

# Home Birth from a Comparative Legal Perspective

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*ABSTRACT* The reproductive rights of women touch upon healthcare provided during childbirth, which involve freedom of choice of the place of childbirth. Thus, the issue of home birth is of interest among the legislators, which may be interpreted as part of an "obligation" posed by international legal documents to ensure that respectful care is provided to women during the whole time of pregnancy. However, currently, there is no evident European consensus on how home birth shall be regulated thus, the legal approach is different among European states. The decision-making of the European Court on Human Rights has influenced domestic legislation, especially in Hungary (*Ternovszky v. Hungary* case), however, there was a completely different outcome in the Czech Republic in a factually very similar case (*Dubská and Krejzová v. Czech Republic*). Accurately, what is the woman's role during childbirth? One model suggests that she is the passive side, and the physician has the main role in successfully conducting the birth. The other model follows the ideal, that childbirth is centred around the woman, and her competency in her body and mind makes her the one in control. Nevertheless, alternative birthing methods are not newfangled in some countries such as the Netherlands, where traditional midwife-supervised home birth can be carried out if a woman chooses so, unlike in Slovakia where this freedom of choice is not evident and discouraged by the legislators. This study tries to shed light on why legislation on this issue is so different in these European states.

**KEYWORDS** *home birth, woman's rights in maternity care, alternative birth, right to choose the place of birth*

## 1. Introduction

The issue of home birth from a legal perspective concerns women's reproductive rights, especially their right to decide on the place of childbirth. The current legal regulation on home birth varies in each European country. Some states prefer a more liberal approach, others are more conservative, while each of them has referred to valid arguments for reasoning their permissive or restrictive regulation. On the other hand, from a non-legal approach, international health organizations, based on current scientific findings, argue that home birth can be a good and safe alternative in obstetric care. Since the

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area of legal regulation of home birth is controversial, it is important to highlight the permissive and restrictive legal approaches of different states, and to present the international legal standards, as well as societal expectations in this regard.

The reproductive rights of women, especially the rights which arise during obstetric care have been listed and touched upon in many international legal documents. Moreover, the case-law of the European Court of Human Rights (ECtHR), within the scope of Article 8, namely the right to respect private and family life, is relevant when examining the human rights disposition of reproductive rights, as well as when we review domestic legislation. Nevertheless, the case law of the ECtHR provides important guidance in interpreting individual fundamental human rights and freedoms that are relevant to childbirth.

There is an evident controversy stemming from the issue of birth in a home setting, as two healthcare approaches<sup>1</sup> “compete” here with each other. On the one hand, there is no doubt that maternity care in hospitals often involves unnecessary, medically not indicated medical interventions. However, professional care is obvious if an emergency situation arises, as they have all the necessary medical equipment in reach. On the other hand, the undeniable medicalization of birth, based on the technocratic childbirth model is the general approach, as society has accepted the view that the place of birth shall be the hospital, and childbirth shall be exclusively conducted by a physician.<sup>2</sup>

Planned birth in a home setting or outside an institutional healthcare facility, supervised by a midwife follows the holistic childbirth model. It focuses on the involvement and competency of the woman who gives birth while making this a natural and family event. The presumption that a woman knows best what is good for her body and the child, ensures her capacity to be deeply involved in the decision-making.<sup>3</sup>

Irrespective of which system the given state follows and favours, women during childbirth are in a very sensitive situation both physically and mentally. In order to ensure respectful healthcare during this time, a special personalized human-rights-based approach shall be practised by the medical personnel as the WHO suggests in many of its guidelines, with special regards to respecting human dignity, also women’s right to self-determination in this setting.

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<sup>1</sup> Namely the biomedical and the alternative healthcare system, which we will define and explain in a later chapter.

<sup>2</sup> Barbara Kisdí, “Bevezető – a szülés és születés mint társadalomtudományi téma,” in *Létkérdések a születés körül. Társadalomtudományi vizsgálatok a szülés és születés témakörében*, ed. Barbara Kisdí (Budapest: L’Harmattan Kiadó – Könyvpont Kiadó, 2015), 7–17.

<sup>3</sup> Ibid.

## 2. Reproductive rights of women in international legal documents

Women during childbirth are in a special position where they are offered and simultaneously given healthcare, whereas in this setting various rights are involved. In these interpersonal relationships, legal questions arise, particularly in the realm of human rights related to reproductive health and reproductive rights.

The individual rights of women during childbirth are encompassed by multiple legal provisions in both domestic legislation (likely in the Constitution, the acts on healthcare or the anti-discrimination act, as well as in other legal sources such as ministry decrees) and in international conventions<sup>4</sup> concerning human rights, by which the given state is bound and which take precedence over domestic laws.

The responsibility for upholding the human rights of women in relation to childbirth lies with individual healthcare providers, and healthcare professionals, but the primary bearer of responsibility is the state, which must respect, protect, and fulfil these rights.<sup>5</sup> These specific obligations are outlined in General Recommendation No. 28 of the Committee on the Elimination of Discrimination against Women (CEDAW). It governs the fundamental obligations of contracting states according to Article 2, paragraph 9 of the Convention on the Elimination of All Forms of Discrimination against Women from the year 2010. These documents are of the most relevance in connection with the reproductive rights of women, from where we can deduce how the

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<sup>4</sup> We are referring to the following conventions:

UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979

UN International Covenant on Civil and Political Rights (ICCPR), 16 December 1966

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984

UN International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965

UN Convention on the Rights of Persons with Disabilities (CRPD), 12 December 2006

UN Convention on the Rights of the Child (CRC), 20 November 1989

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention), 4 April 1997

European Social Charter revised (ESC), 22 October 1991

<sup>5</sup> Janka Debrecéniová, "Ľudské práva ako normatívne východisko, želaný stav a interpretačný rámec pre poskytovanie pôrodnej starostlivosti," in *Ženy - Matky – Telá II, Systémové aspekty porušovania ľudských práv žien pri pôrodnej starostlivosti v zdravotníckych zariadeniach na Slovensku*, ed. Janka Debrecéniová (Bratislava: Občan, demokracia a zodpovednosť, 2016), 92.

issue of the right to choose the place of birth can be interpreted and regulated in a member state.

