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Epistemic Blind Spots, Misconceptions and Stereotypes: The Home Birth Jurisprudence of the European Court of Human Rights

Fleur van Leeuwen[*]

Abstract

This article offers a critical feminist reading of the home birth jurisprudence of the European Court of Human Rights. The aim is to shed light on the gender sensitivity of the Court in its legal reasoning and knowledge production. Since its first decision on the permissibility of a blanket de facto home birth ban in the case of Ternovszky v. Hungary in 2010, the Court has given five judgments on the matter, including a Grand Chamber decision in the case of Dubska and Krejzova v. Czech Republic. The author finds that the Court applies an overtly restrictive obstetric narrative of childbirth without situating its controversial epistemic basis. In doing so, the Court reinforces a rationale that is linked to loss of agency and disempowerment of persons in childbirth and reproduces harmful stereotypes. The article highlights bias in knowledge formation and (re)production at the Court in addressing cases of home birth. The findings in this article add to feminist inquiries of international human rights adjudication, specifically in regard to knowledge formation, knowledge production and stereotyping as well as to literature on the Court's gender sensitivity.

1 Introduction

In 2010, the European Court of Human Rights (ECtHR) was the first international human rights monitoring body to address the question of a right to give birth at home. In *Ternovszky v. Hungary*, the Court found that the right to private life of the applicant had been violated as the laws and policies in regard to where and how she could

[*] Assistant professor, Department of Political Science and International Relations, Boğaziçi University, Istanbul, Turkey; senior affiliated researcher, Atria: Institute for Gender Equality and Women's History, Amsterdam, The Netherlands. Email: vleeuwenfleur@gmail.com.

give birth had been unclear. Since then, the Court has given four more judgments in cases of de facto home birth bans, including a Grand Chamber judgment. In these judgments, the Court has ruled that the states in question were justified in making home birth de facto unavailable with the aim of compelling women to give birth in hospitals.[1] This article provides a critical reading of these five judgments of the Court from a feminist angle.[2]

This reading is conducted against the background of studies in the field of midwifery, medicine and (feminist) sociology that relate the medicalization of childbirth with loss of agency and the disempowerment of the birthing person.[3] The medicalization of childbirth is understood here as the move from a midwifery model of care, which considers pregnancy, childbirth and postpartum to be normal, physiological life events, to an 'obstetric model of care', which treats childbirth as inherently pathological and needing to be medically managed in specialized, centralized facilities.[4] There is a significant body of work that relates the medicalization of childbirth with controlling women and their bodies[5] and that, for example, discusses how fear of childbirth is cultivated and how patriarchy has told the woman in labour that her suffering is purposive.[6]

The reading itself is informed by feminist legal theory and feminist epistemology. Both theoretical strands counteract misconceptions and stereotypes in law and

1 In this article, I use 'women', 'persons in childbirth' and 'birthing persons' interchangeably, recognizing that one does not have to identify as a woman in order to be able to give birth. Generally, when referring to the jurisprudence of the European Court of Human Rights (ECtHR), the word 'woman' is used in line with the Court's phrasing. When discussing the implications of the Court's jurisprudence or discussing the topic of childbirth at large, 'birthing persons' or 'persons in childbirth' is used.

2 This article focuses on the jurisprudence of the Court regarding a right to choose to give birth at home. It therefore does not address the judgments of the Court in *Konovalova v. Russia* and *Hanzelkovi v. Czech Republic*, which respectively deal with the attendance of medical students during birth and a court-ordered interim measure that required the immediate return to hospital of a newborn baby and its mother. ECtHR, *Konovalova v. Russia*, Appl. no. 37873/04, Judgment of 9 October 2014; *Hanzelkovi v. Czech Republic*, Appl. no. 43643/10, Judgment of 11 December 2014. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

3 For example, Kitzinger, 'Rediscovering the Social Model of Childbirth', 39 *Birth: Issues in Perinatal Care* (2012) 301; Johanson, Newburn and Macfarlane, 'Has the Medicalisation of Childbirth Gone Too Far?', 324 *British Medical Journal* (*BMJ*) (2002) 892; Moore, 'Reclaiming the Body, Birthing at Home: Knowledge, Power, and Control in Childbirth', 35 *Humanity and Society* (2011) 376; Miller *et al*., 'Beyond Too Little, Too Late, and Too Much, Too Soon: A Pathway towards Evidence-based, Respectful Maternity Care Worldwide', 388 *The Lancet* (2016) 2176; Nelson and Romanis, 'The Medicalisation of Childbirth and Access to Homebirth in the UK: COVID-19 and Beyond', 29 *Medical Law Review* (*MLR*) (2021) 661, at 674–675; Martin, 'Giving Birth Like a Girl', 17 *Gender and Society* 1 (2003) 54, at 55.

4 Johanson, Newburn and Macfarlane, 'Has the Medicalisation of Childbirth Gone Too Far?', 324 *BMJ* (2002) 892.

5 Beckett, 'Choosing Caesarean: Feminism and the Politics of Childbirth in the United States', 6 *Feminist Theory* (2005) 251, at 266; Nelson and Romanis, 'The Medicalisation of Childbirth and Access to Homebirth in the UK: COVID-19 and Beyond', 29 *MLR* (2021) 661, at 674; Martin, 'Giving Birth Like a Girl', 17 *Gender and Society* (2003) 54, at 55.

6 A classic example is A. Rich, *Of Woman Born: Motherhood as Experience and Institution* (1976).

adjudication and contest the notion of singular 'truths' and objective knowledge.[7] Reading with and against the grain, the aim of this article is not to determine whether the ECtHR recognizes a right to give birth at home or to analyse the legal rules as such[8] but, rather, to question the ways in which gender influences the Court's conceptions of knowledge, knowers and practices of inquiry and justification. Hence, instead of a doctrinal approach, this reading is informed by what is often called 'asking the woman question'.[9] A method that consists of exploring absences, silence, difference, oppression and the power of epistemology in (legal) texts with the understanding that knowledge is produced within contexts in which meaning and experience cannot be simply distinguished.[10]

Such a feminist lens is pertinent as feminist legal scholarship has convincingly shown international law, including human rights law, to be androcentric.[11] A deficiency of the legal system has been acknowledged by states and international organizations in numerous international fora.[12] International human rights monitoring bodies were accordingly called upon to 'include the status and human rights of women in their deliberations and findings', to 'integrate a gender perspective' and to

7 Charlesworth, 'Feminist Methods in International Law', 93 *American Journal of International Law* (*AJIL*) (1999) 379; Davies, 'Law's Truths and the Truth About Law: Interdisciplinary Refractions', in M. Davies and V. Munro (eds), *Feminist Legal Theory* (2018) 65, at 73; Smart, 'Law's Truth/Women's Experience', in R. Graycar (ed.), *Dissenting Opinions: Feminist Explorations in Law and Society* (1990) 1; L. Hodson and T. Lavers, *Feminist Judgments in International Law* (2019), at 5–6; Davies, 'Knowledge, Identity, and the Politics of Law', 11 *Hastings Women's Law Journal* (*HWLJ*) (2000) 259, at 260; Tuana, 'Feminist Epistemology: the Subject of Knowledge', in I.J. Kidd, J. Medina and G. Pohlhaus, *The Routledge Handbook of Epistemic Injustice* (2017) 125, at 125; Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (2007), at 31.

