

## NEW TECHNOLOGIES AND THE EXISTING MODEL OF PROTECTION OF MOTHERHOOD AND PARENTHOOD

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**Abstract:** *New technologies, particularly in the field of medical research, significantly affect the currently used model of social-law protection of motherhood and parenthood not only in the field of labour law but also in the field of social security law.*

*The current model of social-law protection of motherhood and parenthood covers only the typical situations when a woman becomes pregnant by natural means, gives birth to the child and postpartum will start to care for their child. Under the current legal status such a woman (after giving birth or potentially a man) is entitled to a special legal protection not only according to the Slovak law but also under the law of the Czech Republic and the EU law.*

*Few years ago, there have been continuously growing cases of surrogate motherhood, where a surrogate mother has carried a fetus and after the child is born she hands it over to the care of an intended mother under a special civil-law contract. Although most of the legislations of the EU member states do not regulate surrogacy, labour law and social security law must give solutions of social-law consequences of surrogate motherhood even regardless of whether the civil code provides for surrogacy any adequate legal framework.*

*The proliferating cases of surrogate motherhood have been already addressed by a new case law of the ECJ under which the specific protection of a mother corresponds only to a pregnant woman who gave birth to a child.*

*The increasing frequency of cases of surrogate motherhood will especially require in the near future from the legislators to provide a certain part of the social-law protection to the surrogate mother at the time of her pregnancy, at birth and shortly after the birth, and a part of this protection shall be provided also to the intended mother that will take the baby into her custody after the birth.*

**Keywords:** *surrogacy, the surrogate mother, the intended mother. The Convention on the Rights of the Child, the term parent, the in vitro pregnancy, a breastfeeding woman, the concept of a legal guardian, the concept of a mother, maternity leave, parental leave, protection of pregnant women and mothers, the Directive 92/85/EEC, model of social-law protection of motherhood and parenthood*

### INTRODUCTION

New technologies bring unexpected possibilities for human development. And are especially related to stem cell transmission, the development of reproductive medicine, and gene manipulation, which, on the one hand, bring new challenge for the field of law and, on the other hand, have their moral and religious dimension as they address the fundamental questions of life and its protection.

The topic of surrogacy has become an enormous issue in Europe and in the world, and therefore has been dealt with by the European Parliament various times, the last time and the most recent it was in July 2016. In its resolution, the European Parliament addresses the issue of surrogacy in a very special way, shows its interest in the issue, but is not very

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optimistic neither negativistic. In particular, the resolution highlights the sensitivity of the problem of surrogacy which may have traits of human trafficking in certain circumstances.

This issue has also been addressed recently by the Episcopal Conference of Slovakia, which described the surrogacy as morally flawed, and being in contradiction with the dogmas of the Catholic Church.

So far, there has not been stated any precise theoretical or legal definition of surrogacy. According to Black's Legal Dictionary, a surrogate mother is a woman who is artificially inseminated by the sperm of another woman's husband. The surrogate mother gets pregnant, she carries the child and, after giving birth, she transfers her parental rights to the real father of the child and his wife.<sup>2</sup>

According to the reproductive medicine, the surrogacy begins with artificial fertilization of the surrogate mother or with embryo insertion into her. The surrogate mother then carries the child and gives birth to it and she is ready to leave the child after the birth to a third person, i.e. the intended mother. Genetically, a child may originate either from the so-called intended parents who take parental care after birth, or from the father and the surrogate mother, or from him and the third woman. Genetic material can also come from other people, where there is in the client's position not only a man and a woman, but also two men or two women.

Paternity is usually ensured already during pregnancy by declaring of the surrogate mother before the registry office.

The phenomenon of surrogacy has expanded widely in recent years, crossing the borders of both states and continents (there appear opinions expressing that it is a world trade with uteruses). Similarly, the number of pregnancies in vitro is also increasing. On the other hand, "due to" civilization diseases as well as other unfavourable civilization influences and existing lifestyle, the number of women who, even though they are healthy, cannot naturally become pregnant, is also increasing, therefore the advances in reproductive medicine allow them to get pregnant, for example, by the method in vitro.

