the nongovernment organization identifying typical reasons from the answers they received from different mothers about why they did not want to become mothers:<sup>4</sup>

1. *Social grounds*: mothers coming from an orphanage and never had support from their biological parents, a dysfunctional family (divorce) or families suffering social and financial problems;
2. *Underage women in their first pregnancy*: hiding it from their parents because of strict morals observed in the family, fear of opinions of other people (friends, acquaintances) or fear of becoming mothers;
3. *Women who did not want to become mothers*: because they had been raped or preferred to stay in their careers; and
4. *Married/engaged women, infidelity*: extramarital pregnancy, the baby's father is someone other than the mother's life partner.

Undesired pregnancies occur in women from different social groups living in different countries. These women have several options in handling such a situation. Some act lawfully and choose legal abortion, others bear the child and give it up for adoption. On the other hand, there are also women with no intention of obeying the law, possibly putting themselves or someone close to them in danger of prosecution and conviction.

## Legal Abortions

### Slovakia

Abortion in Slovakia is currently governed by Act 73/1986 Coll. on Abortion. Section 4 allows a woman to terminate her pregnancy legally before the thirteenth week, i.e. in the first trimester. Her pregnancy is terminated by medical intervention after a written request, unless health reasons preclude an abortion. Even a pregnancy that has already extended past the limit earlier specified can be medically terminated under Section 5 in the following circumstances:

- If there is a significant threat to the life or health of the woman,
- If there exists a danger of unhealthy development of the fetus, and
- In the case of genetically impaired fetal development.

Nevertheless, the twelve-week period from conception where abortions are legal could also be considered relatively long since it is practically one-third of a woman's gestation period.

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<sup>4</sup> A. Ghannamová, "Help for unwanted children, from intervention to prevention, rescue nest and what's next? *Proceedings of the international conference Child is a Gift, Bratislava, Slovakia, September 25-26, 2014* (2014): 76-87, at 77.

Article 15(1) of the Slovak Constitution states that “human life is worthy of protection even before birth.”<sup>5</sup> There has been a huge debate about whether abortion under this Act is consistent with the Slovak Constitution at different scientific, political, legal and health forums, but the primary point of this article is not the issue of a moral or religious right to a legal abortion. The fact remains that both Slovak law and the legal systems of other countries allow abortion, which consciously terminates a fetus’s life with impunity before it reaches a specific period of development.

Statistics show that the number of abortions has rapidly declined in Slovakia since 1993:

- 38,815 abortions in 1993;
- 18,468 abortions in 2000;
- 15,307 abortions in 2004;
- 9,970 abortions in 2009; and
- 9,299 abortions in 2010.<sup>6</sup>

Seven tenths of a percent (0.7%) of fertile women sought abortions in 2009 while by 2010 the figure had fallen to 0.66% of fertile women. Although not a significant part of the female population, these numbers still cannot be overlooked because they show a number of expectant women do not want the babies they are carrying. In contrast, there remained cases where gestation had continued past the threshold for legal abortion. These pregnancies could have ended with an illegal abortion or with the unwanted newborn’s life terminated through infanticide, where the Slovak Criminal Code provides for rather harsh punishment.

### **Canada**

A totally different situation exists in Canada, one of the few nations with no legal restrictions on abortion. However, accessibility to abortion differs between provinces because not all clinics perform them, because some provincial governments do not fund abortions in private clinics, and because abortions are too expensive for some applicants.

Early in Canadian history all abortions were illegal. In 1967 Pierre Trudeau’s government introduced a bill in Parliament to amend Article 251 of the Criminal Law of Canada to legalize abortion if a committee of doctors signed a statement saying that it was necessary for the physical or mental well-being of the mother. The amendment was approved on May 14, 1969.

The 1969 law was interpreted differently by different doctors and hospitals, leading to access depending upon the community where the mother lived. The standard was the physical or mental well-being of the mother, to be decided by a hospital’s Therapeutic Abortion Committee (TAC). However, there was no requirement for a hospital even to have a TAC and only about one-third of hospitals ever had one. Some committees took a very liberal stance and allowed almost all requests, while others blocked almost

<sup>5</sup> *Ústava Slovenskej republiky* [Constitution], Art. 15(1) (Slovak).

<sup>6</sup> *Umelych prerušeni tehotenstva coraz menej, Slovenský pacient*, April 12, 2012, available at <<https://www.slovenskypacient.sk/umelych-preruseni-tehotenstva-coraz-menej/>> (last visited June 12, 2016).

all requests. Access to legal abortions was easy in major metropolitan areas, but much harder outside of large cities. The TACs often took days or weeks to make their decisions, pushing a pregnancy further along. The women were not seen by the committee and had no right to appeal a decision. Because of the lack of facilities in smaller provinces or rural areas, women were often forced to travel to major cities at their own expense. Many other women chose to travel to the United States.

