

Milestone or stillbirth?

An analysis of the first judgment of the European Court of Human Rights on home birth

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1. Introduction

In 2010 the European Court of Human Rights (henceforth: the Court or ECtHR) ruled that Hungary had violated Article 8 of the European Convention on Human Rights (ECHR) because it had interfered with Ms Ternovszky's right to choose where to give birth. Ms Ternovszky had wanted to give birth at home but argued that she was prevented from doing so because a government decree dissuaded health care professionals from assisting home births. The Court ruled that the matter of health professionals assisting home births was surrounded by legal uncertainty prone to arbitrariness and that this was incompatible with the notion of 'foreseeability' and hence with that of 'lawfulness'.² The judgment of the Court in *Ternovszky versus Hungary* is the first binding decision by an international human rights monitoring body on the right to choose the circumstances of giving birth. For this reason alone it is noteworthy to take a closer look at it. But what makes scrutiny also interesting is that the decision – which was heralded by home birth advocates around Europe – has started to be used for legal actions and negotiations on a domestic level. This is remarkable because the Court did not explicitly recognise a right to home birth in its decision.

In this commentary I take a closer look at the *Ternovszky* decision and ask whether it provides any clarity in terms of the entitlements of individuals or obligations for the state party in question as far as home birth is concerned. To that end, I scrutinise its line of reasoning and its outcome. Moreover

1 I would like to thank Marjolein van den Brink, Sam Dubberley, Susanne Burri, and Jenny Goldschmidt for their comments on earlier versions of this article.

2 ECtHR, *Ternovszky v. Hungary*, 14 December 2010 (Appl.no. 67545/09).

– since it is a case that deals with a highly gender-specific issue – I probe the gender sensitivity of the Court in addressing the matter of childbirth. My overall interest is to find out if the judgment provides home birth proponents with any ammunition in their fight for the legal recognition of a human right to home birth and if it gives any guidance as to (negative and positive) obligations on the part of states in this respect. In the following section I provide some background information to the home birth/hospital birth debate, after which I briefly summarise and then analyse the case. I end with some concluding remarks on this and future home birth cases.

2. Home birth versus hospital birth

Home births are no longer the norm in developed countries. The World Health Organisation (WHO) notes that with ‘the widespread institutionalisation of childbirth since the 1930s the option of a home birth in most developed countries disappeared, even where it was not banned.’³ Beckett and Hoffman observe that in the United States ‘under pressure from organised medicine, some states explicitly prohibited midwifery. Others allowed its practice but restricted it through licensure and other regulatory mechanisms; still others, especially those with large rural populations, tolerated but ignored its practitioners’.⁴ In Europe the situation is slightly different. Here midwives can exercise their profession, but they are restricted to the confines of a hospital and work under the supervision of physicians. The exception being childbirth in the Netherlands where a considerable proportion of Dutch society still gives birth at home under the supervision of a midwife.⁵ With regard to the relocation of childbirth from the home to a hospital, Beckett and Hoffman observe that this was ‘a consequence of a host of demographic, institutional, and cultural changes’, as well as ‘the consolidation of medical authority and power. Indeed, by the early 20th century, allopathic medicine had established itself as authoritative in virtually all health matters, and this

3 WHO, *Care in Normal Birth – A Practical Guide*, WHO/FRH/MSM/96.24, 1996, at p. 11.

4 BECKETT and HOFFMAN 2005, at p. 131.

5 BECKETT and HOFFMAN 2005, at p. 131.

authority was reflected in licensure laws that increasingly marginalised those who practised alternative forms of health care'.⁶