On one hand, the advances in reproductive medicine have grown by milestones, and the law in most countries does not reflect this development either in positive or negative terms. On the other hand, on a global scale, the black "uterine trade" (illegal rentals of uteruses) is unwittingly spreading. The intended mothers enter into contract on surrogate maternity with the surrogate mother also outside the legislation framework (various types of innominate contracts), which subject is the child as a human being. The subject of these contracts is the obligation of the surrogate mother to carry the child and after the child-birth, to give it for money to the other, intended parents, i.e. the intended mother and also the father whose sperm is most often used to fertilize the surrogate mother.

It seems that as if the Civil Code of the Czech Republic expected a situation of surrogacy, because in the Section 804 it explicitly prohibits a woman to adopt a child that her mother gave birth to, which does not allow the adoption of a child, if the family relationship is preventing the adoption (if, for example, the surrogate mother was the mother of the woman who cannot have children and the grandmother would give birth to her own

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<sup>2</sup> BLACK, H. C. *Blackův právní slovník. 2. svazek*. Translated by Baláš et al. 6<sup>th</sup> edition. Praha: Victoria Publishing, 1993, p. 1318, see also: HADERKA, J. Surogační mateřství. *Právní obzor*. 1986, No. 10, p. 917.

granddaughter). According to Section 775 of the Civil Code of the Czech Republic, the mother of the child is the woman who gave birth to the child. The Family Act of the Slovak Republic provides for the legal status of the mother in the same way.

Especially in foreign practice there are more forms of surrogacy. If the intended mother is healthy, but cannot carry her child, a substitute mother receives into her body in vitro a „foreign“ genetic material. She remains a biological mother, but from the genetic point of view, parents are the genetic parents. In other cases, the surrogate mother is in vitro fertilized by an anonymous donor from an anonymous sperm-bank. This method of surrogacy will not allow the child to become aware of his / her parents in the future, which is the right of the child under the Convention on the Rights of the Child.<sup>3</sup>

Naturally, the EU legislation cannot, in these sensitive matters, force Member States to establish the institute of surrogacy. These are issues which belong to the exclusive competence of the Member States, from which it is clear that only a few EU Member States are allowing a legal way of surrogacy. Part of the EU Member States explicitly prohibit it, for example, Germany.

The UK and some US states, Thailand and India are more liberal with regards to the legislation on surrogacy. Among the European non-EU countries, only Ukraine has a more comprehensive legal framework surrogacy.<sup>4</sup> The courts have so far solved many complex cases of surrogacy, i.e. its consequences.<sup>5</sup> There is known a case when the surrogate mother refused to give the born child to the intended parents or the case of twins when the intended parents were willing to take over only one of the born children. The specialist literature also mentions an interesting case in Sweden when the child procreated from the genetical material of a man and a woman was carried by a sister of the father, and until the post-natal legal relationships related to the transfer of parental rights were arranged, the spouses divorced. In the birth certificate of this child, there were stated siblings as parents of the child, a sister of the intended father as a biological mother and the brother as a biological father. The father of the child withdrew his consent to the adoption by his ex-wife, and thus his ex-wife, with whom he divorced, had lost the right to a child that would result from marriage if one of the spouses was a parent.<sup>6</sup>

While we are aware of the complexity and sensitivity of the issue of surrogacy, the existence of this problem cannot be solved just by the law as such, although the law often has to deal only with the social-legal consequences of surrogacy. Even in the current situation, the enshrinement of surrogacy remains in the responsibility of the Member States of the European Union.

However, on the other hand, we cannot forget about the social-legal consequences of surrogacy, for example, in the sense that surrogacy occurs in a state that allows surrogate

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<sup>3</sup> See also BUREŠOVÁ, K. Surogátní mateřství a jeho (nejen) právní aspekty. *Právní rozhledy*. 2016, No. 6, p. 193 and others.