In defiance of the law, Dr. Henry Morgentaler began performing abortions at his clinic without approval of a TAC and in contravention of the law. The Quebec government took Morgentaler to court four times, but in all four cases the juries refused to convict him. After many struggles between the government and Mr. Morgentaler, he appealed to the Supreme Court of Canada, which in 1988 ruled in *R. v. Morgentaler* that the existing laws were unconstitutional and struck down the 1969 law. The court noted that “forcing a woman by threat of criminal sanction to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations” and the law “that the woman’s capacity to reproduce is to be subject, not to her own control, but to that of the state”<sup>7</sup> were essentially a breach of the woman’s right to security of the person, guaranteed under Canada’s Charter of Rights and Freedoms. The Supreme Court of Canada nullified the entirety of Sec. 251 of the Criminal Code when it was held to violate Section 7 of the Canadian Charter of Rights and Freedoms. The Court also found that the procedural requirements to obtain an abortion, as set forth in the law, were especially troublesome. Only accredited or approved hospitals could perform abortions, which imposed a barrier to local access. The law also specified that women wanting an abortion were required to consult a TAC. The court found the TAC to be deeply flawed, in part because of the long delays caused by the TAC and that, in many hospitals, the TAC were merely committees on paper and did not actually approve the abortions. “The structure of the system regulating access to therapeutic abortions is manifestly unfair. It contains so many potential barriers to its own operation that the [exception] it creates will in many circumstances be practically unavailable to women who would prima facie qualify.”<sup>8</sup>

As such, the provision was held to violate the principles of fundamental justice and was struck down. Since then Canada has had no law governing abortion and instead a woman makes the decision along with her doctor.

Statistics of abortions in Canada show that the number of abortions has been decreasing since 1998 as follows:<sup>9</sup> 110,520 (1998); 105,862 (1999); 105,669 (2000); 106,498 (2001); 105,535 (2002); 103,619 (2003); 100,763 (2004); and 97,254 (2005).

In 2005 there were 14.1 abortions per thousand women in Canada age 15-44. Induced abortion rates fell in every age group except among women age 35 to 39, where

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<sup>7</sup> *R v. Morgentaler*, January 28, 1988, Case number 19556, [1988] 1 S.C.R., at 31, available at <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do>> (last visited June 12, 2016).

<sup>8</sup> *Ibid*, at 115.

<sup>9</sup> *Therapeutic Abortion Survey*, Statistics Canada, January 1, 2006, <[http://www23.statcan.gc.ca/imdb-bmdi/pub/document/3209\\_D4\\_T2\\_V6-eng.pdf](http://www23.statcan.gc.ca/imdb-bmdi/pub/document/3209_D4_T2_V6-eng.pdf)> (last visited June 12, 2016).

it remained the same. Teenage women under the age of 20 experienced the largest decline, with the rate dropping from 13.8 for every 1000 women in 2004 to 13.0 in 2005. The induced abortion rate for these women has gradually declined since 1996 when it peaked at 18.9. The number of induced abortions for every 100 live births fell to 28.3 in 2005 from 29.7 in 2004.<sup>10</sup>

## Abortion-Related Crimes

### *Slovakia*

If a woman in Slovakia opts for medical termination of pregnancy beyond the twelfth week of pregnancy and does not qualify for legal termination of the pregnancy under Section 5 of Act 73/1986 Coll. on Abortion, such a woman is no longer eligible for a legal abortion and would have to undergo the operation illegally. If a physician (or other person) carries out such an abortion at the woman's request or with her consent, he/she commits the offense of "illegal abortion"<sup>11</sup> because the pregnancy has been interrupted "in terms that contradict the generally binding legal regulations on abortion" and thus faces a possible two to five years' imprisonment. The Slovak Criminal Code (SCC) also punishes anyone who influenced a pregnant woman's decision to undergo an illegal abortion with up to one year imprisonment. The definition of an offender is anyone who "induces a pregnant woman to artificially abort her pregnancy by herself or otherwise requests or allows another person to artificially abort her pregnancy in the procedure or in terms that contradict the generally binding legal regulations on abortion."<sup>12</sup> The Slovak Criminal Code also punishes people who help the woman perform an illegal abortion either by herself or with the help of another person. The sentence is the same—up to one year imprisonment.<sup>13</sup> In none of the cases above would the woman herself be held criminally liable. This offense is incorporated in a section of the Slovak Criminal Code titled "crimes against life" and it is "primary life" that is protected by provisions of the section, i.e. the life of the mother, not the child's life.

### *Canada*

Prior to 1969 an abortion was an offence in Canada punishable under Section 287 of the Canadian Criminal Code by life imprisonment.<sup>14</sup> However, the Trudeau bill made an exception for abortions performed in a hospital with the approval of the

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<sup>10</sup> *Induced Abortion Statistics*, Statistics Canada, 2005, at 7, available at <<http://www.statcan.gc.ca/pub/82-223-x/82-223-x2008000-eng.pdf>> (last visited June 12, 2016).

<sup>11</sup> Code, No. 300/2005 Z.z., Slovak Criminal Code, Sec. 151(1).

<sup>12</sup> *Ibid.*, Sec. 152(1).

<sup>13</sup> *Ibid.*, Sec. 152(2): "The same sentence as referred to in the first paragraph shall be imposed on any person who helps a pregnant woman to abort her pregnancy, or assists her in asking or having another person to perform abortion upon her."