Ever since the medical establishment started to take over birthing from traditional midwifery, criticism has been voiced about the medicalisation of childbirth. Beckett notes that it was in the late 1960s and early 1970s that an 'alternative birth movement' emerged as an increasingly cohort and united movement in the United States and other industrialised countries. This movement offered a fairly coherent critique of the conventional approach to childbirth, one that emphasised the importance of treating childbirth as an important life experience and family event rather than a medical emergency.⁷ Gaskin, one of the important spokespersons of this movement, said in 1975: '(w)e feel that returning the major responsibility for normal childbirth to well-trained midwives rather than have it rest with a predominantly male and profit-oriented medical establishment is a major advance in self-determination for women'.⁸ Besides these notions of self-determination and autonomy, advocates of home births also point to the fact that home births are generally safer for women than hospital births and are far less invasive.⁹ Those that question or oppose home births tend to focus on the risks that giving birth at home arguably poses to the unborn child. Philip Steer, Emeritus Professor in obstetrics and gynaecology at Imperial College London held in 2011, for example that he 'feels slightly frustrated when women's groups say most women should have a natural labour'. He insists that problems in labour arise far more commonly than many people appreciate and that 'around half of pregnant women in the United Kingdom will have or develop a complicating factor that makes hospital birth advisable'.¹⁰ In 2010 the American Journal of Obstetrics & Gynaecology published the results of a meta-analysis of studies from several industrialised nations that concluded that planned home births carried two to three times more risk of neonatal

6 BECKETT and HOFFMAN 2005, at p. 130.

7 BECKETT 2005, at p. 254.

8 GASKIN 1975, at p. 11.

9 BECKETT 2005, at p. 255 and p. 263. A recent study in the Netherlands showed that women with planned home births had a lower rate of severe acute maternal morbidity than those with planned hospital births. DE JONGE et al. 2013, at p. 13.

10 HILL 2011.

death than a planned hospital delivery.¹¹ Although the research was heavily criticised both for reasons of methodology and its findings,¹² the American College of Obstetrics and Gynaecology states in its Committee Opinion on planned home birth that it respects the right of a woman to make a medically informed decision about delivery, but finds that they should be informed that although the absolute risk may be low, planned home birth is associated with a twofold to threefold increased risk of neonatal death when compared with planned hospital birth.¹³

3. Ternovszky versus Hungary

3.1. A brief summary of the judgment

In December 2009 Anna Ternovszky filed a complaint against Hungary with the ECtHR. At the time of the application she was pregnant and wished to give birth at home. She argued that she was effectively obstructed in doing so because uncertainty in the law dissuaded health professionals from assisting home births. Home birth was not prohibited in Hungary and the Health Care Act of 1997 recognised patients' right to self-determination in the context of medical treatment. Concurrently, however, a government decree was operative that sanctioned health professionals who carried out activities that were incompatible with either the 1997 law or their licence.¹⁴ In this context, proceedings had been instituted against health professionals for assisting in a home birth in at least one case.¹⁵ Although the applicant complained of a violation of both Articles 8 and 14 of the Convention, the ECtHR considered that the complaint should be examined under Article 8 alone. It did not explain why. The Court observed that Article 8 included the right to choose the circumstances of becoming a parent. It held that it was satisfied that giving birth incontestably formed part of one's private life for

11 Wax et al. 2010, at p. 243.e1-243.e8.

12 ZOHAR and DE VRIES 2011, at e14; GYTE 2011, at e15; HILL 2011.

13 THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS 2011, at p. 3.

14 ECtHR, *Ternovszky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 9.

15 ECtHR, *Ternovszky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 6. See also EGGERMONT 2012. She discusses the case of Agnes Gereb, the midwife who was prosecuted in Hungary for assisting a home birth.

