LEGAL AVENUES TO TACKLE INVOLUNTARY STERILIZATION OF ROMA WOMEN IN CENTRAL-EASTERN EUROPE

By

Emma Várnagy

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Supervisor: Professor Judit Sándor

ABSTRACT

Involuntary sterilization of Roma women in the Czech Republic, Hungary and Slovakia are a remain of a particular social policy of the Socialist era and a manifestation of systemic bias against women of this ethnic group. The thesis focuses on cases arising from the early 2000's and examines possible legal avenues – civil, criminal and international – from the point of view of their effectiveness in stopping the human rights violation and fostering attitudinal changes in the society. The analysis draws from the experience of attorneys representing the cases at domestic and international courts and academic literature regarding the law and practice of the European Court of Human Rights in anti-Roma violence cases.

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List of Abbreviations

CAT – Convention/Commission Against Torture

CEDAW – Convention/Commission on the Elimination of All Forms of Discrimination Against Women

CERD – Convention/Commission on the Elimination of Racial Discrimination

ECHR – European Convention of Human Rights

ECtHR – European Court of Human Rights

ERRC – European Roma Rights Centre

FIGO – International Federation of Gynaecology and Obstetrics

IACtHR – Inter American Court of Human Rights

ICESCR – International Covenant on Economic Social and Cultural Rights

ICCPR – International Covenant on Civil and Political Rights

NEKI – Legal Defence Bureau for National and Ethnic Minorities

Poradňa - The Centre for Civil and Human Rights (Poradňa pre občianske a ľudské práva)

WHO – World Health Organization

Introduction

Involuntary sterilizations of Roma women in Czechoslovakia have been a government backed practice in the socialist era, and were also not uncommon in other Central-Eastern European countries like Hungary, under the cynical pretext that decreasing the population of a certain societal group will thus decrease the social and economic problems associated with it.[1] An estimated 90.000 Roma women have been sterilized in hospitals without their knowledge between the 1960's and 1990 in the Czech Republic alone.[2] With the regime change, the ideology disappeared from the social policy agenda, however, the same doctors kept following the same practice. Complaints arising in the Czech Republic and the forthcoming entry of Slovakia into the European Union in 2004 triggered an in-depth fact finding mission concerning the practice of forced sterilization in Slovakia conducted with the collaboration of experts on reproductive and human rights.

The publication of their findings in the Body and Soul Report has invited great attention to this grave human rights violation and soon cases of women affected were taken to courts. The cases set off in both criminal and civil law directions, and subsequently a number of cases were heard by international human rights bodies, including the European Court of Human Rights. The judgments were followed by significant changes in legislation, especially in Slovakia, which greatly contribute to the prevention of further such practice. However, the litigation process in

[1] David M. Crowe, „The Roma in Post-Communist Eastern Europe: Questions of Ethnic Conflict and Ethnic Peace" *Nationalities Papers*, 36, no. 3 (2008): 522

[2] Gaya Stoyanova „Forced Sterilization of Romani Women – A Persisting Human Rights Violation" *Romedia Foundation*. February 7, 2013, https://romediafoundation.wordpress.com/2013/02/07/forced-sterilization-of-romani-women-a-persisting-human-rights-violation/ (accessed: February 18, 2016)

either direction were difficult and often problematic, which particularities of each procedural level and strategy I will analyze in my thesis.

Relying on interviews with attorneys who represented the cases of coercively sterilized Roma women at courts, I will explore the question whether the criminal or civil law avenue seems more advantageous from a point of view of facilitating social and attitudinal change. Even though it seems that the criminal cases were eventually unsuccessful at domestic courts, I will argue that the strongest message would have been the communication of the criminal liability and conviction of health care providers who committed the violations.

Another problematic which arises from the cases is the lack of addressing their discriminative nature. Relying on Mathias Möshel and Ruth Rubio-Marín's[3] theses on the reluctance of the European Court to find substantive Article 14 violations in anti-Roma violence cases and the idea of the Holocaust Prism, I will explore the phenomenon and the results of advocacy concerning this issue.

The structure of the thesis is divided into four parts, the first part explains the background and origin of the cases, the methodology of the interviews and an overview of the organizations involved in the litigation process. The following parts focus on the specificities of the civil law, criminal law and international human rights law procedures and the questions arising respectively.

[3] Ruth Rubion-Marin and Mathias Möschel, „Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism" *European Journal of International Law*, 26, no. 4 (2015): 881-899.

Chapter One – Background and Context of Cases

The relevance of examining forced sterilization cases is not only important because of the cases which are still pending since the early 2000's, but because such a practice was and is one of the ways in which deep-rooted, systemic racism manifests in our societies, which is in itself a grave human rights violation. I intend an important message to this thesis, which is that institutionally embedded bias cannot be changed through mere legislative acts, only with strong political will. In this chapter, I will give a brief overview of the prevailing societal attitudes towards Roma people in general and explain the choice of jurisdictions. Then, relying on the Body and Soul Report, which is the outcome of a fact-finding mission concerning the practice of coercive sterilizations in Slovakia, I will outline the trends investigated, and identify the violations committed, which led to the trials of the cases that will be examined in the following chapters. Finally, I will introduce the institutions which represented the cases and give a brief summary of the methodology I applied in my research.