<sup>14</sup> Criminal Code of Canada (R.S.C., 1985, c. C-46) - Part VIII.3 Offences Against the Person and Reputation, Sec. 287(1): "Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and liable to imprisonment for life."

hospital's three-doctor therapeutic abortion committee. The TAC was required to certify that the pregnancy would likely endanger the pregnant woman's life or health. The term "health" was not defined and therapeutic abortion committees were free to develop their own theories as to when a likely danger to "health" (which might include psychological health) would justify a therapeutic abortion. The Supreme Court of Canada decision in *R v. Morgentaler* removed abortion from the Canadian Criminal Code.

## Newborn-Related Crimes

### Slovakia

Some women opt not to seek legal termination of their pregnancies, but instead act illegally after the birth and try to rid themselves of the newborn child. If a child is left in a place where its life or health is not endangered (where people often congregate, such as a train or bus station), the mother would be held liable for the offense of "exposure of a child" with potential punishment of up to two years imprisonment.<sup>15</sup> When a child younger than three years of age is abandoned, punishment for the mother (or whoever abandons the child) potentially ranges from two to six years imprisonment.<sup>16</sup>

Another case of criminal liability is when a child is left at risk of death or harm (abandoning it in a forest), where the mother would be held criminally liable for "child abandonment." In this case the punishment either ranges from one to five years imprisonment or in an aggravated case where the child is younger than six years of age, the sentence would be between three and ten years imprisonment. If the child dies or suffers serious harm, the sentence would increase to seven to twelve years.<sup>17</sup> However, this applies to a woman who abandons her child and the newborn child's death was not intentional (death could only be indirectly inflicted).

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<sup>15</sup> See Slovak Criminal Code, *supra* note 10, Sec. 205(1): "Who will leave the child to which he/she has the duty of care and which cannot take care of itself at the place where it is not in danger to life or health shall be liable to a term of imprisonment of up to two years."

<sup>16</sup> See Slovak Criminal Code, *supra* note 10, Sec. 205(2): "The offender shall be liable to a term of imprisonment of two to six years if he commits the offence referred to in (1): a) Acting in a more serious manner, or b) Acting against a child under three years of age."

<sup>17</sup> See Slovak Criminal Code, *supra* note 10, Sec. 206(1): "Who will leave the child to which he [she] has the duty of care and which cannot take care of itself at the place where it is in danger to life or health shall be liable to a term of imprisonment of one to five years." Section 206(2): "The offender shall be liable to a term of imprisonment of three to ten years if he [or she] commits the offence referred to in (1) a) Acting in a more serious manner; or b) Acting against a child under six years of age. Section 206(3): The offender shall be liable to a term of imprisonment of seven to twelve years if he [or she] commits the offence referred to in (1)(a) and causes grievous bodily harm or death through its commission, or (b) under a crisis situation."

Murder of a newborn is a specific offense and under specific occasions and conditions it would be classified as “infanticide.”<sup>18</sup> Whenever these conditions are not met, the mother would simply be charged with “murder.”<sup>19</sup>

The sentence for conviction of “infanticide” ranges from four to eight years imprisonment while provisions of SCC Sec. 145(2) would apply in a conviction of “murder” (because the Slovak Criminal Code views a child as a “protected person” and so the sentence is greater), and the sentence thereunder would be 20-25 years imprisonment for the murder of a child.<sup>20</sup> It is clear that these two situations envisaged diametrically different punishment.

The offense of “infanticide” is not a novelty in the Slovak Criminal Code. This crime was a part of the older 1950 and 1961 versions of the Slovak Criminal Code and over more than 60 years has undergone practically no changes. For this offense, a mother would be responsible if she intentionally kills her child at birth or soon after the birth while suffering mental disturbance caused by childbirth. Therefore, for this provision of the code and milder punishment to apply, the conditions below need to be met:

- The child must have been killed by its mother (1);
- The death must have been caused due to mental disturbance from childbirth (2); and
- The killing must have occurred during or immediately after birth (3).

First, the state of “mental disturbance” caused by childbirth is a “specific maternal mental state which originates in physiological processes induced by birth, weakening the will of the mother to act in the interest of the child’s life as well as its resistance to various external and internal stimuli. It cannot be stress which does not have its basis in childbirth.”<sup>21</sup> An assessment of whether a woman was in such a state is a question for a medical expert. Assessing whether or not someone was in such a state can be highly difficult, especially when the crime is uncovered a couple of weeks or months later. In Slovakia a dead child was found in a freezer and experts presumed that it had been kept there frozen for 3-8 years.<sup>22</sup> In Slovak criminal law the principle *in dubio pro reo*<sup>23</sup>

<sup>18</sup> See Slovak Criminal Code, *supra* note 10, Sec. 146: “The mother who, as a result of mental disturbance caused by the effects of the childbirth, intentionally kills her new-born child at the time of birth or immediately afterwards shall be liable to a term of imprisonment of four to eight years.”

<sup>19</sup> *Ibid*, Sec. 145(1): “Any person who intentionally kills another person be liable to a term of imprisonment of fifteen to twenty years.”

<sup>20</sup> *Ibid*, Sec. 145(2): “The offender shall be liable to a term of imprisonment of twenty-five years or to life imprisonment sentence if he [or she] commits the offence referred to in paragraph 1 as follows: a) Against two persons; b) Acting in a more serious manner; c) Against a protected person; d) By reason of specific motivation; or e) With intention to obtain tangible profit.”

