

Consent to Medical Treatment

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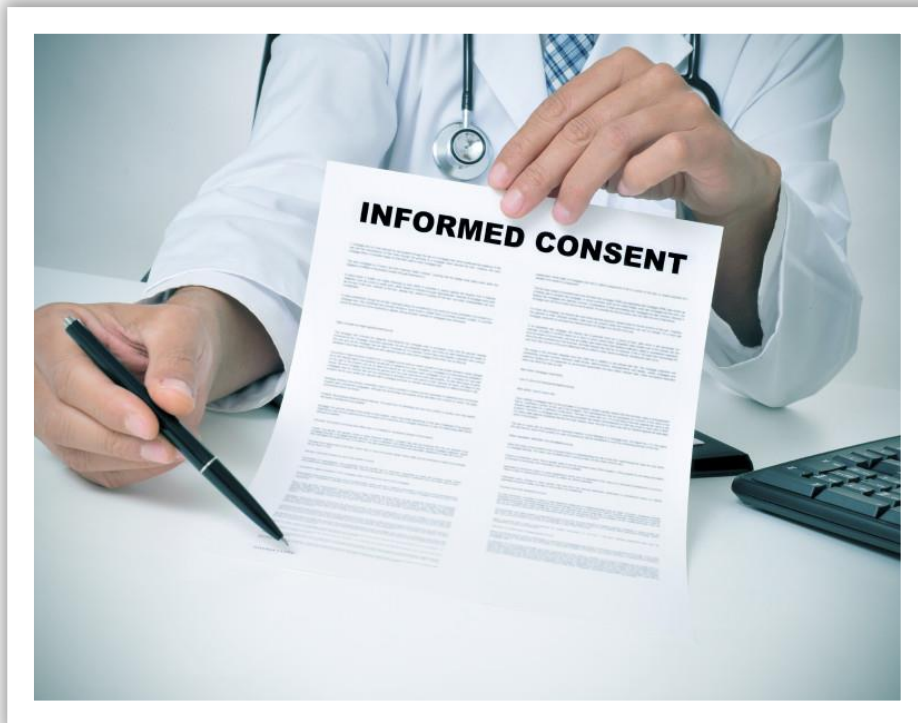


Table of Contents

A. Introduction.....	2
B. Legal basis.....	3
C. Principle of informed consent	4
D. European Court of Human Rights case-law.....	8
E. Conclusion	15
Literature.....	17
Conventions and laws.....	17

A. Introduction

The continuous development of medical practices and the expanding possibilities of intervention on human health have raised fundamental bioethical challenges. The execution of a medical action consists an issue of various legal perplexities, for a series of hardly reconcilable rights and duties are affected. Such ones are the right to self determination and physical integrity, according to which no medical operation shall be conducted on a human body unless the person affected by it consents, and the physician's duty to care.

The singularity of a medical action lays in that it is by itself an invasive action. At a first glance it is credited to injure, interfere or indirectly affect human health, as for example in the cases of the damage of human tissues during an operation, of the administration of anesthetics or of psychotherapy¹. Subsequently, questions have arisen as to whether, any medical action consists an invasion to the human body and should always be considered as a tort, and, predominantly, as to the circumstances under which medical liability can and ought to be founded when a patient's life is at stake, when a medical action has caused another damage on the patient's health or even when a patient's life is saved through procedures on which one would not agree.

The principle of informed consent plays a pivotal role in the potential abuse and misuse of today's biomedical applications, as it safeguards the right to self determination and physical integrity and is attributed to raise the unjust character of

¹ Civil Medical Responsibility (Αστική Ιατρική Ευθύνη), Aikaterini Fountedaki, Sakkoula 2003, p. 169.

the theoretical insult of a human's health. In the following pages the principle will be analysed, a short comparative analysis concerning the greek jurisprudence will be presented, and finally, crucial case-law of the European Court of Human Rights will be summarised.