Nevertheless, the CEDAW shall be considered as a primary international legal document, which highlights women's right to health and is specifically connected to their sexual and reproductive health. In order for a state to pursue the objectives outlined by the CEDAW Convention, it has an obligation to refrain from enacting laws, policies, regulations, programs, administrative procedures, and institutional structures that directly or indirectly deny women's equal enjoyment of their rights. Furthermore, the protection of women's rights by the state entails that contracting states must ensure equal treatment for women by private actors through adopting measures directly aimed at eliminating entrenched and any other practices that lead to biases and the perpetuation of the notion of subordination or superiority of either gender and the stereotyping of roles of men and women.

The obligation to fulfil these rights requires states to undertake a variety of measures to ensure the equal exercise of rights for women and men, both *de jure* and *de facto*, including, if necessary, through temporary special measures in accordance with Article 4(1) of the Convention and General Recommendation No. 25. This establishes the duty to apply appropriate means or procedures and the obligation to achieve required results. Member states should take into consideration that they must grant and fulfil their legal commitments to all women, through the preparation of such public policies, programs, and institutional frameworks that are aimed at satisfying the specific needs of women, leading to the full development of their potential based on equality.<sup>6</sup> The state cannot exempt itself from these obligations.

It can be stated that the state has a primary role in ensuring women's reproductive rights, within which it should establish an institutional system for providing healthcare during childbirth. This system should cover the following areas: appropriate training of healthcare workers, oversight of compliance with human rights standards during childbirth, ensuring an effective procedure in case of violations, as well as continuous reassessment and development of the system.

In providing maternity care, the woman's legal status shall be of the greatest concern, since she is the holder of specific rights and entitlements. Moreover, individual rights during childbirth are applied simultaneously and cannot be separated from each other. We are primarily referring to the following human rights: the right to life, the right to human dignity, the right to health and healthcare, the right to protection of private and family life, the right to information and informed consent, and the right to equality and non-discrimination.

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<sup>6</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, <https://www.refworld.org/docid/4d467ea72.html>

Women during childbirth due to their physical and mental exertion are in a specifically sensitive position. Thus they can be easily exposed to potential violation in their reproductive rights, if the medical staff overlooking and assisting the childbirth is not prudent enough.

The key component and the core of reproductive and sexual rights, which is of utmost importance, is the respect for human dignity while giving medical assistance in childbirth which all the more concrete and specific rights can derive from, serves as an interpretative framework for them. To illustrate, the denial of the right to information and informed consent, or informed decision-making during labour and childbirth, is also a violation of the woman's right to human dignity, as this denial presupposes that she cannot autonomously, with full capacity, make decisions about healthcare service for herself, as she becomes an object instead of remaining an active engaging subject of such services. Personal integrity can be jeopardized even through not respecting the patient's right to privacy, which similarly results in the violation of human dignity, as childbirth and labour in a very sensitive, intimate circumstance and by its nature make the woman „helpless” and physically and emotionally drained.<sup>7</sup>

In a practical sense, these violations can be embodied in the following routine practices provided by healthcare assistants: birthing women are not informed about individual medical procedures performed during childbirth or when these procedures are carried out even against their will and consent, arranging the space where health care is provided in a way that does not guarantee the most basic protection of privacy and intimacy (examination or birthing chairs facing the door), and not allowing the free choice of birthing position etc.<sup>8</sup>

### **3. The interpretation of home birth**

In order to understand the concept of home birth, we need to keep in mind that healthcare systems are fundamentally characterized by plurality, where various approaches are simultaneously present and used within different cultures. The basic healthcare systems encompass the popular sector, the biomedical sector, and alternative systems.<sup>9</sup>

Within the popular system, there are methods of treatment carried out in a narrower family circle. This involves self-treatment through family members and other individuals whose positive energies affect our feelings and “heal” our “ailments”, many times applying mixed methods of biomedical and alternative

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<sup>7</sup> Sue Kruske, Kate Young, Bec Jenkinson, and Ann Catchlove, “Maternity care providers’ perceptions of women’s autonomy and the law,” *BMC Pregnancy Childbirth* 13, no. 84 (2013).

<sup>8</sup> Debrecéniová, “Ľudské práva ako normatívne východisko,” 53.

<sup>9</sup> Barbara Kisdi, “Az Otthonszülés Mint Társadalmi Kórjelző Tünet,” *KAPOCS*, no. 58 (2016): 35.

systems.<sup>10</sup> The biomedical approach is part of the modern Western healthcare sector. This method of treatment is rooted in various specialized medical disciplines such as biochemistry, biophysics, microbiology, and so on.<sup>11</sup> Alternative systems involve techniques from natural and alternative medicine that are based on old, traditional healing procedures and are subsequently integrated into modern treatments.

