

On Patients' Autonomy, Medical Paternalism and Situations of Vulnerability in *Y.P. v. Russia*

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On 20 September 2022 the European Court of Human Rights (ECtHR) issued its judgment in the *Case of Y.P. v. Russia*^[1] holding by five votes to two that the sterilisation without the affected woman's consent did not amount to inhuman and degrading treatment pursuant to Article 3 European Convention on Human Rights (ECHR). This case marks the first time the Court determined that a woman's non-consensual sterilisation does not amount to inhuman and degrading treatment. The Court instead limited itself to establish a violation of the applicant's right to private life under Article 8 ECHR unanimously. The reasons provided by the majority merit some further analysis, as they raise general questions as to the weight given to the doctor's intention rather than the applicant's autonomy as well as the Court's general understanding of the concept of 'vulnerability' as an additional factor to be taken into account in Article 3 ECHR cases.

Facts

The case concerns a 28-year-old woman, who was sterilised without her consent during a Caesarean section in a public hospital in Russia. During the delivery of her child, she suffered a rupture of her uterus, which was immediately sutured by the doctors. In addition to this life-saving measure, and while she was still unconscious under general anaesthetic, the doctors decided to ligate the fallopian tubes to prevent any future pregnancy. The latter measure permanently deprived her of her reproductive capacity and was exclusively of preventive nature, as the doctors considered that any future pregnancy could lead to another rupture of her uterus and thus put her life at risk. The sterilisation could equally have been carried out at any later moment. Before said medical intervention, the patient had signed a consent form in which she explicitly excluded sterilisation from her consent.

The Court's Reasoning

After having exhausted domestic remedies, the applicant proceeded to the ECtHR, claiming that the sterilisation without her consent amounted to inhuman and degrading treatment (in breach of Article 3 ECHR) and violated her right to private life (Article 8 ECHR).

The Court found a violation of the substantive and procedural limb of Article 8 ECHR recognizing that the sterilisation 'grossly affected her physical integrity'^[2] and had been carried out without her consent while not being a life-saving measure. Additionally, she had neither been granted compensation nor had the responsibility of the doctors been established at the national level. However, the application based on Article 3 ECHR was found inadmissible (pursuant to Article 35 § 3 (a) ECHR).

Although the Court was 'prepared to accept' (one may note this all but victim-sensitive language) that she 'felt humiliated and degraded' by the sterilisation,^[3] the Court found that the ill-treatment did not attain the necessary minimum level of severity to amount to inhuman and degrading treatment under Article 3 ECHR.

The Court distinguished the present case from previous sterilisation cases, where the threshold had been met, based on two main factors: First, the ‘doctors had not acted in bad faith, let alone with an intent of ill-treating or degrading her’.^[4] Second, the Court could ‘not discern any additional elements such as, for instance, the applicant’s particular vulnerability’.^[5]

This reasoning is troubling due to: (i) the importance given to the doctor’s intentions instead of the patient’s autonomy (ii) the Court’s narrow, group-based understanding of ‘vulnerability’ and (iii) the lack of considering structural vulnerability in the present case.

The Doctor’s Intentions v. The Patient’s Autonomy

First, according to the Court non-consensual sterilisation does not *per se* reach the required severity threshold to constitute inhuman or degrading treatment. Thus, additional factors, such as the doctor’s malicious intent or the patient’s particular vulnerability, are necessary to *raise* the level of severity of the treatment to the required threshold.