the purposes of this provision and it noted that the choice of giving birth in one's home would normally entail the involvement of health professionals. Legislation which arguably dissuaded health professionals from providing the requisite assistance therefore constituted an interference with the right to respect for private life.¹⁶ The question then was whether this interference was in accordance with the law. The Court considered that where choices related to the exercise of a right to respect for private life occur in a legally regulated area, the state should provide adequate legal protection to that right in the regulatory scheme, notably by ensuring that the law is accessible and foreseeable. In the context of home birth it noted that this implied that the pregnant woman was entitled to a legal and institutional environment that enabled her choice, except where other rights render necessary the restriction thereof.¹⁷ The Court observed that the matter of health professionals assisting home births was surrounded by legal uncertainty prone to arbitrariness. The interference with Ms Ternovszky's private life was therefore not in accordance with the law as the laws in question were not compatible with the notion of 'foreseeability'. The Court ruled that Hungary had committed a violation. In their joint concurring opinion, Judges Sajo and Tulkens held that the state has to provide the adequate legal security needed for the exercise of a freedom, but that this could not be equated with liberalising home births as such. The latter, they noted, was 'obviously a matter of balancing in view of available (currently disputed) medical knowledge, the health of the mother and the child, the structure of health care services, etc. This is a matter where the State has a broad margin of appreciation (...)'.¹⁸

3.2. *An unexpected line of reasoning*

Childbirth, like abortion, can be a tricky subject to tackle for an international human rights monitoring body. The interests of the expectant mother and those of the innocent unborn are easily portrayed as being in conflict with

16 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 22.

17 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 24.

18 There is one dissenting opinion to the Judgment, made by Judge Popovic. He argued that the complaint should have been declared inadmissible, *inter alia* because the domestic remedies had not been exhausted.

each other, with the accompanying understanding that the primary threat to foetal health comes from pregnant women.¹⁹ The rights of women to self-determination and autonomy are in that context easily overridden for the 'best interests of the child'. Illustrative are the many countries that restrict the possibility to give birth at home de jure and/or de facto in order to protect the life and health of the unborn child.²⁰ In the case of *Ternovszky* one could have expected the Court to take the easy (and arguably more correct) way out and look at the procedural requirements with regard to the right to private life and whether these had been met. After all, this is what it generally does in cases of similar controversy: cases concerning a lack of access to abortion in which the right of the pregnant woman is de facto restricted for reasons of the protection of the unborn, but is de jure available. In most of the Court's cases on abortion the applicant did in fact have a right to have an abortion under national law, but was for a variety of reasons unable to enjoy her legal right. In those cases the ECtHR decided that it was more fruitful to look at the procedural aspects of Article 8 and whether these were met rather than examining whether the interference in the applicant's enjoyment of her right was justified.²¹ The Court thus did not have to make any statements about the existence of a right as such, like a right to abortion, and the accompanying understanding that a state should recognise this right. Instead it could suffice by examining the compatibility of the de facto situation with the already existing de jure one. Judging this matter is a lot less sensitive. In this respect the Court has previously held, for example, that if the legislature decides to allow abortion, it must not

19 BECKETT 2005, at p. 266.

20 Hungary adopted a similar line of reasoning in this case. It argued that there was professional consensus in Hungary to the effect that home birth was less safe than birth in a health care institution. It appeared to refer here to less safe for the unborn child as it spoke of 'how to strike a fair balance between the mother's right to give birth at home and the child's right to life and health and, in particular, to a safe birth.' ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at paras. 16 and 17. BECKETT 2005, at p. 265.

21 ECtHR, *Tysiąc v. Poland*, 20 March 2007 (Appl.no. 5410/03); ECtHR, *A, B and C v. Ireland* (Grand Chamber), 16 December 2010 (Appl.no. 25579/05); ECtHR, *P. and S. v. Poland*, 30 October 2012 (Appl.no. 57375/08).

structure its legal framework in a way that would limit real possibilities to obtain it.²²

The Ternovsky case closely resembles these abortion cases – not only does it also concern a case in which the rights of the mother are weighed against the protection of the unborn (Hungary itself submitted that there is professional consensus in Hungary to the effect that home birth is less safe – thereby it seems to imply less safe for the unborn child),²³ but the applicant also had a right under national law to give birth at home – that is to say she was not prohibited from doing so – and she could not enjoy this right because of obstructing practices by the authorities (which were prosecuting midwives). Following its line of reasoning in the aforementioned abortion cases, the ECtHR could thus have argued that Hungary had breached its positive obligations under Article 8 by deterring health professionals from assisting home births and by offering no alternative means to ensure that the woman in question could give birth at home (it was not contested by Hungary that this particular woman could give birth at home, i.e., there was, for example, no medical reason necessitating a hospital birth). But, as previously stated, this was not the approach that the ECtHR opted for. Instead it examined whether the constituted interference was justified – a negative obligations approach.