Home birth is considered as one of the alternative birthing methods and is associated with a holistic approach that conflicts with the technocratic medicalized interpretation of maternity healthcare in various aspects. The medicalized approach views childbirth as a medical event. A holistic understanding of childbirth means that the process is seen as a complete event carried out between the mother and the fetus, minimizing medical interventions and the presence of a doctor.<sup>12</sup>

The alternative approach to childbirth assumes that every woman possesses fundamental natural knowledge and strength, which manifest specifically during the process of childbirth. Furthermore, the holistic childbirth model presupposes that a woman instinctively knows how her fetus is growing within her body and how it should be born. Strengthening her trust in these instincts is considered the primary role, achieved through providing appropriate information and emotional empowerment. This model emphasizes that the childbirth process is significantly influenced by the mental and emotional approach and expressions of the mother.<sup>13</sup>

Home birth, based on the above-mentioned information, is not restricted solely to choosing a specific birthing location, but it highly encourages the utilization of domestic and alternative healing practices that contribute to ensuring that childbirth does not resemble a medical procedure. It represents a gentle way of giving birth, where various practices come into play: water births, alternative pain relief methods, avoiding and replacing pain medications, active labour where the mother's physical and psychological expressions are not restricted, rooming-in practices where the newborn is placed in the same room as the mother, and the presence of additional individuals during childbirth.<sup>14</sup>

These concepts and obstetric techniques originate from the French obstetrician Frédéric Leboyer, who popularized gentle birthing methods, which facilitated the smoother adaptation of the newborn to entirely new conditions. Such an approach to childbirth holds significance in ensuring that the newborn does not encounter drastic physical changes upon arriving in the birthing environment

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<sup>10</sup> Susan Reynolds Whyte, Sjaak van der Geest, and Anita Hardon, *Social lives of medicines*. (Cambridge: Cambridge University Press, 2002), 11.

<sup>11</sup> Arthur Kleinman, "Concepts and a Model for the Comparison of Medical Systems as Cultural Systems," *Social Science & Medicine. Part B: Medical Anthropology*, no. 12 (January 1978): 85–93.

<sup>12</sup> Lucia Mazúchová, Simona Kelčíková, Patrícia Vasilková, and Ján Buchanec, "Bonding support after child birth," *Podpora bondingu po pôrode. Československá pediatrie* 71 (2016): 198.

<sup>13</sup> Kisdi, "Az Otthonszülés Mint Társadalmi Kórjelző Tünet," 35.

<sup>14</sup> *Ibid.*

and that the welcoming setting shall resemble conditions in the womb. Therefore, he favoured dim lighting, increased temperature in the delivery room, slower movements, immersing newborns in a small tub of warm water - known as the “Leboyer bath,” avoiding routine quick measurements and other interventions recommended to be performed later, as he considered it most important for the newborn to be brought to the mother for breastfeeding.<sup>15</sup>

A conceptual distinction has to be made to differentiate and to specify the circumstances of home birth as an „alternative” way of childbirth that is further discussed in this paper, in contrast to „general” childbirth in medical system, that is in hospitals.

1. Planned home birth can be defined as childbirth taken place outside a medical facility, at home or in a birth centre, that was consciously chosen by the pregnant woman, who intended to perform this way from the beginning of the pregnancy. In countries where planned home birth is regulated, the pregnant woman and the pregnancy itself have to meet the specific circumstances and the woman can choose the option beforehand to avail herself to childbirth care outside the medical facility.

Moreover, the definition of planned home birth also includes a mother's plan to give birth at home. According to this interpretation, even a pregnant woman who prepares for a home birth but, due to unexpected complications, ends up giving birth in a hospital, falls under the category of a home birth.

2. Home birth can also refer to unplanned childbirth taking place outside a medical facility, due to unexpected, incidental or abrupt beginning of the labour. Furthermore, occasions when the pregnant woman intends to birth at home without actually resorting to any assistance from a medical professional or a midwife fall under this scope. These instances can be referred to as, “unassisted childbirth” or “free birth”.<sup>16</sup>

### 3. 1 The WHO on maternity care

In the preamble of the WHO Constitution, health is defined as a *state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity*.

In the context of maternity and obstetric health care, the WHO has issued various publications, recommendations, checklists, and implementation guidelines, aiming to establish universal standards that doctors and midwives can apply in practice. Some of the significant documents include the following:

1. *WHO Recommendations: Intrapartum Care for a Positive Childbirth Experience* (7 February 2018). This guideline provides recommendations on various aspects of childbirth care, including the role of skilled birth attendants, birth settings, and the importance of respectful maternity care. The up-to-date guideline comprehensively lists the existing WHO recommendations in one

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<sup>15</sup> Conley Olivia, “Birth without Violence (1975), by Frederick Leboyer,” *Embryo Project Encyclopedia* (2010-06-30), <http://embryo.asu.edu/handle/10776/2032>.

<sup>16</sup> Kisdi, “Az Otthonszülés Mint Társadalmi Kórjelző Tünet,” 30.

document, which aims to ensure positive pregnancy and birth experience, based on a woman-centred, holistic, human rights-based approach.

2. *WHO Recommendations: Home-Based Records for Maternal, Newborn, and Child Health* (1 January 2018), is not specifically related to home births. The document highlights the necessity and importance of providing accurate information from home-based records for the care of pregnant women. The guideline focuses on the free and accessible flow of information between healthcare providers and patients in maternity care, primarily by addressing various decision-making tools and activities that are deemed useful in planning a home birth.

3. *WHO recommendations on antenatal care for a positive pregnancy experience* (28 November 2016) targets to give recommendations on antenatal care. The guidance acknowledges the complexity of the territory of antenatal care and tries to shift the focus of healthcare providers to person-centred approach, which shall align with a human rights-oriented perspective, focusing not solely on preventing mortality and health issues but also on promoting human dignity.

