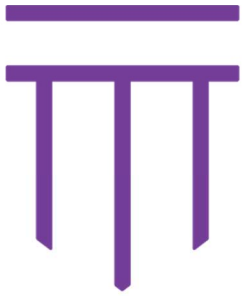

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‘Irresponsible Women’: On freedom to choose, risks, and de facto criminalisation of home births in Czechia

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Abstract

This paper offers a feminist critique and rewriting of a 2024 Czech Constitutional Court judgment upholding the criminal conviction of a woman following the death of her child during a planned home birth. While the Court recognised the constitutional right to choose the circumstances of childbirth and rejected the notion of foetal rights, it nevertheless accepted that exercising this choice could give rise to criminal liability where additional risks were foreseeable. We situate the judgment within the broader context of the medicalisation of childbirth in Czechia, characterised by the marginalisation of independent midwifery, widespread obstetric violence, and the dominance of obstetricians in shaping reproductive healthcare policy and judicial understandings of risk. We argue that the Court's reasoning fails to appreciate how restrictions on home births and inadequate protection against non-consensual medical interventions undermine meaningful reproductive autonomy. By treating hospital birth as an unproblematic alternative, the Court overlooks the relationship between place of birth, bodily integrity, and informed consent, creating a chilling effect on the exercise of constitutionally protected rights. Our Rewrite of the judgment focuses on the right to bodily integrity and choice of the place and manner of birth, as well as on discrimination. We submit that pregnant and birthing persons cannot be required to undergo unwanted medical treatment, especially caesarean sections, for the sake of foetal protection and that criminalising decisions aimed at avoiding obstetric violence also constitutes sex discrimination and violates equality in dignity.

Keywords

Home births, obstetric violence, bodily integrity, women’s rights

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'Irresponsible Women': On freedom to choose, risks, and de facto criminalisation of home births in Czechia

Terezie Boková & Barbara Havelková[1]

In December 2024, several Czech online news sites were dominated by a story which, in their narrative, exposed the shocking recklessness of a pregnant woman who made a tragic – and careless – decision. Despite knowing about severe risks, she decided to give birth to her first child at home, without even taking the precaution of having the assistance of a medically trained midwife, relying on a 'doula' instead. When her labour became complicated, both the mother and the doula hesitated to call an ambulance, and both were later found criminally liable for the death of the child during childbirth. 'They tried to revive the breathless baby by singing hymns instead', one news headline said.[2]

1 Introduction

The news story summarised in the opening of this chapter referred to a Czech Constitutional Court's ('CCC' or 'Court') judgment, which dismissed the constitutional complaints of both the mother and the doula against their criminal convictions for involuntary manslaughter ('Original Judgment').[3] In the abstract, it confirmed the right of women[4] to decide in what circumstances they give birth. It found, however,

[1] The authors would like to thank you the editors of this volume, as well Jonathan Herring, Kate Greasley and Adéla Hořejší for their feedback and comments. This is a draft contribution to a forthcoming book edited by Silvia Suteu and Elena Brodeală, written in the 'Feminist Judgments in Central and Eastern Europe' Project.

[2] ČTK, 'Nedýchající dítě chtěly „dostat zpět" zpěvem, ÚS zamítl stížnost duly i rodičky' [They tried to "bring back" a non-breathing baby by singing; the Constitutional Court rejected the complaints filed by both the doula and the mother.] (iDNES.cz, 3 December 2024) <https://www.idnes.cz/ceske-budejovice/zpravy/domaci-porod-dula-ustavni-soud-smrt-dite.A241203_164359_budejovice-zpravy_mrl>.

[3] CCC judgment of 19 November 2024, I. ÚS 605/24.

[4] When referring to the past, to the Original Judgment, or other case law that relies on gendered language, we speak primarily of (pregnant or birthing) women. We attempt to use more inclusive, gender-neutral terms when discussing the matter at large and in a forward-looking manner.

that they can be found criminally liable (and sentenced for) exercising that right in a 'disproportionate' manner, given the specific, individual circumstances.[5]

The label 'irresponsible' in the title of this contribution, as well as the Court's own attitude, rests on a widespread perception which regards the decision to give birth outside of a medical facility as something 'esoteric' and extremely reckless due to inherent risks involved, and thus as morally reprehensible. It is therefore important to present to the readers the wider context of the medicalisation of childbirth in Czechia, and we do so in Section 2. We show that Czech women often choose to birth outside of a medical facility, not as a matter of convenience or 'frivolous' preference, but because they regard it as a well-considered step aimed at ensuring their bodily autonomy and integrity. Doing so, they take into account their and their born child's wellbeing, and at avoiding obstetric violence, which is rife in Czech hospitals (2.2). Instead of addressing the issues of hospital-based obstetric violence,[6] Czech health law and policy have instead taken steps to press birthing women into hospital care, through the suppression of independent midwifery (2.1) and hampering of home births (2.3). The Czech Society of Gynaecologists and Obstetricians ('Ob-Gyn Society') – a medical doctors' organisation with an obvious conflict of interest – has been central to determining law and policy, controlling women's bodies and health in individual medical practice and influencing the outcomes of court cases as expert witnesses. The medical establishment's dislike of birth outside of the hospital has impacted the way judges view such births too; the CCC has been cautious about stepping in to protect women's fundamental rights (2.5).

The Original Judgment itself is analysed in Section 3. Although the Court confirmed the constitutionally protected right to decide the circumstances of giving birth and rejected a foetus's right to life, its balancing between the right to choose and the constitutional value of foetal protection, we argue, was incorrect (3.1). The Court should have paid more attention to the counterfactual and ask whether a hospital birth would have changed the outcome, without the woman being forced to undergo non-consensual medical procedures (3.2). Consequently, in practice, the Original Judgment is likely to have a chilling effect when it comes to birthing persons' right to choose a place of birth, especially a home birth, by exposing anyone giving birth deliberately outside of a hospital to a possibility of criminal prosecution for exercising that right, depending on the outcome of the birth itself (3.3).

[5] Original Judgment § 54.

[6] Obstetric violence is not specifically criminalized or otherwise mentioned in Czech law, however.

We explain our choices for the Rewrite – focus on the right to bodily integrity and choice of the place and manner of birth, and on discrimination – in section 4. Finally, the Rewrite focuses particularly on the assessment of proportionality *stricto sensu* and presents a narrower understanding of justifiable interferences with birthing persons' rights, one which ensures that these rights become and remain meaningful and effective in practice. It assesses the criminalisation of a behaviour aiming to avoid (gender-based) violence – obstetric violence in our case – to be a breach of the constitutional requirement of equality in dignity, as well as discrimination on the basis of sex (section 5).

2 The Medicalisation of Childbirth in Czechia

Czechia has a long history of restrictions of women's free choice in childbirth. The medicalisation of childbirth can be seen as a legacy of state-socialist healthcare paternalism,[7] although such an approach was not limited to state-socialist countries of Central and Eastern Europe.[8] In Czechoslovakia, childbirth was understood as a 'pathological and risky process that requires all that modern medicine and technology have to offer', and women were thus ushered to medical facilities to 'be delivered'.[9] Pre-1989 obstetric and neonatal care could be characterised in terms of a technical, depersonalised, and paternalistic approach to care focused on a successful medical outcome, understood as low perinatal mortality.[10] In order to achieve this aim, the prevailing approach suppressed autonomous decision-making by women in the sphere of reproductive health.[11]

Post-1989 developments brought various systemic changes in the healthcare system, including better material equipment in maternity wards. However, they did not dramatically alter the dominant paternalistic approach to obstetric care.[12] This

[7] See e.g. Zuzana Candigliota, 'Jak Byly Vymýceny Porodní Báby v Českých Zemích' [How Midwives Were Eliminated in the Czech Lands] in Barbara Havelková, Kateřina Šimáčková and Pavla Špondrová (eds), *Mužské právo. Jsou právní pravidla neutrální?* [*Men's Law. Are Legal Rules Neutral?*] (Wolters Kluwer 2020), 786-792.

[8] In South America, the widespread 'pathologisation supporting a medicalised and interventionist approach childbirth, which translates into the medical appropriation of women's bodies and reproductive processes' led to the creation of the concept of 'obstetric violence'. See a summary in Camilla Pickles, "Everything is Obstetric Violence Now': Identifying the Violence in 'Obstetric Violence' to Strengthen Socio-legal Reform Efforts' (2024) 44(3) *Oxford Journal of Legal Studies* 616, 618.

[9] Alena Heitlinger, *Reproduction, Medicine and the Socialist State* (Palgrave Macmillan 1987) 198–200.

[10] *Ibid*., 198–219.

[11] Ema Hrešanová, 'The Island of Alternatives: Power, Medical Science, and "Gentle Birthing" in Socialist Czechoslovakia' (2018) 73(1) *Journal of the History of Medicine and Allied Sciences* 73, 74.

[12] Ema Hrešanová, '"Nobody in a Maternity Hospital Really Talks to You": Socialist Legacies and Consumerism in Czech Women's Childbirth Narratives' (2014) 50(6) *Czech Sociological Review* 961, 963–966.

has been criticised repeatedly by the Committee on Elimination of Discrimination against Women ('CEDAW Committee'), which noted that 'childbirth conditions and obstetric services unduly curtail women's reproductive health choices', specifically referring to 'disproportionate limitations on home childbirths' as one of the issues.[13] It has been recommended that Czechia make 'midwife-assisted childbirth outside hospitals a safe and affordable option for women'.[14]

Despite this advice, the Czech medical establishment[15] still maintains a narrow view of what a good birth is: 1) one led by doctors, 2) who decide what is best, with limited respect for the birthing person's wishes, and 3) taking place in a hospital. The legal establishment – from lawmakers to courts – has often unquestioningly facilitated this via 1) a move away from a midwifery model of care, which included marginalisation of the profession of midwives, 2) not holding hospitals sufficiently responsible for obstetric violence, and 3) suppression of births outside of hospitals. These issues are intertwined – the fear of violence in hospitals is an important reason why women choose home births, while home births are, in turn, made riskier by an absence of a good legal framework for midwife support. We discuss all three in turn in the following (sections 2.1-2.3). We then focus on the role of the 'medical establishment' (2.4) and the CCC, noting that the CCC can be seen overall as cautiously pushing back against the worst excesses of both doctors and the criminal courts (2.5). This makes the case analysed here particularly striking.