3.3. *The question of legality*

In theory a negative obligations approach could have offered clarity as to the existence and extent of a right to home birth. But the Court did not provide such an illumination. Although the Court recognised a right to choose the circumstances of becoming a parent and one can decipher an obligation for states to regulate birthing choices, it did not address the question of a right to home birth. This is because its reasoning stopped at the point of the question of legality when it – in my opinion wrongly – held that the interference with Ternovsky’s right to private life was incompatible with the

22 ECtHR, *Tysiąc v. Poland*, 20 March 2007 (Appl.no. 5410/03), at para. 116.

23 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at paras. 16 and 17. BECKETT 2005, at p. 265.

notion of 'foreseeability' and therefore with that of 'lawfulness'. Hence, the interference was held to be not justified and Hungary had breached Article 8. I will briefly explain my dissatisfaction with this conclusion by the Court. The interference in the present case was legal in the sense that the prosecution of the midwife (or midwives) was in accordance with domestic law. If there was an interference in this case then it was caused by the *application* of the law (in this case the Health Care Decree), *not* irregularities in the law. This law stipulated that a health professional who carries out activities in a manner which is not in compliance with the law or his or her licence is punishable with a fine. Although this law can be contested by midwives who feel they have been wrongly prosecuted (for example, on the basis of legal uncertainty), this law was of no concern to the pregnant woman in this case, *unless* the law is *applied* wrongly and is used to ensure that midwives cannot (or will not) assist in home births. The interference was therefore in my opinion construed incorrectly by the Court – as said it was not the law itself, but its application. It is not uncommon for states to adopt admirable laws and to ignore them in practice. This does not mean that the reasoning of the Court in cases like these should stop at the point of the question of lawfulness (due to the unforeseeability this arguably creates). This would also let states off the hook too easily, as the only statement the Court in fact made is: clarify your laws. In my opinion, when authorities factually deny a person a certain right (or part of that right) the interference lies in that practice and the Court when addressing such a case should either take a positive obligations approach – as described previously – or examine whether the interference was justified on grounds other than just legality. In the present case, this would entail that Hungary would have to explain to the Court why it was prosecuting midwives and as such was interfering with – amongst others – Ms Ternovszky's right to private life. The question then becomes one of proportionality: can a state deny women (in general) the possibility to give birth at home? That is, after all, what the state's policy would boil down to (and Hungary actually admitted as much when they argued that home birth – although considered to be a part of the pregnant woman's right to self-determination – was neither encouraged nor supported 'because

of the inherent risks').²⁴ This is the question that remains unanswered in the Ternovsky case.

3.4. Regulated birthing options

A decision by the Court on proportionality would thus have provided clarity as to the existence and breadth of a right to home birth. But as it stands the judgment – ending with a decision on the legality of the interference – is a rather meagre result for home birth advocates. Yes, women have a right to choose the circumstances of the birth of their child – but this is not to say that this choice includes home birth. The Court did not specify a choice, nor whether this is a choice between home or hospital birth; whether it means that women should be able to give birth at any location of their liking; or whether it means a choice with regard to a natural birth or a c-section, for example. Also if this choice was to include home birth (and the choice refers first and foremost to a choice between home and hospital birth), it was not stated that states cannot prohibit home births for reasons of, for example, protection of the unborn. The Court itself stated that it 'is aware that, for want of conclusive evidence, it is debated in medical science whether, in statistical terms, home birth as such carries significantly higher risks than giving birth in hospital'.²⁵ And as the concurring judges Sajo and Tulkens held in their joint opinion, this decision could not be equated with liberalising home birth as such. The latter was 'obviously a matter of balancing in view of available (currently disputed) medical knowledge, the health of the mother and the child, the structure of health care services'. What we can decipher from the judgment is that states need to regulate home birth (which could also mean that states would be justified in prohibiting home births completely): A woman has a right to know where she can legally give birth and thus what her birthing options are.