8 Several scholars analysed the first and second judgments of the ECtHR with the question whether the Court recognized a right to give birth at home under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222. Some dubbed the rulings of the Court paradoxical. Chen and Cheeseman, 'European Court of Human Rights' Rulings in Home Birth Set to Cause Trouble for the Future: A Review of Two Cases', 25 *MLR* (2017) 115; Chervenak *et al*., 'The European Court of Human Rights on Planned Homebirth: Resolution of a Paradoxical Ruling', 124 *British Journal of Obstetrics and Gynaecology* (2017) 1472; McCartney, 'Childbirth Rights: Legal Uncertainties under the European Convention after *Ternovsky v. Hungary*', 40 *North Carolina Journal of International Law and Commercial Regulation* (2015) 543.

9 Bartlett, 'Feminist Legal Methods', 103 *Harvard Law Review* (1990) 829, at 837–849.

10 Davies, 'Law's Truths and the Truth About Law: Interdisciplinary, in M. Davies and V. Munro (eds), *Feminist Legal Theory* (2018) 65, at 73; S. Kouvo and Z. Pearson, *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (2014), at 5.

11 See, e.g., R. Cook, *Human Rights of Women: National and International Perspectives* (1994), at 3–4; Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613; Binion, 'Human Rights: A Feminist Perspective', 17 *Human Rights Quarterly* (*HRQ*) (1995) 509; O'Hare, 'Realizing Human Rights for Women', 21 *HRQ* (1999) 364; Bunch, 'Women's Rights as Human Rights: Towards a Re-vision of Human Rights', 12 *HRQ* (1990) 486.

12 See, e.g., Vienna Declaration and Programme of Action, Doc. A/CONF.157/23, 25 June 1993, part II, at 42; GA Res. 60/1, 24 October 2005; GA Res. 49/161, 23 December 1994; UN Commission on Human Rights, The Elimination of Violence Against Women, Doc. E/CN.4/RES/1994/45, 4 March 1994; Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into Human Rights Activities and Programmes, Doc. E/CN.4/1996/105, 20 November 1995, at 45.

conduct 'gender mainstreaming'.[13] Scholarship has highlighted how, despite these strategies (or perhaps because of these strategies),[14] international human rights practice remains male biased.[15] This holds true not only for human rights mechanisms established within the framework of the United Nations (UN) but also for regional human rights bodies like the ECtHR. Although the Court has consistently held that gender equality is one of the key underlying principles of the European Convention on Human Rights (ECHR), scholars have, for example, highlighted how the Court incorporates a limited understanding of non-discrimination and has failed to conduct a systematic analysis of harmful gender stereotypes.[16]

In thus deconstructing the home birth jurisprudence of the ECtHR, this article aims to provide further insight into the gender sensitivity of the Court and, in doing so, also add to an understanding of 'knowledge production in (international) legal processes'. 'An expression', as Andrea Bianchi and Moshe Hirsh explain, 'that could turn into an established term of art to connote the study of the mechanisms of producing knowledge in the field of international law, with due heed being paid to the forces at play and the actors involved in such processes'.[17] The findings in this article centre on the obstetric narrative of the Court in addressing the topic of childbirth in its judgments. As described in the following section on the Court's homebirth jurisprudence, the central tenet to the Court's reasoning is that childbirth is necessarily a medical event as 'unexpected difficulties may (always) arise'. Holding medical science to be the authority on childbirth, the Court finds that the hospital setting is always the best place to give birth. Section 3 of this article discusses how this conception of the obstetric model of childbirth care as the best model of care is integral to the Court's knowledge formation on the topic of childbirth and its framing of the cases at hand as well as

[13] See, e.g., Gallagher, 'Ending the Marginalisation: Strategies for Incorporating Women into the United Nations Human Rights System', 19 *HRQ* (1997) 283; Johnstone, 'Feminist Influences on the United Nations Human Rights Treaty Bodies', 28 *HRQ* (2006) 148; Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights at the United Nations', 18 *Harvard Human Rights Journal* (*HHRJ*) (2005) 1.

[14] Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights at the United Nations', 18 *HHRJ* (2005) 1.

[15] Otto, 'Women's Rights', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (2018) 309, at 324–325; F. van Leeuwen, *Women's Rights Are Human Rights: The Practice of the United Nations UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights* (2009); Van Leeuwen, 'The United Nations and the Promotion and Protection of Women's Human Rights: A Work in Progress', in I. Westendorp (ed.), *The Women's Convention Turned 30* (2012) 13, at 24–29.

[16] ECHR, *supra* note 8; Fredman 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', 16 *Human Rights Law Review* (*HRLR*) (2016) 273; Alkaviadou and Manoli, 'The European Court of Human Rights through the Looking Glass of Gender: An Evaluation', 11 *Goettingen Journal of International Law* (2021) 191; Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights', *19 European Journal of International Law* (2008) 841; Oja and Yamin, '"Woman" in the European Human Rights System: How Is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women's Citizenship?', 32 *Columbia Journal of Gender and Law* (2016) 52.

[17] A. Bianchi and M. Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (2021), at 3.

its (approach to) stereotyping. The last section of the article relates these findings to claims of androcentricity in the Court's practice and biased knowledge production.

2 The Court's Home Birth Jurisprudence

A Ternovszky v. Hungary

In 2010, in the case of *Ternovszky v. Hungary*, the ECtHR ruled for the first time that persons have a right to choose the circumstances of giving birth.[18] The case centred on a pregnant woman who wanted to give birth at home but who argued that she could not do so because she could not find a midwife willing to assist her. She was not able to find a midwife because of the regulations in place that dissuade health care professionals from assisting in home births. In Hungary, home birth is not prohibited, but the government restricts health professionals from assisting with them. Those who 'encourage unsafe home births overstep the limits of their licences and might face administrative sanctions'.[19] It is this issue of not being able to give birth at home because restrictions in place make it impossible to obtain skilled assistance during childbirth that lies at the heart of this case as well as the subsequent homebirth cases discussed later in this article. Hence, in none of the cases is there a de jure prohibition of giving birth at home. Rather, as the Court observes, there is a de facto ban in place 'as the choice of giving birth at home would normally entail the involvement of health professionals'. Anna Ternovszky argued that this de facto ban constituted a violation of her rights under Article 8 of the ECHR, the right to private life, in conjunction with Article 14, the right to non-discrimination.

The ECtHR considered that Ternovszky's complaint must be considered under Article 8 alone and, as is not uncommon, did not disclose its reasons for dismissing the Article 14 complaint.[20] Looking at the negative obligations of Hungary under Article 8 of the ECHR, it set out to determine whether the contested legislation constituted an interference with Ternovszky's right to private life. The question whether this de facto home birth ban falls within the scope of Article 8 of the convention is answered in the affirmative. The Court observed that:

> the notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8. … Therefore, the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent. The Court is satisfied that the circumstances of giving birth incontestably form part of one's private life for the purposes of this provision.[21]

It was the first time that the Court recognized a right to choose the circumstances of giving birth. In terms of whether there is an interference with this right, the framing of the regulations in place as a de facto ban is crucial. By law, Ternovszky could have given birth at home as she was not prohibited from doing so. But, crucially, the

18 ECtHR, *Ternovszky v. Hungary,* Appl. no. 67545/09, Judgment of 14 December 2010.
19 *Ibid.*, at 6.
20 *Ibid*, at 12.
21 *Ibid.*, at 22.