It is also worth reminding the reader of the other CCC judgment subject of our Commentary and Rewrite in this volume,[16] regarding a (former) legal regime which made foreign women fall through the cracks of both public and private insurance when it came to childbirth and neonatal care, meaning they might have needed to opt out of medical help in childbirth if they wanted to avoid personal bankruptcy. It is hard to escape the conclusion that – at least at the relevant time – Czech women

[13] CEDAW Committee, *Concluding observations on the sixth periodic report of the Czech Republic*, UN Doc CEDAW/C/CZE/CO/6 (14 March 2016) <https://digitallibrary.un.org/record/833824?ln=en&v=pdf> § 30. Furthermore, CEDAW Committee highlighted unnecessary separation of newborns from their mothers without medical grounds, frequent use of episiotomy without medical need and in contravention of the preference of the mother, and undue restrictions on the use of midwives in lieu of physicians or gynaecologists in situations where such use does not pose a health risk.

[14] *Ibid.*, § 31. The progress reported back from Czechia seems minimal, in that regard: the government proclaimed its continuous effort to raise capacity of '*midwifery units within maternity hospitals, offering births led by a hospital midwife*', but admitted that demand still and by far exceeded supply. Furthermore, it highlighted the work of a 'working group of obstetrics' and 'commission of obstetrics'. CEDAW Committee, *Replies of Czechia to the list of issues and questions in relation to its seventh periodic report*, UN Doc CEDAW/C/CZE/RQ/7 (29 July 2025).

[15] See section below.

[16] CCC judgment of 3 May 2017, Pl. ÚS 2/15 (on foreigner's health insurance).

and 'babies' were to be 'protected', even against their will, while foreign women and 'babies' were left to fend for themselves.

2.1 The Suppression of Midwifery[17]

From state socialism, Czechia inherited a regime in which midwives were not independent medical professionals but mere 'nurses', solely tasked with assisting doctors.[18] The 1997 Act on Health Insurance continued this trend: midwives could charge for their services under the public health insurance scheme only if their work was 'indicated' by a medical doctor (although some began assisting women privately, outside the official system of medical care and insurance).[19] Even apparent harmonisation with EU law did not alter the approach of curbing midwifery. From 2004, midwives were legally allowed to assist in a 'physiological birth'. This was, however, defined by the Ministry of Health as a birth subsequently assessed as one without complications.[20] Therefore, absurdly, midwives could never be certain of the legality of their assistance until after birth; a fact criticised in the Report by the Public Defender of Rights from 2009.[21]

Zuzana Candigliota, an attorney focusing on freedom and autonomy cases before the CCC, has detailed how most of the statutory and sub-statutory regulations in the last two decades have been influenced by long-term campaigns of the Czech Ob-Gyn Society against midwife-led births.[22] A Ministerial Decree from 2009 created a theoretical possibility of a 'birthing centre' (*porodní dům*), but the requirements placed on their material equipment and personnel[23] were so demanding that not a single birthing centre (independent of an already existing maternity hospital) was established in practice. The decree also listed equipment required for midwives providing care outside a medical facility (i.e. 'in the patient's own social

[17] We borrow this title from Zuzana Candigliota (although the original Czech is perhaps closer to 'purge'). In Candigliota, *supra* note 7.

[18] Candigliota, *supra* note 7, 787–788. Hrešanová, *supra* note 12, 964. Authors outside the CEE context also noted that the profession of midwives was profoundly transformed with being subdued to the medical expertise. See Soo Downe and Nancy Stone, 'Midwifes and Midwifery: The Need for Courage to Reclaim Vocation for Respectful Care' in Camilla Pickles and Jonathan Herring (eds), *Childbirth, vulnerability, and law: exploring issues of violence and control* (Routledge 2019) 88–110.

[19] Candigliota, *supra* note 7, 795.

[20] *Ibid.*, 798.

[21] Veřejný ochránce práv, *Zpráva o šetření – § 18* [Public Defender of Rights, Investigation Report – s 18], 2481/2009/VOP (4 November 2009) <https://eso.ochrance.cz/Nalezene/Edit/592>.

[22] Candigliota, *supra* note 7, *passim*.

[23] Vyhláška č. 92/2012 Sb., o požadavcích na minimální technické a věcné vybavení zdravotnických zařízení a kontaktních pracovišť domácí péče [Ministerial decree no 92/2012 Coll., on Requirements for Minimum Technical and Material Equipment of Health Care Facilities and Home Care Contact Points] annex 2.

environment'),[24] but without explicitly enumerating any technical and material equipment necessary for her[25] to attend childbirth at the patient's home, as it did with equipment necessary for birth in a medical facility. This led public authorities to conclude that midwives, even when duly registered as health care providers, could not legally assist home births.[26]

Practically speaking, this was understood to mean that a midwife could provide care to her patients at their homes and offer services before and after childbirth. But once the patient moved into the first stage of labour, the midwife had to stop providing care, which would have been care identical to the one that she would be fully competent to provide in a medical facility,[27] unless she dared to commit an administrative offence of providing unauthorised health care, an offence punishable by a high fine.[28]

Aside from the use of administrative law and fines to discourage home-based midwifery, midwives who provided care in the home were also prosecuted criminally, most notably Ivana Königsmarková, the president of the Union of Midwives, in 2010. She was given a two-year suspended sentence for causing grievous bodily harm to a child who temporarily stopped breathing during a home birth. The *actus reus* of her crime, as charged, involved not arranging hospitalisation, assisting in a home birth without adequate technical, material, and personal support, and faults in infant resuscitation. The CCC found the criminal courts' decision to be constitutionally non-compliant, stating that the causal nexus between the midwife's acts and the baby's condition had not been proved beyond a reasonable doubt. Noting that the standard of care requested by criminal courts would have led to the effective prohibition of home births, the Court noted that in a 'materially understood *Rechtstaat*', freedom is always accompanied by a certain level of acceptable risk.[29] Despite this individual

[24] *Ibid.*, s 1(3) and annex 11.

[25] Data from 2025 show that only 0,1% of Czech midwives were male. Český statistický úřad, *Statistická ročenka České republiky 2025* [Czech Statistical Office, 2025 Annual statistical report on Czech Republic] <https://csu.gov.cz/produkty/statisticka-rocenka-ceske-republiky-2025#zdravi> figure 25.22 Pracovníci ve zdravotnictví [Health care sector employees]

[26] To the best of our knowledge, this conclusion was mostly accepted by administrative authorities registering midwives as healthcare providers and administrative courts, while there were some rare exceptions at the level of courts, such as judgment of the Regional Court in Plzeň of 19 December 2022, 77 A 159/2020.

[27] The scope of services provided by midwives is defined on sub-statutory level by another ministerial decree (Vyhláška č. 55/2011 Sb., o činnostech zdravotnických pracovníků a jiných odborných pracovníků, [Ministerial decree no 55/2011 Coll., on competences of medical staff], s 5)

[28] Candigliota, *supra* note 7, 808.

[29] CCC judgment of 24 July 2013, I. ÚS 4457/12.

victory, the general message of discouragement from midwife-assisted home births was clear.

The *de facto* prevention of midwifery support at home in Czechia was also the factual background of Mrs Dubská's case, in the well-known ECtHR judgment *Dubská and Krejzová v Czech Republic*.[30] In it, the Grand Chamber, disappointingly, did not find a breach (in a 12:5 decision). It failed to appreciate similarities with ECtHR case *Ternovszky v Hungary,*[31] in which the Strasbourg court first established that 'the circumstances of giving birth incontestably form part of one's private life' (and thus fall within the scope of article 8 ECHR).[32] The five dissenting judges rightly criticised the insufficient distinction between the cases: 'The law [...] renders assisted home births impossible in the case of Hungary and unsafe in the case of the Czech Republic. The parents concerned thus do not enjoy a real choice in [Czechia], either, since a home birth without a midwife incontestably puts the lives of mother and child at risk. Czech law therefore prevents *de facto* home births and has a chilling effect on mothers wishing to give birth at home.'[33] But the majority found that – due to a lack of European consensus – states had a wide margin of appreciation and accepted the Czech measure as a proportionate pursuit of a legitimate aim.[34]

In the following, we focus on the story and criminal liability of the birthing mother. A brief comment on the doula's criminal conviction is also called for, however, as it reveals the paradox hidden in the state's policy of pushing women towards the mainstream 'medicalised' childbirth through suppression of midwife-assisted home births. The doula's criminal conduct, as per the criminal courts and the CCC, consisted of, *inter alia*, 'overstepping' her role as a doula, i.e. a medically untrained person, when it was clear the birth was going wrong. A contributing reason why she overstepped her role (by 'pulling the child' when the birth stopped progressing) was that a midwife, as a medically trained professional, could not have attended the childbirth without risking an administrative penalty. Therefore, the doula's conviction is, at least to some extent, directly linked to the state's policy choice

[30] *Dubská and Krejzová v the Czech Republic* (Judgment) [GC] ECtHR Apps Nos 28859/11 and 28473/12 (15 November 2016), which followed in outcome the earlier Chamber judgment from 11 December 2014.

[31] *Ternovszky v Hungary* (Judgment) ECtHR App No 67545/09 (14 December 2010).

[32] *Ibid.*, § 22.

[33] Dissent by judges Sajo, Karakaş, Nicolaou, Laffranque, and Keller in *Dubská and Krejzová v the Czech Republic*, *supra* note 30, § 11.

[34] *Dubská and Krejzová v the Czech Republic*, *supra* note 30, §§ 167 ff. ECtHR has followed similar approach in several later cases, e.g. *Kosaitė-Čypienė and Others v Lithuania* (Judgment) ECtHR App No 69489/12 (4 June 2019).

concerning suppression of home births through suppression of midwives' care which renders them unsafe.[35]

2.2 Obstetric Violence in Hospitals

When women do give birth in a hospital, their treatment often amounts to 'obstetric violence' as understood in international human rights standards[36]: invasive and risky procedures without clear clinical justification and/or without informed consent or in violation of a refusal.[37]

Adéla Hořejší, an attorney specialising in cases of reproductive rights,[38] has noted that acts qualifiable as obstetric violence remain the norm rather than the exception.[39] In the absence of more specific and reliable data, that seems to be indirectly supported by the prevalence of medical interventions that are used disproportionately more often than in other states. For example, the share of vaginal births that included episiotomy (the cutting of the perineum) is significant, even though it has been slowly declining (from 45% in 2019 to 28 % in 2023). In the same period, synthetic oxytocin was administered to approximately 30% of birthing persons.[40] In Sweden, for comparison, the proportions are 10% and 7%, respectively.[41] It thus comes as no surprise that, according to a quantitative study

[35] A point noted already by Judge Lemmens, dissenting, in *Dubská and Krejzová v Czech Republic* (Judgment) [Chamber] ECtHR Apps Nos 28859/11 and 28473/12 (11 December 2014). This could be seen as a variation of the argument raised in relation to abortion by the World Health Organisation ('WHO'), which recognises that restricting access does not reduce the number of procedures, but makes them unsafe. 'Abortion' (*WHO*, 8 December 2025) <https://www.who.int/news-room/fact-sheets/detail/abortion>.