24 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 17.

25 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 24. I pay more attention to this comment of the Court in the next section on gender (in)sensitivity.

3.5. Gender (in)sensitivity

There is a bulk of feminist literature on childbirth which discusses *inter alia* how a fear of childbirth is cultivated and how patriarchy has told the woman in labour that her suffering is purposive, i.e., is in fact the purpose of her life;²⁶ the role of the medical profession in the relocation and transformation of childbirth;²⁷ the monopoly of the medical establishment over medical data and statistics;²⁸ the highly selective ways in which medical research is reinterpreted in order to support current obstetrical dogma;²⁹ and the role of reproductive technologies in reviving and strengthening the conception of women's role in the reproductive process, and the related notion that the primary threat to foetal health comes from its 'maternal environment'.³⁰ Childbirth is not a gender-neutral issue. It is therefore unfortunate that the ECtHR did not pay any attention to the role that gender or gender discrimination might have played in this case: i.e. it did not – for example – examine whether certain harmful gender stereotypes lie at the root of the existing domestic laws and practices regarding childbirth in Hungary, despite Hungary's dubious statement on home birth safety (which I will address below), and it refused – point-blank – to analyse whether the interference in Ms Ternovsky's right constituted gender discrimination (despite her complaint to that end).

It has – in my opinion successfully – been argued by several legal scholars that international human rights monitoring bodies, including the ECtHR, play an important role in recognising and addressing harmful gender stereotypes.³¹ Gender stereotypes are understandings that are present in societies and which perpetuate, reinforce, and instigate (structural) gender

26 See for example RICH 1976, at pp. 152-162. This is just one of many examples that Rich provides as to how patriarchy (and accompanying gender stereotypes) affects childbirth.

27 See for example LEAVITT 1983; BECKETT 2005, at p. 253; and BECKETT and HOFFMAN 2005, at p. 138. They argue that organised medicine's opposition to midwifery is best understood as one component of a larger effort to protect and restore the professional and cultural hegemony it enjoyed for much of the twentieth century.

28 See for example GOER 1995.

29 BECKETT 2005, at p. 265.

30 BECKETT 2005, at p. 266.

31 See COOK and CUSACK 2010, at pp. 173-180; TIMMER 2011.

discrimination.³² With regard to the medicalisation of childbirth, much has been written, for example, about the gender stereotype of the ‘good mother’ who is willing to assume the risks (for her) of a surgical delivery for the benefit of the safety of her unborn.³³ Although the Court was arguably not required to do so,³⁴ the remark made by Hungary in its defence that ‘there was a professional consensus in Hungary to the effect that home birth was less safe than birth in a health care institution’³⁵ did deserve scrutiny. For whom are hospital births deemed safer and on what basis? And could this justify taking away a woman’s right to decide to give birth at home – under all circumstances? In this respect one should take into account the feminist literature on childbirth previously referred to, especially the arguments presented therein regarding the high levels of technological intervention during hospital births which are frequently unnecessary and often cause harm to women and babies; the notion that medical research is necessarily partial and imperfect for various reasons (for example: physicians and hospitals have their own sets of interests and medical research is reinterpreted in highly selective ways to support obstetrical dogma); and the studies that indicate that planned home births attended by trained midwives are actually as safe or safer than physician-attended hospital births for low-risk women.³⁶ Is this statement by Hungary then not a reflection of the notion of a ‘good mother’ – the one who should sacrifice herself for the sake of the unborn?