<sup>4</sup> The Article 123 of the Family Act of Ukraine provides for the determination of maternity and paternity in the event of in vitro fertilization. Under Section 123, Paragraph 4 of the Family Act of Ukraine, the parents of a child are also a married couple if the child was conceived by implanting an egg of a foreign woman.

<sup>5</sup> See the Section 35 of the Health Care Act of Russia. According to the ruling of the court of 2010, the intended parent may also be just a woman whose child was born to a surrogate mother ([http // www.jurconsnet.ru](http://www.jurconsnet.ru)).

<sup>6</sup> Fall 55.I. Nytt juridiskt arkiv. Stockholm. *Norstedts Juridik AB*. 2006, p. 505–510.

motherhood and the social-legal protection of such women must be dealt with in a state that does not allow surrogate motherhood. These are fundamental issues of the social rights of all pregnant women (regardless of how the pregnancy occurred), of social protection of breastfeeding women, the protection of women shortly after giving birth, the right to maternity benefits as for example health insurance benefits, or the right to maternity or parental leave or the parental benefit.

Some of these aspects of surrogacy have in the meantime been dealt with by the Court of Justice of the EU, which responded to the complex social problems arising from the consequences of surrogacy. The EU has, however, not dealt with the mentioned problem as with a human-law problem neither as with the problem of protection or intervention in the fundamental human rights.

As regards labour law aspects, there is relevant not only the legal protection of the surrogate mother, who carries and gives birth to the child, but also the social and legal protection of the intended mother who takes care of the child permanently and personally after the birth of the child. In the developed countries of the world, these intended mothers are demanding the same social protection rights that belong to the biological mothers that have given birth to the child.

To what extent would certain mothers be protected from the point of view of existing social insurance, who, although have not carried nor given birth to the child, but immediately after the birth of the child will take the child into their permanent personal care?

It is interesting to note that the Court has also recently dealt with the question of whether a uterus lacking in a woman may be regarded as a disability. The Court has stated that a missing uterus in a woman is not a characteristic for a disabled person for the purpose of prohibiting discrimination because this fact does not prevent women from performing their working lives.<sup>7</sup>

One case of the social rights claims of the intended mother has already been dealt with by the EU Court.<sup>8</sup>

The Court considered the question whether a woman is entitled to maternity leave even though she has not given birth to the child, which was delivered by surrogate mother. After the child was born by the surrogate mother, for the fertilization of whom there was used the Mrs. D partner's sperm, Mrs. D began taking care of the baby already one hour after birth, including breastfeeding. Subsequently, the court acknowledged her the permanent and complete parenthood of the child, so Mrs D. and her partner considered themselves as the parents of that child. Mrs D. applied to her employer for parental leave for the purpose of caring for a child who was carried by the surrogate mother and which she qualified as equivalent to the time-off granted for adoption. The surrogacy in the United Kingdom, in which this case arose, allows this, under certain conditions, even though there is no special regulation on maternity leave for the intended mothers. In the main proceedings, the Court dealt in particular with the question of whether the intended mother can be protected under Directive 1992/85/EEC. The Court has held that a worker in the status of

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<sup>7</sup> C-363/12 (Z) of 03/18/2014.

<sup>8</sup> C-167/12 (C.D.) of 03/18/2014.

an intended mother who obtains a child solely by a surrogate mother does not fall within the scope of the protection of Directive 1992/85/EEC, even if she can breastfeed after the birth because the purpose of this directive is to protect the health of the mother of a child who, due to her pregnancy, is particularly vulnerable. The basic condition for entitlement to maternity leave under the Directive is that the employee was pregnant and has given birth to the child. In the context of the present case, the Court has stated that the Directive lays down only the minimum limits for the legal protection of this work category of women, while at the same time not precluding Member States from granting maternity leave to intended mothers on account of the birth and aftercare of the mentioned child.