[36] Note that there is no legal definition of obstetric violence in the Czech law; it is not criminalised as a specific crime under the Criminal Code, as it stands in the time of writing (October 2026).

[37] This adopts a relatively conservative definition of the term; more expansive definitions also encompass omissions to act, verbal abuse, and other forms of mistreatment. See Pickles, *supra* note 8. For examples and analysis from Czechia, see also Adéla Hořejší, 'Porodnické násilí. Jak (staří) muži rozhodují o tělech (mladých) žen' [Obstetrics violence. How (old) men decide about (young) women's bodies] in Kateřina Šimáčková, Barbara Havelková and Pavla Špondrová, *supra* note 7.

[38] Hořejší represented the doula in the proceedings before CCC which led to the Original Judgment.

[39] For a detailed argument, see Hořejší, *supra* note 37. See also Cecily Begley, Natalie Sedlicka and Deirdre Daly, 'Respectful and Disrespectful Care in the Czech Republic: An Online Survey' (2018) 15 *Reproductive Health* 198. In their paper, the authors noted that Czech maternity hospitals frequently fail to meet 'evidence-based' standard and interferences are at times performed without informed consent.

[40] Aperio - Společnost pro zdravé rodičovství, *Jak se rodí v českých porodnicích 2019-2023* [Aperio - Society for Healthy Parenthood, *Giving birth in Czech materinity hospitals 2019-2023*] (2024) <https://pruvodce-porodnicemi.aperio.cz/wp-content/uploads/2024/07/Pruvodce-porodnicemi_analyza-dat-2024.pdf>.

[41] Hořejší, *supra* note 37.

focused on women with experience of planned home birth in 2015–2020 in Czechia, the prevailing motivation of women who decide to give birth at home is that they want to avoid the risks involved in hospital births;[42] notably routine unnecessary medical interventions and disrespectful behaviour of medical staff.[43] Separation of mother and newborn is also common (a factor that motivated Mrs Krejzová to give birth at home).[44]

There are two cases on obstetric violence[45] (although not in those terms) which have so far been decided on merit by the CCC. In the 2015 case, obstetric violence included 'episiotomy and fundal pressure in the second stage of labour (Kristeller maneuver)'.[46] The applicant claimed that the various involuntary interventions caused extensive bleeding and threatened her life. The applicant was successful before the CCC insofar as she claimed that the criminal proceedings she instigated were not pursued with sufficient diligence by the police and the public prosecution. The CCC found her right to an effective investigation violated (Article 2 ECHR) but did not rule on the issue of obstetric violence beyond general observations[47] and

[42] Anna Durnová and Eva M Hejzlarová, 'Domácí Porody v Česku: Motivace, Důvody a Názory Žen, Které Rodily Plánovaně Doma (2015-2020)' [Home Births in the Czech Republic: Motivations, Reasons, and Views of Women Who Planned a Home Birth (2015–2020)] <https://fsv.cuni.cz/sites/default/files/uploads/files/18-10042s_vyzkumnazprava_Durnova_Hejzlarova_27_1_2021.pdf>. For findings on motivations of women who decide for non-institutionalised home birth more generally, see Lianne Holten and Esteriek De Miranda, 'Women's Motivations for Having Unassisted Childbirth or High-Risk Homebirth: An Exploration of the Literature on "Birthing Outside the System"' (2016) 38 *Midwifery* 55. This is in line with the WHO's conclusion that experience with disrespect and abuse during childbirth in medical facilities disincentivises women from accessing maternal care. In WHO, *The prevention and elimination of disrespect and abuse during facility-based childbirth* (14 September 2014) <https://www.who.int/publications/i/item/WHO-RHR-14.23>.

[43] Durnová and Hejzlarová, *supra* note 42, 5.

[44] *Dubská and Krejzová v the Czech Republic*, *supra* note 30, § 18.

[45] Obstetric and reproductive violence in Czechia cannot be discussed without mentioning the long history – both pre- and post-1989 – of forced sterilisation of (overwhelmingly) Roma women. These cases were also subject of extensive constitutional litigation. And the saga is to an extent still ongoing, as the compensation which was finally agreed to be paid out to the victims has been maladministered by Ministry of Health. See Sandra Pašková, 'Odškodnění nuceně sterilizovaných žen – vítězství s hořkým koncem' [Compensation for Forcibly Sterilized Women – A Victory with a Bitter Ending] in Kateřina Šimáčková, Barbara Havelková, Pavla Špondr Večl (eds) *Mužské právo II* [*Men's Law II*] (Wolters Kluwer 2025).

[46] CCC judgment of 2 March 2015, I. ÚS 1565/14.

[47] We recall these in section 3.3**Error! Reference source not found.**.

concluded that the alleged interferences were not serious enough to warrant the right to an effective investigation.[48]

The 2021 case involved 'the lack of securing informed consent before interventions, artificial birth-acceleration, forceful move into a position on the back with legs in stirrups, episiotomy, [...], careless and undignified treatment, and preclusion of leaving hospital'. The CCC confirmed the trial court's assessment, with reference to expert medical testimony, that the interventions were justified and proportionate to the need to protect the life of the newborn.[49]

2.3 Discouragement from Home Births

While never actually illegal, home births have been the subject of legal measures which have made them more dangerous, such as the lack of a legal framework for midwife care, noted above. They have also been the subject of much public controversy, often stirred by the medical establishment. Despite constituting an absolute fraction of births in Czechia (0,25%),[50] home births have been among the most publicly discussed healthcare-related issues over the past two decades in Czechia.[51] Unsurprisingly, their portrayal by obstetricians is invariably negative. In 2012, the Ob-Gyn Society issued a statement condemning home births as outdated, unscientific, *non lege artis* 'procedures', which fail to meet the necessary professional standard of care.[52] Implicitly, their assessment relied on understanding childbirth as a medical event, whose success and safety are measured primarily in terms of

[48] CCC judgment I. ÚS 1565/14, *supra* note 46. This decision is striking when one compares the logic applied here with the Original Judgment: a 'desirable and socially beneficial behaviour' (health care), performed in 'good faith with the intention of improving or even saving the health of patients, should by no means be criminalised', stated the CCC in the 2015 case (§ 38). Why not extend this to the 'desirable and socially beneficial behaviour' (human reproduction; giving birth to a child), performed in 'good faith', with the intention of safeguarding one's physical and mental integrity, as in the case examined here?

[49] CCC judgment of 16 March 2021, III. ÚS 2480/20.

[50] EU-wide data shows that the highest prevalence of home births is in the Netherlands (16%), which is, however, an outlier. For any other Members State, the prevalence of home births is below 1,4%. In Czechia, it is recorded at 0,25% in 2015-2019 period. In Gabriela Galková and others, 'Comparison of Frequency of Home Births in the Member States of the EU Between 2015 and 2019' (2022) 9 Global Pediatric Health 1, 3. However, the statistics is unreliable, which makes any discussion about them difficult. See Eva M Hejzlarová and Anna Durnová, 'The Czech Home Birth Controversy as an Example of the Activation of the Civil Sphere: Jeffrey Alexander's Concept of Societalisation' (2022) 58(2) *Czech Sociological Review* 151, 155.

[51] Hejzlarová and Durnová, *supra* note 50.

[52] 'Expert opinion on home births' (*Czech Medical Chamber*, 8 March 2012) <https://www.lkcr.cz/tiskove-zpravy/99307cs-odborne-stanovisko-vedecke-rady-clk-k-porodum-v-domacnosti>. 'Planned home birth in Czech Republic' (*Czech Medical Association of Jan Evangelista Purkyně*, 29 August 2012) <https://www.cls.cz/stanovisko-k-porodum-doma>.

perinatal mortality. Accordingly, in obstetricians' discourse, women who deliberately choose a home birth tend to be ascribed negative characteristics such as self-centred, ill-informed, and incompetent.[53]

This understanding of home births as inherently riskier than medically-supervised childbirth has also been prevalent in the legal community.[54] The attitude, absolute preference for hospital over home care – even in case of no complications – can be illustrated by another case against the Czech Republic, which reached the ECtHR. In *Hanzelkovi v Czech Republic*,[55] the police forcibly returned a newborn and mother to a hospital, against the parents' wishes, and despite no urgent medical need to do so. And while it seems there had been no prior criminal prosecution of a mother who gave birth at home before the Original Judgment,[56] it is worth noting that as early as 2009, the Ministry of Health commissioned a legal opinion on possible criminal liability of mothers in relation to home births.[57] This prejudicial attitude against home birth, in both the medical and legal communities, provides an important context to the Original Judgment.

2.4 The Medical Establishment – The Ob-Gyn Monopoly and the Missing Women

Ob-gyn doctors come through as central actors in the story told in the previous sections. The Ob-Gyn Society and its members have effective control over women's reproductive experiences, despite suffering from an obvious conflict of interest. They 1) have for years essentially dictated state policy through unchecked and often exclusive access to the Ministry of Health; 2) are the ones assessing pregnancies as risky (and making decisions about involuntary interventions in hospitals); and then 3) appear as experts before courts to effectively confirm and justify these decisions by their colleagues. It is worth noting that despite the gender composition of the

[53] Hejzlarová and Durnová, *supra* note 50, 167–169.

[54] See, e.g., in David Karaba, 'Možné příčiny domácích porodů v Česku' [Possible Reasons for Home Births in the Czech Republic] (2020) 10(1) *Časopis zdravotnického práva a bioetiky* [*Journal of Medical Law and Bioethics*] 15. Similarly, Fleur van Leeuwen noted that a 'risk management narrative' it is also prevalent in the ECtHR's case law on home births. See Fleur van Leeuwen, 'Epistemic Blind Spots, Misconceptions and Stereotypes: The Home Birth Jurisprudence of the European Court of Human Rights' (2024) 35 *European Journal of International Law* 153.

[55] Hanzelkovi v Czech Republic (Judgment) ECtHR App No 43643/10 (11 December 2014). Stemming from CCC decision of December 17, 2009, I. ÚS 1995/08.

[56] CCC judgment of 9 June, 2014, IV. ÚS 787/13, involves a claimant found guilty of 'murder of an infant during childbirth', which she allegedly committed after giving birth at home. The circumstances of the criminal case, however, did not focus on the home birth as such. Nevertheless, it is interesting to note that the fact the claimant had given birth at home, unprepared, was used against her as circumstantial evidence that she was planning to kill the infant.