The WHO in the *Recommendations: Intrapartum Care for a Positive Childbirth Experience*, pays special attention to ensuring and defying respectful maternity care, which every woman should enjoy. Respectful maternity care means that the human dignity of women is preserved during labour and childbirth, while their right to privacy and confidentiality, and the opportunity for informed decision-making are ensured and are exempt from harm and ill-treatment in their care.<sup>17</sup>

Concerning the place of birth, this WHO guideline does not specifically recommend either. The WHO recommendation highlights that within institutional frameworks of care, the practical implementation of the principles stated in the recommendation requires interventions both on the level of interaction between birthing women and professionals and on the institutional level, encompassing the entire healthcare system. Over the past two decades, women have been primarily encouraged to give birth within institutional settings, namely in a hospital. However, the fact that prenatal care and childbirth take place in a hospital does not necessarily guarantee adequate quality of care. Disrespectful and undignified treatment, as indicated by the WHO recommendation, is prevalent in numerous healthcare institutions worldwide. The recommendation underscores that under the prevailing model of maternity care, the healthcare service provider (obstetrician-gynaecologist) takes the lead in the birthing process, which can result in unnecessary medical interventions being imposed on healthy pregnant women. These interventions could potentially disrupt the physiological process of childbirth.<sup>18</sup>

A positive childbirth experience is defined here, as a childbirth that fulfils or exceeds their prior personal and sociocultural beliefs and expectations. This

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<sup>17</sup> WHO recommendations: intrapartum care for a positive childbirth experience. Geneva: World Health Organization; 2018. Licence: CC BY-NC-SA 3.0 IGO, 19.

<sup>18</sup> WHO recommendations, 8.

encompasses delivering a healthy baby in a safe environment from a clinical and psychological viewpoint, where the woman receives all the practical and emotional support from the competent healthcare professional and its staff. The woman shall feel that she is involved in the decision-making process and that she is in control.<sup>19</sup>

The WHO does not provide a definitive answer favouring home birth over hospital birth or vice versa; however, it does acknowledge this alternative form of childbirth as safe and feasible, considering the positive practices observed in developed countries. WHO generally supports the idea that birth at home led by a trained and competent midwife can be a safe and suitable choice for women with uncomplicated pregnancies who prefer a home setting for childbirth. However, this should be within a well-functioning health system that ensures timely and appropriate referral to a hospital in case of complications or emergencies. As scientific discussions in this field are ongoing, the approach accepted by the WHO holds significance for advocates of alternative birthing methods, supporters of home births, and midwives.

#### **4. The regulation of home birth in Slovakia**

The issue of home birth is not directly and specifically regulated in the Slovak legislation, but a certain legal framework can be derived from the existing law. Home birth is generally a subject to civil, criminal and administrative regulations, nevertheless most importantly, it falls under a specific legal category of Healthcare law, within the broader spectrum of Medical law. However, neither Healthcare law nor Medical law exist as officially distinct and comprehensive branches of law. Healthcare law deals with establishing a healthcare system in which individuals can exercise their right to healthcare. On the other hand, Medical law encompasses the legal framework for the practice of medical activities, applying to human beings and their health, interpersonal relationships in providing healthcare, legal conditions for providing healthcare, and care for human embryos and fetuses before birth, as well as care for the human body after death, disposal of such deceased bodies and their parts.

Regarding the national legal sources, we can include primarily the Constitution of the Slovak Republic<sup>20</sup>, the Healthcare Act<sup>21</sup>, and the Anti-Discrimination Act<sup>22</sup>, all of which contain the reproductive rights of women. Within these legal sources, it is necessary to thoroughly examine the Healthcare Act, which also regulates issues related to childbirth and maternity healthcare. Additionally, we will reference certain decrees, methodological guidelines, and orders issued by the Ministry of Health of the Slovak Republic.

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<sup>19</sup> Ibid.

<sup>20</sup> Act no. 460/1992 on the Constitution of the Slovak Republic.

<sup>21</sup> Act no. 576/2004 on Healthcare, Services Related to Healthcare Provision.

<sup>22</sup> Act no. 365/2004 on Equal Treatment in certain areas and Protection against Discrimination.

According to the Healthcare Act, the term healthcare includes nursing care as well as maternity assistance<sup>23</sup> provided by healthcare professionals. Furthermore, according to § (section) 2 point 3 of this Act, urgent healthcare is defined as “healthcare provided to a person in the event of a sudden change in their health condition that immediately endangers their life or any of their basic life functions; without prompt healthcare provision, it could seriously jeopardize their health, cause sudden and unbearable pain, or lead to sudden changes in their behaviour and actions, under the influence of which they immediately endanger themselves or their surroundings.”

This definition also includes healthcare provided during childbirth. Based on its phrasing, we can come to the conclusion that a woman can give birth anywhere, even outside a healthcare facility, including her home, if it falls under the category of urgent healthcare. However, such an unplanned and sudden childbirth does not fall within the definition of home birth.

Therefore, prohibition of home birth is neither regulated, nor expressed in the legislation. It is not stipulated that a woman must give birth exclusively in a healthcare facility as part of institutional healthcare. Nevertheless, the Healthcare Act also envisions the possibility that a child may be born outside a healthcare facility. However, in such cases, it does not constitute a planned official home birth.

Maternity assistance is defined in the law as follows: “healthcare provided by a qualified maternity assistant according to specific regulations to women and infants during physiological pregnancy, childbirth, and postpartum period, healthcare related to reproductive health, and provision of nursing care for gynecological and obstetric conditions. Maternity assistance is provided through the nursing process within the scope of maternity assistance practice.”<sup>24</sup>

The scope of such practice encompasses nursing and maternity care, determining patient needs, ensuring these needs are met, maintaining health documentation, caring for reproductive health, and more. Nursing practice is a distinct form of healthcare provision characterized by a systematic, rational, and individualized method for planning and documenting maternity care. We can conclude that a maternity assistant has limited capabilities in providing healthcare during childbirth, as their role primarily focuses on supporting the mother and assisting the doctor.

Decree No. 95/2018 of the Ministry of Health<sup>25</sup> further defines the competencies and the execution of nursing practice of maternity assistants.

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<sup>23</sup> In Slovak it is, “pôrodná asistencia”, it refers to *midwifery*, the care carried out by midwives. In the context of the Slovak legislation, we will use the term maternity assistance.

<sup>24</sup> Healthcare Act § 2, 17.