Court reasoned that the choice of giving birth at home normally entails the involvement of health professionals. Therefore, 'legislation which arguably dissuades these professionals from providing the requisite assistance constitutes an interference with the exercise of the right to respect for private life by prospective mothers such as the applicant'.[22]

Hungary defended its policy by noting that there is professional consensus in the country that home birth is less safe than birth in a health care institution. The judgment did not testify to any statistics or other data to support its position. Paradoxically, Hungary also submitted that its regulations do not dissuade mothers from giving birth at home and that there is no evidence that birth care professionals were effectively discouraged by the legislation in place from providing assistance to those in need.[23] The ECtHR did not address this inconsistency. It found that the interference was not 'in accordance with the law'. Noting 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 the right in the regulatory scheme, notably by ensuring that the law is accessible and foreseeable, enabling individuals to regulate their conduct accordingly'.[24]

In the context of home birth, it found that this implies that 'the mother is entitled to a legal and institutional environment that enables her choice, except where other rights render necessary the restriction thereof'.[25] The Court observed that the regulations in place are contradictory. On the one hand, the Health Care Act recognizes patients' right to self-determination, and, on the other hand, a government decree sanctions health professionals who carry out activities within their qualifications in a manner that is incompatible with the law or their licence: '[T]he matter of health professionals assisting home births is surrounded by legal uncertainty prone to arbitrariness.'[26] The Court therefore found that there had been a violation of Ternovszky's right to private life.

Notably, the Court also observed here that it was aware, 'for want of conclusive evidence, that it is debated in medical science whether, in statistical terms, homebirth as such carries significantly higher risks than giving birth in hospital'.[27] It is an addendum that has no bearing on the conclusion that the situation in Hungary is incompatible with the notion of 'lawfulness' but that the Court evidently felt compelled to make.[28] It is a prelude to the obstetric rationale applied by the Court in its subsequent home birth cases where the issue is addressed as one of risk (of home birth, not of hospital birth) and where medical science is the epistemic authority.

[22] *Ibid.*
[23] *Ibid.*, at 17.
[24] *Ibid*, at 24.
[25] *Ibid.*
[26] *Ibid.*, at 26.
[27] *Ibid.*, at 24.
[28] Van Leeuwen, 'Milestone or Stillbirth? An Analysis of the First Judgment of the European Court of Human Rights on Home Birth', in M. van den Brink, S. Burri and J. Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?* (2015) 197, at 207–208.

B Dubska and Krejzova v. Czech Republic

Sarka Dubska and Alexandra Krejzova filed their applications shortly after the ECtHR's judgment in *Ternovszky*. Like Ternovszky, both women were pregnant at the time of their application and wanted to give birth at home, but they could not find a midwife willing to assist them. The Regional Office, the body responsible for registering and issuing authorizations to health professionals, informed them that midwives listed in the register of health professionals are allowed to attend births only at premises possessing certain technical equipment, which excludes a private home. The applicants complained of a violation of Article 8 of the ECHR.

In its judgment, the Court determined that it was appropriate to analyse the applicants' complaints as concerning negative obligations as 'their core argument being that midwives were prohibited from assisting them at home births under the threat of a sanction, which disproportionately restricted the applicants' right to respect for their private life'. Despite similarities with the legal situation in the *Ternovszky* case, the Court found that the applicants 'were able to foresee with a degree that was reasonable in the circumstances that the assistance of a health professional at a home birth was not permitted by law'.[29] The Medical Services Act specified that a person could provide medical care only if they were in possession of the appropriate licence, the conditions of which included a requirement that appropriate technical equipment as specified in a decree issued by the Ministry of Health was present. The Court noted that it was clear that private homes did not satisfy this requirement.

It therefore turned to the question of the state's legitimate aim and the necessity and proportionality of the interference in the cases at hand. The ECtHR considered that 'there exist no grounds for doubting that the policy in issue was designed to protect the health and safety of the new-born during and after delivery and, at least indirectly, that of the mother', but it did not elaborate on this finding.[30] In doing so, it dismissed the arguments of the applicants who claimed that the aim was to 'actively prevent mothers-to-be from benefiting from healthcare provided by midwives, in order to protect the financial and power monopoly of the incumbent providers of institutional health care' and disregarded the paradox in the state's reasoning. As Judge Paul Lemmens remarks in his dissenting opinion, 'it is … theoretically possible for mothers to give birth at home. Should they choose to do so, however, they are unable to obtain the assistance of a midwife. I cannot understand how such a system, taken as a whole, can be seen as compatible with the stated aim of protection of the health of the mothers and their children'.[31]

Notably, the ECtHR does recognize the risks that the de facto home birth ban creates. In its discussion on proportionality, it observes that 'the situation in question had a serious impact on the freedom of choice of the applicants, who were required, if they wished to give birth at home, to do so without the assistance of a midwife and,

[29] ECtHR, *Dubska and Krejzova v. Czech Republic*, Appl. no. 28859/11 and 28473/12, Judgment of 11 December 2014, at 82–83.

[30] *Ibid.*, at 86.

[31] *Ibid.*, at 3, Dissenting Opinion of Judge Lemmens.

therefore, with the attendant risks that this posed to themselves and to the new-borns, or to give birth at hospital'.[32] And, subsequently, it states that 'a situation such as the one in the Czech Republic, where medical professionals are not allowed to assist mothers who wish to give birth at home and where no specialised emergency aid is available, may be said to increase rather than reduce the risk to the life and health of the mother and new-born'.[33] But these findings did not lead the Court to question the state's party's legitimate aim or the proportionality of the interference.

The Court held that the state has a wide margin of appreciation in balancing the interests at stake. In this regard, it observed that the case 'involves a complex matter of healthcare policy requiring an assessment by the national authorities of expert and scientific data concerning the relative risks of hospital and home births', and it referred to a lack of common ground in member states, the social and economic policy considerations involved for the state and the fact that 'besides their physical vulnerability, newborns are fully dependent on decisions made by others, which justifies a strong involvement on the part of the State'. In the same vein, the Court held that, 'while there is generally no conflict of interest between the mother and her child, certain choices made by the mother as to the place, circumstances or method of delivery may be seen to give rise to an increased risk to the health and safety of the new-borns, whose mortality rate, as shown in figures for perinatal and neonatal deaths, is not negligible, despite all the advances in medical care'. Hence, strong state intervention is justified in order to protect newborns from irresponsible decisions by the persons that give birth to them.

The ECtHR's conclusion regarding a lack of European consensus is remarkable. The data presented to it show that in only a few states (Croatia, Lithuania and Ukraine) can a health professional face a sanction for assisting with a planned home birth and that no state prohibits home birth.[34] As Judges András Sajó, Işil Karakaş, George Nicolaou, Julia Laffranque and Helen Keller underline in their dissenting opinion in the Grand Chamber judgment, there is 'a consensus in favour of *not* prohibiting home births among the member States'.[35]

Although the Court notes that the conditions in most local hospitals, in terms of respecting the choices of mothers, 'were questionable' and that the majority of the research studies presented to it showed that there was not an increased risk if certain preconditions were met, it found that the state did not overstep its wide margin of appreciation. Crucial in this finding is the Court's obstetric narrative:

> [E]ven if a pregnancy seems to be without any particular complications, unexpected difficulties can arise during the delivery, such as an acute lack of oxygen supply to the foetus or profuse bleeding, or events which require specialised medical intervention, such as a Caesarean section or the need to put a newborn on neonatal assistance. Moreover, in the course of a hospital birth, the institution can immediately provide the necessary care or intervention, which is not

[32] *Ibid.*, at 95.

[33] *Ibid.*, at 96.

[34] *Ibid.*, at 59–61.

[35] *Dubska and Krejzova* 2014, *supra* note 29, at 28, Dissenting Opinion of Judges Sajó, Karakaş, Nicolaou, Laffranque, and Keller.