[57] Candigliota, *supra* note 7, 801.

specialism being largely equal,[58] the Society only ever had male Presidents[59] and the current Committee only has two women out of twelve.[60]

First, the Ob-Gyn Society has long co-created the state's policy.[61] Since the doctors see themselves as the only experts on pregnancy and childbirth, they actively suppress other voices in the policy-making processes, particularly those of midwives and birthing persons. One such instance occurred in 2012 when the Ministry of Health instituted – in reaction to a negative assessment by the CEDAW committee[62] – a multidisciplinary Working Group on Obstetrics. The Ob-Gyn Society stated that Czech obstetrics care needed no reform, instructed its members not to attend, and called for the Group's dismissal. The doctors indeed left the Group; the Ministry abolished it and subsequently instituted a new one without representation from midwives and women advocating for change.[63] The deep entanglement between the Czech obstetricians and the Ministry is further illustrated by the fact that, when a new Working group was established by the Government Council for Gender Equality in 2015, the Ministry sent two lead members of the Ob-Gyn Society as its representatives.[64]

Second, ob-gyns, as doctors to individual pregnant women, are the source of assessment of what constitutes a 'risky' pregnancy. This gives them tremendous power, as the Original Judgment makes this assessment a determinant of the criminality of the pregnant/birthing woman.

Third, the obstetricians are then also evaluating what is right, *lege artis*, and necessary to protect the foetus/newborn, when cases make it to court. There is no opposing or critical view to the one presented by the Ob-Gyn Society and its members, including before the courts. In the above-mentioned case of criminal

[58] The proportion of women ob-gyns has been steadily rising, from 35.3 % in 1993, to 45.7% in 2013. Czech Statistical Office, 'Zaostřeno na ženy a muže' 2014 [Focus on Women and Men 2014] (*Czech Statistical Office,* 2014) 66, table 2-2 <https://csu.gov.cz/produkty/zaostreno-na-zeny-a-muze-2013-qelgahgc43>. As of 2024, the specialism is 55 % female. Ústav zdravotnických informací a statistiky ČR (ÚZIS ČR), 'Datový souhrn OIS 11-16: Pracovníci – počty zdravotnických pracovníků podle věku, pohlaví, kraje a okresu, 2024' [Data summary OIS 11-16: Workers - number of workers in healthcare based on age, sex, region and district] (*National Healthcare Information Portal*, 30 October 2025, data as at 31 December 2024) worksheet 'Kraje', row 1364 <https://www.nzip.cz/data/2358-pracovnici-pocty-zp-vek-pohlavi-kraj-okres-datovy-souhrn>.

[59] This information is not readily available on the Society's website (https://cgps.cz/), but based on a wider research, the following appear to have been Presidents since 1990: Ladislav Pilka, Vít Unzeitig, Jan Hořejší, Vladimír Dvořák, Jaroslav Feyereisl, Vladimír Dvořák, Marian Kacerovský.

[60] 'Výbor ČGPS ČLS JEP volební období 2026–2030' (*Česká gynekologicko prodonická společnost ČLS JEP*, undated) <https://cgps.cz/vybor-cgps/>.

[61] Beyond what is mentioned above, see further examples in Hořejší, *supra* note 37.

[62] See *supra* note 13.

[63] Candigliota, *supra* note 7, 810.

[64] Together with one bureaucrat. Candigliota, *supra* note 7, 815.

prosecution of the midwife Königsmarková,[65] it was the same doctors who filed the criminal complaint against her and then acted as expert witnesses in the case (sic!).[66] The trial court refused to appoint the foreign expert proposed by the defendant instead.[67] Moreover, the Ob-Gyn Society expects its members to inform and collaborate with it on expert witness statements. As Adéla Hořejší summarises:

> Expert witness reports in the field of obstetrics in Czechia have been steered towards a monopoly and an interest group since at least 2002, and no woman who is a victim of obstetric violence or an independent midwife has a chance to receive an impartial and independent expert opinion in her case, because healthcare professionals who are responsible for faulty actions cooperate with expert witnesses; all of this not only under the protection, but even at the initiative of the management of the Ob-Gyn Society.[68]

And yet, the obstetricians are not objective, neutral experts; they are in a clear conflict of interest: they are professionals whose jobs and incomes depend on maintaining births under their control in hospitals. It is obvious they are motivated to protect their long-held monopoly. This conflict of interest did not go unnoticed by the dissenting judges in *Dubská and Krejzová,* who noted that 'in the creation of the State's legislative framework, economic interests might have played a more decisive role than the protection of the newborn child'.[69]

Not only are women absent from deciding about the legal framework governing the treatment of their own bodies, but their well-being is also absent from the definition of a successful birth adopted by the medical establishment. For the Ob-Gyn Society, the sole criterion is perinatal[70] mortality[71] (even though this statistic tends to reflect the quality of care for prematurely born babies rather than anything else[72]). This single-criterion approach has been uncritically adopted by the Czech

[65] CCC judgment I. ÚS 4457/12, *supra* note 29.
[66] Hořejší, *supra* note 37, 766.
[67] *Ibid.*
[68] *Ibid.*, 767.
[69] *Dubská and Krejzová v the Czech Republic*, *supra* note 30, dissent by Judges Sajó, Karakaş, Nicolaou, Laffranque, and Keller, § 17.
[70] Stillbirths and deaths under seven days of age.
[71] E.g. Candigliota, *supra* note 7,) 825.
[72] Candigliota, *supra* note 7, 825, citing Markéta Pavlíková, 'Manipulace s novorozeneckou úmrtností – už zase?' (*Biostatistička.cz*, 27 April 2015) <http://www.biostatisticka.cz/manipulace-novorozeneckou-umrtnosti-uz-zase>.

courts[73] to determine the necessity of involuntary medical interventions (in previous cases) as well as 'risk' (in the Original Judgment). What does not seem to enter the equation are women, their birth-related mortality, let alone the long-term physical and mental harm which can result from a bad birth.[74]

2.5 The Legal Establishment's Response – The CCC as an Actor

The CCC has ruled on home births in a range of cases which challenged the discouragement of midwifery through fines in various ways. The Court's approach has steadily developed: from rejection to recognition of the issue to only a very reluctant and limited remedy. The Original Judgment does not completely regress this slow and slight progress in principle but shows extreme deference to the restrictive Czech system of obstetric care.

At first, the CCC was not receptive. When the *Dubská and Krejzová* case first came before it, the Court dismissed Mrs Dubská's petition challenging 'unconstitutional encroachment' of the right to choose the circumstances of childbirth as inadmissible for procedural reasons.[75] Over the years which followed, the CCC heard a number of other cases in which the applicants 'tested' whether a claim could produce a different result than (procedural) dismissal or (substantive) rejection.[76] These included: prospective mothers requesting injunctions securing a midwife's assistance at home birth;[77] complaints against administrative authorities informing midwives upon their registration as health care providers that they cannot assist at home births, allegedly with the aim of dissuading prospective mothers intending to give birth at home;[78] and civil claims against public health insurance

[73] For more on this, see Hořejší, 'Porodnické násilí pokračuje: soudní neklid z mladých žen' [Obstetrics violence continues: judicial discomfort vis-a-vis young women] in Kateřina Šimáčková, Barbara Havelková, Pavla Špondr Večl, *supra* note 45.

[74] Antje Horsch and Susan Garthaus-Niegel, 'Posttraumatic Stress Disorder Following Childbirth' in Camilla Pickles and Jonathan Herring (eds), *Childbirth, vulnerability, and law: exploring issues of violence and control* (Routledge 2019) 49–66.

[75] CCC (plenary) decision of 28 February 2012, Pl. ÚS 26/11. It is a curious decision: While dismissing the constitutional complaint as procedurally inadmissible due to non-exhaustion of other remedial measures, judge-rapporteur Eliška Wagnerová penned the decision so that the CCC acknowledges and accepts ECtHR's conclusions in *Ternovszky v Hungary*, to much dismay of her colleagues (9 out of 14 judges appended separate opinions criticising her approach as unduly unrestrained; it is, indeed, rather unusual for the CCC to discuss anything relating to the substance of the case when the case is being dismissed for procedural reasons).

[76] The latter often based on the ECtHR's *Dubská and Krejzová* judgment. See, e.g., reasoning in CCC decision of 14 May 2019, III. ÚS 3613/16.

[77] CCC decision of 10 March 2015, II. ÚS 391/14; CCC judgment of 29 November 2016, III. ÚS 2433/15.

[78] CCC decisions of 26 September 2017, IV. ÚS 2167/17; of 13 March 2018, II. ÚS 2600/17; and III. ÚS 3613/16, *supra* note 76.

provider arguing for the costs of a midwife's attendance at home birth to be paid from public health insurance.[79]

Throughout these cases and beyond, one can identify subtle 'nods' of the CCC towards recognition of autonomous decision-making in a childbirth-related context.[80] However, the CCC was consistently showing considerable deference to the legislative and executive branches as the appropriate sites of contestation of the *status quo* in a parliamentary democracy. We noted elsewhere that in socially sensitive, divisive, gender-related cases, the CCC often avoids making decisions on the merits, relying, among other things, on the separation of powers principle.[81] Similarly, in the case of home births, the Court claimed it cannot single-handedly 'establish a right to midwife-assisted home birth', as this would breach its 'political question doctrine'.[82]

As it became increasingly clear that the executive or legislative branches would not create the necessary legal frameworks,[83] the CCC seemingly took a more proactive stance in two subsequent cases.[84] In 2021, it opened a procedural avenue for expectant mothers to pursue strategic litigation to ensure access to midwifery care during home birth. Acknowledging that its own case law kept closed all possible avenues for such litigation, the CCC ruled that pregnant women interested in midwife-assisted home birth could become parties to administrative court proceedings reviewing the legality of 'limited registration' of midwives *vis-à-vis* care provision in the home.[85] That, however, produced only limited change in terms of

[79] CCC decision of 1 March 2021, II. ÚS 956/20.

[80] E.g. CCC judgment I. ÚS 4457/12, *supra* note 29.

[81] Barbara Havelková, Terezie Boková and Lucia Berdisová, 'The Non-Constitutionalization and Avoidant Constitutionalization of Gender in Czechia and Slovakia' (2025) 23(2) *International Journal of Constitutional Law* 527. *See also* Hubert Smekal, Jaroslav Benák and Ladislav Vyhnánek, 'Through Selective Activism towards Greater Resilience: The Czech Constitutional Court's Interventions into High Politics in the Age of Populism' (2021) 26(7) *The International Journal of Human Rights* 1230.

[82] See, e.g., CCC decision IV. ÚS 2167/17, *supra* note 78.

[83] It is symptomatic that even the government was unable to decisively show substantive progress achieved in this area in its 7th periodic report to the CEDAW committee (for details, see supra notes 13 and 14).