<sup>25</sup> Decree No. 95/2018 issued by the Ministry of Health of the Slovak Republic, which defines the scope of nursing practice provided by nurses independently, independently based on a doctor's indication, and in cooperation with a doctor, and the scope of maternity assistance practice provided by maternity assistants independently, independently based on a doctor's indication, and in cooperation with a doctor.

Pursuant to this, a maternity assistant can independently manage by themselves physiological childbirth in the scope of care during childbirth<sup>26</sup>. However, this is not her primary role. In the previous, now ineffective version of this decree, it was directly stipulated that a maternity assistant could independently manage physiological childbirth in a healthcare facility within institutional care. In the currently effective version of the decree, the criterion for the place of childbirth management is not included, but it can be assumed that the absence is due to the fact that the Healthcare Act does not account for planned home births.

It is evident that the regulation of home birth lacks a clear legal framework in Slovakia, which may result in the absence of a network of adequately qualified maternity assistants with the necessary competence and practical experience to independently assist home births, which is currently not legally possible except in cases of urgent healthcare.

In order for planned home births to become a genuine option for women, a desirable legislative regulation is needed. This regulation should define planned home birth, establish the necessary qualifications for maternity assistants to independently practice, and specify the required equipment and other provisions—essentially, the conditions under which a home birth can take place. Additionally, the development of protocols for procedures in case of unexpected complications during birth and the need for a transfer to a hospital should also be considered. These changes would prevent insufficiently qualified maternity assistants from unsupervised participation in home births with inadequate technical resources and from taking unauthorized actions during the birth process. In the author's opinion, developing and enacting these conditions are essential to ensure women's genuine right to freely choose the place of childbirth.

### **5. The regulation of home birth in Hungary**

The legal regulation regarding home birth in Hungary is more advanced compared to that of Slovakia. Home birth is positively regulated by the Government Decree no. 35/2011 on professional rules, conditions, and reasons for excluding childbirth outside an institution. Prior to the issuance of this decree, several domestic civil and criminal court proceedings, proceedings before the ECtHR, and pressure from civil society were involved.

The practices and methods of planned natural childbirth at home were popularized by the prominent gynaecologist and maternity assistant, Dr. Ágnes Geréb, who attended and assisted in several unofficial home births and thus popularized and institutionalized natural childbirth methods. Alongside other maternity assistants, she developed a binding protocol for home births, which emphasized the conscious preparation of parents for such sort of childbirth.<sup>27</sup>

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<sup>26</sup> Decree No. 95/2018 issued by the Ministry of Health § 5, 3 letter f).

<sup>27</sup> Barbara Kisdi, *Mint a földbe hullott mag. Otthon szülés Magyarországon – egy antropológiai vizsgálat tanulságai* (Budapest: L'Harmattan Kiadó, 2013), 17–20.

However, the legal regulation of home childbirth at that time was insufficiently regulated similarly to Slovakia, where it was not directly prohibited, making these births potentially illegal. The legal regulation was eventually "forced" by some cases where home births had fatal consequences. According to expert opinions and professional views of obstetricians, these fatalities were linked to the fact that the births took place in a home setting. Based on the established facts from an appellate criminal proceeding in 2012, Dr. Ágnes Geréb was sentenced to two years imprisonment and a ten-year professional ban due to the identified circumstances. In 2018, she was pardoned by the President for her prison sentence, but the 10-year-long suspension from practising her profession still remains.

Based on the judgement of the ECtHR in the case of *Ternovszky v. Hungary*<sup>28</sup>, the current government regulation in force on the regulation of home childbirth

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<sup>28</sup> The factual background of the case is that the Applicant was pregnant with her second child at the time of submitting the application to the ECtHR. She claimed that domestic legislation prevented her from exercising the option of home birth that she was considering, and therefore, she is discriminated against in the exercise of her right to private and family life under Article 8 of the Convention. This is because adequate maternity health care is guaranteed only to women who intend to give birth in a hospital. She supported her argument by stating that the regulation from the Hungarian government warns against the provision of health care by midwives outside of medical facilities under the threat of a monetary penalty.

Furthermore, she presented recommendations from the World Health Organization, according to which giving birth at home and in a hospital are equivalent alternatives. In this context, the mother should be informed about both options and should be respected if she chooses either of these alternatives after consideration.

The argumentation of the Hungarian government emphasized that there is no positive obligation derived from Article 8 of the ECHR for the state to expand the choice of services within the healthcare system and that the limitation on the right to self-determination is permissible under the principle of the margin of appreciation granted to the legislator of member states. In general, home birth is not regulated in several member states due to the lack of consensus on how to strike a balance between the mother's right to give birth at home and the child's right to life. The court stated that since Hungarian law does not expressly prohibit home birth, the legal framework clearly discourages healthcare workers from providing maternity care in a home setting. The state thus prevents the exercise of the right to freely choose the place of childbirth, which constitutes an interference with the complainant's rights. The court further acknowledged the ambiguity in countries' approaches to the issue of home birth and that an ongoing professional discussion about its safety is still underway.

The court emphasized that it is desirable for a woman to choose the place of birth with certainty and the knowledge that her choice will not be subjected to any sanction. Given that there was no clear and explicit legal provision allowing healthcare workers to assist in home births, but on the other hand, the law imposed a monetary fine for providing such healthcare service, it was evident that the absence of positive legal regulation prevented healthcare workers from performing such service. The lack of direct legal regulation and the existence of a financial penalty clearly restricted the complainant's free choice.

has been developed. The regulation defines the prerequisites for conducting home childbirth, the qualification of midwives, the necessary equipment and technical facilities, health conditions, and reasons for excluding the possibility of home childbirth, as well as the details and form of agreement between the healthcare provider and the woman, and the procedures in case of complications, etc.<sup>29</sup>