The first assumption is already questionable. It could well be argued that the required severity is inherent in non-consensual sterilisation of ‘a mentally competent adult patient’^[6], affecting ‘one of the essential bodily functions of human beings’, as the Court itself recognises.^[7]

But also the weight given to the doctor’s perceived good intention is remarkable: While the Court had argued before in cases of non-consensual sterilisation that the doctor’s intent was not determinative, the intent has now become one of the decisive factors. In fact, the Court had established before that non-consensual sterilisation violated Article 3 ECHR arguing that

‘[a]lthough there is no indication that the medical staff acted with the intention of ill-treating the applicant, they *nevertheless displayed gross disregard for [the patient’s] right to autonomy and choice as a patient.*’^[8]

Contrary to that, the Court now even rejected the admissibility of the application based on Article 3 ECHR arguing that

‘when taking the decision to sterilise the applicant the doctors had not acted in bad faith, let alone with an intent of ill-treating or degrading her. The said decision, *albeit clearly disrespectful of the applicant’s autonomy* was driven by the doctors’ genuine concerns for her health and safety.’^[9]

The Court’s reasoning thus appears to mark a shift away from the protection of the patient’s autonomy to the protection of the doctor’s decision if based on ‘good intentions’ (or medical paternalism?^[10]). This is especially worrying given the fact that in this case, the doctors had not only acted *without* the patient’s consent^[11] but *against* her express will, as stated previously in her consent form. The doctors thus effectively replaced the woman’s decision with their own consideration what was best for her. The doctor’s reasoning that and *how exactly* the woman must be protected from future harm (and herself?^[12]) may be well-intentioned but still follows a logic of paternalistic care, informed by discriminatory considerations based on sex and gender, as argued below.

It finally stands out that she had been replaced as moral decision-making agent, although there had not been any medical emergency. Critically, while the Court had formerly applied the criterion of ‘*imminent medical necessity*’,^[13] reference is now made to the ‘*necessity to prevent a risk to the applicant’s life in the future*’ in order to justify the doctor’s decision-making power.^[14] The Court thereby broadens the criterion of medical necessity to cover medical treatment which equally could (without imminent risk) be performed on a later stage and thus with the patient’s consent. This broadened understanding of ‘medical necessity’ adds to the shift away from primarily protecting the patient’s autonomy.

Neglected Structural Vulnerability in the Present Case

Finally, the Court argues that it did 'not discern any additional elements such as, for instance, the applicant's particular vulnerability'.^[15] The Court thereby appears to limit its consideration on 'vulnerability' to the applicant's personal characteristics (i.e., whether the person as such is 'vulnerable') but fails to take into account the applicant's vulnerability arising of external factors (i.e., whether the situation places the person in a 'vulnerable position'). This is striking, given the facts at hand. Clearly, further factors could have been taken into account beyond the applicant belonging to a 'vulnerable population group',^[16] such as the applicant's age (28),^[17] the hierarchical doctor-patient relation and underlying gender stereotypes, which might have influenced the doctor's decision-making.

In this sense, the Inter-American Court of Human Rights (IACtHR) determined in a parallel case concerning the non-consensual sterilisation of a woman in a public hospital that the doctors had acted based on prejudicial gender stereotypes and concluded that the sterilisation constituted cruel, inhuman and degrading treatment (in violation of Article 5(1) and 5(2) of the American Convention on Human Rights, in relation to Article 1(1) of the same Convention).^[18] In the latter case a woman had been sterilised during a c-section while still under epidural anaesthetic to prevent any risk related to a possible future pregnancy. Against this background the IACtHR identified 'some of the gender stereotypes frequently applied to women in the health sector that have serious effects on the autonomy of women and their decision-making power' being, among others, the fact, that 'women are seen as vulnerable beings, incapable of taking reliable or consistent decisions' and the assumption that 'it is the woman who should bear the responsibility for the couple's sexual health'.^[19]

In addition to the problematic assumption that women are incapable of reliable decision-making, the fact that women are portrayed as exclusively responsible for birth-control is equally illustrated in the present case by the consideration of only two options: hysterectomy or sterilisation of the female patient. This omits that there are other, less invasive, contraceptive methods. It also omits that there are male contraceptive measures, which also could have been considered before proceeding to implement any permanent birth-control measure.^[20]

The judgment thereby missed the opportunity to challenge the culturally and socially accepted norm that women alone bear the risks associated with birth control while simultaneously being regarded as irresponsible. Future judgments on the non-consensual sterilisation of women might thus consider whether discrimination does not add to the severity of the treatment but also whether the Protection from Discrimination according to Article 14 ECHR (and Article 1 of Protocol No. 12) might not be relevant as well. Finally, one cannot help but ask how the Court would have decided a case in which a male had been castrated against his will, but with good intentions.