[84] A more 'proactive' stance could have stemmed from composition of CCC three-member panels which heard the cases. See note 85. The latter case was similarly heard by a panel composed of more liberal-leaning judges

[85] CCC judgment of Nov 24, 2021, II. ÚS 1238/21. Its judge rapporteur, Kateřina Šimáčková, was particularly active in promoting liberal stances in gender-related issues while serving at the CCC. See Havelková, Boková and Berdisová, *supra* note 81. David Kosař and Sarah Ouředníčková, 'Responsive Judicial Review "Light" in Central and Eastern Europe – A New Sheriff in Town?' (2023) 48(3-4) *Review of Central and East European Law* 445, 465–466.

outcomes: women were heard, but administrative courts still reached the same unfavourable conclusions.[86]

Finally, in 2024, the CCC 're-interpreted' the applicable statutory law to rule that the care of a midwife during home birth does not qualify as 'medical service' regulated by law.[87] This is a win and a loss at the same time. Through rather technical, statutory-level reasoning, the CCC acknowledged that home births were not explicitly illegal, thus midwives could legally assist with home birth without the risk of punishment 'just like any other person'.[88] In this way, the CCC ensured access to midwife care, free from risk of administrative penalties. By doing so, however, it pushed their care outside the scope of statutorily regulated medical services. It thus appears that the Court did only what was strictly necessary to liberalise the regime of home births, i.e. ensured that midwives could not be precluded from assisting during home births. It did not, however, recognise that the 'right to give birth at home' enjoys constitutional protection, nor that it might impose positive obligations on the state in that regard. Additionally, excluding midwife-assisted home birth from the statutory category of 'medical services' exposes both birthing persons and midwives to legal uncertainty due to the absence of a clear statutory framework. It also cemented the exclusion of midwifery in home births from public health insurance coverage. The Court's implicit message again seems to be that it is up to the legislature to ensure any future development.

3 Analysis of the Original Judgment

The case was brought to the CCC[89] through two individually filed constitutional complaints challenging criminal court decisions: the mother's and the doula's. Both women were found guilty of involuntary manslaughter[90] as they caused the death of a newborn during a home birth. Each was given a suspended sentence of six months' imprisonment. Relying on expert witness testimony by an obstetrician, the district and regional courts (as first and second instance courts) concluded that the baby had been alive when 'partially delivered', even though the courts could not establish whether the baby had been alive when the labour had been completed. They concluded the death of the child occurred during the second stage of labour, stalled

[86] See, e.g., Supreme Administrative Court judgment of 11 August 2023, 2 As 241/2022-74. For a notable exception, see a judgment of the Regional Court in Plzeň referenced in note 26.

[87] This was a novel and quite unorthodox legal conclusion – the CCC in its previous case law, as well ECtHR in both the *Dubská and Krejzová* judgments, worked with the premise that midwife assistance at home birth was *de facto* banned relying on regulation of medical services that the CCC considered not applicable in this judgment.

[88] CCC judgment of 28 August 2024, I. ÚS 2746/23.

[89] The account of facts of the case which follows is based on the Original Judgment §§ 2–11.

[90] S. 143(1) of the Criminal Code (Act no 40/2009 Coll.).

due to the baby's breech position, because of hypoxia. The first-time mother was of 'advanced maternal age' (she was 36 years old) and in the 41st week of pregnancy. She had been told by her gynaecologist that her baby was in breech position, and consequently, she had been advised that a caesarean section was recommended. According to the courts, her journal entries suggested that she had been intentionally planning to give birth at home, with the assistance of the doula and the baby's father; it did not seem that she had discussed alternatives to caesarean section with any obstetrician. All these factors were considered important in assessing the mother's criminal liability for the death of the baby. It is worth reproducing verbatim how the first instance court described the mother's *actus reus*:

> [A]s a mother, she did not act in such a way as to prevent harm to the life or health of the newborn, as she knew that there was a risk to the foetus during a vaginal breech delivery, which requires professional guidance during delivery in a healthcare facility and by a healthcare professional, yet she did not contact a healthcare facility before or during delivery. She proceeded with a home birth, even though a caesarean section would have been primarily indicated in the case of a breech birth in a 36-year-old first-time mother in the 41st week of pregnancy. As a result of her actions, the newborn J. V. suffered suffocation during birth and died. (quoted in the Original Judgment § 3)

The reasoning of the Original Judgment shows that the Court attempted to adopt a nuanced approach — one which would not give unconditional preference to the rights of the birthing woman nor protection of foetus or newborn. Nonetheless, as we elaborate below, the outcome of the Court's balancing exercise renders the mother's rights theoretical and illusory.

3.1 Women's Right to Choose vs the Constitutional Value of Foetal Protection

It is worth highlighting what the Court did well: it confirmed that a pregnant person has a constitutionally protected right to decide the circumstances of giving birth,[91] and it rejected that the foetus enjoys a right to life.[92] The recognition of the right to choose the circumstances of childbirth stemmed from earlier case law of the Court, noted above.[93] The Court followed the ECtHR and grounded the right with the right to private life, specifically the rights to privacy and personal integrity.[94] While

[91] Original Judgment §§ 48–50.
[92] *Ibid.*, §§ 40–47.
[93] See section 2.5.
[94] Articles 10(2) and 7(1) of the Charter.

acknowledged in earlier case law, the right had made little difference until then.[95] In the Original Judgment, it became central.

As for the rejection of the foetal right to life, the Court elegantly avoided the question of when life begins.[96] It relied on the guarantee of Article 6 (1) of the Charter of Fundamental Rights and Freedoms ('Charter'), which states that 'Everyone has the right to life. Human life is worthy of protection even before birth.' True to the Charter's language, the Court found that the latter clause guaranteed foetal protection as an 'objective value protected by constitutional law'[97] distinct from the 'right to life', which only pertained to 'persons'. It thus concluded that an unborn child is, in a specific way, constitutionally protected, without extending the concept of life before birth or without conferring fundamental rights to the foetus. This measured approach has been adopted by other constitutional courts in the region as well.[98] Taken together, these findings could have provided a solid foundation for taking reproductive rights seriously.[99]

Yet, while the Court recognised the right of pregnant/birthing persons, it set considerable limits, both on the content of the right and by giving the conflicting interest great weight. First, on the content of the right itself, while recognising the right to choose the circumstances of childbirth, the Court clarified that there is 'no constitutional right to give birth at home'[100] per se. Second, the Court gave great weight to the value of foetal protection.[101] It stated that it qualifies the rights of

[95] Even the break-through judgment I. ÚS 2746/23, *supra* note 88, liberalizing midwife-assisted home births, does not build its legal reasoning primarily on violation of the birthing persons' rights.

[96] The question has been a battleground in abortion rights clashes. The ECtHR's case law leaves the question ambiguously open and left for the states to decide (*Vo v France* (Judgment) [GC] ECtHR App No 53924/00 (8 July 2004)).

[97] Original Judgment § 44.

[98] The Original Judgment refers to a Slovak case in § 44: Slovak Constitutional Court judgment PL. ÚS 12/01. See also, more recently the Constitutional Court of Croatia, Decision U-I-6-/1990 and others of 21 February 2017 (Official Gazette 25/2017) regarding abortion. For discussion, see e.g. Ana Horvat Vuković and Ana Samobor, Constitutional construction of reproductive rights and family in Croatia and Slovenia (2025) 23(2) *International Journal of Constitutional Law* 501, 521–522.

[99] As a counter-example to the starting point here, see Anna Śledzińska-Simon's chapter on the Polish Constitutional Tribunal judgment of 22 October 2020, K 1/20 (unconstitutionality of abortion), in this volume.

[100] Original Judgment § 50.

[101] It did not assess the possibility of a paternalistic intervention aimed at protection of the competent birthing person themselves. The ECtHR's maintains a liberal stance towards involuntary treatment of a competent patient who refuses life-saving treatment. Cf. *Pindo Mulla v Spain* (Judgment) [GC] ECtHR App No 15541/20 (17 September 2024) §§ 146. However, recently, the ECtHR accepted that a birthing person could be involuntarily confined in a hospital, with the aim of protection of rights of the unborn child and the birthing person, suggesting a more 'interventionist' approach when an unborn child is involved. See *C.P. v Spain* (Judgment) ECtHR App no 50181/22) (11 June 2026) § 114.

pregnant persons 'especially during childbirth', when the unborn is 'no longer a mere foetus, not yet a person'.[102] Consequently, the Court accepted that criminal law protection of the foetus extends even before it is (completely) born, to the process of childbirth itself.[103] And even though the Court refused the idea of foetal rights, it stated that 'even if the unborn child were not a subject of fundamental rights, the protection of the life and health of the child during childbirth is nevertheless a constitutionally protected good',[104] making little practical distinction between conferring rights on the foetus and the objective value of their protection.

Recognition of birthing persons' rights and rejection of the fundamental rights of the foetus were important for conducting a nuanced proportionality assessment. However, mere recognition is insufficient for the prevention of hindering birthing persons' rights when the principle of foetus protection is considered as weighty as – and inherently in conflict with – autonomy, privacy, and bodily integrity of the birthing person. An alternative balancing and proportionality assessment, therefore, forms a central part of our Rewrite below.

3.2 The Illusion of Choice: Home Birth or Coerced Hospital Care

Moreover, the CCC was disingenuous about what 1) constituted the mother's illegal conduct and 2) what behaviour had been legally required of her, i.e. what medical intervention would she be required to suffer. The first disingenuity concerns the question of the legality or criminality of a birthing person's decision to give birth at home. On one hand, the Court stated that a birthing woman cannot be held criminally liable for a mere act of giving birth at home, even though it is 'inherently riskier'.[105] Home births as such are not declared illegal (*nullum crimen sine lege*).[106] On the other hand, it opined that giving birth at home (*actus reus*, as per the criminal courts' reasoning) can lead to the commission of a crime in circumstances when a birthing person knows of specific risks, which (apparently) make home birth 'even riskier'. In this particular case, the Court reasoned, the mother had known (*mens rea*) of the additional risk factors (breech position, primipara, her age, and an overdue pregnancy). Neglecting them despite her ob-gyn's recommendation made her liable for the outcome of the birth.[107]

Therefore, opting for a home birth, while in itself legal, could come with criminal liability in specific circumstances. It depends on whether birth commences

[102] Original Judgment § 43.
[103] *Ibid.*, § 46.
[104] *Ibid.*, citing previous the CCC's previous judgment I. ÚS 1565/14, *supra* note 46.
[105] Original Judgment § 56.
[106] *Ibid.*, § 53.
[107] *Ibid.*, § 54.

with the foetus being viable (i.e., capable of becoming a person), the assessment of the risks involved, and the outcome of the birth. These questions would be ascertained only *ex post facto* on the basis of expert witness testimony, which suffers from a conflict of interest, as noted above (section 2.4). Despite having a constitutional right to make decisions about childbirth, the option to choose a planned home birth is thus limited and dependent on factors that are not fully foreseeable when birth commences.