As mentioned above, only a very few countries in Europe and the world have so far admitted parenthood *ex lege* to the intended mothers. For example, under the United Kingdom legislation, the 2008 Human Fertilisation and Embryology Act, Article 54, provides that a court may, at the request of two persons, issue a decision on parenthood according to which the child should be legally considered to be the child of the claimants, if:

- this child was carried by a woman who is not one of the claimants, and the child was procreated either by embryo insertion or sperm and egg insertion into that woman or by artificial insemination,
- a gamete of at least one of the claimants was used for embryo production, and
- some other conditions are met, including the fact that the claimants are in a marital or similar relationship.<sup>9</sup>

Article 47C of the Employment Rights Act 1996 states that an employee has the right not to be harmed by any action by an employer for the stated reason. These are reasons mainly related to pregnancy, childbirth or maternity, regular and supplementary maternity leave as well as regular and additional leave in the case of adoption.<sup>10</sup> The problem of Mrs C.D. was that, when applying for a care leave for a child carried by a surrogate mother, she was not able to submit an adoption certificate because this case was not subject to the adoption procedure. By submitting a certificate of adoption, she would be subject to legal protection and maternity leave would apply to her.<sup>11</sup>

According to the EU Court of Justice, Directive 1992/85 / EEC does not enforce EU Member States to grant maternity leave to a mother who has a child through a surrogacy agreement.<sup>12</sup> The Member States can freely decide on the legal regulation of surrogacy as well as on the legal status of the intended mothers because the legal norms of EU law (Directive 1992/85 / EEC) only regulate minimum social standards.

According to the decision of the Court of Justice in the above-mentioned legal case, the intended mother for whom the surrogate mother carries and gives birth to a child does not fall under the legal protection of Directive 1992/85/EC, the purpose and aim of which is the protection of pregnant women and women shortly after giving birth.

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<sup>9</sup> See the Article 54 of the Human Fertilisation and Embryology Act of 2008.

<sup>10</sup> See also the ruling C-167/12 (C.D.) of 03/18/2014, point 13.

<sup>11</sup> *Ibid.*, point 21.

<sup>12</sup> *Ibid.*, point 47 and point 53.

## 1. IS THERE THE RIGHT TO MATERNITY LEAVE WHEN A CHILD IS BORN BY A SURROGATE MOTHER?

The intended mother from Ireland has agreed with a surrogate mother on child carrying and has sought legal protection under Directive 2006/54/EC as well as Directive 2000/78/EC. The applicant was unable to conceive or to give birth to the child even though she was prolific. The woman lacked the uterus. The child was carried by the surrogate mother.<sup>13</sup>

A birth certificate was issued to this new-born child, which was carried by the surrogate mother, in which there were stated as parents the biological parents of the child, Mrs. Z. and her husband. After their return to Ireland, Mrs Z. asked her employer to take maternity leave, i.e. leave after adoption. The employer refused to grant her leave because she was never pregnant. Although she is the biological mother of the child, there has never taken place any adoption, so it has not been possible under the Irish law to grant her leave because of adoption. Mrs Z. sued her employer for discrimination on grounds of sex and discrimination on grounds of disability.

The EU Court of Justice did not grant the applicant legal protection for a pregnant worker or mother after giving birth because the applicant was never pregnant and did not give birth to a child. As regards discrimination on grounds of disability (missing uterus), the Court stated that, despite her limitations resulting from disability, which is of a long-term nature, it is not a restriction which hinders the employee from fully and effectively engaging in working life, therefore the Court did not assess her illness as disability within the meaning of Directive 2000/78/EC.

As it can be seen, within the labour protection for mothers, the European Union law provides social protection only to the pregnant woman who gave birth to the child. Only such a woman, according to the current legal situation, is subject to the protection within the meaning of Directive 1992/85/EEC on the protection of mothers, i.e. protection against dismissal by the employer, prohibition of certain work for pregnant women, the claimant nature of the working conditions, if the pregnancy of the woman requires it, and also the right to maternity leave and later to parental leave.