B. Legal basis

The prerequisite of informed consent for any medical intervention in one's body is safeguarded by the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997). Articles 5 to 10 of the Convention define the principle of informed consent, introduce legal safeguards for the protection of persons who are incapable to consent or suffer from a mental disorder, regulate the possibility for medical interventions without consent in the case of emergency situations, manifest the necessity for the consideration of the previously expressed wishes of a patient and guarantee the right to private life and information. It should be noted that Greece was one of the first countries to ratify the Convention, which became domestic law with the law 2619/1998.

Notwithstanding that the Convention on Human Rights and Biomedicine was the first comprehensive multilateral instrument on biomedical human rights², the principle of consent has been safeguarded since 1950, under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Private life, safeguarded under Art. 8 of the ECHR, is a very broad notion, not susceptible to exhaustive definition, which encompasses, inter alia, the right to physical integrity³. The European Court of Human Rights in its established jurisprudence has stated that since a person's bodily integrity concerns the most intimate aspect of their private life, any medical intervention without consent, even if it is of minor importance, constitutes an interference with this right⁴. The principle of informed consent is inherent in the principle of self-determination. It should be noted that the Convention on Human Rights and Biomedicine is often used by the European Court of Human

² Cf. Henriette Roscam Abbing, "The Convention on Human Rights and Biomedicine. An Appraisal of the Council of Europe Convention", *European Journal of Health Law*, 1998, n°5, p. 379.

³ *X and Y v the Netherlands*, app. no. 8978/80, §22; *Pretty v the United Kingdom*, app. no. 2346/02, §61.

⁴ *Y.F. v Turkey*, app. no. 24209/94, §33; *X v Austria*, app. no. 8278/78; *Acmanne and Others v Belgium*, app. no. 10435/83; *Peters v the Netherlands*, app. no. 21132/93.

Rights⁵, which has previously acknowledged its advisory responsibility⁶ on its interpretation⁷.

Furthermore, the principle of informed consent is also safeguarded under Article 3§§1, 2(a) of the Charter of the Fundamental Rights of the European Union (entry into force 2009) and under Articles 5 and 9 of the Universal Declaration on the Human Genome and Human Rights (1997).

It should be noted that in Greece the principle of informed consent was safeguarded even before the country signed the European Convention on Human Rights and the Convention on Human Rights and Biomedicine. Specifically, it is argued that the principle of informed consent is guaranteed under Articles 2§1 and 5§1 of the Greek Constitution, for consent to medical treatment is inherent to the guaranteed right of personal autonomy and self-determination, the freedom to develop one's personality and the protection of human dignity. In 1992 Greece signed a law on the modernisation and organisation of the healthcare system, in which the right to informed consent is also explicitly guaranteed⁸. Finally, the latest Code of Medical Ethics (3418/2005) manifests the right to informed consent on Article 12.

C. Principle of informed consent

Under Article 5 of the Convention on Human Rights and Biomedicine “An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.” All patients that are subjected to medical actions have the right to give free and informed consent, in order for these actions to gain legal ground and be carried out. In addition, all patients have the right to withdraw consent at any time, under Article 5§3 of the above-mentioned Convention. The interpretation of the doctrine of informed consent⁹ and of Article 8 of the

⁵ Glass v the United Kingdom, app. no. 61827/00, §75; Demir and Baykara v Turkey, app. no. 34503/97, §81; M.A.K and R.K v the United Kingdom, app. nos. 45901/05, 40146/06, §77; Vo v France, app. no. 53924/00, §84.

⁶ Article 29 of the Convention on Human Rights and Biomedicine

⁷ Vo v France, app. no. 53924/00, §84.

⁸ Article 47§§3,4 of the greek law 2071/1992.

⁹ Informed Consent, Parental Permission, and Assent in Pediatric Practice, PEDIATRICS Vol. 95 No. 2, February 1995, available at <http://www.nocirc.org/consent/bioethics.php>

European Convention on Human Rights is that the Applicant also possesses the right not to consent and to refuse a suggested treatment¹⁰.