> true of a home birth, even one attended by a midwife. The time spent getting to a hospital should such complications occur could indeed give rise to increased risks to the life and health of the newborn or that of the mother.[36]

The Court ruled that, 'having regard to all circumstances of the case and bearing in mind that there is no European consensus in the matter', there is no violation of Article 8 of the Convention.

C *Dubska and Krejzova at the Grand Chamber*

Dubska and Krejzova requested referral of their cases to the Grand Chamber. In its judgment, the Grand Chamber followed the chamber in most of its reasoning: it applied a negative obligations approach; held that the applicants were able to foresee to a degree that was reasonable that the provisions in question did not permit a health professional to assist with a planned home birth; and did not doubt that the Czech state's policy was designed to protect the health and safety of the mother and child.[37] For reasons identical to those of the chamber, it also found that the margin of appreciation must be a wide one.[38] Although the Grand Chamber observed in regard to the point of European consensus that no legislation had been found that explicitly prohibits the assistance of midwives at home births, it found that 'the right to choose this mode of delivery is never absolute and is always dependent on certain medical conditions being satisfied' in the 20 member states in which planned home births are provided for in domestic law and regulated.[39]

In regard to the question whether the Czech Republic struck a fair balance, the Grand Chamber reiterated the main observations of the chamber. It echoed the chamber's problematic observations that the policy in place gives women the choice to give birth in a hospital or do so at home without the assistance of a midwife, 'with the attendant risks that this posed to themselves and the newborns' and that 'a home birth without the assistance of medical professionals may increase the risk to the life and health of both the mother and the newborn child'.[40] And it reiterated that certain choices made by the mother as to the place, circumstances or method of delivery may be seen to give rise to an increased risk to the health and safety of newborns.[41] It also repeated the chamber's obstetric narrative, noting that, 'even if a pregnancy proceeds without any complications and can therefore be considered a "low-risk" pregnancy, unexpected difficulties can arise during the delivery which would require immediate specialist medical intervention, such as a Caesarean section or special neonatal assistance'.[42] The Grand Chamber observed in this connection that the Czech Republic had not set up a system of specialist emergency assistance for cases of home births, which

[36] *Dubska and Krejzova* 2014, *supra* note 29, at 97.
[37] ECtHR, *Dubska and Krejzova v. Czech Republic*, Appl. No. 28859/11 and 28473/12, Judgment of 15 November 2016, at 165, 171, 172.
[38] *Ibid.*, at 182–184.
[39] *Ibid.*, at 183.
[40] *Ibid.*, at 187.
[41] *Ibid.*, at 185.
[42] *Ibid.*, at 186.

would likely be to increase the potential risks for women giving birth at home and their babies. It is a point that is contested by the applicants, who argued that emergency services were already available to any woman in the Czech Republic.[43]

Although the reasoning of the Grand Chamber is on many fronts a repetition of that of the chamber, there are some novel aspects in the judgment. The first is the presence of *amicus curiae*. Remarkably, in the selection of these third-party interveners, the president of the ECtHR denied leave to organizations with particular expertise in reproductive rights and rights in childbirth. These included the Center for Reproductive Rights, Human Rights in Childbirth and Paul Hunt, the former UN special rapporteur on the right to health. Parties that represented medical professionals as well as member states with similar home birth regulations in place were granted leave.[44] This selection is illustrative of the Court's approach to childbirth, treating it as a medical event, a practice in which medical science is the epistemic authority and ultimate arbiter. The second aspect worth highlighting is the Grand Chamber's observation that the applicants could have opted for a maternity hospital 'where their wishes would in principle have been satisfied'. Although, like the chamber, it was cognisant of the concerns expressed by the UN Committee on the Elimination of All Forms of Discrimination against Women on the conditions for childbirth and obstetric services in the Czech Republic.[45]

The Grand Chamber found that the interference with the applicants' right to respect for their private life was not disproportionate. By 12 votes to five, it held that there had been no violation of Article 8 of the ECHR. The Grand Chamber's judgment in *Dubska and Krejzova* cemented the Court's approach to home birth cases. Judge Laffranque observes in her concurring opinion: 'I voted with the majority: the judgment as such cannot depart from the already established case law of the Court.'[46]

D Pojatina v. Croatia

Although the context in the case of *Pojatina* differs from that in *Dubska and Krejzova*, the ECtHR reiterated its reasoning from its previous judgments. In Croatia, home births are not prohibited, and midwives are not expressly prevented from assisting home births. Croatia, however, does not legally provide for assistance at home births either. This was made clear to the applicant in a letter from the Croatian Chamber of Midwives as well as in a letter from the minister of health. The former noted that, due to a lack of a clear legal framework, no midwife had set up a private practice or officially assisted with home births. The latter, in response to an enquiry from the ombudswoman for children, had stated that the question of home births had not been

[43] *Ibid.*, at 74.

[44] Van Leeuwen, 'The Missing Voice of Pregnant Women: Third Party Intervention in the Dubska and Krejzova Case', *Strasbourg Observers* (23 November 2015), available at https://strasbourgobservers.com/2015/11/23/the-missing-voice-of-pregnant-women-third-party-interventions-in-the-dubska-and-krejzova-case-2/.

[45] *Ibid.*, at 188.

[46] ECtHR, *Kosaite-Cypiene and Others v. Lithuania*, Appl. no. 69489/12, Judgment of 4 June 2019, Concurring Opinion of Judge Laffranque.

regulated by law and that medical assistance in such procedures was considered to be quackery. It had also stated that home births were the personal responsibility of the mother and the person assisting with the delivery.[47] Ivana Pojatina therefore could not obtain assistance for a home birth from a midwife registered with the Croatian Chamber of Midwives. The latter had, however, informed the applicant that home births did occur in Croatia.[48] Pojatina gave birth at home with a midwife from abroad. She complained that Croatian law had dissuaded health professionals from assisting her when giving birth at home and that she had not had an effective domestic remedy at her disposal. This, she argued, constituted a violation of her rights under Articles 8 and 13 of the ECHR.[49]

Despite the fact that home birth was not prohibited and that midwives were not explicitly prevented from assisting, the ECtHR addressed the case as one in which the relevant domestic law did not allow health professionals, including midwives, to assist with planned home births.[50] In terms of applicability of Article 8 of the ECHR, the Court reiterated that, 'although Article 8 could not be interpreted as conferring a right to give birth at home as such, the fact that it was impossible in practice for women to be assisted when giving birth in their private home came within the scope of their right to respect for their private life and accordingly of Article 8. It sees no reason to depart from that view in the present case'.[51] Turning to the question of the lawfulness of the interference, the Court 'accepts that at first there might have been some doubt as to whether a system for assisted home births had been set up in Croatia' and 'invites the Croatian authorities to consolidate the relevant legislation so that the issue is expressly and clearly regulated'. However, this did not lead the Court to find that the law was not foreseeable. It found that the applicant was clearly made aware, through the letters from the Croatian Chamber of Midwives and the Ministry of Health, that the relevant domestic law did not allow health professionals, including midwives, to assist with planned home births and that the impugned interference was therefore foreseeable and in accordance with the law.[52]

In terms of a legitimate aim, the ECtHR echoed its judgments in *Dubska and Krejzova*. It 'considers that there are no grounds for doubting that the Croatian State's policy of