The intended mother, i.e. the mother whose child is carried by another woman begins to take care of the child only after its birth. According to the relevant rulings of the Court of Justice, such a woman is not entitled to the protection during pregnancy nor employment protection in respect of childbirth or shortly after childbirth.

## 2. THE LEGAL STATUS OF SURROGATE MOTHERS

The legal status of surrogate mothers has so far not been provided for by the case law of the EU Court, although it is undeniable that during pregnancy, regardless of the reason for pregnancy, such women should enjoy the protection of pregnant women as well as legal protection that women have shortly after giving birth or for which are entitled the breastfeeding women. So far, most EU countries have not provided for the social status of

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<sup>13</sup> C-363/12 (Z) of 03/18/2014.

surrogate mothers. The status of surrogate mothers in the framework of the labour relations of most states is not dealt with, *inter alia*, because, for example, within the European Union, the number of surrogate mothers is very low and also because the ethical issues related to the protection of life and family law fall within the competence of the Member States.

Therefore, the social status of surrogate mothers has not yet been dealt with by the legal order of the vast majority of the Member States of the European Union. However, they provide this category with a social protection during pregnancy and childbirth without addressing the problem of how the pregnancy or childbirth has occurred. Neither Slovak labour law nor the social security law addresses the mentioned problem.

If such surrogate mothers were working and were pregnant, they would be fully entitled for labour protection within the meaning of Directive 1992/85/EEC on the protection of mothers and the relevant national labour legislation regulating the special working conditions of pregnant women. This is not only a ban on the performance of some works for pregnant women, but also a ban on termination of employment by the employer during their pregnancy, as well as special protection at termination of employment and during the probationary period.

From the point of view of the social security law, surrogate mothers could be entitled to a compensatory allowance for redeployment to another job for which performance they would have lower earnings than their original average earnings. With regard to surrogate motherhood, it is also interesting to monitor the extent to which surrogate mothers would qualify for maternity benefits, i.e. maternal and parental allowance as well as sickness insurance benefits.

On the other hand, however, it should be noted that only a few surrogate mothers work and are socially insured. The number of surrogate mothers is growing strongly, but especially in developing countries, most often as a manifestation of a “desperate” way of securing elementary living conditions. Surrogate motherhood, which is financially remunerated, is therefore widespread in developing countries where it is naturally also the cheapest, and, on the contrary, the number of intended mothers is increasing especially in highly developed countries. And especially, the intended mothers whose number has increased significantly in recent years also in the EU countries are demanding adequate social-law protection after taking the child into their permanent care after the childbirth. Therefore, the problem of social-law protection of intended mothers has also been brought before the Court of Justice of the EU.

As regards the problem of surrogate motherhood, it appears that the existing legal model of maternity protection has not been sufficient, since as if the factual status of the surrogate mother on the one hand and the intended mother on the other hand required from the legislator to divide the social protection of mothers between surrogate mothers and intended mothers. Some of the legal entitlements linked to pregnancy and childbirth would belong to surrogate mothers, and some of the legal entitlements related to the childcare would belong to the intended mothers.

If we are based on the current labour legislation of the Labour Code, special labour law protection is available to pregnant women and women in the context of childbirth or shortly after birth as well as to breastfeeding women. It follows from the foregoing that the labour protection of a pregnant woman who is in a surrogate mother’s position is suf-

ficiently provided for after the childbirth and shortly afterwards. Other social-rights claims related to the personal care of a born child could be attributable to the intended mother, i.e. mother, who took the child into permanent care after the surrogate mother gave birth to it. However, it is not that easy. The biggest legal complications arise with the transfer of parental rights to intended mothers, where most commonly there is used the institute of adoption. If we were based on foreign practice of recent years, legal situations arise that intended mothers who start taking care of a child after the birth of a child request from their employers the same social and legal rights as women who were pregnant and gave birth to the child themselves. This is mainly a legal entitlement to maternity leave and parental leave.