It has been argued that consent to medical treatment should not serve as prerequisite of a medical action, once the patient has signed a contract with the doctor¹¹. However, this opinion could lead to extreme results should one consider that the consent at stake is the one of the specific patient on a specific action, and many times the patient might not have considered possible the necessity of a medical action that might arise in a later time. Moreover, even if the patient had considered the possibility of a medical intervention, it is not clear that the patient has adequate knowledge and information for the specific purpose, nature and consequences of the possible action. Indeed, consent to medical treatment might be omitted when there exists a contract between the doctor and the patient, only in the case of common and safe actions, for which any person in society would have an adequate level of knowledge. For instance, a person who visits a cardiologist to carry out a medical examination could be considered to give consent for the measuring of his blood pressure or for the conduction of an electrocardiograph¹².

The given consent should be “free”, meaning that the patient should feel absolutely free in regards to the acceptance or rejection of any medical action in his body. For instance, the consent cannot be considered to be free in the case that the patient has been blackmailed or threatened to proceed to a specific medical action. Furthermore, and most importantly in practice, the consent should be “informed”. The legal duty of the patient’s information is a rather complex procedure, for there could be discerned various “types” of information ought to be given to the patient¹³. To begin with, under Article 10 of the Convention on Human Rights and Biomedicine the physician has in general the duty to inform the patient about the status of his health in such a way, in order for the patient to be able to take critical decisions on his health in a responsible manner. In addition, the physician has the duty to provide therapeutic-safety information to the patient with regards to the patient’s health protection, as in the case of the instructions on the administration of a drug¹⁴. Yet,

¹⁰ Cruzan v. Director, MDH, 497 U.S. 261 (1990); Malette v. Shulman, 67 DLR (4th) 321, 72 OR (2d) 417 (1990).

¹¹ Savatier, *Traité*, 223-224.

¹² Civil Medical Responsibility (Αστική Ιατρική Ευθύνη), Aikaterini Fountedaki, Sakkoula 2003, p. 182.

¹³ *ibid* p. 178.

¹⁴ As in the case of the German law, Laufs/Uhlenbruck §62, “Sicherungs- therapeutische Aufklärung”.

this duty of the physician is distinctive from the physician's duty to provide information to the patient, in order for patient to legally consent to medical treatment. This is also portrayed by the Convention, since it regulates the information needed in different articles in a different way. In particular, the patient's information as a prerequisite for his or her consent shall necessarily include information "as to the purpose and the nature of the intervention as well as on its consequences and risks", under Article 5§3. The precise and comprehensive information ought to be provided to the patient should be accompanied with scientific advice and exchange of opinions between the patient and the doctor. Informative leaflets, no matter how illustrative or simple might seem, cannot be considered adequate for the patient's information.

The information of the patient for the conduction of any medical action is profoundly manifested in the greek regulation. The patients' information is inherent in articles 5§1 and 5A of the Greek Constitution, which enshrine personal freedom and the right to information. In addition, under Article 11 of the Code of Medical Ethics (3418/2005) the doctor has the duty to be honest with the patient; he oughts to inform the patient holistically and comprehensively for the real status of his health, the content and the results of the suggested medical action, the consequences and the possible dangers or complications from the conduction of the medical action, as well as for the possible rehabilitation time, in order for the patient to understand precisely the medical, social and financial aspects and consequences of his situation and take accordingly his decision. In addition, the doctor ought to respect the patient's will not to be informed; in these cases the patient has the right to ask the doctor to inform accordingly exclusively another person or a group of people of his choice¹⁵. In the greek jurisprudence the prerequisites of valid consent, apart from the information of the patient as analysed above, are that the patient has the capability to consent, that the consent is not a result of the delusion, deceit or threat of the patient, that the consent is not contrary to moral ethics, and that the consent refers to the specific medical action both as to its content and as to the time of its conduct¹⁶.

As regards to the patient' capability to consent, Article 6 of the Convention on Human Rights and Biomedicine guarantees in detail the protection of people not able to consent. In specific, it is manifested that an intervention may only be carried out

¹⁵ Article 11§2, greek Code of Medical Ethics (3418/2005).