<sup>21</sup> O. Samaš, H. Stiffel and P. Toman, *Trestný zákon: Stručný komentár* (Bratislava: Iura Edition, 2006): at 309.

<sup>22</sup> Banská Bystrica: *Mŕtve novorodeniatko našli v igelitke!*, *cas.sk*, December 1, 2009, available at <<http://www.cas.sk/clanok/141086/banska-bystrica-mrtve-novorodeniatko-nasli-v-igelitke.html>> (last visited June 12, 2016).

<sup>23</sup> When you cannot be sure about the important circumstance in a case, you presume the circumstance is in favor of the convicted person.

applies in such cases. The mother would have therefore faced the maximum prison sentence of eight years under SCC Section 146. But the application of this provision would be irrelevant even if the mother had intended to kill the baby before it was born.<sup>24</sup> Therefore, it is possible for the offense of “infanticide” to be applied not only instead of “murder,” but also instead of the offense of “premeditated murder.”<sup>25</sup>

Second, the time “during birth” is the time from conception until birth. From a biological perspective, birth starts with the opening of the cervix of matrix and birth canal and there are regular matrix contractions, which can take three to seven hours. Childbirth ends with the expulsion of the placenta from the body of the mother and the end of afterbirth. The second part of the provision, however, lies in the formulation “immediately after the birth.” Jozef Čentěš states that the period is assessed according to whether the mental disturbance caused by childbirth persists and can last several days.<sup>26</sup> Although the time when the state of “mental disturbance” caused by childbirth would take place is difficult to define, this time can never be undefined. The offense is thus defined by the term “newborn.” Peter Polák believes the legal definition of a newborn child has to be interpreted in accordance with the medically defined term newborn child. According to the medical scientific view, the newborn period covers only the first 28 days of the infant’s life. This point of view is also supported by the World Health Organization (WTO).<sup>27</sup> However, other laws consider the period to be until the child is six weeks old<sup>28</sup> and today it is accepted that a newborn child could be identified as a child not older than six weeks.<sup>29</sup> When applying this provision, such a fact should be taken into consideration.

Whenever an expert says that a woman did not act because of mentally disturbance caused by childbirth, the provisions of SCC Section 146 cannot be applied and Section 145(2) will be applied instead. This woman would be responsible for “murder” against a protected person (child) and potential imprisonment reaches from 20 to 25 years. This is relatively harsh punishment in comparison to legal abortion that keeps an unborn child unprotected in the first trimester of gravidity and basically the life of the unborn child remains unprotected until birth. SCC Section 146 only protects a baby’s life after it has been born. This is relatively dramatic increase in criminal responsibility—until birth life not protected by criminal law at all and yet punishable from when the infant is born until it has reached six weeks of age by a sentence of six to eight years imprisonment, thereafter increasing to 20-25 years.

<sup>24</sup> J. Čentěš et al., *Trestný zákon s komentárom* (Žilina: Eurokódex, 2006): at 212.

<sup>25</sup> E. Burda, *Trestné činy proti životu a zdraviu v porovnaní starého a rekonštruovaného Trestného zákona* (Šamorín: Heuréka, 2006): at 101, 103. See Slovak Criminal Code, *supra* note 10, Art. 144 sec. 1: “Any person who intentionally kills another person with premeditation shall be liable to a term of imprisonment of twenty to twenty five years.”

<sup>26</sup> See J. Čentěš et al., *supra* note 24, at 212.

<sup>27</sup> P. Polák, Poznámky k „hniezdam záchrany“ z hľadiska trestného práva, *Justičná revue* 59, no. 11 (2007): 1474-1476, at 1475.

<sup>28</sup> Act, No. 576/2004 Coll. on Health Care.

<sup>29</sup> *Hniezdo záchrany*, available at <<http://www.sancaoz.sk/content/hniezdo-zachrany>> (last visited June 12, 2016).

To talk about “infanticide,” thought needs to be given to the situation when an accomplice helps the mother perform the act of murdering her newborn child, where the aspects of “infanticide” allow no one to have perpetrated the offense except the child’s mother. As Eduard Burda writes, another person who assists in this act would be responsible for the crime of “murder” (under SCC Sec. 145(2)) or even “premeditated murder” if the killing was planned before the act of killing (according to Sec. 144 sec. 2 SCC).<sup>30</sup> No one else other than the mother is legally considered to be mentally disturbed due to having given birth. The comparison of sentences is clearly visible: up to eight years for the mother and the possibility of life imprisonment or 25 years for her accomplice when premeditated murder is applicable (e.g. husband, spouse, relative or friend).