[47] ECtHR, *Pojatina v. Croatia*, Appl. no. 18568/12, Judgment of 4 October 2018, at 12.
[48] *Ibid*., at 8.
[49] *Ibid*., at 3.
[50] *Ibid*., at 72.
[51] *Ibid*., at 44. Judge Wojtyczek criticizes this observation in his partly dissenting opinion. He argues that, '[i]f – as the majority allege – Article 8 could not be interpreted as conferring a right to give birth at home as such, then it is difficult to understand why the fact that it was impossible in practice for women to be assisted when giving birth in their private home can still *come within the scope* of their right to respect for their private life and accordingly of Article 8' (at 5, Partly Dissenting Opinion Judge Wojtyczek; emphasis in original).
[52] *Pojatina*, *supra* note 47, at 72. As Judge Wojtyczek also stresses in his partly dissenting opinion, this is a remarkable conclusion as assistance is permitted but not officially provided due to a lacuna in the law. He therefore finds that the information provided to the applicant was not accurate. He notes that the Court's approach 'is highly problematic. In my opinion, the legal situation was sufficiently clear, not because of but *in spite of* the information provided in the above-mentioned documents' (at 3, Partly Dissenting Opinion Judge Wojtyczek; emphasis in original).

encouraging hospital births … was designed to protect the health and safety of mothers and children during and after delivery'.[53] And, although it observed that '[i]n the end, she gave birth at home with a midwife from abroad',[54] it reiterated that, 'as a consequence of the legislative provisions in force at the relevant time, the applicant was put in a situation which had a serious impact on her freedom of choice: she was required either to give birth in a hospital, or, if she wished to give birth at home, to do so without the assistance of a midwife and, therefore, with the attendant risks that posed to herself and her baby'.

Similar to the previous cases, this judgment does not testify to any statistics on risks of home birth versus hospital birth. Instead, the Court observed that the Commission for Perinatal Medicine of the Ministry of Health was of the view that hospitals were the safest places for performing deliveries, providing the best guarantees for the preservation of the health and life of both mothers and newborns. The Court reiterated its obstetric narrative and echoed the sentiments expressed by the Grand Chamber regarding maternity hospitals, noting that the applicant could have opted to give birth in a maternity hospital 'which [was] fully staffed and adequately equipped from a technical and material perspective'. Similar to the Grand Chamber, it also acknowledged that the wishes of mothers-to-be do not seem to be fully respected in maternity wards. But although 'those concerns cannot be disregarded', the Court recognized that in recent years various initiatives to improve the situation have been taken. On that note, the Court invited Croatia to keep 'the relevant legal provisions under constant review so as to ensure that they reflect medical and scientific developments while fully respecting women's rights in the field of reproductive health, notably by ensuring adequate conditions for both patients and medical staff in maternity hospitals across the country'. In doing so, the Court echoed the recommendation of the Grand Chamber to the Czech Republic but overlooked the fact that Croatian law does not regulate assistance during home birth. The Court found that the interference was not disproportionate and held unanimously that there had been no violation of Article 8 of the ECHR.[55]

E Kosaite-Cypiene and Others v. Lithuania

The last home birth judgment of the ECtHR to date centres on the cases of four women who had all previously given birth at home with the assistance of J.I.S., an unlicensed doula. As criminal charges had been brought against J.I.S., they could not rely upon her services for their upcoming births.[56] The women could also not obtain

[53] *Ibid.*, at 74.

[54] *Ibid.*, at 79.

[55] The Court rules that the complaint regarding Article 13 of the ECHR is manifestly ill-founded.

[56] The fourth applicant was not pregnant at the time of application. The Court, however, held that '[a]lthough it has not been asserted that the fourth applicant in this case was pregnant when lodging this application, it is not disputed that she belonged to a category of women – namely, those of child-bearing age – that may be adversely affected by the restrictions imposed by the prohibition on the provision of medical assistance during home births. She was not seeking to challenge *in abstracto* the compatibility of Lithuanian law with the Convention, since she ran a risk of being directly prejudiced by the measure complained of. The fourth applicant can thus claim to be a "victim" within the meaning of Article 34 of the Convention'. *Kosaite-Cypiene*, *supra* note 46, at 70.

the assistance of other health care professionals as the public hospitals to whom the women had turned for help had told them that such assistance was prohibited under Lithuanian law. The Ministry of Health had informed the first three applicants, in response to their requests, that the specialists were unanimous in the conclusion that it was safest for a woman to give birth in a maternity ward, even when there was little risk of complications, and that the question of home birth concerned not only the woman's choice but also the state's.[57]

The applicants argued that Lithuanian law dissuaded health care professionals from assisting them when giving birth at home, in violation of their right to private life. Although home birth is not as such prohibited, qualified medical assistance, under domestic regulations, can only be offered in hospitals. In its response, Lithuania stressed the necessity of state intervention, arguing that obstetrics is 'the only area of healthcare practice where assistance is provided to two human beings at the same time. In order to ensure that they stayed alive, both human beings had to be monitored during labour'.[58] Echoing the reasoning of the Grand Chamber, the Court examined the cases of these four women from the standpoint of the state's negative obligations; reiterated that, 'contrary to the applicants' arguments, the Court considered that there are no grounds for doubting that the Lithuanian State's policy of encouraging hospital births, as reflected in the relevant national legislation, was designed to protect the health and safety of mothers and children during and after delivery;[59] and ruled that the impugned interference was foreseeable and in accordance with the law.[60] In discussing whether the interference is necessary in a democratic society, the Court reiterated its obstetric narrative and indicated that this was an issue of comfort over safety: '[It] takes note of the Government's argument that for objective and quantifiable reasons, and even though home delivery might be more pleasant for some mothers-to-be, it still represented an option that was not as safe as a full hospital delivery, which provided the best guarantees for the preservation of the health and life of both mothers and newborns.'[61]

Lithuania had argued that, in situations when women were in labour, the state's primary responsibility was to protect the health and life of human beings. It therefore limited the places in which labour could take place, whereas 'if it allowed women the unrestricted right to choose the most emotionally comfortable place in which to give birth, it would not be able to secure its primary goal – preserving the health and life of the mother and of the newborn'.[62] In this context, Lithuania also pointed to the first applicant's submission that she had given birth to her last child at home, 'which for the Government showed that this applicant thus failed to act in a manner ensuring that the life of a future human being would not be placed in danger'.[63] The Court

57 *Ibid.*, at 8–9.
58 *Ibid.*, at 81.
59 *Ibid.*, at 98.
60 *Ibid.*, at 97.
61 *Ibid.*, at 104.
62 *Ibid.*, at 85.
63 *Ibid.*

did not question Lithuania's observations in this respect. It reiterated its observation that maternity hospitals are 'fully staffed and adequately equipped from a technical and material perspective' and 'able to provide all the necessary urgent medical care, whereas this would not be possible in the case of a home birth, even with a midwife attending'.[64] Furthermore, it added that it:

> cannot but note that all four applicants could have opted to give birth in any maternity ward in Lithuania that they considered likely to respect their wishes in principle. … In fact, in reply to her demand that she be provided with medical assistance during her home birth, the third applicant was explicitly invited to visit one of those hospitals in order to become acquainted with the environment therein. … However, as pointed out by the Supreme Administrative Court, she never approached any of the maternity wards about arrangements that they could make to ensure her privacy, as she saw it.[65]

On the basis of the foregoing, noting that the Grand Chamber had decided in the cases of *Dubska and Krejzova* that the margin of appreciation to be afforded had to be wide, and acknowledging that specific steps had been taken to ensure home-like conditions for women giving birth at the majority of maternity wards, the Court found unanimously that there had been no violation of Article 8 of the ECHR.