Despite the extensive and direct legal regulation, the option of home childbirth is not guaranteed to all women. The regulation includes strict conditions and prerequisites for both the woman and the fetus that must be fulfilled simultaneously for childbirth in a home setting. In order to minimize complications, a woman who is over 18 years old but younger than 40 years old can give birth at home if the delivery occurs between the 37th and 41st week of pregnancy and if her fetus is in an optimal position. Women who have already had a Caesarean section, experienced shoulder dystocia, have certain medical conditions or are expecting twins are excluded, and the fetus must not weigh more than 4000 grams etc.<sup>30</sup> In addition to the subjective requirements, it is necessary to ensure that the place of childbirth is located within a maximum distance of 20 minutes from a hospital and a specialist responsible for the course of childbirth should be designated.<sup>31</sup>

These conditions were established to minimize potential complications and risks during childbirth and thus ensure the safety of such obstetric care. It can be said that some of the assumptions are discriminatory and therefore criticized by experts as well. However, in spite of this, it can be stated that the legislation is sufficient for performing safe homebirths, which could be improved in the future according to the development of practices and societal expectations.

## 6. The regulation of homebirth in the Czech Republic

Homebirth in the Czech legal system is not specifically regulated, but it is to some extent addressed by general legal provisions. The issue of home birth has been a topic of discussion in the Czech Republic for several years, influenced partly by judgments of the ECtHR against the Czech Republic.

According to current law, midwives are qualified to assist at childbirth. More precisely, in the course of their profession, they provide “health care in midwifery assistance, which includes overseeing, providing care and advice to women during pregnancy, childbirth, and the postpartum period if these

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The mentioned ambiguity did not meet the requirement of the principle of legitimate expectation, predictability, and legality. Based on these arguments, the court concluded that there had been a violation of Article 8 of the Convention. The court alerted the Hungarian government to the need for providing adequate legal regulation, according to which women's choice would not be implicitly limited.

<sup>29</sup> Government Decree 35/2011 (III. 21.)

<sup>30</sup> Attachment 1 to Government Decree No. 35/2011 (III. 21.) on the health conditions and exclusion criteria for receiving care.

<sup>31</sup> Government Decree 35/2011 (III. 21.) § 5 l. b)

processes are physiological. This involves guiding physiological childbirth, providing care to newborns, and also providing nursing care to women in the gynaecological field. Furthermore, midwives, in collaboration with physicians, participate in preventive, therapeutic, diagnostic, rehabilitative, palliative, urgent, or dispensary care.”<sup>32</sup> Despite midwifery not being a concrete medical profession, midwives have the capability to attend births according to these provisions, as they deliver healthcare and nursing services.

The issue of where a midwife can perform her profession was addressed by the ECtHR in the case of *Dubská and Krejzová v. Czech Republic* (Applications no. 28859/11 a 28473/12). The applicants wished to give birth at home, but due to the Czech legal provisions at that time, namely they that did not allow midwives to accompany home births, they were unable to find a midwife to assist them. Ultimately, the applicant Mrs. Dubská gave birth at home alone, and Mrs. Krejzová gave birth in a hospital. The applicants argued that the Czech Republic violated their right to private life under Article 8 of the Convention by preventing them from giving birth at home in the presence of a qualified midwife.

The Grand Chamber of the ECtHR ruled that there was no violation of Art. 8. Nevertheless, the Court acknowledged that determining and deciding on the circumstances of childbirth falls within the scope of Article 8 and that Czech laws constituted an interference with the complainants' right to private life, this interference met the criteria of permissible interference. This was because it pursued a legitimate aim (the protection of health and the rights of others as per Article 8 paragraph 2) and aimed to safeguard the health and safety of the newborn during and after childbirth, while indirectly ensuring the mother's health.<sup>33</sup>

Regarding the proportionality and necessity of the intervention in a democratic society, the Court argued that the issue of safety in providing healthcare during home births is a highly complex issue. Therefore, national legislation should take scientific and expert opinions on such healthcare services into account. Given the lack of a unified European consensus on whether home births should be allowed or not and considering that this matter involves general aspects of social and economic policy, states have a broad margin of discretion in their legislation.<sup>34</sup> The Court concluded its reasoning by stating that the interference with the complainants' right to respect for their private life was not disproportionate. Therefore, the state did not exceed the margin of appreciation provided to it, and the Court found no violation of Article 8.<sup>35</sup>

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<sup>32</sup> Act no. 96/2004 Coll. on Non-Medical Health Professions, as amended by later regulations, § 6, 2.

<sup>33</sup> *Dubská a Krejzová v Czech Republic*, 172, 173.

<sup>34</sup> *Dubská a Krejzová v Czech Republic*, 184.

<sup>35</sup> *Dubská a Krejzová v Czech Republic*, 190, 191.

Currently, the Czech law on healthcare services<sup>36</sup> distinguishes between the provision of healthcare services within healthcare facilities and outside of them, in one's own social environment. One of the conditions for granting authorization to provide healthcare services is the obligation to be authorized to use healthcare facilities.<sup>37</sup> Furthermore, according to § (section) 10 of this Act, the provision of healthcare services in one's own social environment is allowed, when the performance of which is not contingent on the technical and material equipment necessary for the execution of care in a healthcare facility. Such healthcare services include outpatient services or home nursing, rehabilitation, or palliative care.<sup>38</sup>

### 7. The regulation of homebirth in the Netherlands

The Netherlands is a country where homebirth is a common practice in the field of maternity care, and therefore, the legal framework is advanced in this area. Their system supports homebirth, which is why 16.3% of women choose the option of giving birth at home. In 2004, this proportion exceeded 30%<sup>39</sup>. Women in the Netherlands also have the option to give birth in maternity facilities that offer a homely atmosphere. The unique birthing system in the Netherlands can be justified by their view of childbirth as a natural physiological process and a family event that historically took place in a home setting with the assistance of midwives. Medicalization of childbirth has not progressed as significantly there as in other European countries, which is why the role and competencies of midwives have not been questioned.<sup>40</sup>

Ensuring a high level of education for midwives is crucial to provide them with broader competencies in the field of maternity healthcare. Births are carried out either in a hospital or at home in the presence of a midwife or a doctor. In the Netherlands, there is a well-developed system that allows determining which women are eligible for a homebirth. A midwife has the authority to assess whether home birth is recommended for a woman or not. Home birth is recommended for women with low-risk pregnancies, where complications are unlikely to occur. This categorization of pregnant women also ensures that unnecessary interventions and interventions during childbirth are avoided.<sup>41</sup>

Specialized birth facilities are known as birth centres, and they serve as a good alternative for pregnant women who, based on medical assessment, do not

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<sup>36</sup> Act no. 372/2011 Coll. on Health Services and Conditions for Their Provision (Health Services Act).