The last situation that could occur is when the murder itself is carried out by a third party at the desire or request of the mother. The mother in this case acts as the instigator, possibly as the organizer in the meaning of SCC Section 21.<sup>31</sup> Mr. Burda states that the mother should also be then criminally liable for the offense under SCC Section 146.<sup>32</sup>

Police statistics for the offense of “murder of a newborn child by its mother” (SCC Section 146 SCC) indicate no more than three cases per year in recent years. These statistics also indicate that the offense was primarily perpetrated by women with a lower level of education, with a higher probability that the mother was under 30 years of age.<sup>33</sup>

### Canada

The offense of “infanticide” is also incorporated in the Canadian Criminal Code: “A female person commits infanticide when by a willful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.”<sup>34</sup> The conditions for the criminal liability of a mother are similar to those of the Slovak Criminal Code. However, the punishment is less strict—in Canada a mother is liable

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<sup>30</sup> See E. Burda, *supra* note 24, at 102. See Slovak Criminal Code, *supra* note 10, Sec. 144(2): “The offender shall be liable to a term of imprisonment of twenty-five years or to a life imprisonment sentence if he [or she] commits the offence referred to in (1) and: a) He has already been convicted for murder; b) Acts against two persons; c) Acts in a more serious manner; d) Acts against a protected person, e) Does so by reason of specific motivation; or f) Acts with the intention to obtain tangible profit.”

<sup>31</sup> See Slovak Criminal Code, *supra* note 10, Sec. 21: “(1) An abettor to a completed or attempted criminal offence is any person who intentionally a) Masterminded or directed the commission of a criminal offence (organizer); b) Instigated another person to commit a criminal offence (instigator); c) Asked another person to commit a criminal offence (hirer); or d) Assisted another person in committing a criminal offence, in particular by procuring the means, removing the obstacles, providing an advice, strengthening the determination, making a promise of post crime assistance (aider). (2) Unless this Act provides otherwise, the criminal liability of an abettor shall be governed by the same provisions as the criminal liability of an offender.”

<sup>32</sup> See E. Burda, *supra* note 24, at 102.

<sup>33</sup> J. Tkáčiková, “Žena – páchatel’ka trestného činu,” *Sociálna kriminalita – prevencia kriminality*, no. 1 (2012): 9-10, at 10.

<sup>34</sup> See Criminal Code of Canada, *supra* note 13, Sec. 233.

for imprisonment for a term not exceeding five years imprisonment (while in Slovakia the penalty is four to eight years).

Compared to Slovakia, the Canadian Criminal Code has an explicit provision regarding other persons participating in infanticide—these accomplices can be charged with the offence of “Killing unborn child in act of birth”: “Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life.”<sup>35</sup> However, such a person would not be liable for this offence, if such conduct were performed to preserve the life of the mother: “This section does not apply to a person who, by means that, in good faith, he [or she] considers necessary to preserve the life of the mother of a child, causes the death of that child.”<sup>36</sup>

However, the Canadian Criminal Code also recognizes other crimes when the death of a child could be incurred in a different manner than by infanticide: A female (mother) who, “being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable assistance in respect of her delivery, if the child is permanently injured as a result thereof or dies immediately before, during or in a short time after birth, as a result thereof”<sup>37</sup> could be held liable for the offense of “Neglect to obtain assistance in child-birth.” The possible punishment for such an offense could reach a term not exceeding five years imprisonment.

This offense does not focus compared to infanticide on the intended murder of a newborn, although the death of the baby is also the result. However, in this case the death of the baby is only an “undesired” result of other intentional conduct committed by the mother, namely concealing the birth.

Connected with this offense is “concealing body of child,” where the perpetrator commits such an offense if “in any manner [he or she] disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth.”<sup>38</sup> Anyone could be punished for such an offense, not just the mother who delivered the child. The possible punishment could reach a term not exceeding two years imprisonment. The Slovak Criminal Code does not have similar provisions for these two latter mentioned offenses.

## **Legal Abandonment of Unwanted Babies**

### ***Legal Abortion***

The first option is legal abortion, already mentioned at the beginning of this article. Some women know when they become pregnant that they do not want the baby. Globally, the main reasons leading to abortion are the desired number of children,

<sup>35</sup> *Ibid*, Sec. 238(1).

<sup>36</sup> *Ibid*, Sec. 238(2).

<sup>37</sup> *Ibid*, Sec. 242(1).

<sup>38</sup> *Ibid*, Sec. 242(2).

work or school, lack of finances, problems in relations between parents, immaturity of the future mother, rape, wish to have a child of a particular sex, population control pressure (e.g. in China), lack of contraception and poor awareness.<sup>39</sup> However, not all pregnant women know whether they wish to keep the baby they are carrying and they lose the option of legal abortion by not deciding within the prescribed first trimester of pregnancy. Thus, only three other options remain for mothers who have not decided by the end of the first trimester.

### **Adoption**

The second option is to give up the baby for adoption once it is born. If the mother is single, she must give written consent to adoption and her child will be given to suitable new parents. If the mother is married, the written consent of both parents is needed. The mother announces her intent to give such written consent to the doctor directly in the hospital after the baby has been born. Then the Office for Labor, Social Affairs and Family is contacted and a staff member from this office visits the mother in the hospital to have her sign adoption documents. Such consent is revocable until the child has been placed in the custody of the new family pursuant to the decision of the court.<sup>40</sup>