The second disingenuity pertains to the question of what interventions a birthing person could be required to submit to without her consent. On one hand, the Court stressed that the mother was *not* found guilty of *not undergoing a caesarean section*, as recommended by her ob-gyn. It was not rejecting a purely hypothetical understanding of *actus reus*; submitting to a caesarean section is clearly mentioned in the criminal courts' judgments.[108] The CCC was at pains to stress that it was indeed just the choice of place of birth, not foregoing any medical treatment she would not have consented to, that constituted *actus reus*.[109] On the other hand, the Court suggested that the choice of place of birth mattered precisely because a medical facility would provide assistance of medically trained staff, better equipped to 'lead the delivery' with a multitude of possible treatments.[110]

If the Court assumed that a birthing person could reject any treatment offered in the hospital, why force them into going to a hospital in the first place? In order to maintain a belief that the born child (counterfactually) could have survived the birth, the Court must have implicitly counted on some medical treatment being provided, voluntarily or not.

In fact, the Court's previous case law has established the basis for such involuntary treatment. In its obstetric violence cases,[111] the CCC accepted that the right to bodily integrity of the birthing person can be limited in order to achieve a legitimate aim of protection of an (*un)born child*.[112] Previously, the Court applied this principle to involuntary interventions such as the Kristeller manoeuvre, amniotomy, episiotomy[113] or the administration of antibiotics to a birthing woman;[114] not caesarean section, notably.[115] Thus, from the birthing persons' perspective, staying

[108] See quote in section 3.
[109] Original Judgment §§ 58, 60 and 62.
[110] *Ibid.*, § 61.
[111] Mentioned in section 2.2.
[112] CCC judgment I. ÚS 1565/14, *supra* note 46, § 81.
[113] CCC judgment I. ÚS 1565/14, *supra* note 46.
[114] CCC judgment III. ÚS 2480/20, *supra* note 49.
[115] Nevertheless, relying on the Court's case law, some Czech academics consider forced caesareans a possibility, see Lucie Široká and Michaela Povolná, 'Právo rodící ženy odmítnout péči versus právo

out of the hospital is the only effective safeguard against receiving involuntary obstetric care; it is not merely a preference for a specific birthing environment.[116]

We argue that the Court's refusal to acknowledge the intrinsic link between the place of birth and the obstetric care provided serves an important purpose: it makes it appear that what the mother would have had to give up in order to 'save her child' (just go to the hospital) was much 'lesser' than what was lost when she made her choice to give birth at home (the death of the child). Moreover, it hides the logical consequences of this construction, namely that a birth in a hospital means that various medical procedures can be forced on birthing mothers.

While there is some ambiguity about what constitutes obstetric violence, the definitions overlap[117] in considering non-consented care as a form of behaviour that amounts to obstetric violence as a specific, gender-based form of violence and discrimination. In the Original Judgment, the CCC implicitly sanctions coercive control of birthing persons' bodies, a feature of obstetric violence practices.[118] It exemplifies that obstetric violence is not about isolated incidents, but a culture within both medical and legal establishments, creating structures ensuring that a pregnant person is not trusted to make decisions about her body and that of her expected child.

However, it is worth highlighting that the Original Judgment's conclusions would have been flawed even if we proceeded on the premise that involuntary obstetric care would have indeed been an option. The previous case law limited such interferences to exceptional circumstances and to cases when they are proportional.[119] Yet, the Court did not perform a standard 'proportionality test', restricting itself to a declaration that a mother's rights could not be exercised without any limitation at the expense of the 'unborn (or born) child'.[120] However, even if one accepts that a birthing person has a legal duty to bear interferences with their rights for the sake of their (un)born child, it clearly is the extent of that duty which matters.

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dítěte na život a zdraví ve světle judikatury Ústavního soudu a Evropského soudu pro lidská práva' [The right of a woman in labour to refuse care versus the child's right to life and health in light of the case law of the Constitutional Court and the European Court of Human Rights.] (2017) 26(5) *Jurisprudence* 18, 26.

[116] Note that this is in line with sociologists' findings on reasons for preference of home births, quoted *supra* in section 2.2.

[117] See Pickles, *supra* note 8.

[118] Jonathan Herring, 'Identifying the Wrong in Obstetric Violence: Lessons from Domestic Abuse' in Jonathan Herring and Camilla Pickles (eds), *Childbirth, vulnerability, and law: exploring issues of violence and control* (Routledge 2019) 69–74.

[119] CCC judgment I. ÚS 1565/14, *supra* note 46, §§ 83–84.

[120] Original Judgment §§ 64–65.

Just as the constitutional protection of the foetus, explicitly stipulated in the Charter, cannot be negated, so too are the birthing person's rights.

3.3 Rendering Rights Theoretical and Illusory – The Chilling Effect

What is the likely real-life impact of the Original Judgment? It creates legal uncertainty for people who want to give birth at home. First, it puts the question of legality of home birth into the hands of a doctor with a conflict of interest: the assessment of whether a birthing person could face criminal liability for a deliberate choice of birth outside a medical facility now depends on obstetricians and their assessment of 'additional risk factors'. Second, the CCC did not provide much guidance as to the borderline between an 'acceptable level of risk', when home birth is still legal, and an increased level of risk, when it becomes criminal if the born child does not survive. Yet, there is no risk-free childbirth and some of the 'additional risk factors' present in the Original Judgment, such as the birthing person's age, dubious a factor as it is,[121] are becoming the norm, not an exception. Thus, if these frequent factors justify limiting birthing persons' decision-making autonomy, we could expect wide-ranging constraints. The Original Judgment leaves it for the criminal justice system to determine where the borderline lies in a case-by-case approach, risking a 'slippery slope'.[122] We return to the question of risk in the Rewrite.

4 Conclusion and Directions for the Rewrite

The Original Judgment, while tackling a novel issue, is a part of a wide pattern. Women's[123] autonomy, as a fundamental value and a right, seems to be – at best – a footnote. Individual freedom – considered a fundamental principle on which the transition from state socialism was built in CEE[124] – appears not to carry as much weight when its denial is gender-specific and experienced mostly by women. For these reasons, we find the Original Judgment a prime sample for feminist critique and rewrite. Not only does it show a lack of interest and understanding of an area of fundamental violation of – typically and overwhelmingly – women's physical and

[121] Melodie Cardin, 'Reconsidering "Advanced Maternal Age": communicating about pregnancy, disability risk and ageing' (2020) 20(8) *Feminist Media Studies* 1073.

[122] A more recent criminal conviction of a mother (who is, quite ironically, a midwife by profession) for the death of a child due to a home birth seems to suggest lowering of the bar concerning the 'additional risks' involved. It does not require a combination of multiple risk factors – the only 'additional risk factors' mentioned is a footling breech position of the foetus prior to birth. See the Czech Supreme Court judgment of 18 March 2026, 4 Tdo 120/2026.

[123] We speak of women here, as this exclusion is part of a historical pattern which was binary and attached to biological sex. We, of course, recognise that and other birthing persons' rights are equally at stake.

[124] For more detail, see Barbara Havelková, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart/Bloomsbury 2017) 198–207.

mental wellbeing by the organs of the state, including the courts; it also shows how one of the fundamental principles of Western liberal democracies – that of freedom – can be circumscribed to exclude freedom when it is specific to women; autonomy where they most want and need it.

The feminist Rewrite follows,[125] focusing on the right to bodily integrity and choice of the place and manner of birth, as well as on discrimination. We focus on the birthing person's bodily integrity instead of autonomy and freedom mentioned previously, as this is what the Original Judgment did. This stems from our commitment to offer a realistic Rewrite: there is earlier case law on limitations of birthing person's bodily integrity that the Court needed to take into account; we wanted to do the same. A broader comment might be useful to the relationship between the Commentary and the Rewrite. For non-Czech readers, the context, both legal and societal, is essential to understand what the circumstances of women's birthing decisions are, as well as what are the expert narratives influencing the perceptions of the legitimacy of such decision. We also had to introduce the law. The Rewrite, on the other hand, is perhaps of limited use to non-Czech readers – it is very much based on Czech constitutional and criminal law and idiosyncrasies of the previous CCC case-law. Writing Feminist Judgments in English, about non-English speaking East Central European jurisdictions, might require difference balance between Commentary and Rewrite than many previous Feminist Judgment projects.

Beyond bodily integrity and discrimination, there were two other possible approaches to the Rewrite. First, we could have explored the lack of certainty, clarity and predictability of the sanctioned obligation and thus the breach of the principle of legality in criminal law (nullum crimen, nulla poena sine lege).[126] This argument would highlight the legality of home births as such and the lack of clarity as to when home birth is a risk elevated enough to escalate to criminal liability. Moreover, we consider that if the criminal aspect were the focus and were successful before the CCC, there would be the real possibility that the Criminal Code would be amended by the legislature to clarify this point, thus cementing criminal liability of birthing persons. Second, it could be argued that the use of criminal law here is in breach of the principle of subsidiarity of criminal repression. Freedom to make autonomous decisions comes with responsibility for those decisions. But this does not

[125] By rewriting the majority judgment, we sacrifice the possibility writing in a less technical, more personalised style, as well as the chance to include more contextual analysis currently presented in the Commentary. We decided to rewrite the Original Judgment nonetheless, as it symbolically communicates that this is not a fringe (dissenting) opinion, but there was sufficient legal basis to reach this legal opinion for the Court.

[126] Article 39 of the Charter. See e.g. CCC judgment of 4 February 2026, Pl. ÚS 5/25, §§ 78–81.

mean that the responsibility has to take a form of a criminal sentence. According to the CCC, criminal law represents the proverbial 'ultima ratio' within the legal regulatory system. This means that not every act that proves to be irrational, wasteful, or even unlawful is necessarily an act that should be punished through criminal law.[127] However, this line of reasoning could be seen as directing the legislator to adopt intrusive private law or punitive administrative law measures against home births: also, an undesirable outcome. The challenge to the CCC's understanding thus needed to be more fundamental, substantive-values oriented. There is certainly a critical feminist criminal law paper here too, but for reasons of space, as well as our own (relative lack of) expertise, we focus on the constitutional law aspects here.

For that, there was no reason to rewrite parts of the Original Judgment, including most of the 'general principles', which are not problematic *per se*. We do, however, completely rewrite 'the application of the general principles', with the following guidelines. First, we want to acknowledge the wider social and legal context of the case and of the pregnant and birthing woman's conduct, which is a prerequisite for shifting the perspective from considering home birth a moral and legal wrongdoing to a legitimate and legal choice. Second, we address whether the criminal courts sentenced the mother also for not undergoing a caesarean section, which invites us to elaborate on forced caesarean sections more generally. Third, we base our holding on a more nuanced proportionality assessment, which accords appropriate weight to the birthing person's rights. Fourth, we assess whether the criminalisation of the avoidance of likely hospital-based obstetric violence could be considered discriminatory on the basis of sex.

5 Rewritten Judgment: Majority Decision written by Judge Boková and Judge Havelková, Judgment (excerpts)

(...)