<sup>37</sup> Ibid, § 16, 1 l. f).

<sup>38</sup> Ibid, § 10, 1 letters a) b).

<sup>39</sup> Stephanie van den Berg, "Homebirth in the Netherlands: why the Dutch cherish them," June 13, 2023, Expectica, <https://www.expatica.com/nl/healthcare/womens-health/home-births-in-the-netherlands-100749/>

<sup>40</sup> Miroslava Rašmanová "Holandsko: Krajina, kde je pôrod doma normálna vec," 2016, zenskekruby.sk, <https://zenskekruby.sk/holandsko-ked-je-porod-rodinna-udalost/>

<sup>41</sup> Ibid.

require hospital birth but do not wish to give birth at home either. Birth centres provide supervision by a midwife or a childbirth specialist. These facilities offer a homely environment, the option of providing pain-relieving anaesthesia, and the staff accommodates personal preferences (such as playing music, using candles, etc.). A woman also has the option to request a transfer to a hospital at any stage of childbirth.<sup>42</sup>

Not all options for maternity healthcare are covered by insurance. For example, if a woman with a low-risk pregnancy does not have medical reasons to give birth in a hospital, she might have to pay extra. During a home birth, medical pain relief methods are usually not provided (as it is considered a low-risk birth). However, if desired, this is considered a medical reason for transfer to a healthcare facility, and the woman does not have to pay extra for that.<sup>43</sup>

From the above-mentioned practices, it is evident that the Netherlands does not exhibit nor pursue a strong medicalization of childbirth. Lawmakers ensure that the home birthing system remains a realistic, professional, and safe option for pregnant women.

## **8. Concluding remarks on the regulation of home birth of selected states**

In the above mentioned chapters, we have addressed the legal regulations on home birth in Slovakia, Hungary, the Czech Republic and the Netherlands. By focusing on some Central European countries which offer various legal solutions to the issue of home birth, we can see the cultural and societal differences, regardless of the historic connection these countries share. The positive regulation and a shifted societal acceptance on home birth in the Netherlands points out how modern and liberal values on childbirth, pregnancy, maternity and obstetric care can be incorporated. Overall, these countries are member states of the European Union, thus we can derive whether there is or not a common inclination for the creation of a European standard.

The classical medicalization of childbirth and pregnancy is characteristic of the Slovak legislation as it is silent on the matter of planned home birth. Basically, a woman can freely give birth wherever she wants, with the condition that she will be provided with urgent healthcare. Overall, the legal provisions do not oblige a woman to give birth exclusively in a healthcare facility, however if some complications arise during planned home birth, the midwife and others cooperating in the process could be held even criminally liable. Nevertheless, the holistic approach to childbirth and pregnancy is present as there are several associations of doulas<sup>44</sup>, however their practical attendance during childbirth at the hospital is up to the decisionmaking authority of the given medical staff.

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<sup>42</sup> Van den Berg, "Homebirth in the Netherlands: why the Dutch cherish them."

<sup>43</sup> Rašmanová, "Holandsko: Krajina."

<sup>44</sup> In comparison with midwives, doulas have no formal obstetric training. Their role is to be an active emotional, informational and physical support to the woman during the whole period of pregnancy and childbirth. A trusted and trained individual, companion

## Home Birth from a Comparative Legal Perspective

The Czech Republic has somewhat of a paradoxical attitude and regulation regarding planned home births, as the legislation allows and authorizes midwives to assist and supervise physiological births in a home environment which may not meet the technical and material equipment of a medical facility where only specific type of healthcare could be provided (patient's own social environment). It is questionable whether medical assistance during home birth fits into this category or not. What is more, an additional insecurity for midwives to assist home births is the potential that a fine can be imposed for the violation of obligations arising from this law.

The regulatory framework permits home births, but simultaneously prohibits midwives from assisting them as they could be subjected to a fine. The free choice of a woman to decide on the place of birth is formally present but practically not realistic to be carried out. Moreover, the ECHR decision on *Dubská and Krejzová v Czech Republic* gave a green light to a mixed and ,”hidden discouraging” legal framework on the issue.

The circumstances in Hungary have been similar to that of the Czech Republic, however due to the decision of the ECHR in the case *Ternovszky v. Hungary*, the Hungarian legislators enacted a specific government decree<sup>45</sup>, pursuant to which rules were established regarding planned home birth. The original legal environment on the matter echoes the background and conditions presented in the case of *Dubská and Krejzová v Czech Republic*. What can be the reason for the different decision of the court?