### **Confidential Birth**

An option similar to the option earlier mentioned above is “confidential birth.” Here the mother can keep her identity secret if she does not want her child. In such a case the baby will be placed in the custody of a new family and the process of legal adoption will be launched. Compared to the option of adoption above, the mother has the right to revoke her decision for confidential birth only in the first six weeks of the infant’s life. Thereafter her decision is irreversible.<sup>41</sup> Documentation about her identity, her state of health and other information necessary for the child’s health is filed with the Ministry of Health, but remains confidential.<sup>42</sup> The difference between “consent to adoption” and “confidential birth” is that, in the first option, the birth mother still possesses her rights as the biological mother and the legal option for reversing the adoption in exceptional circumstances. On the other hand, a mother whose gives birth to a child confidentially loses all rights to her baby after six weeks. Confidential birth is used mostly by very young mothers (e. g. students age 18-20 and/or in university). These are women who have not yet matured enough for a mother’s role, have no stable partner or feel they have not yet created a suitable environment to raise a child.<sup>43</sup>

The option of “confidential birth” was introduced in the Slovak legal system on January 1, 2005. In Germany this option was not even allowed by law until May 2014.<sup>44</sup>

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<sup>39</sup> See Mojtoová, *supra* note 2, at 25-26.

<sup>40</sup> Statute, No. 36/2005 Z.z. on Family, Sec 102, (1) and 2.

<sup>41</sup> In comparison to Germany, there is the period for choice 8 weeks. See Wolpert, *supra* note 3, at 73.

<sup>42</sup> See Statute on Health Care, *supra* note 28, Art. 23, para. 5.

<sup>43</sup> See Mojtoová, *supra* note 2, at 27.

<sup>44</sup> See Wolpert, *supra* note 3, at 72.

Since 2005 there have been 238 confidential births in Slovakia,<sup>45</sup> but there are no further provisions in the law about confidential birth, so the law lacks the following:

- No serious information provided by the government to the public and concerned groups;
- No help line established;
- No official existence of a “confidential birth application”;
- No clear and detailed rules for implementation (*Šanca pre nechcených* found only four hospitals in Slovakia able to implement all the necessary means to make the birth truly confidential),
- No database set up for collection and preventive measures.<sup>46</sup>

### **Abandonment**

Some mothers cannot decide what to do with their unwanted children immediately after they are born or they feel ashamed or frightened to say anything about having no desire for the child. They only decide later to abandon the child and either have never been informed about other options or they prefer to do it “easier”—not formally, e.g. not to abandon their children “legally,” but “practically” by infant exposure. Since January 1, 2006 an exception to criminal liability for the offense of “infant exposure”<sup>47</sup> has been incorporated into Slovak law. Section 11(12) of Act 576/2004. Coll. on Health Care allows a mother to bring her newborn child anonymously to a “baby hatch” without being held criminally liable. Because Act 576/2004 Coll. on Health Care allows unwanted newborns to be left anonymously and without charge in a publicly accessible special incubator called a “baby hatch” (or baby box) up to six weeks after birth, such action falls under circumstances excluding criminal liability in the form of “exercising rights and obligations” under the Slovak Criminal Code. The rationale for excluding criminal liability lay in the fact that if the law or a decision issued under the law imposes certain obligations or allows certain behavior, then such conduct may not be illegal and no one can be held criminally liable for it.<sup>48</sup>

Baby hatches have been put in place in the Slovak Republic since 2004 at the initiative of *Šanca pre nechcených* and are located in the neonatal departments of hospitals. Unless the baby is specifically placed in the baby hatch and was instead left elsewhere (such as at a station, a supermarket, in the waiting room of a hospital), the mother could be charged under Sec. 205 SCC with child abandonment.

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<sup>45</sup> See Ghannamová, *supra* note 4, at 78.

<sup>46</sup> *Ibid.*

<sup>47</sup> See *supra* note 15.

<sup>48</sup> See Slovak Criminal Code, *supra* note 11, Art. 28 sec. 1: Legal diction of “exercise of rights and obligations”: “An act, which otherwise gives rise to criminal liability, shall not be considered as a criminal offence if it constitutes the exercise of rights or the performance of duties prescribed by a generally binding legal regulation, resulting from the decision of a court or other public authority, connected with the fulfilment of work assignments or other tasks, or resulting from an agreement which does not breach or circumvent the law, provided that such rights are exercised and duties are fulfilled in a lawful manner.”

However, the idea of baby boxes has not been accepted by all experts and professionals. Psychologist Kevin Browne of Nottingham University claims: “Studies in Hungary show that it’s not necessarily mothers who place babies in these boxes—e.g., relatives, pimps, step-fathers and fathers. Therefore, the big question is: Are these baby boxes upholding women’s rights, and has the mother of that child consented to the baby being placed in the baby box? The baby hatch is so anonymous, and so removed from the availability of counselling, that it creates damage and a danger to the mother and child.”<sup>49</sup> Critics have also raised concerns that the baby hatches may encourage more mothers to abandon their children.<sup>50</sup>