50. However, even birthing persons' freedom to choose the circumstances of their childbirth is not unlimited. The right to respect for private and family life under Article 10 of the Charter and Article 8 of the ECHR – which encompasses the issue of choosing the circumstances of childbirth – often comes into conflict with other fundamental rights or constitutional values. The Court itself has previously ruled that the free choice of the place and manner of childbirth may be limited by the interest in the born child's protection (judgment I. ÚS 4457/12). The Court also stated that even a mother's right to bodily integrity may be restricted when pursuing the same

[127] E.g. CCC judgment of 11 June 2018, II. ÚS 1152/17.

legitimate aim (judgment I. ÚS 1565/14, § 84). In light of the foregoing, there is no reason to *a priori* rule out a restriction on the free choice of place of birth. This is consistent with the conclusion that neither the Czech constitutional order nor Art. 8 of the ECHR establishes a fundamental right to give birth at home as such (judgment, case no. I. ÚS 2746/23, §§ 36 and 41; ECHR judgment in *Dubská and Krejzová v the Czech Republic*, § 163).

Prohibition of discrimination on the basis of sex

51. The Court has previously ruled that when examining whether there has been a violation of the right to equal treatment due to the discriminatory criteria used in the legislation, it is necessary to assess whether, as a first question of the test, the individuals or groups concerned are comparable (judgment Pl. ÚS 18/15, § 118[128]). Pregnancy and childbirth – for reasons of typical male and female biology – offer no truly comparable male experience, however. As the European Court of Human Rights noted, "only women can be treated differently on grounds of pregnancy, and for this reason such a difference in treatment will amount to direct discrimination on grounds of sex if it is not justified" (*Napotnik v Romania*, no. 33139/13, § 77, 20 October 2020; see similarly the *Dekker* judgment of the CJEU; 8 November 1990, C-177/88, EU:C:1990:383). Because of the specificity of the experience of pregnancy, neither court requires an actual comparator.

52. This Court follows such an approach: in cases of pregnancy and childbirth, it considers the question of comparator an unnecessary step in the test. Heuristically, it can be useful to look to a hypothetical (male) comparator and consider whether an interference would ever be considered proportionate if an intrusion of a similar type and gravity were inflicted on a man. This would, however, not be a required part of the assessment.

Application of the general principles to the case

A. On assessment of whether maternal-foetal conflict arises

53. Restricting constitutionally protected rights requires balancing of rights with conflicting constitutionally protected values. Is it worth noting that, ordinarily, no such conflict arises between the pregnant/birthing person and foetus/born child ('maternal-foetal conflict'). Interests pertaining to both are, usually, aligned, since the

[128] Recently reiterated in a judgment on sex discrimination of early career judges on maternity and parental leave (CCC judgment of 20 November 2024, Pl. ÚS 16/24, § 73). This judgment, however, came (a day) after the Original Judgment. We therefore do not cite it directly.

future parent's interest is also to assure the well-being of their future child (judgment II. ÚS 1238/21, § 55). The Court already acknowledged that a conflict between them is imaginable only in 'exceptional circumstances' (judgment I. ÚS 1565/14, § 80). Under ordinary circumstances, we trust that the birthing person will choose the best option for the birth of their child, taking into account their health and the well-being of both. The question is thus what does, and what does not, constitute extraordinary circumstances when the state might intervene in order to ensure the protection of the foetus/born child.

54. This is where the widely shared ideas about an 'ideal' and 'normal' childbirth in Czechia have to be noted as creating a possible socio-cultural preconception of what ordinary and extraordinary mean. Drawing on the Ob-Gyn Society statements as well as the prevalence of hospital-based births, the Court acknowledges that in Czechia, the medical establishment and a large part of the public appear to support a medicalised approach to childbirth. This could lead to an overly ready acceptance of the existence of the maternal-foetal conflicts when pregnant/birthing persons do not conform to the widely accepted cultural expectations and pave the way towards recognising overbroad interferences with birthing persons' rights as justified.

55. Given the general principles stated above, the Court refuses to accept that home births automatically create a situation of maternal-foetal conflict (see judgment I. ÚS 4457/12). Whether such a conflict arises must be assessed taking into account not only the risks posed by the home birth itself, but also risks linked to hospital-based childbirth, to both birthing person and to the born child, which have been known to lead to both physical and mental harm and injury (see. e.g. Angela Reitsma and others, 'Maternal Outcomes and Birth Interventions among Women Who Begin Labour Intending to Give Birth at Home Compared to Women of Low Obstetrical Risk Who Intend to Give Birth in Hospital: A Systematic Review and Meta-Analyses' (2020) 21 *eClinicalMedicine*; Susan Bewley and Lin Foo, 'Are Doctors Still Improving Childbirth?' in Fatemeh Ebtehaj and others (eds), *Birth Rites and Rights* (Hart Publishing 2011)). The complexity of the matter and the need to reflect evidence-based standards prevent a simplistic assertion that an obstetrician-led childbirth always represents an indisputable good, whereas a planned home birth jeopardises interests pertaining to the foetus/born child, resulting in a maternal-foetal conflict.

56. Furthermore, the Court emphasises that the matter of risks and benefits cannot be reduced to statistical data on maternal and perinatal morbidity and mortality. Childbirth is not a 'medical procedure'; it occurs naturally even without medical experts' interference (judgment II. ÚS 1238/21, § 53). Rather, it is a deeply personal event that belongs especially to the birthing person (judgment IV. ÚS 3035/15, § 23). To reflect that appropriately requires more than a measured medical

judgment offered in good faith. The birthing person's personal values and their own vision of what 'good birth' entails need to be duly taken into account (see similarly Montgomery v Lanarkshire Health Board [2015] UKSC 11 (Lady Hale)).

57. The Court notes that the challenged court decisions summarily accepted that the applicant's decision to give birth at home was unequivocally detrimental to the interests of foetal protection/protection of the born child. Four – in themselves relatively common – conditions (primipara of higher age and a breech position of foetus prior to an overdue birth) led them to conclude there was a conflict without giving due regard to reasons that the applicant herself had for her decision, or without considering other relevant factors, such as risks of hospital-based birth in the given circumstances. Such an assessment clearly lacks the breadth and depth that the Court described above.

58. Having said that, the Court does not rule out that a maternal-foetal conflict can arise in these circumstances, and therefore, in order to perform a full review of the case, proceeds with the assumption that the case indeed entailed such a conflict.

B. Clarification of what constitutes the interference with the applicant's rights

59. The applicant was found guilty of a crime, which undoubtedly constituted interference with her rights. In order to assess that interference, it must be clear what her criminal conduct (*actus reus*) consisted of. The applicant claims that she was not found guilty of giving birth at home, but also for avoiding a caesarean section, as recommended by her obstetrician. The Court notes that such an understanding is supported by the language of the challenged judgments. They link the planned birth at home to the fact that a delivery by caesarean section had been medically indicated. An alternative reading of the challenged decisions suggests that the only applicant conduct relevant was the planned home birth.

60. There is a clear distinction between the two. A mere birth in a hospital appears significantly less serious interference than forcing the applicant into an invasive surgery. That has important consequences for the balancing itself.

61. The Court considers that the applicant's understanding is more appropriate, for two reasons in addition to the very wording of the challenged judgments. First, the two issues – the place of giving birth and involuntary medical treatment – are intrinsically linked both in legal and real-world terms, as the Court elaborates below. Ignoring this fact would mean ignoring the reality of obstetric care in Czechia. Second, the Court finds that the criminal conviction would not be capable of fulfilling any legitimate aim if the criminal conduct consisted only of a planned birthing outside a hospital. The argument runs as follows.

62. As stems from the general principles stated above, the legitimate aim pursued was (i) the protection of the foetus (as an objective constitutional value) and (ii) the protection of rights of others (of the born child once it becomes a subject of rights during childbirth). Neither of these aims would have been furthered if the authorities had insisted that the applicant had given birth in a hospital, but she had been free to refuse any form of obstetric care and indeed did so. The challenges of giving birth in her particular circumstances would have remained the same as when she gave birth outside the hospital. The mere possibility that she might have had a change of heart regarding receiving obstetric care is hypothetical and thus insufficient. A scenario in which her child would have been born in a condition allowing its rescue by immediate provision of emergency care (even against the applicant's wishes) is also merely hypothetical, since it was not established beyond a reasonable doubt when the child died. Therefore, accepting that the criminal conduct was constituted merely by giving birth at home would lead the Court to find a violation of the applicant's rights immediately in the first step of a standard proportionality assessment – it would not have been suitable to the pursued legitimate aim (for the proportionality test, see the judgment of 12 October 1994, Pl. ÚS 4/94).

63. The other possible reading of the criminal court judgments, namely that the applicant could have been subjected to obstetric treatment on an involuntary basis, opens up a possibility that the above-mentioned legitimate aims could have been fulfilled. The care indicated by the challenged decisions is a caesarean section delivery. The Court will thus analyse the interference from this perspective.

C. Constitutionality of a criminal conviction for the failure to submit to a caesarean section

64. As a starting point of discussion of the matter, it is worth remembering that a patient's informed consent serves as the basis for the provision of any healthcare services, see esp. Art. 7(1) of the Charter, Art. 8 of the ECHR (see ECtHR's judgment Konovalova v Russia, application no 37873/04, 9 October 2014) as well as Art. 5 and 26 of the Oviedo Convention (Convention on Human Rights and Biomedicine). Consequently, under normal circumstances, any person with the capacity to express consent is free to refuse medical treatment that would be beneficial to their health or, in extreme cases, necessary for their survival. The same principle applies in the context of childbirth. The Court notes that the applicant's capacity to provide consent has never been questioned.

65. The key constitutional issue before the Court is whether a birthing person could be forced to undergo a caesarean section, i.e. have to submit to it without their informed consent. While the legal issue is a novel one for this Court, it has been the

subject of judicial and academic debate abroad. In multiple jurisdictions (e.g. the United States,[129] the United Kingdom,[130] and Ireland[131]), courts concluded that a competent birthing person cannot be forced to undergo a caesarean section even if the likely consequence is a threat to the born child, due to the prevailing protection of her autonomy.

66. The Court accepted earlier – similarly in the context of childbirth – that the right to bodily integrity and autonomy are not absolute rights. The Court's earlier case law suggested that autonomy and bodily integrity of a birthing person could be limited when life and health interests of the born child are in imminent danger, and the limitation of the birthing person's rights is strictly proportionate to the legitimate aim of preventing that danger (judgment I. ÚS 1565/14, § 83).

67. The Court is of the opinion, however, that in no circumstance can the application of these principles justify forcing a birthing person to undergo a caesarean section. This conclusion is supported by an application of the standard proportionality test, with the following steps: (1) suitability of the interference to the legitimate aim, (2) its necessity, and (3) its proportionality *stricto sensu*.