¹⁶ Article 12§2, *ibid*.

on a person who does not have the capacity to consent only if it is on his or her direct benefit¹⁷. In the case of minors incapable to consent, an intervention may be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law, taking into consideration the opinion of the minor in proportion to his or her age and degree of maturity¹⁸. In the cases of adults incapable to consent due to a mental disability, disease or similar reasons, it is regulated that the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law, given that the individual concerned takes part in the authorisation procedures to the extent that he can¹⁹. In all the above cases, it is necessary that the representative, authority, person or body mentioned shall be informed appropriately, as mentioned above, while the authorisation may be withdrawn at any time in the best interests of the person concerned²⁰. Special consideration is given to the persons have a mental disorder of a serious nature. Under Article 7 of the Convention these people may be subjected without their consent to an intervention aimed at treating their mental disorder only in the cases where, without such a treatment, serious harm is likely to result to their health.

In greek law when a medical intervention concerns a minor, the consent is given by the persons who are responsible for the minor's custody or care. Should the doctor deem that the minor is mature in terms of age, spirit and emotions, and that the minor can comprehend the situation of his or her health, the content, the consequences and dangers of the medical actions, the doctor shall always consider the minor's opinion, being obliged, though, to obtain the consent of the minor's representatives²¹. If the patient is incapable to consent, the consent should be given by the patient's legal conservator, or if one does not exist, by the family of the patient, while in any case the doctor should attempt to ensure the voluntary participation of the patient in the procedure²².

Notwithstanding the generality of the principle of informed consent, the latter is not required in the case of emergency situations. Under Article 8 of the Convention on

¹⁷ Article 6§1, Convention on Human Rights and Biomedicine.

¹⁸ *ibid*, 6§2.

¹⁹ *ibid*, 6§3.

²⁰ *ibid*, 6§§4,5.

²¹ Article 12§2 aa), greek Code of Medical Ethics (3418/2005).

²² *ibid*, 12§2 bb).

Human Rights and Biomedicine, when because of an emergency situation the appropriate consent cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned. The greek legislator has regulated more extensively the situations when informed consent is not necessary for the conduction of a medical action. Under Article 12§3 of the greek Code of Medical Ethics, the patient's consent is not necessary in emergency cases in which the appropriate consent cannot be obtained and there is an immediate, absolute and urgent need for medical care. In addition, consent is not necessary in the case of suicide attempt and in the case where the representatives of an incapable patient deny to give to the needed consent in order for serious harm for the life or the health of the patient to be prevented.

D. European Court of Human Rights case-law

In *Jalloh v. Germany*²³ the Court judged upon the forcible administration of emetics as a means for the obtainment of evidence of a drugs offence. The Court's analysis on the violation of Article 3 of the European Convention on Human Rights regarding the prohibition of torture will not be analysed at the present paper. What is very important is the Court's consideration on the principle of consent, when medical interventions on persons deprived of their liberty is concerned. In specific, the prohibition of torture or of inhuman or degrading treatment or punishment imposes the positive and negative obligation of the State to protect the physical well-being of persons deprived of their liberty, which could be achieved with the guarantee of medical assistance. To this extent, a measure which is of therapeutic necessity cannot in principle be regarded as inhuman or degrading²⁴. For instance, there is no inhuman or degrading treatment in the case of the force-feeding of a detainee, which is aims at saving the life of the particular person who consciously refuses to take food. As the Court has previously established, it is essential that a medical necessity exists and that each decision, for example force-feed, is accompanied by procedural guarantees which are complied with²⁵. In *Jalloh v. Germany* the Court reiterated that Articles 3 and 8 of the European Convention on Human Rights do not as such prohibit medical actions without consent in order for criminal evidence to be

²³ Application no. 54810/00.

²⁴ *Herczegfalvy v. Austria*, judgement of 24 September 1992, Series A no. 244, §82.