Neither is the UN Committee on the Rights of the Child a proponent of baby boxes and the Czech Republic has even recommended withdrawing them. The recommendation of the UN Committee addressed to the Czech Republic specifically states: “The Committee urges the State party to increase its efforts to identify the root causes that lead to abandoned children, including providing information on family planning, as well as appropriate counseling and social support for unplanned pregnancies. The Committee also recommends that the State party consider introducing, as a measure of last resort, the possibility of confidential hospital births.”<sup>51</sup> The recommendation is good, but even with the best of intentions and the application of various preventive measures, governments cannot achieve such situation where baby hatches would never be needed. The UN Committee on the Rights of the Child refers to the Convention on the Rights of the Child (“the Convention”), under which every child has the right to know their parents and children who are placed in public incubators never secure this right. The UN Committee on the Rights of the Child fails to explain the intention of the Convention deeply enough. The Convention nevertheless states explicitly in Art. 7(1) that: “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.”<sup>52</sup> It is important to highlight the formulation of the right of the child to know its own parents, where it stressed “as far as possible.” This leads to the conclusion that the Convention provides for the possibility that the child will not know its own parents and will not be in their custody, which may be the case if the mother decides to place its newborn baby in the baby box for various reasons.

If the UN Committee on the Rights of the Child refers to the right of the child to know his or her parents, why then does it ignore Art. 6(1) of the Convention, which stipulates the right of the child to life, and Art. 6(2), that the Contracting States shall as far as possible ensure the survival and development of the child? These rights can be secured through baby boxes. When these options did not exist, there were several

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<sup>49</sup> See Ailes, *supra* note 1.

<sup>50</sup> *Ibid.*

<sup>51</sup> M. Michalčík, *Komentár: Zachraňovat' hniezda záchrany?* July 21, 2011, available at <<https://www.postoj.sk/2180/komentar-zachranovat-hniezda-zachrany>> (last visited June 12, 2016).

<sup>52</sup> *Convention on the Rights of the Child*, November 20 (1989), Art. 7 sec. 1, available at <<http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>> (last visited June 12, 2016).

cases publicized where the remains of suffocated infants were found wrapped in a junkyard container or left in a wooded area. Fortunately, ever since baby boxes were introduced in Slovakia there has been no case, of which the public has been aware, of a newborn having been abandoned in such a brutal manner. And even if there have been some cases, certainly there are now fewer of them, something considered by us to be a huge success. Even if baby boxes would save the life of just one newborn baby, their importance would be justified. The right to life and preserving the life of a child under the Convention is the most valuable right, something which should have clear priority over the right of the child to know their own parents.

The idea of baby hatches had been introduced earlier in other countries before Slovakia, such as in the US (first in Texas in 1999 under the name “Safe Haven” and subsequently in almost all US states),<sup>53</sup> Germany (which in 1999 opened two baby hatches in Hamburg and one in Schleswig-Holstein)<sup>54</sup> and Switzerland (five “baby windows” founded since 2000).<sup>55</sup> Since the project was introduced in Slovakia, other countries have launched similar projects (Czech Republic in 2005, Latvia in 2007 and Italy in 2008).

The first such baby hatch in Slovakia was introduced in 2004. At that time no legislation had yet been adapted to address new efforts to protect mothers who did not want a child against criminal liability. Nevertheless, baby hatches began to be installed even with no effective legislation to protect mothers (or anyone else) using them against criminal prosecution and on April 16<sup>th</sup> 2005 a child was placed in one for the first time. Within a year the legislation had been amended and this exception to criminal liability was accepted by the Slovak Parliament. Today, twenty baby hatches exist throughout Slovakia and have to date saved the lives of 47 children.<sup>56</sup> In the Czech Republic there are 65 baby boxes and between 2005 and August 2014 a total of 108 babies have been placed in them.<sup>57</sup> In 2013, there were 99 baby boxes in Germany, 45 in Poland, 26 in Hungary, 8 in Lithuania, and about 8 in Italy, while some can also be found in Belgium, Switzerland, Vatican City, Canada and Malaysia.<sup>58</sup>

The legislative problem of baby hatches was identified in a missing legal definition of the term “newborn child” found in Slovak law.<sup>59</sup> Today it is accepted that no infant older than six weeks can be left in a baby hatch without criminal liability for the

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<sup>53</sup> T. Burkett, “The idea of “Safe Heaven” for unwanted infants,” *Proceedings of the international conference Child is a Gift, Bratislava, Slovakia, September 25-26, 2014* (2014): 28-33, at 31.

<sup>54</sup> See Wolpert, *supra* note 3, at 72.

<sup>55</sup> M. Balling, “The project “baby window” in Switzerland and what the federal government says about it,” *Proceedings of the international conference Child is a Gift, Bratislava, Slovakia, September 25-26, 2014* (2014): 34-36, at 35.

<sup>56</sup> 10. narodeniny hniezd záchrany, November 6, 2014, available at <<http://www.sancaoz.sk/sanca/10-narodeniny-hniezd-zachrany>> (last visited June 12, 2016).

<sup>57</sup> L. Hess, “Babybox in Czech Republic have helped to get into life more than 100 unwanted human younglings,” *Proceedings of the international conference Child is a Gift, Bratislava, Slovakia, September 25-26, 2014* (2014): 48-51, at 50.

<sup>58</sup> See Ailes, *supra* note 1.