### 3. SOCIAL PROTECTION OF INTENDED MOTHERS – CONSIDERATIONS *DE LEGE LATA AND DE LEGE FERENDA*

From the labour-law point of view, the intended mother could eventually benefit from the benefits for which women are entitled until the third year of the child's age, or those related to working time arrangement up to 15 years of age, or those related to overtime work. The provision of Section 164 of the Labour Code considers as the competent body of these claims a woman who permanently cares for a child younger than 15 years of age and in the case of working overtime there is necessarily required the consent of a woman who is constantly caring for a child under the age of three. The unilateral order to work overtime to such a woman would be contrary to the Labour Code.

Pursuant to section 169 of the LC, a woman could be entitled to the claim for care which substitutes parental care according to a decision of the competent authority. It is mainly related to the adoption cases. The intended mother would be entitled to maternal or parental leave from the date when she takes the custody of the baby for 28 weeks, in the case of a single mother it is 31 weeks and for the woman who took over more babies, it is 37 weeks, however, no longer then until the child reaches three years. According to the Section 166, Par. 2 of the LC, the parental leave (additional maternity leave) shall be granted for a period of three years from the date of termination of maternity or parental leave or from the date of taking over of the child, who reaches three years, and no longer than until the child reaches the age of six. In the case of a child with a long-term adverse health condition requiring special care, parental leave for the intended mothers could also be provided for the period until the child reaches eight years. However, these considerations are formulated from the *de lege ferenda* point of view.

If an intended mother takes the baby into care later and not immediately after childbirth, i.e. after six weeks, the intended mother could be entitled to parental leave which could be considered as a child care replacing parental care (substitute parental care).

The existing legal patterns of adoption in European countries normally link the acquisition of „parental“ rights within the surrogate motherhood to the fact that at least one of the spouses is the parent of the child.



#### 4. LABOUR LAW PROTECTION OF A WOMAN IN THE CASE OF *IN VITRO* PREGNANCY

In vitro fertilization is referred to as fertilization of the egg cell outside the female body. According to the European Commission, as well as the recent case law of the Court, this process has several stages, hormonal stimulation of the ovaries to simultaneously obtain more mature egg cells, follicular puncture, egg removal, fertilization of one of the egg cells by pre-prepared sperm, transfer of fertilized egg or fertilized eggs to the uterus, which is carried out on the third or fifth day after removal of the eggs, except when the fertilized eggs are stored in a frozen state; and a nidation.<sup>14</sup>

How can the beginning of pregnancy be limited? When does the pregnancy start? This is a fundamental legal issue. According to the Court, the fertilized egg which has not yet been transferred to the womb, cannot be considered as the beginning of pregnancy, because the fertilized eggs can be stored for a maximum of 10 years<sup>15</sup> and, ultimately, may not be transferred to a woman's body at all for various reasons.

In court case C-506/06 (Mayr) of 26 February 2008, the Court ruled on the protection of a woman against the dismissal within the meaning of Directive 1992/85/EC on the protection of mothers on grounds of their pregnancy.

The factual situation which was the subject of the Court's assessment was complicated by the fact that Mrs Mayr was dismissed at the time of her incapacity for work during which she underwent artificial insemination. At the time of the dismissal by employer, she was not pregnant yet, even though her eggs had already been fertilized by her partner's sperm, so they already existed as in-vitro embryos but were not yet been transferred to her uterus. This procedure took place only three days later. However, according to a ruling of the Court of Justice of the EU in the above-mentioned legal case, the condition of granting protection of a woman against dismissal under Directive 1992/85/EC is only an existing pregnancy. In order to protect legal certainty, the Court refused to consider as the beginning of the pregnancy the fact that eggs were already fertilized in vitro at the time of the worker's dismissal, but had not yet been transferred to her uterus at the time of the notification of dismissal. This was also due to the fact that in some Member States, as mentioned above, it is possible to store such eggs for up to ten years prior to the transfer to a woman's womb. Applying the protection of a woman even prior to the transfer of fertilized eggs would mean that this protection would also be obtained by a woman for whom such a transfer was delayed for a few years or even had not been done at all. For this reason, it was not possible for the Court of Justice to grant such protection against dismissal under Directive 1992/85/EC on the protection of mothers. It is interesting to note in this case that the Court has also had to deal with the problem when does the pregnancy start, as the pregnancy is subsequently legally linked to increased labour protection for women and mothers. The Court of Justice did not grant such a worker legal protection because, at the time of the dismissal, the employee was not yet pregnant.