²⁵ *Nevmerzhtsky v. Ukraine*, application no. 54825/00 §94.

obtained. Besides, in previous cases it has been decided that the taking of blood or saliva samples against a suspect's will in order to investigate an offence does not constitute a violation of the above Articles²⁶. Any recourse to a forcible medical intervention for the above-mentioned purposes must be convincingly justified on the facts of each case, especially when the evidence is retrieved from inside the individual's body. There should be strict scrutiny of all the surrounding circumstances and of the seriousness of the offence at issue, while the authorities shall take into consideration alternative methods of recovering the evidence and proceed in so careful a way, in order not to entail any risk of lasting detriment to the suspect's health. In addition, a minimum level of severity shall not be exceeded during the conduction of therapeutic purposes, and especially *account has to be taken whether the person concerned has experienced serious physical pain or suffering as a result of the forcible medical intervention*. In such cases the Court will take into consideration *whether the forcible medical actions was ordered and administered by medical doctors, whether the person concerned was under medical supervision and whether the medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health*²⁷. The Court concluded that the applicant was subjected to inhuman and degrading treatment, considering that the authorities interfered gravely with his physical and mental integrity against his will, and for not therapeutic reasons force him to regurgitate, while there existed other less intrusive methods, equally effective measures.

The case M.A.K. and R.K. v. the United Kingdom²⁸ concerned the medical examination of a nine-year old girl without her parents' consent. During the hospitalisation of R.K., the young girl, the paediatrician concluded that the bruising on the child's legs had been caused by physical abuse, and later on that the child had been sexually abused by her father, M.A.K. The Applicants, between others, alleged a violation of Article 8 of the European Convention on Human Rights because a blood sample and photographs of R.K. were taken without parental consent. The Court argued that the authorities, both medical and social, ought to protect children and to this extent cannot be held liable every time genuine and reasonably held concerns about the safety of children have ended up to have been

²⁶ X. v the Netherlands, no 8239/78, Commission decision of 4 December 1978 pp 187-189; Schmidt v Germany (dec), no. 32352/02.

²⁷ Ilijkov v. Bulgaria, no. 33977/96; Krastanov v. Bulgaria, no. 50222/99, §53.

²⁸ Application nos. 45901/05 and 40146/06.

misguided. However, since parental consent is a prerequisite of any medical intervention carried out on a child, the Court found a violation of Article 8 of the Convention, since there appears no justification for the decision to conduct a blood test and take intimate photographs of a young girl against the expressed will of her parents, while she was alone in the hospital.

In *Arskaya v. Ukraine*²⁹, the applicant's forty-two year old son was hospitalised for pneumonia and tuberculosis. During his hospitalization he refused in three occasions a bronchoscopy and was examined and diagnosed with a paranoid disorder. Despite the fact that the son's situation was deteriorating continuously, he rejected intramuscular injections and died in less than a month. The national authorities found that the son's death was a result of the patient's refusal to accept medical treatment, which was aggravating his condition. During the internal inquiry and disciplinary proceedings the Court found that one of the central issues in determining the validity of refusal to undergo medical treatment by a patient was the patient's decision-making capacity. The doctors did not examine the patient's capacity to understand, especially when his mental soundness had been questioned, and thus the appropriate legal procedures and procedural requirements were not met.

Another very crucial judgment of the Court is the *Petrova v. Latvia* case³⁰, which concerns organ transplantation without consent. The applicant's son was injured in a road traffic accident and was taken to a public hospital in Riga, where his situation deteriorated and he died. Nine months later, the applicant discovered that her son's kidneys and spleen had been removed for organ transplantation purposes immediately after his death, when Latvian law provided for the right of the person concerned and his or her closest relatives to express their wishes in relation to the removal of organs. The Court found a violation of Article 8 of the European Convention on Human Rights, as the applicant was not informed -let alone provided with any explanation- as to how and when her right to consent to her son's organ donation might have been exercised.

The *M.S. v. Croatia*³¹ concerns the case of a woman who visited her family doctor for a severe lower-back pain and ended up in being diagnosed with acute psychotic disorder and was prescribed hospitalisation. The woman was immediately, against

²⁹ Application no. 45076/05.

³⁰ Application no. 4605/05.