On the one hand, the state's interest in limiting access to home birth is driven by the will to protect the health of women and children, and on the other hand individuals would like to exercise their right to autonomy and a choice to freely exercise informed consent concerning their reproductive health. Article 8 of the Convention establishes both positive and negative obligations the state shall incorporate into their legislation in order to protect the right to respect private and family life. In both cases the legislation interfered with the exercise of these rights, as in one way or another dissuaded professional midwives from assisting home births (potential of imposing a fine). In the *Ternovsky* case the legal uncertainty was of paramount importance in identifying the violation of Art. 8, however in the *Dubská and Krejzová* case lack of foreseeability was not an issue, as the applicants could reasonably deduct that assisted home birth was not in accordance with the law.<sup>46</sup> The Czech law within a negative obligatory framework definitely was approved by the Court, as they choose to follow

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to the pregnant woman, who creates a comfortable safe environment during pregnancy and childbirth. For more information see: Kisdi Barbara, “A dúlaság intézménye Magyarországon,” in *Társadalomtudományi gondolatok a harmadik évezred elején*, ed. Karlovitz János Tibor (Komárno, 2013), 145. <https://docplayer.hu/1035333-A-dulasag-intezmenye-magyarorszagon.html>.

<sup>45</sup> Government Decree no. 35/2011 on professional rules, conditions, and reasons for excluding childbirth outside an institution.

<sup>46</sup> Caitlin McCartney, “Childbirth Rights: Legal Uncertainties under the European Convention after *Ternovsky v. Hungary*,” *North Carolina Journal of International Law* 40, no. 2 (2014): 576.

a narrower interpretation of state interference.<sup>47</sup> By this the Czech Republic explicitly outlaws medical assistance during home birth, which actually was the intent of the legislator in order to encourage hospital births where the health of the mother and child in cases of risky child delivery could be more efficiently protected. This argument was acknowledged by the Court.<sup>48</sup> The freedom of choice of the circumstances of childbirth was maintained as home births are not excluded, but is made unfeasible and prevented to be a real safe option. Nevertheless, the Court did not examine the Czech legislation in a broader context to identify whether a woman could authentically make a free choice about safe home births. Ultimately, regardless of the state's action or inaction in the legislative sphere, the focused analysis of the core interest for a woman to exercise her free choice on the circumstances of giving birth was not placed in the centre of the Court's interpretation.

Lastly, a positive example of an effective home birth system was presented by describing the circumstances of medical assistance during childbirth in the Netherlands. We have to focus on the distinctive approach they have in respect of the patients' autonomy as opposed to the heavy medicalisation of childbirth that comes hand in hand with a paternalistic view on healthcare, which in Slovakia and the Czech Republic is based on the discouraging legislation on planned home births. One shall highlight that clear cut qualification requirements for midwives and the precise parameters of the given pregnancy serve as proper assessment measurements for making home births eligible to most woman who meet the criteria. This positive obligation of the state is also present in the Hungarian legislation, which now provides legal certainty to women in their choices connected to circumstances of child delivery. However, it shall be highlighted that these two components may not be necessarily practically feasible to the other countries mentioned, as the Netherlands has a considerable advantage regarding the smaller geographical area and high population density. Therefore, in cases of emergency it is not a problem to transport the mother to the hospital in a very short time. However, these conditions would be impossible to achieve in the Czech Republic and Slovakia, especially in small villages located several tens of kilometres away from urban hospitals.

In the author's opinion in order to make home births a real option for a pregnant woman, a holistic approach to pregnancy and childbirth shall be widespread, both in the sphere of medical professionals and the families involved. The state cannot grant a "positive childbirth experience" in general, but can create the circumstances in which well-trained, accessible midwife or doula services are available, who could be complementary to the work of the physician and nurses in the preparation and during child delivery. Nevertheless, individual approach

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<sup>47</sup> Frank Chervenak, Amos Grünebaum, Birgit Arabin, and Laurence McCullough, "The European Court of Human Rights on Planned Home Birth: Resolution of a Paradoxical Ruling," *BJOG: An International Journal of Obstetrics & Gynaecology* (2017): 124.

<sup>48</sup> Press Release, Registrar of the Court, Chamber Hearing Concerning Homebirth in the Czech Republic, Eur. Ct. H. R. (Oct. 9, 2013).

to pregnant women and their active, conscious participation shall be of paramount consideration of the medical staff in order to respect their reproductive rights. However, data suggests that maternity care in some Central European countries does not provide respectful care in everyday practice.<sup>49</sup> On the other hand, states shall take responsibility in clearly stating the options for women whether they can or cannot access planned home births through a positive regulatory framework. Hungary with the solution of creating accessible birth houses with a home-like environment and proper midwife services for home births, could be deemed as an inspiring example as the circumstances regarding technical and societal facilitation are similar to those of Slovakia and the Czech Republic. In conclusion, pregnant women shall be aware of the options they have, they shall be informed that they can decide and navigate their birth experience within the circumstances in which they feel most comfortable, let it be a hospital delivery or in a home environment.

### 9. Conclusion

The reproductive rights of women are protected both on the national and international levels and should be ensured regardless of where a woman chooses to give birth. It is evident why the concept of home birth is controversial from both legal and non-legal perspectives. Different legal regulations in the individual member states of the European Union are justified by varying judgments of the European Court of Human Rights regarding the issue of home birth.

In the case of Hungary, where the *Ternovszky v. Hungary* complaint was successful, the domestic legal framework permitted home birth. On the other hand, in the Czech Republic, there is still no legal definition of home birth, as the ECtHR in the cases of *Dubská* and *Krejzová v. Czech Republic* did not oblige the state to change its legal regulations.

Childbirth as a physiological process is medicalized to a large extent, despite international healthcare organizations, such as the WHO that advocate for a more friendly and personalized approach pursued by healthcare professionals in providing maternity care, incorporating methods of alternative childbirth. The debate is still ongoing as no European consensus on how it should be regulated has been established yet.

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<sup>49</sup> See more in: Janka Debrecéniová (ed.), *Ženy - Matky – Telá II, Systémové aspekty porušovania ľudských práv žien pri pôrodnej starostlivosti v zdravotníckych zariadeniach na Slovensku*,

[https://odz.sk/wp-content/uploads/ZMT2\\_systemove\\_apekty\\_v6\\_w.pdf](https://odz.sk/wp-content/uploads/ZMT2_systemove_apekty_v6_w.pdf).