<sup>14</sup> C-506/06 (Mayer) of 11/27/2007, point 30.

<sup>15</sup> Ibid., point 42.

The provision of maternity leave was not only related to pregnancy but also to childbirth. That means that the existence of pregnancy is the legal basis for woman's labour protection. Until the fertilized eggs are transferred to the body of a woman, she does not, according to the existing labour law, enjoy special labour protection.

If the woman was temporarily incapacitated in connection with preparation for the transfer of fertilized egg, she would receive sickness insurance benefits. Although women who have not yet been pregnant, do not enjoy special protection against dismissal because they are not yet pregnant, in the case of temporary incapacity for work of such a woman due to her preparation for the transfer fertilized eggs to a woman's body, the dismissal by employer would be incorrect because of the breach of the prohibition of discrimination by sex. In our legislation, an employer's dismissal during a woman's incapacity for work would be invalid not just for that but also for some other reason. There are European Union countries that do not provide protection against dismissal during the employee's temporary incapacity to work.

From the point of view of the Court of Justice, this case is interesting because the Court also considered this legal case in terms of the consistency of the dismissal of a woman with regard to Directive 1976/207/EC on the principle of equal treatment between men and women. The EU Court declared in this decision that it is a discrimination against women within the meaning of Directive 1976/207/EC (now Directive 2006/54/EC), because the dismissal of a female employee during the temporary incapacity of a woman due to puncture of the follicles and transfer of the embryos created from them in the womb of a woman immediately after fertilization of the eggs can only affect women. At the same time, dismissal due to temporary incapacity for work would not be discriminatory, if it would not differ from the dismissal of a male for the same reason (which applies to countries that do not protect their citizens against the dismissal of the employee during their temporary incapacity to work).

## 5. PROVISION OF THE LEGAL STATUS OF BREASTFEEDING MOTHERS

Breastfeeding mothers are under special labour law protection. According to the Slovak labour law, Section 170 of the Labour Code they are not only entitled for breaks to be able to breastfeed but they are particularly protected in case of a possible dismissal by the employer during their probationary period.

According to the Section 72 of the Labour Code, the employer may terminate the employment relationship with the pregnant woman, the mother until the end of the ninth month after the birth and the breastfeeding woman only in writing, in exceptional cases not related to her pregnancy or maternity, and must duly justify it, otherwise the termination of the employment relationship is invalid.

According to the Section 170 of the Labour Code, the employer provides breaks for breastfeeding for mothers who are breastfeeding. Although the intended mother can breastfeed, she is not considered as a real mother in the respect of the Family Act. The cited provision of the Labour Code attributes the right to work breaks due to breastfeeding only to biological mothers. According to current legal status, the mother of the child is the woman who gave birth to the child. However, if an intended mother took the child into her care that substitutes parental care within the meaning of Section 169 of the LC, she might be entitled to breaks for breastfeeding.

But what does it mean to breastfeed a baby? Under both Slovak and Czech legislations, breastfeeding is interpreted as a concept in its original sense, i.e. the actual feeding of the baby from the breast of the woman-mother and not feeding the baby from the bottle (even though the Section 72 of the Labour Code provides labour protection during the probationary period to breastfeeding women, not breastfeeding mothers). At the same time, maternity breaks due to breastfeeding under the current legal status of the Labour Code of the SR apply only to “mothers who are breastfeeding a child” (meaning “her child” or a child entrusted to them to care replacing parental care).