³¹ No. 2; Application no. 75450/12.

her will, admitted to a psychiatric clinic, where she was tied to a bed in an isolation room for one night. The applicant remained in the clinic for one month, while the legal-aid lawyer whom she was assigned never contacted her. The applicant complained that she was ill-treated during her hospitalisation and that had been unlawfully and unjustifiably detained in a hospital. The Court acknowledged the vulnerability of mentally-ill persons and underlined that the deprivation of liberty and the use of coercive measures against them ought to be justified by medical necessity and proportionality. Physicians ought to seek such measures as a last resort and apply them only in order to prevent harm to the patients and others.

The case of *Lambert and others v. France*³² concerns Vincent Lambert, a victim of a road traffic accident who had made no living will and given no instructions as regards life-sustaining treatment. The applicants (Vincent Lambert's parents, half-brother and sister) complained that the withdrawal of nutrition and hydration would violate Vincent Lambert's physical integrity. In order to decide upon whether an individual could act in the name and on behalf of a vulnerable person, the Court noted two prerequisites to be met. First, the existence of a risk that that the direct victim would be deprived of effective protection of his or her rights and second, the existence of a conflict between the patient and individuals. The Court noted the absence of a consensus among the Council of Europe member States in permitting the withdrawal of artificial life-sustaining treatment, although most of the States allow it. The Court granted States a wide margin of appreciation on permitting such a withdrawal and of arranging its procedure, guaranteeing the respect of the patient's rights to life, private life and personal autonomy.

In *Bataliny v. Russia*³³, the applicant was held at a psychiatric hospital for two weeks, alleging that he was not permitted to contact the outside world and that he was used for scientific research. The applicant alleged that he was treated with a new antipsychotic drug, unauthorised for sale. The Court emphasised that the testing of a new medication on a patient against his or her consent is unacceptable.

In *Juhnke v. Turkey*³⁴ the applicant complained that she was unlawfully detained due to her suspicion of membership of an illegal armed organisation, the PKK, and that she was subjected to ill-treatment and gynaecological examination against her will.

³² Application no. 46043/14.

³³ Application no. 10060/07.

³⁴ Application no. 52515/99.

Notwithstanding that the Court found unsubstantiated her complaint about the violation of Article 3, it highlighted that the applicant resisted the examination until persuaded to agree to it, and that she could not have been expected to indefinitely resist to have the examination, given her vulnerability as a detainee. The Court decided to speculate the case under Article 8 and found that there had been an interference with the applicant's private life, since she was enforced to undergo the examination without her free and informed consent. In particular, the Court deemed that she might have been misled into believing that the examination was compulsory. Neither did the Court find the intervention in accordance with the law, since it appeared that the examination served as a discretionary measure in order to protect members of the security from false accusations of sexual assault. Such a safeguard does not justify the persuasion of a detainee to agree to an interference with her physical integrity, when she herself did not complain of having been sexually assaulted. Hence, the Court decided that there had been a violation of Article 8 of the European Convention on Human Rights, for the applicant's refusal to consent was not respected.

Similarly, in *Salmanoğlu and Polattaş v. Turkey*³⁵ the applicants were arrested during a police operation against the PKK. Between others, the applicants, who were 16 and 19 in age, alleged that during their police custody they had been subjected to ill-treatment, and in specific sexual abuse and rape. The Court observed that the virginity tests to which the applicants were subjected were not proved to be based on and be in compliance with any statutory or other legal requirement. Even though the Government submitted that the applicants had consented to the tests, there did not exist any evidence of any written consent. The Court stated that *"in assessing the validity of the purported consent, the Court cannot overlook the fact that the first applicant was only sixteen years old at the material time."* Like in the previously mentioned case, the Court did not discern any medical or legal necessity justifying so intrusive an examination, especially when the applicants had not complained of sexual assaults. The Court found an interference with the applicant's right to private life under Article 8 of the European Convention on Human Rights, considering the sensitive nature of the medical procedure in question.

³⁵Application no. 15828/03.