Outlook

The judgment is troubling in various ways. The ECtHR seems to raise the threshold of inhuman and degrading treatment in medical cases by invoking the doctor's intent of ill-treating or degrading the alleged victim and by considering future risks as sufficient to justify immediate medical procedures under Article 3 ECHR. This clearly goes to the detriment of the patient's autonomy. Secondly, vulnerability is limited to personal characteristics thereby excluding vulnerability arising out of the specific situation of the case, particularly neglecting possible prejudicial gender stereotypes.

Finally, the case was filed against Russia, which ceased to be a Party to the ECHR just four days before the issuance of the present judgment.^[21] Although the Committee of Ministers will continue to supervise the execution of judgments concerning Russia, including this one, and the Court remains competent to deal with applications against Russia based on acts which occurred up until 16

September 2022, any alleged human rights violation which occur after this date will no longer be analysed by the ECtHR. In this sense, any judgment against Russia marks an important opportunity to make a final statement, at least to the victims.

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[1] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, <<https://hudoc.echr.coe.int/eng/?i=001-219209>>.

[2] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 57.

[3] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 36.

[4] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 37.

[5] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 37.

[6] See ECtHR, Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture, First Edition, 31 August 2022, para 82.

[7] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 36.

[8] Emphasis added. ECtHR, Judgment, *Case of V.C. v. Slovakia*, 8 November 2011, Application No. 18968/07, para. 119. Similarly, ECtHR, Judgment, *Case of N.B. v. Slovakia*, 12 June 2012, Application No. 29518/10, para. 78 (stating that ‘the information available does not indicate that the medical staff acted with the intention of ill-treating the applicant. They nevertheless acted with gross disregard for her human freedom, including the right to freely decide, together with her representative and after having had the possibility of discussing the matter with her partner, whether she consented to the procedure.’).

[9] Emphasis added. ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 37.

[10] As argued by Judge Pavli in his partly dissenting opinion to ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 7

[11] As in previous cases, see footnote 8.

[12] See concurring opinion by Judge Elósegui to ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 11.

[13] Emphasis added. ECtHR, Judgment, *Case of V.C. v. Slovakia*, 8 November 2011, Application No. 18968/07, para. 117.

[14] Emphasis added. ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 37.

[15] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 37.

[16] ECtHR, Judgment, *Case of Y.P. v. Russia*, 20 September 2022, Application No. 43399/13, para. 34.

[17] See although eight years younger ECtHR, Judgment, *Case of V.C. v. Slovakia*, 8 November 2011, Application No. 18968/07, para. 116.

[18] IACtHR, Judgment, *Case of I.V. v. Bolivia*, 30 November 2016, Series C No. 329, para. 236, 270.

[19] IACtHR, Judgment, *Case of I.V. v. Bolivia*, 30 November 2016, Series C No. 329, para. 187.

[20] One might think of the already mentioned IACtHR, Judgment, *Case of I.V. v. Bolivia*, 30 November 2016, Series C No. 329, para. 69 where the woman's husband asked after her sterilisation 'why [the doctors] had not considered performing a vasectomy on him and why they had performed a tubal ligation on' her instead.

[21] Council of Europe, Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, 16 March 2022, www.coe.int/en/web/moscow/-/resolution-cm-res-2022-2-on-the-cessation-of-the-membership-of-the-russian-federation-to-the-council-of-europe; Resolution of the ECtHR on the consequences of the cessation of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, 22 March 2022, https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf.

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