3 Epistemic Blind Spots, (Mis)conceptions and Stereotypes

A *Introduction to the Findings*

A critical reading is necessarily subjective. This reading was situated in the context of the work of scholars in the social sciences, midwifery and medicine that relates the medicalization of childbirth with loss of agency and the disempowerment of the birthing person. It was informed by feminist epistemology and critical feminist approaches to international (human rights) law. Reading with and against the grain, there were several issues that drew my attention. These concern the ECtHR's knowledge formation on the topic under consideration, its framing of childbirth as a medical event and the related epistemic authority of medical science and its allusion to stereotypes of the woman in childbirth. These three issues are interwoven, meaning that the ways in which one acquires knowledge, consciously or unconsciously, are, amongst other things, informed by one's prejudices and presumptions.[66] In the same vein, knowledge formation is informed by, and informs, one's framing of the issue at hand, which, in turn, is related to those stereotypes that lie at the root of one's framing and the ways in which one acquires knowledge. To illustrate, in its judgments, the Court framed childbirth as a medical event. In terms of knowledge formation, it pointed, therefore, to the opinions of medical 'experts' and portrayed the person in childbirth as a threat to the life of their baby when they refuse to abide by medical

[64] *Ibid.*, at 104.
[65] *Ibid.*, at 106.
[66] Davies, 'Knowledge, Identity, and the Politics of Law', 11 *HWLJ* (2000) 259, at 260.

opinion. Although interwoven, these three issues and their implications for agency and rights in childbirth will be addressed here separately.

B *Questions of Knowledge Formation*

Knowledge formation – the ways in which one gathers information in order to obtain knowledge on a particular issue – is a subjective process that includes the question of who or what is considered 'a knower' or the epistemic authority. The rules of procedure of the ECtHR do not specify how knowledge on a particular issue must be acquired, interpreted or applied or who must be heard as an expert. Nor does the Court have to substantiate in its reasoning (or elsewhere) how it acquired knowledge on a particular matter. Rule 74 of the Rules of Court,[67] which lays down the requirements in regard to the content of judgments, refers to practical matters like the names of the parties, the names of their agents and the facts of the case. But, in terms of legal reasoning, it only mentions that the judgment must contain the reasons 'in point of law'.

This lack of guidance, or requirement of transparency, in knowledge formation is also present in terms of the selection of *amicus curiae* who may be granted leave by the president of the Court to intervene in proceedings as a third party. It is found that these third parties are granted leave to intervene in order to affirm the existence of a European or international consensus, to draw inspiration from legal solutions adopted in other systems and to underscore the different interests at play in a case.[68] Although the Rules of the Court lay down certain requirements for these requests for leave to intervene, the discretion to grant leave is left up to the president of the Court, who does not need to elaborate on their decision.[69] In the case at hand, the medical profession was granted a monopoly over the production of what gets recognized as knowledge about women's bodies. Illustratively, the president of the Court did not grant leave to intervene to those organizations and individuals that represented the perspective of persons in childbirth but accepted the briefs of medical professionals as well as those of the states with similar restrictive home birth policies in place.[70]

Similarly, in its reasoning, the ECtHR relied on statements from the defendant states, holding that obstetricians in the state concerned argued that home birth carries greater risks than hospital births, notably without requiring data to support their position. The Court ignored the data that had been presented to it that contradicted the position proffered by the defendant states. These included various meta studies and a World Health Organization report that stipulates that:

> [t]here is a temptation to treat all births routinely with the same high level of intervention required by those who experience complications. This, unfortunately, has a wide range of negative effects, some of them with serious implications. … [N]ormal birth, provided it is low-risk,

[67] European Court of Human Rights, Rules of Court, 30 October 2023.

[68] Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights', 31 *Netherlands Quarterly of Human Rights* (*NQHR*) (2013) 271, at 275.

[69] European Court of Human Rights, Rules of Court, 30 October 2023, https://www.echr.coe.int/documents/d/echr/rules_court_eng, Rule 44(3).

[70] Van Leeuwen, *supra* note 44.

> only needs close observation by a trained and skilled birth attendant in order to detect early signs of complications.[71]

Reiterating in each judgment that 'the risk for mothers and newborns was higher in the case of home births', without pointing to any evidence that supports this position, the Court displayed an unfounded adherence to the epistemic authority of obstetric science in matters of childbirth. Illustrative is also the Court's unsubstantiated observation that 'certain choices made by the mother as to the place, circumstances or method of delivery may be seen to give rise to an increased risk', thereby invalidating the embodied knowledge of the birthing person on issues of childbirth.[72] In doing so, the Court bolstered the doctor–patient hierarchy in which the professional appropriates the place of knowledge and, thereby, of power.

The Court acknowledged that its position on childbirth practices differs from the data that had been presented to it by the parties, but it failed to explain or substantiate why it chose to adopt an alternative narrative. The notion that something may always go wrong and that, therefore, the hospital is always the safest place to give birth appears for the Court to be a self-evident 'truth'.

C *The Obstetric Narrative and Risk Management*

Framing denotes the way in which information is presented – to the placing of emphasis on particular aspects of the object of interest.[73] In doing so, framing has the potential to affect decision-making, including in the field of (international) adjudication.[74] Typically, in the legal interpretation of the issue at hand, adjudicatory bodies make one issue salient while under-emphasizing other important aspects.[75] They thereby create a narrative that justifies adjudicatory decision-making.[76] Framing theory and the study of framing effects thus suggest that decision-making, including (international) adjudicatory decision-making, is subjective and dependent on the frame(s) applied to the issue at hand.[77]

71 *Dubska and Krejzova* 2014, *supra* note 29, at 57.

72 This practice of invalidating experiences and knowledges of those not in privileged positions has been dubbed 'gaslighting', a form of epistemic harm. Tuana, 'Feminist Epistemology: The Subject of Knowledge', in I.J. Kidd, J. Medina and G. Pohlhaus, *The Routledge Handbook of Epistemic Injustice* (2017) 125, at 127.

73 Merilainen and Vos, 'Framing Issues in the Public Debate: The Case of Human Rights', 18 *Corporate Communications* (2013) 119, at 120; Chong and Druckman, 'A Theory of Framing and Opinion Formation in Competitive Elite Environments', 57 *Journal of Communication* (2007) 99, at 100–101.

74 Van Aaken and Elm, 'Framing in and through Public International Law', in A. Bianchi and M. Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (2021) 35, at 36–37.

75 *Ibid*., at 47.

76 Cusato, 'Beyond War Narratives: Laying Bare the Structural Violence of the Pandemic', in M.M. Mbengue and J. D'Aspremont (eds), *Crisis Narratives in International Law* (2021) 109.

77 Feminist judgment writing projects have highlighted, for example, how by paying specific attention to the voices and experiences of the individuals involved in the cases, particularly those traditionally marginalized and silenced in law; telling the story differently; renaming and reframing; and contextualizing, judgments can be rewritten within the boundaries of the law with different outcomes. L. Hodson and T. Lavers, *Feminist Judgements in International Law* (2019), at viii, ix; R. Hunter, C. McGlynn and E. Rackley, *Feminist Judgments: From Theory to Practice* (2010); M. Enright and J. McCandless, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (2017).

In the judgments discussed here, the Court framed childbirth as a medical event. It perceived home birth as a deviation from the 'normal' approach to childbirth and addressed these cases from an angle of risk management rather than from the angle, for example, of individual autonomy or reproductive justice. The Court's reasoning emphasizes the alleged risks involved in home birth and highlights that the state must necessarily take steps to mitigate those risks. Illustratively, Judge Villiger remarks in his concurring opinion that the Court is here 'called upon to examine the dangers of home birth for new born babies'.[78] Notably, this notion of risk focuses exclusively on risks of home birth (and not of births in medical settings) and, foremost, on the risk of death of the newborn. For example, the risks of neonatal morbidity in hospital births, concerns about unnecessary obstetric interventions and associated mental and physical health consequences both for the person giving birth in a medical institution as well as for the child that is born and the health benefits for mother and child of planned home births for uncomplicated pregnancies are not taken into account in the Court's reasoning.