Section 1.1 – Historic and contemporary attitudes towards Roma

Roma have been subject to persecution since short after their arrival in Europe as evident from dozens of medieval documents, which attest taking away children from their families, other forms of forced assimilation and killing of vagrants.[4] Closer to our time in history, Roma were also considered inferior by the Nazi regime and thus were subject to the law of July 1933 permitting forced sterilization of Roma women among Jews and disabled people, their

[4] Dimitrina Petrova, "The Roma: Between a Myth and the Future," *Social Research: An International Quarterly* 70 (1) (2003):5-7.

internment and eventually their extermination.[5] Discrimination continued after the end of the war and under the communist regime in Eastern Europe. Roma were not considered a national minority but a problematic social group, target of harsh governmental policies to assimilate them into the mainstream society by repressing their language and culture and attempts to cure their "unhealthy lifestyle".[6] In the 1970's Czechoslovakia there was a government policy of awarding monetary incentives for voluntary sterilization in the whole society. While nothing in the 1972 Sterilization Regulation refers specifically to Roma women, the legislation through its application became racialized, because of the tremendous racism against this ethnic group. While white women generally received an amount as high as a year's salary, Roma women's accounts imply that they agreed to the procedure under pressure from the authorities, had given misinformed consent, or simply were unaware of their sterilization which had been performed during their child delivery.[7] A significant increase in the number of operations in hospitals serving near large settlements is noticeable in the 1980's, as well as an outstandingly high 60% of the operations performed on Roma women in a region where they represented only 7% of the population.[8] Although the government backing of the sterilization policy disappeared with the fall of the regime, and human rights activist have brought cases to the authorities' attention, the claims have been dismissed, the doctors remained in office and post-communist governments have not done significant inquiries into the matter, nor have they condemned the practice.[9] It was not until the strict application process of the enlargement of the European

[5] The Center for Reproductive Rights and Poradna pre obcianske a ludské práva, "*Body and Soul – Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia"* (2003), 1-140: 41.
[6] Human Rights Watch, "*Struggling for Ethnic Identity – Czechoslovakia's Endangered Gypsies*," (1992), 1-153:9.
[7] Body and Soul, 43.
[8] Ibid.
[9] Ibid, 45.

Union in the early 2000's that a change in political attitudes occurred to demonstrate commitment to the rule of law, human rights and minority protection.[10]

Roma today constitute the biggest ethnic minority group in Central Eastern Europe, though reliable data concerning the exact numbers of the Roma population do not exist due to various reasons.[11] On the one hand, the obstacles are a set of legal rules, including data protection laws, on the other hand, it is a marginalized group's natural response to be reluctant to reveal their identity to authorities towards whom they have little trust. The last census in the region took place in 2011, which indicated that in the Czech Republic the percentage of Roma population is around 1.3%, in Hungary it is 3.2% and around 2% in Slovakia, whereas the European Roma Rights Centre estimates that the ratio is as high as 5-10%.[12] Roma live in significantly worse conditions than the average population in all three countries examined, including income, education and health. In Slovakia, at the time of the census, roughly half of the Roma population lived in segregated areas, and the poorest lived in settlements, which often lack water and electricity.[13] The life expectancy of Roma is thus significantly lower than the national average.[14] Combined with high birth rates, the Roma population is remarkably young within the aging European population, a demographic fact often fuelling the racist fear that Roma will outnumber the population and overtake the country.[15]

Discrimination against Roma take various forms, but is very significant in education, where the operation of segregated classes has been repeatedly condemned by human rights bodies,

[10] Ibid, 38.
[11] Petrova, „The Roma: Between a Myth and the Future," 112.
[12] Ibid, 113.
[13] Arno Tanner, "The Roma of Eastern Europe: Still Searching for Inclusion" *Migration Policy Institute*, 1 May, 2005 available: http://www.migrationpolicy.org/article/roma-eastern-europe-still-searching-inclusion (accessed: 4 August, 2016).
[14] Body and Soul, 39.
[15] Ibid, 46.

and in employment, where in some segregated regions in Slovakia, the unemployment rates are close to 100%.[16] Hate crimes are common against Roma, with the most extreme case of a serial killing of six innocent people, including a five-year-old boy, in their homes in North-East Hungary between 2008 and 2009. Degrading treatment and the use of demeaning language is not alien from authorities, public officials have allowed themselves to make inflammatory racist statements regarding the Roma at various instances.[17] Human and minority rights organizations address all of the above areas, and work really hard through advocacy, legal aid and trainings to make the lives of Roma people easier and attitudes of society and decision makers more accepting. Later on in the thesis I will include the experience and opinion of experts working in various organizations contributing to Roma rights protection. Here stands a brief summary which represents the shared idea of the attorney whom I talked to in the course of my research. *"In the past 8-10 years, racism has really become mainstream in Hungary, and not only here but everywhere in Europe. Of course, stereotypes were always present, but I think it is recent that it goes so deep in the media and becomes a part of the political agenda in such an extreme way that anyone feels free to be openly racist without fear of consequences.*"[18] These general negative attitudes manifest also in stereotypes regarding Roma women's fertility, sexual appetite, the perception of their poor maternal abilities and the agenda to have too many children in order to obtain more social benefits.[19] Another attorney, when asked to describe general attitudes towards Roma highlights that "*especially Roma women face discrimination based on their ethnicity but also their gender.*"[20] Health care providers also bear