However, more problematic than the Court not addressing Hungary’s stereotypical comments is that the Court itself made a very similar statement in the judgment. It noted that ‘(f)or the Court, the right to choice in matters of child delivery includes the legal certainty that the choice is lawful and not subject to sanctions, directly or indirectly. At the same time, the Court is aware that, for want of conclusive evidence, it is debated in medical science whether, in statistical terms, home birth as such carries significantly higher

32 COOK and CUSACK 2010, at pp. 20-24.

33 BECKETT 2005, at pp. 266-267.

34 A discussion on this matter – although very interesting – falls outside the scope of this commentary.

35 ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 17.

36 BECKETT 2005, at pp. 251-257. A recent study in the Netherlands showed that women with planned home births had a lower rate of severe acute maternal morbidity than those with planned hospital births. DE JONGE et al. 2013, at p. 13.

risks than giving birth in hospital'.³⁷ Again the question is: for whom are the risks higher? Is the Court implying that women's right to choose the circumstances of giving birth can be interfered with when medical research points to higher risks for the unborn? If the Court is indeed referring to the protection of the unborn, would the results of such research make a general prohibition on home birth proportional? Besides the fact that the Court does not seem to question the reliability of these medical data and that it makes no mention of the alternative body of knowledge on childbirth available from midwives, the statement of the Court – if indeed it refers to the safety of the unborn – does seem an awful lot like a reflection of the 'good mother' idea. It is not clear why the Court made this remark as it had no bearing on its final decision.

Secondly, although no harmful gender stereotypes were exposed by the Court in the proceedings on Article 8, they could have surfaced in an examination of the Article 14 complaint of the applicant. This is another reason why it is to be regretted that the Court decided not to examine this part of the application. Laws (or practices) that deny women self-determination over their bodies – especially when it concerns reproductive issues: issues closely entwined with morals regarding women's virtue and sexuality – should be treated as suspect. Although I do sympathise with, for example, reasons of time management (I am aware of the enormous number of pending cases before the Court) that may be offered as an explanation for not examining all alleged violations in an application – I do feel that in cases such as these, the Court should not that easily bypass a complaint of gender discrimination. After all, only when we address the root of the problem can we ensure the elimination of certain practices (like prosecuting midwives in order to prevent home births).

4. Concluding remarks

In this commentary I set out to examine whether the Ternovsky judgment of the ECtHR offers any clarity with regard to a human right to home birth and, if so, whether any indications are given by the Court regarding human

³⁷ ECtHR, *Ternovsky v. Hungary*, 14 December 2010 (Appl.no. 67545/09), at para. 24.

rights obligations for states in that respect. Although home birth advocates heralded the judgment, one must conclude after close scrutiny that the Court did not make any ground-breaking statements – or for that matter any statements specifically in favour of home birth proponents. With regard to individual rights, the Court *did* recognise that there should be room for choice in birthing circumstances, but it did not address the question whether this choice should include the possibility to give birth at home. Although home birth advocates might argue that the Court implicitly recognised such a right (it has been held that the choice referred to in this judgment is a choice between a hospital birth or a home birth), home birth opponents can just as well argue that the decision allows states to prohibit home birth if they have the medical data to support this. The truth of the matter is the following: it is still unclear whether states can prohibit home birth and under which conditions. It is therefore also still not possible to decipher any obligations for states with regard to a right to home birth. What can be deduced from the judgement is that states need to regulate the circumstances under which women can give birth: i.e. a pregnant woman has a right to know where she can legally give birth. Hence, the Ternovsky case offers a decent first – not a milestone – but arguably one on which the Court can build in its future judgments.³⁸ And when it does so it is to be hoped that it does not stop its reasoning at the point of the question of legality and that it takes into account the possibility of gender discrimination as a root cause for denying the woman in question the possibility to give birth at home. I hope that the Court will demonstrate sufficient courage to address the tricky matter of home birth head-on. I for one would be very interested to see what the outcome of the case would then be.

38 At the time of writing three cases on home birth were still pending: *Dubská v. the Czech Republic* (Appl.no. 28859/11), *Krejzová v. the Czech Republic* (Appl.no. 28473/12), *Kosaite - Cypriene and others v. Lithuania* (Appl.no. 69489/12).

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