Following this emphasis on risk management, any perceived risk of (neonatal) death justifies an absolute ban on home births. Illustratively, there is no discussion by the ECtHR on whether a risk of neonatal death in home births, even when very small, would justify an interference of the autonomy, and of the physical and mental integrity, of the person in childbirth. The Court does not engage in any discussion as to at what level of risk such an interference with the right to choose the circumstances in which one wants to give birth would be acceptable. In fact, even when states do not produce evidence that supports the notion that home births carry more risks than hospital births, absolute bans are justified as, in the Court's words 'unexpected difficulties can arise'. Had the Court adopted a frame that emphasized, for example, the autonomy of persons in childbirth or had it framed this as an issue of reproductive justice, the absolute ban would likely have been subjected to more stringent scrutiny. An example of such an alternative approach is offered by Judge Lemmens in his dissenting opinion. He stresses the applicants' freedom of choice and underlines the observations of the Czech Constitutional Court, which had held that:

> a modern democratic State founded on the rule of law is based on the protection of individual and inalienable freedoms, the delimitation of which closely relates to human dignity. That freedom, which includes freedom in personal activities, is accompanied by a certain degree of acceptable risk. The right of persons to a free choice of the place and mode of delivery is limited only by the interest in the safe delivery and health of the child; that interest cannot, however, be interpreted as an unambiguous preference for deliveries in hospital.[79]

Following this line of reasoning, the de facto ban would have been subjected to more strict scrutiny, which, without evidence to support such a complete ban, would arguably have led to a different outcome in the cases at hand.

[78] *Dubska and Krejzova* 2014, *supra* note 29, Concurring Opinion of Judge Villiger.
[79] *Dubska and Krejzova* 2014, *supra* note 29, Dissenting Opinion of Judge Lemmens, at 5.

D *Selfish and Unreliable Mothers*

A corollary to the rationale of the defendant states as well as that of the ECtHR in these judgments is the notion that the person giving birth cannot necessarily be trusted to knowledgeable decision-making in matters of birth.[80] Illustratively, the Court found that, 'besides their physical vulnerability, newborns are fully dependent on decisions made by others, which justifies a strong involvement on the part of the state' and that 'the parent … cannot … be entitled under Article 8 to have measures taken that would harm the child's health and development'.[81] In addition, it states that, as mentioned previously, 'certain choices made by the mother as to the place, circumstances or method of delivery may be seen to give rise to an increased risk to the health and safety of newborns'.[82]

Notably, the ECtHR signals in several judgments that individuals who opt for home birth over birth in a medical setting choose personal comfort over the safety of their baby.[83] Markedly, in her concurring opinion, Judge Ganna Yudkivska finds that not all 'particular aspects of giving birth' engage the protection of the convention: 'I understand perfectly that for many women home delivery is preferable because they find it far more comfortable psychologically. However, I believe that the Convention is aimed at safeguarding fundamental human rights. … It cannot be interpreted as requiring the State to guarantee the level of comfort an individual seeks, even at the crucial moment of giving birth'.[84] By alluding to the behaviour of those that want to give birth at home as reckless or selfish, the Court plays into various well-known stereotypes.[85] These include that of the mother and the maternal environment as representing the primary threat to foetal health and that of women as irrational and incompetent decision-makers, who are incapable of reaching difficult and painful moral decisions.[86]

Stereotyping, the process of ascribing to an individual general attributes, characteristics or roles by reason of their apparent membership in a particular group, may have a positive or negative valence or both. Many of the stereotypes attached to individuals at the subordinate end of power structures, however, often carry negative connotations.[87] Various scholars therefore highlight the role that courts can play in

[80] See, e.g., *Kosaite-Cypiene*, *supra* note 46, at 85; *Pojatina*, *supra* note 47, at 40.

[81] *Dubska and Krejzova* 2014, *supra* note 29, at 93–94.

[82] *Ibid.*; *Dubska and Krejzova* 2016, *supra* note 37, at 185.

[83] *Kosaite-Cypiene*, *supra* note 46, at 104; *Pojatina*, *supra* note 47, at 58, 80; *Dubska and Krejzova* 2016, *supra* note 37, at 188.

[84] *Dubska and Krejzova* 2014, *supra* note 29, Concurring Opinion Judge Yudkivska.

[85] Ehrenreich, 'The Colonization of the Womb', in N. Ehrenreich (ed.), *The Reproductive Rights Reader: Law, Medicine and the Construction of Motherhood* (2008) 391, at 393–394.

[86] Cook, Cusack and Dickens, 'Unethical Female Stereotyping in Reproductive Health', 109 *International Journal of Gynecology and Obstetrics* (2010) 255, at 256; Villarmea, 'When a Uterus Enters the Room, Reason Goes Out the Window', in C. Pickles and J. Herring (eds), *Women's Birthing Bodies and the Law: Unauthorised Intimate Examinations, Power and Vulnerability* (2020) 63, at 69; Zampas, 'Human Rights and Gender Stereotypes in Childbirth', in Pickles and Herring, *ibid.*, 79.

[87] M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (2007); R. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (2010), at 1.

naming, exposing and contesting such stereotypes.[88] Law, it is argued, 'is an effective tool for naming because it can publicly and authoritatively proclaim and transform an unacknowledged harmful experience into an experience … that is recognized at law as one that is harmful and that requires legal redress'.[89] In doing so, this practice of naming and contesting stereotypes also underlines the systemic nature of the wrong; it relates this individual experience to a broader, collective form of subordination. Such an approach – also called an anti-stereotyping approach or the anti-stereotyping principle – would thus befit a gender-sensitive practice at the Court.

Commentators have underlined how the Court's general approach to stereotyping is piecemeal[90] and often silent on the issue[91] and that, when it does name stereotypes, it focuses on stereotyping by domestic courts (judicial stereotyping) rather than on the way in which stereotypes are ingrained in the (domestic) system as a whole – that is, in law, policy and practice.[92] In the cases presented here, the Court not only omits to address the stereotypes of the woman in childbirth, referred to in the responses of the defendant states, but also alludes to these harmful notions itself. Thereby, it reinforces those harmful understandings of birthing persons that are said to lie at the root of the over-medicalization of childbirth, mistreatment in childbirth and obstetric violence:[93] human rights concerns that are recognized to be widespread and systemic in nature.[94]

4 Androcentric Human Rights: Some Final Reflections

In 1993, the World Conference on Human Rights acknowledged that international human rights law and practice was androcentric and requested change. Mainstream

88 Cook and Cusack, *supra* note 87; Timmer, 'Toward an Anti-Stereotyping Approach for the European Convention of Human Rights', 11 *HRLR* (2011) 707; E. Brems and A. Timmer, *Stereotypes and Human Rights Law* (2017); Peroni and Timmer, 'Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights Jurisprudence', in Brems and Timmer, *ibid.*, 39; Henningsen, 'The Emerging Anti-Stereotyping Principle under Article 14 ECHR: A Multidimensional and Intersectional Approach to Equality', 3 *European Convention on Human Rights Law Review* (2022) 185.