<sup>59</sup> See Polák, *supra* note 27.

act.<sup>60</sup> When discussing a suitable time period for leaving a child in a baby hatch, the legislation of certain US states have been used as precedent. The threshold ranges in individual states from three days to one year of age. The most common thresholds are three days (11 states) and 30 days (17 states).<sup>61</sup> The idea behind baby boxes should be to help mothers in crisis and so they should be aware of them prior to giving birth. This option should be used from the birth of the child to a short time thereafter. But it should not be beyond a certain threshold following birth if the mother believes she cannot be a proper parent.

Today Slovak legislation allows a newborn to be placed in a baby hatch without any information about it. However, experiences in the US show it to be quite useful when medical staff at the baby hatch are provided with complete medical and genetic information about the newborn (birth date, full term of pregnancy, any prenatal care, drugs or alcohol taken during pregnancy).<sup>62</sup> Providing such information is voluntary and recommended. The obligation to fill out a questionnaire could lower the number of children left in baby hatches. Allowing either parent to safely relinquish their newborn with no questions asked and no fear of prosecution is what makes baby hatches a viable alternative for parents seeking to do the right thing for their newborns while protecting themselves in the process.

Baby hatches are primarily employed by hospitals in order for the newborn to be given immediate medical attention. For example, in Switzerland baby windows function as follows: “There is a window on the outside wall of a hospital which can be opened from the outside. Inside there is a baby’s cot, heated to 37 degrees (celsius). Inside there is also a letter to the mother. If a baby is placed in it, an alarm goes off to the midwife on duty after three minutes. The child will be taken, looked after and cared for lovingly and as well as that it will receive a medical check-up. Then it will be registered with the local authorities.”<sup>63</sup> There is a similar procedure in the Czech Republic: “...after having the baby put inside a sensor is activated, the door is automatically closed. The inner space is air-conditioned. The alert is given over the internet, which also allows the baby box to be controlled and adjusted remotely.”<sup>64</sup> Baby hatches in Germany function as follows: “If a baby is placed in the baby hatch, there is an internal alarm and the baby hatch is also monitored by a security device that instantly alerts the SterniPark background service. The staff goes directly to the baby hatch. In the meantime, the baby hatch is locked. At the same time the camera above the heated bed turns on. After about five to ten minutes, the employees take the lead and care initially for the child. The next step is for the child to be examined by a pediatrician or in a hospital. If the child does not need to be hospitalized, two employees from SterniPark bring the child to a foster family

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<sup>60</sup> Hniezdo záchrany, available at <<http://www.sancaoz.sk/content/hniezdo-zachrany>> (last visited June 12, 2016).

<sup>61</sup> See Burkett, *supra* note 53, at 32.

<sup>62</sup> *Ibid.*

<sup>63</sup> See Balling, *supra* note 55, at 35-36.

<sup>64</sup> See Hess, *supra* note 57, at 51.

for a certified brief time.”<sup>65</sup> Baby hatches in the United Kingdom “are built as a separate entrance in to a hospital or public building. ... They are almost like an incubator in that they are heated and the mother can go in and put the baby in a secure and warm, padded incubator and close the door up. It sets an alarm off, and on the other side a nurse or a clinician would come and take the baby away.”<sup>66</sup>

Some of those children delivered to baby hatches or baby boxes have come from home births although current legislation providing for “confidential birth” gives mothers that do not want their babies enough incentives for them to remain anonymous, thereby discouraging home births and motivating them to give birth in a hospital. Then a mother could opt for a confidential birth and never has any need to use a baby hatch.

### **Conclusion**

This article examines the issue of unwanted babies and possible criminal liability for an unwanted child. Both the laws in Slovakia and also in Canada were cited in discussing this problem, but there are many other countries that could have been mentioned but were not due to space limitations. Yet it should be noted that criminal liability for abandonment in such cases is common in all democratic and developed countries—“abandoning a child is against the law across Europe.”<sup>67</sup> Some mothers have no idea or are not aware of the existence of criminal liability. This article should be publicized to all women that do not know how to deal with their unwanted pregnancy and to all countries about how to address this social problem. There is always another way than provided in criminal law. A huge price could be paid for having embarked on a “criminal solution” with a long sentence of imprisonment which neither a woman nor the country where she resides would necessarily want to pay. This article expresses a greater hope that a mother expecting a baby she does not want to keep will find a legal option to resolve this problem, rather than opting to illegally abandon the baby or terminate the pregnancy. There is also a chance that in more states the idea of baby hatches will be promoted as an increasing number of advocates work to make them more widespread.

This article makes it clear that the lives of unwanted children can be saved, whether through confidential birth or baby hatches. These options also contribute to eliminating the criminal aspect in the scope of life and health, as well as in the family and youth. All of society should care about saving the lives of unwanted newborns and therefore agree with the option of deliveries carried out in confidence and the creation of baby boxes (hatches). This article also challenges the position taken by the UN Committee on the Rights of the Child in advocating the abolition of baby boxes. The position of this institution has both proponents and opponents, so the idea of creating baby boxes could be endangered in the future. The issue should be discussed on the international level in order to reach common positions that both promote and preserve solutions that

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<sup>65</sup> See Wolpert, *supra* note 3, at 73.

<sup>66</sup> See Ailes, *supra* note 1.

<sup>67</sup> *Ibid.*

will save lives. It is our hope that this article will help to launch worldwide discussion about unwanted babies and a solution to this problem.