In the case of *Konovalova v. Russia*³⁶, the applicant who was pregnant, objected to the presence of medical students during the delivery. Her claims before the national courts about the non-authorised presence of medical students during the birth was not successful, since, between others, the national law did not require the written consent of a patient for her inclusion to the teaching program. The Court found that the presence of the medical students lacked the requirement of lawfulness of Article 8§2 of the Convention, for the domestic law lacked sufficient procedural safeguards against arbitrary interference with the applicant's right to private life. A booklet which contained "*a rather vague reference to... the study process*" does not appear to be adequate, while patient's capability to make decisions shortly before and during the birth is dubious.

In *V.C. v. Slovakia*³⁷ the applicant was a roma woman who was sterilised during the delivery of her child without her full and informed consent. The Court noted that sterilisation constitutes a medical actions that consist a major interference with a person's reproductive health status and requires informed consent when the patient is an adult of sound mind, for it involves numerous aspects of personal integrity. The applicant was not found to have been fully informed about her health statues and the proposed medical action or its alternatives. The Court judged that there had been a violation of Article 8, since Slovakia failed to fulfill its positive obligation and provide legal safeguards during the applicant's sterilisation.

*N.B. v. Slovakia*³⁸ also concerns the sterilisation of a Roma woman during the delivery of her child. Yet, in this case legal representatives were absent during the delivery and there appeared a hospital file which contained an entry with typed information signed by the applicant that she herself had requested the sterilisation procedure. Her request was ex post facto approved by a sterilisation commission, on the grounds that the measure was necessary for her health. The woman denied signing a request of sterilisation, confirming that she signed some papers during her delivery but was unable to read the documents herself. The Court reiterated that roma women in Slovakia "*had been at particular risk due to a number of shortcomings in domestic law and practice at the relevant time*" and found a violation of her right

³⁶Application no. 37873/04.

³⁷ Application no. 18968/07.

³⁸ Application no. 29518/10.

under Article 8 of the European Convention on Human Rights, since no legal conditions and effective legal safeguards were met during the sterilisation.

In *Hoffmann v. Austria*³⁹, the applicant, a mother of two, alleged a violation of her rights under Articles 8 and 14 of the European Convention on Human Rights, complaining that the Austrian Supreme Court had awarded the parental rights of the children to their father in preference to herself, because she was a member of the religious community of Jehovah's Witnesses. In awarding parental rights the Innsbruck District Court and Regional Court considered, between others, the opposition of the Jehovah's Witnesses to the administration of blood transfusions. In detail, the Austrian Court considered the upbringing and care of the children, acknowledging that the mother, due to her religion, would refuse to consent to so critical a medical action which might prove catalytic for the survival of the children in a case of emergency. The European Court of Human Rights decided that there is indeed a violation of Articles 8 and 14 of the European Convention on Human Rights. In *Glass v. the United Kingdom*⁴⁰ the European Court of Human Rights was called upon to judge the unauthorised medical treatment of a severely mentally and psychologically disabled child. The applicants alleged a violation of Article 8 of the European Convention on Human Rights, claiming that the decision to administer diamorphine to the child against the mother's wish and to place a "do not resuscitate" notice in the patient's notes without the mother's knowledge interfered with the child's right to physical and moral integrity. The European Court of Human Rights decided that the mother of the child had the authority to act on his behalf and to defend his interests and that the mother's objections to the administration of diamorphine were overridden, despite her continuous opposition. The Court decided that the imposition of treatment in defiance of the mother's objections constituted an interference with the child's right to physical integrity. The Court considered that the clinical judgment of the doctors was intended to serve the interests of the child, yet no emergency situation occurred. In addition, it rejected the Government's contention that the mother had consented to the use of diamorphine in light of the previous discussions she had with the doctor. The Court highlighted that the discussions concerned the administration of morphine, and thus it cannot be stated that any consent given was free, express and informed. Especially considering that

³⁹ Application no. 12875/87.

⁴⁰ Application no. 61827/00.

the mother withdrew her consent at a later stage, the Court decided that the opinion of the mother should have been respected and the doctors should not have engaged in rather insensitive attempts to overcome her opposition.

E. Conclusion

To conclude, the principle of informed consent appears to be a complex idea, which if not safeguarded with precision and lawfulness in domestic legislation, could lead to serious violations of a person's private life.