The Court of Justice has stated that not only a woman but also a man is entitled to work breaks due to breastfeeding because it understands breastfeeding in a much broader context, including breastfeeding from bottle. This means that the entitled person is not only the father-partner of a female worker, but also the father-partner of a woman who is in the legal status of a self-employed person.

The existing labour law regulation of breastfeeding would have to be reviewed not only by the Slovak but also by the Czech legislator, by extending legitimate subjects also to fathers and men, which is especially relevant as the interest of fathers in applying for parental or paternity leave is frequently growing.

The amendment to the existing Slovak labour legislation is also necessary due to the conclusions of the Court’s ruling in the above-mentioned legal case. The entitled person to work breaks limited only to women-mothers and at the same time excluding bottle-feeding is no longer in line with the content of Directive 1992/85/EC on the Protection of Mothers, as currently interpreted by the Court of Justice of the EU.

## 6. PRIVATE LAW ASPECTS OF SURROGACY

In addition to the above-mentioned problems related to the existing social-legal protection of the surrogate mother and intended mother, either in terms of labour law or social security law, the legal status of the surrogate mother and the intended mother has significant legal consequences also from a private law point of view.

Under the current foreign practice, a surrogate mother carries a child for financial compensation on the basis of a private contract concluded with the intended mother. The Civil Code of the Slovak Republic does not provide for a specific type of contract in this type of case, and under the current legal status such a contract would be totally invalid. In some foreign legislations, this type of contract is considered as a service contract.

In the practice of other countries, the parties under the private law contract also regulate situations covering cases where a surrogate mother gives birth to a disabled child and the intended mother refuses to take the child to her personal care after the birth. On the side of the surrogate mother, it would create a considerable non-material damage that cannot be expressed in money, but also a material damage, for example, in cases when a surrogate mother would not be able to work during the entire period of pregnancy.

Practice in other countries of the world shows that, in case of enactment of surrogate motherhood, it would be necessary to revise the legal concept of mother as well as the legal concept of legal guardian. There should be taken into account as an alternative legal solution the status of adoption of the child.

In connection with solving the private law aspects of surrogacy, there arise also other important ethical issues as well as legal issues related to the Convention and the Rights of the Child, in which meaning the child has the right to know their biological parents. Last but not least, in the event of a possible legislation on surrogate motherhood, there is also important to legally consider the form of a private law contract with financial reward concluded by a surrogate mother and an intended mother, as well as the solution of legal situations in the event of violation of such contract, i.e. to regulate responsible relationships in breach of a contractual obligation between the intended mother and the surrogate mother.

The issues of legal guarantees of taking a child after birth by the intended mother in cases where a child is born disabled and the intended mother refuses to take the child into personal care, are particularly sensitive.

## CONCLUSION

New technologies at the third millennium threshold and radical changes in the reproductive medicine represent a major factor in the legal system of states. The use of new technologies has in practice not only positive effects. New technologies and their application bring many social risks to legal practice. Applying new technologies also creates very complex new legal situations, for which the existing law is often not yet ready to respond. Therefore, labour law in Europe and other continents faces many new challenges arising from the application of new technologies and their legal consequences to labour relations. Many considerations for the further development of labour law in the above-mentioned sense are provided in particular by the case law of the European Court of Human Rights and by the case law of the EU Court of Justice.

As the recent decision-making activity of the EU Court of Justice shows, the impact of new technologies is also reflected in the existing social and legal protection of motherhood and parenthood in the area of social security law, but also in labour law. The stated facts related to new technologies are of fundamental importance for the further development of labour law as well as social security law not only in the Slovak Republic, but also in other countries. Among other things, they also predict future legislative developments in the social protection of these women, the employees as well as the risks of such protection.

The legal regulation of surrogacy has important influence both in the field of private contract law and in the area of fundamental status issues of private law.