68. In exceptional circumstances, an involuntary caesarean section (1) can be a suitable measure for the protection of a foetus/born child and (2) be considered medically necessary in order to ensure the birth of the child without considerable risks to its future life and health.

69. The key is thus assessing (3) the proportionality of the measure *stricto sensu*, from a legal perspective. To do so, the Court has to take into account the unique nature of pregnancy and childbirth. Even after reaching the stage of viability, the foetus remains intrinsically linked to and dependent on the pregnant person until leaving the birthing person's body during the second stage of labour. Furthermore, even a 'physiological', complications-free pregnancy requires the pregnant person to undergo a grave amount of personal sacrifice and hardship in order to carry the child to term, with possible lifelong health consequences. Sacrifice of such extent would not be, under any other circumstances, required of any person for the sake of another. There is no analogous legal duty to undergo even a minor medical

[129] In re A.C., 573 A.2d 1235 (D.C. 1990). However, there are court decisions to the contrary as well. See Maria TR Borges, 'A Violent Birth: Reframing Coerced Procedures during Childbirth as Obstetric Violence' (2018) 67 *Duke Law Journal* 827.

[130] See especially St. George's Healthcare NHS Trust v S [1998] 3 All ER 673 and Re MB (Caesarean section) [1997] 2 F.C.R. 541. For deeper discussion, see e.g. Jonathan Herring, 'Caesarean Sections and the Right of Autonomy' (1998) 57 *The Cambridge Law Journal* 438.

[131] The High Court judgment in Health Service Executive v B & Anor [2016] IEHC 605, discussed in Katherine Wade, 'Caesarean Section Refusal in the Irish Courts: Health Service Executive v B' (2017) 25(3) *Medical Law Review* 494.

treatment, let alone such an invasive and painful one as a caesarean section, in order to save someone else's life (see the famous U.S. case *McFall v Shimp*, 10 Pa D & C 3d 90 (Pa Ct Com Pl 1978), on forced bone marrow extraction in order to save life of a relative). From the legal perspective, no equivalent duty exists even in a relationship between a born child and its parent.

70. The Court thus cannot but conclude that forcing birthing persons into involuntary caesarean sections would inevitably impose an unjustified and disproportional burden on them (similarly, see e.g. Bonnie Steinbeck, *Life before birth* (Oxford University Press, 1992) 189; Jonathan Herring, 'The Caesarean Section Cases and the Supremacy of Autonomy' in Michael Freeman and Andrew DE Lewis (eds), *Law and Medicine* (Oxford University Press 2000)).

71. A possible objection to such a conclusion is that pregnant and birthing persons are so uniquely situated that the standards of autonomy and integrity cannot apply in a similar manner, or that by deciding to carry a pregnancy, they implicitly assented to interferences with their integrity. The Court unequivocally rejects such arguments. A decision to carry a pregnancy to term is an individually and socially valuable personal choice that in no way diminishes the fundamental rights of the pregnant person. They do not become 'a foetal container', their rights 'paused' for the duration of pregnancy and childbirth. Such a prejudicial approach would reiterate a number of gender stereotypes that pertain to pregnancy and childbirth (see, e.g. Christina Zampas' and Stella Villarmea's contributions in 'Human Rights and Gender Stereotypes in Childbirth' in Camilla Pickles and Jonathan Herring (eds), *Women's Birthing Bodies and the Law: Unauthorised Intimate Examinations, Power and Vulnerability* (Hart Publishing 2020)).

72. To conclude, the Court finds that a birthing person cannot be forced to undergo a caesarean section, even in cases when such a treatment is medically indicated due to risks posed by vaginal birth to the born child. To expose them to such treatment would amount to a violation of their fundamental rights.

D. Resulting in a violation of the right to choose the circumstances of birth

73. The applicant was sentenced for a crime of not giving birth in a hospital where she would be subjected to a caesarean section without her informed consent, as medically indicated. Given the conclusion that she could not have been forced to undergo that particular treatment, it follows that the means of the interference were not appropriate for the legitimate aim pursued. As a result, the applicant's right to choose the circumstances of birth was violated, too (Art. 7(1) and 10(2) of the Charter, Art. 8 ECHR).

74. However, the Court does not stop there. While the reasoning above suffices to establish a violation of the applicant's rights, the interference would amount to a violation of the right to choose the circumstances of birth even if the obstetric care provided was less invasive, thus inviting reconsideration of the proportionality assessment under (3).

75. The Court believes that, unless in extremely extraordinary circumstances (a possibility that the Court now leaves open), it should be the pregnant/birthing person themselves who decides on the level of acceptable risks, which are the risks that they bear (on acceptability of risk as a collateral feature to freedom in the reproductive sphere, see judgment I. ÚS 4457/12). It is not for medical professionals, nor for the courts, to determine the level of risk that is tolerable. It is important to remember that these are not decisions about the foetus, an object of state protection. These are primarily decisions about the birthing persons' own lives and bodies, who also take into account how to ensure the safe birth of their child.

76. This conclusion does not contradict the Court's earlier case law on obstetric treatment without informed consent. Rather, it aligns it with the Court's recent ruling recognising that a planned home birth is a lawful option. It thus further clarifies the precise contours of general principles expressed therein, given the fact that birthing persons' rights were accorded little weight in this particular case, which, as the Court explains below, is a unique but sadly not an isolated one.

E. Equal dignity and protection from sex discrimination

77. The question then arises whether the violation of the right to bodily integrity (Art. 7(1) and 10(2) of the Charter, Art. 8 ECHR) was also discriminatory: a breach of the more general requirement of equality of dignity (Art 1 of the Charter), and/or an unjustified discrimination on the basis of sex and thus a breach of the applicant's rights not only in itself but also in conjunction with Art 3(1) of the Charter (and Art 14 ECHR). While this assessment might appear unnecessary, given a breach has already been found, both the dignitarian and the sex/gender dimensions of this case are so central that they cannot be ignored.

78. As for equality in dignity, there is no analogous legal duty to undergo even a minor medical treatment, let alone such invasive and painful ones that are routinely performed on birthing women, in order to save someone else's life. The criminal conviction of the applicant lies on an implicit premise that pregnant and birthing persons are not agents able to assess their needs and preferences, nor are they respected clients of health services, nor subjects in their health and reproductive journeys; they are treated instrumentally, as 'means for creation of life rather than

as an end in themselves' (Elizabeth Prochaska, 'Human Rights Law and Challenging Dehumanisation in Childbirth' in Jonathan Herring and Camilla Pickles (eds), *Childbirth, vulnerability, and law: exploring issues of violence and control* (Routledge 2019) 133.). As a result, they do not enjoy equality in dignity (Art. 1 of the Charter). This view and treatment are profoundly incompatible with the equal dignity of all.

79. Moreover, the discrimination must also be understood as based on sex (and thus a breach of Art. 3(1) of the Charter). Women are effectively criminalised for trying to avoid restrictions on their autonomy, integrity, and dignity, in ways unacceptable in any other circumstances, leading to lasting physical and emotional harm. Such medical violence has no male equivalent. In international human rights discourse, this gendered violence has been recognised as "obstetric violence" (for details, see e.g. World Health Organisation statement 'The prevention and elimination of disrespect and abuse during facility-based childbirth', WHO/RHR/14.23 (2015); Dubravka Šimonović, 'A human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence', A/74/137, 11 July 2019; European Parliament-commissioned study 'Obstetric and gynaecological violence in the EU – Prevalence, legal frameworks and educational guidelines for prevention and elimination', 2024).

80. The gravity and gender-specificity of the issue have recently been recognised by legislatures in a number of states, which either explicitly criminalised obstetric violence (e.g. Venezuela, Argentina, Mexico) or recognised it as a violation of rights (e.g. Portugal and parts of Spain). The courts must do the same, when appropriate (to this effect, see, e.g., views adopted by the Committee on the Elimination of Discrimination Against Women concerning communication No. 154/2020, CEDAW/C/84/D/154/2020, 9 March 2023).

81. The case here is not about the infliction of obstetric violence per se, but the criminalisation of the avoidance of likely obstetric violence. The likelihood of being subjected to obstetric violence needs substantiation. Three aspects of the reproductive health situation in Czechia lead us to conclude that the fear is relevant and justified. First, recent research shows that women who choose to give birth at home do so predominantly due to fear that they would not receive respectful and evidence-based obstetric care that complies with human rights standards (see research report by Anna Durnová and Eva Hejzlarová, 'Domácí porody v Česku: motivace, důvody a názory žen, které rodily plánovaně doma (2015–2020)', 2021). Second, the Court is aware the European Court of Human Rights as well as other non-judicial human rights bodies recognised the flaws in Czech obstetric care declaring it in need of a structural change (ECtHR [GC] judgment Dubská and Krejzová v Czech

Republic, §§ 188–189; Committee on Elimination of Discrimination against Women, Concluding observations on the sixth periodic report of the Czech Republic, CEDAW/C/CZE/CO/6, 14 March 2016, §§ 30–31). There is little evidence that the state fulfils its resulting obligations, and the fear that fuels preference for home births thus remains, regrettably, well-grounded. Third, the Court notes that at the time when the applicant was to give birth, the assistance of a midwife at a home birth was virtually impossible (see judgment I. ÚS 2746/23). The applicant was thus prevented by the state from choosing an assisted home birth, which would lessen the possible risks involved.

82. The criminal courts failed to take into account the long-term truncation of pregnant and birthing persons' choices and structural environment that diminished enjoyment of their fundamental rights, combined with the fact that risks of home birth have been actively co-created by the state. This amounts to discrimination on the basis of sex.

Conclusion

83. The Court stresses that the criminal justice system must be capable of distinguishing individual opinions about right and good from what constitutes a criminal act. Criminal law tools cannot be used arbitrarily and discriminatorily to enforce moral duties (aside from the fact that the extent of birthing person's moral duty to consent to obstetric care that would benefit the born child is disputable, too; see among many others Heather Draper, 'Women, forced caesareans and antenatal responsibilities', (1996) 22(6) *Journal of Medical Ethics* 327-333, and Hafez Ismaili M'hamdi and Inez de Beaufort, 'Forced caesareans: applying ordinary standards to an extraordinary case'. (2021) 27(4) *Journal of Medical Ethics* 233-238).

84. For the reasons stated above, the Court holds that the challenged decisions violated the applicant's right to bodily integrity, autonomy, and privacy, alone (Art. 7(1) together with Art. 10(1) and (2) of the Charter and Art. 8 ECHR), and in conjunction the prohibition of discrimination on the basis of sex (Art 3(1) of the Charter and Art 14 ECHR), ultimately impinging her right to equality in dignity (Art. 1 of the Charter).

85. The Court thus quashes the challenged decision of the Supreme Court and the appellate court. It is up to the appellate court to issue a new ruling that would reflect the binding legal opinion expressed in this judgment.