Today, there exists many pending cases on the European Court of Human Rights, which is continuously called to judge cases with serious bioethical concern. In the pending cases of *V.P. v. Estonia*⁴¹ and *Maria da Glória Fernandes de Oliveira v. Portugal*⁴², the Court is called to rule upon the hospital's failure to prevent a patient with mental disorder and suicidal ideation from committing suicide, when any effective provisions for the assessment of the person's capacity to exercise his or her will were absent. In the case of *Sablina and Others v. Russia*⁴³ the Court will rule upon the applicants' complaint that they were not allowed to express their opinion on the extraction of organs from their relative's bodies.

One of the most heated debates of today's society, which is directly linked to the principle of informed consent, is compulsory vaccination. Vaccines are one of the greatest achievements in the history of public health, having been credited for saving millions of lives across the globe⁴⁴. The World Health Organisation has long spoken out on the behalf of the safety of vaccines, leaving no room for doubt as to their vastly positive effect⁴⁵. Yet, a newfound wave of anti-vaccination movements has been on the rise in recent years under the guise of religious objections. Subsequently, questions have arisen as to whether mind should be paid to such claims and, predominantly, as to the circumstances under which religious freedom and the right to parental control can and ought to be restricted when they pose a

⁴¹ Application no. 14185/14.

⁴² Application no. 78103/14.

⁴³ Application no. 4460/16.

⁴⁴NCBI, Vaccines for the 21st century, *EMBO Mol Med.* 2014 June. available at <https://www.unicef.org/immunization/>

⁴⁵ WHO, Questions and answers on immunization and vaccine safety, March 2017, available at <http://www.who.int/features/qa/84/en/>

threat to the protection of health. This ought to be examined in light of the fact that the most effective way to reduce vaccine-preventable diseases is to have a highly immune population⁴⁶. With vaccines constituting the most crucial and critical part of today's quality health care, an intrinsic obligation the State carries irrespective of short-lived trends in public opinion, weight ought to be visibly given to the greater good. Bearing in mind the increasing anti-vaccination movement across the globe and the growing reluctance of individuals to immunise themselves or their children because of their religious and philosophical convictions, the Court is expected to properly balance the conflicting interests in the pending cases of *Vavříčka v. Czech Republic*⁴⁷, *Novotná v. Czech Republic*⁴⁸, *Horných v. Czech Republic*⁴⁹, *Brožík v. Czech Republic*⁵⁰, *Dubský v. Czech Republic*⁵¹ and *Skerlevska v. "the former Yugoslav Republic of Macedonia"*⁵² (no. 54372/15).

Lastly, it is worth mentioning a short criticism on the greek jurisprudence concerning the application of the above-mentioned principles. Examining the greek bioethical case-law, one can discern the common practice of the greek judges to invoke the principle of the "reasonable, responsible and prudent man" in order to decide upon a the nature of a medical action. Yet, given that there exist numerous legal conventions and treaties at both a European and greek level, as mentioned above, it is not justified to rely on this principle in order to decide upon such a crucial and sufficiently legislated issue, since this principle is characterised by its vagueness, uncertainty and subjectiveness, as it could be interpreted in different ways, depending on the cultural, educational, and personal characteristics and experiences of each judge. Hence, it is not a principle which can guarantee legal safety and justice in the present cases, when all aspects of the conduction of medical actions are regulated. In addition, apart from the fallacy of the greek judges to base their legal thoughts on this general legal principle, the judges appear to invoke only the European Convention on Human Rights and Biomedicine and not the greek legislation that has adapted the Oviedo Convention and has regulated the aspects of

⁴⁶Centers for Disease Control (CDC), "General Recommendations on Immunization: Recommendations of the Advisory Committee on Immunization Practices", *Morbidity and Mortality Weekly Report*.

⁴⁷ Application no. 47621/13.

⁴⁸ Application no. 3867/14.

⁴⁹ Application no. 73094/14.

⁵⁰ Application no. 19306/15.

⁵¹ Application no.19298/15.

⁵² Application no. 54372/15.

medical actions in a more comprehensive and detailed way, which offers higher protection to any person involved.

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