89 Cook and Cusack, *supra* note 87, at 39.

90 Timmer, 'Toward an Anti-Stereotyping Approach for the European Convention of Human Rights', 11 *HRLR* (2011) 707, at 709; Renzulli, 'Discrimination and Gender Stereotypes in Judicial Decisions: The Jurisprudence of the European Court of Human Rights in Light of *JL v Italy*: A Retreat into the Shadows?', 41 *NQHR* 155.

91 Peroni and Timmer, *supra* note 88, at 65.

92 Durmas, "Judicial Stereotypes on Female Sexuality and Reproduction: Nucan Bayraktar v Türkiye", 2 November 2023, available at https://strasbourgobservers.com/2023/11/02/judicial-stereotypes-on-female-sexuality-and-reproduction-nurcan-bayraktar-v-turkiye/.

93 UN Special Rapporteur on Violence against Women, A Human Rights-Based Approach to Mistreatment and Violence against Women in Reproductive Health Services with a Focus on. Childbirth and Obstetric Violence, UN Doc. A/74/137, 11 July 2019, at 9; Perrotte, Chaudhary and Goodman, '"At Least Your Baby Is Healthy" Obstetric Violence or Disrespect and Abuse in Childbirth Occurrence Worldwide: A Literature Review', 10 *Open Journal of Obstetrics and Gynecology* (2020) 1544; Villarmea and Kelly, 'Barriers to Establishing Shared Decision-Making in Childbirth: Unveiling Epistemic Stereotypes About Women in Labour', 26 *Journal of Evaluation in Clinical Practice* (2020) 515; Shabot and Korem, 'Domesticating Bodies: the Role of Shame in Obstetric Violence', 33 *Hypathia* (2018) 384.

94 UN Special Rapporteur on Violence Against Women, *supra* note 93, at 4.

human rights mechanisms had to 'include the status and human rights of women in their deliberations and findings'. This 'gender mainstreaming strategy', as it is often called, has been featured in the policies of the Council of Europe since the 1990s. Despite these initiatives (or perhaps because of these strategies),[95] human rights practice remains male biased.[96] Commentators note, for example, that there is still 'a need for judicial proactivity in bringing a gender perspective and gender mainstreaming to cases brought before the Court';[97] that the Court's approach and findings are marred by its own stereotypes, patriarchal influences, misconceptions and preconceptions about what gender equality actually is and how it should be pursued;[98] and that its conceptualization of gender equality is limited.[99]

The present reading ties in with and adds to these critiques, highlighting that the Court's practice does not necessarily work towards the advancement of women's rights. It underlines that gender bias may not only play a role in regard to the Court's interpretation of human rights norms and its conceptualization of equality, as found in the aforementioned studies, but that it can also affect knowledge formation and production in the process of adjudication. The present study of the Court's home birth jurisprudence points to epistemic blind spots in the Court's knowledge formation, which are related to a (mis)conception that hospitals are, under all circumstances, the safest place for childbirth and an understanding of the birthing person as posing a risk to the life and safety of their newborn. It also points to a challenge in identifying problematic stereotypes that are often deeply ingrained in our subconscious minds and frequently accepted as a culturally 'normal' aspect of our lives.[100]

The aim of this study has not been to look for a right to give birth at home or to analyse the interpretation of the legal rules as such[101] but, rather, to question the ways in which gender influences the ECtHR's conceptions of knowledge, knowers and practices of inquiry and justification. Importantly, in these judgments, the Court adhered to a narrative of childbirth that was not supported by the documents that had been presented to it by the parties in the cases before it. The Court also did not refer to other studies or documents that would support its adherence to this obstetric narrative in its judgments. Instead, it stated that it was aware that its narrative differed from the

[95] Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights at the United Nations', 18 *HHRJ* (2005) 1.

[96] Otto, 'Women's Rights', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law* (2018) 309, at 324–325; F. van Leeuwen, *Women's Rights*, *supra* note 15; Van Leeuwen, 'United Nations', *supra* note 15, at 24–29.

[97] Evans, 'Gender Mainstreaming at the European Court of Human Rights: The Need for A Coherent Strategy in Approaching Cases of Violence against Women and Domestic Violence', 54 *University of Miami Inter-American Law Review* (2023) 1.

[98] Alkaviadou and Manoli, *supra* note 16.

[99] Hennette-Vauchez, 'Gender Equality in the European Court of Human Rights', in R. Cook (ed.), *Frontiers of Gender Equality: Transnational Legal Perspectives* (2023).

[100] On this point, see also Cook and Cusack, *supra* note 87, at 41.

[101] Several scholars analysed the first and second judgments of the Court with the question whether the Court recognized a right to give birth at home under Article 8 of the ECHR. Some dubbed the rulings of the Court paradoxical. Chen and Cheeseman, *supra* note 8; Chervenak *et al.*, *supra* note 8; McCartney, *supra* note 8.

studies that had been presented to it. Bias, or blind spots, in knowledge formation and production may necessarily affect the outcome of a case. In the home birth cases discussed in this article, the obstetric narrative applied by the Court works to the detriment not only of the applicants in these cases but also of persons in childbirth at large. The Court adhered to a socially constructed association of medicine with reason, facts and objectivity and portrayed those who opt for home birth as selfish and unreliable. In doing so, it purports to a vision of childbirth that has been found to legitimize restrictions of autonomy of birthing persons and the control of third parties over the reproductive process.[102]

Homebirth remains a contentious issue in many jurisdictions as it deviates from the societal (mis)conception that hospitals are necessarily the safest place to give birth. It is therefore not said that biased knowledge formation and production affects cases of a different nature in a similar manner. The attention for agency in childbirth as a human rights concern is, moreover, relatively new. Those human rights monitoring bodies that focus on matters of childbirth typically do so from the angle of maternal mortality and access to maternal health care.[103] The question of acceptability of health care or what 'good-quality' health care entails is generally not asked. The Court therefore did not have a wealth of precedent to draw from. At the same time, it should be noted that issues that characteristically concern the autonomy of those at the subordinate end of power relations – issues that affect women because of their gender – are often considered controversial and do not necessarily feature prominently in international human rights practice. Hence, rather than absolving the Court, these considerations potentially underscore that its approach to childbirth aligns with an androcentric human rights system.

The findings of this reading, together with other studies that point to a male-biased practice at the Court, demonstrate a need to reconsider the strategies in place to ensure a gender-sensitive, inclusive practice of human rights adjudication. In this regard, attention may be drawn to a possible need for reflexivity of judges in knowledge formation and production: an examination of one's own beliefs, judgments and practices and how these may influence legal reasoning as well as a need for transparency in decision-making.[104] These are matters that require further attention and debate.

[102] Ehrenreich, *supra* note 85, at 394–400; see also C. Pickles and J. Herring (eds), *Childbirth, Vulnerability and Law: Exploring Issues of Violence and Control* (2020).

[103] Lokumagage and Pathberiye, 'Human Rights in Childbirth, Narratives and Restorative Justice: A Review', 14 *Reproductive Health* (2017) 17; UN Special Rapporteur on Violence Against Women, *supra* note 93; van Leeuwen, *Women's Rights*, *supra* note 15, at 150. There are some recent examples of United Nations human rights bodies tackling questions of agency in childbirth. See, e.g., UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), *S.F.M. v. Spain*, decision of 28 February 2020; CEDAW, *N.A.E. v. Spain*, decision of 13 July 2022.

[104] Finlay, 'Reflexivity: An Essential Component for All Research?', 61 *British Journal of Occupational Therapy* (1998) 453; K. Lamsden, *Reflexivity: Theory, Method, and Practice* (2019).