[16] Ibid, 40.
[17] Ibid.
[18] Attorney of ERRC, "*Comparative Analysis of Legal Avenues to Tackle Involuntary Sterilization of Roma Women in Central-Eastern Europe*" Interview by Emma Várnagy, 17 March 2016. (translation by the author)
[19] Body and Soul, 54.
[20] Attorney of Poradna, "*Comparative Analysis of Legal Avenues to Tackle Involuntary Sterilization of Roma Women in Central-Eastern Europe*" Interview by Emma Várnagy, 29 April 2016.

these stereotypes, which lead to various forms of discrimination against Roma women in the health care system, ultimately their sterilization. In 2002 researchers initiated the investigation of such alleged practice, their findings leading to the exposition of a much deeper problem.

Section 1.2 - The findings of the Body and Soul Report

The Body and Soul Report was published as the outcome of a fact-finding mission in cooperation between the Centre for Reproductive Rights, independent minority rights experts and a Slovak NGO called The Centre for Civil and Human Rights (Poradňa pre občianske a ľudské práva, *hereinafter Poradna*). In the course of a three-months interview period, researchers recorded interviews with 230 Roma women, over 40 health care providers and government officials and uncovered a range of human rights violations interconnected with forced sterilization.[21] The methodology of the research was carefully designated to identify potential victims of sterilization and to interview them individually and in groups. As a control group, focus group interviews were conducted with non-Romani women,[22] so their experience on reproductive rights and health care, as well as their perception of the treatment of Romani women in hospitals could be compared to that of Roma women's accounts. In addition, the research team visited over 10 hospitals and talked to lawyers expert on medical malpractice claims.[23] Of the 230 women interviewed, 140 have been sterilized; 30 women underwent the procedure in the communist era, and the remaining 110 were sterilized since the end of the policy encouraging the practice.[24]

Based on the interviews conducted by the Body and Soul research group, a general trend can be recognized, that the sterilization is performed as part of a Caesarian delivery, a style which

[21] Body and Soul, 33.
[22] Ibid, 34.
[23] Ibid.
[24] Ibid.

is disproportionately recommended to Roma women.[25] Even though international medical standards, already at that time, clearly expressed the contrary, Slovak doctors seemed to justify the necessity of sterilization under the pretext that multiple C-sections will jeopardize the safety of a prospective pregnancy, and that vaginal birth after having a C-section is not recommended, as it may cause ruptures on the scar from the previous operation.[26] The most common form of surgical sterilization is tubal ligation, which means the closing of the fallopian tubes. It is considered an irreversible procedure because reversal is very difficult, costly and the outcome of the operation is uncertain.[27] According to the 1972 Sterilization Regulation the first requirement for a sterilization procedure is the patient's informed consent. Some countries enforce a waiting period as long as several weeks between the request and the scheduled surgery, to make sure the patient is deliberate about the choice of sterilization and to avoid the possibility of combining sterilization with another surgery for convenience alone.[28] The law also indicates reasons for requesting sterilization, among which multiple C-section deliveries is one in Slovakia, however this fact does not constitute an exemption under the informed consent requirement. The violation of this requirement ranges from failure to provide adequate information to forced sterilization. About forty interviewees in the Body and Soul Report say they have been coerced by hospital staff into signing a consent form just before their Caesarian delivery started. Twenty-five women accounted of discovering about their sterilization only after their release from the hospital, and over fifty women strongly suspect they underwent the procedure without their knowledge and consent.[29]

[25] Ibid, 57.
[26] Ibid, 50-52.
[27] Ibid, 51.
[28] Ibid, 52.
[29] Ibid, 57.

To coerce women into signing a consent form, doctors often exaggerate health risks. Many women have been told that they or their baby would die during the course of the next pregnancy (reference to other forms of contraception have not been made) unless they sign the papers handed to them on the delivery table, shortly before the operation, when they were in pain from the labor, or under the influence of strong medication.[30] Another scenario of coercively obtaining consent is that the doctors simply do not explain the medical terms they use in a way that is understandable to the patient.[31] In some cases the women cannot read or are not fluent speakers of the majority language. Some women are asked to retroactively sign the consent form, again receiving a vague or exaggerated description of health risks, or they are not notified at all,[32] in which case the sterilization is considered forceful. The women who suspect that sterilization has been performed on them experience serious side effects as a result, which include pain, irregular bleeding and infections, as well as depression because of their perceived deteriorated status in their communities, where fertility is of great importance.

In their accounts, Roma women have reported a range of other serious human rights violations. The most widespread practice is forcing the women into segregated maternity wards and other hospital facilities such as bathrooms and cafeteria. The justification for the segregation varies from hospital to hospital, some say women are categorized as "low hygiene" or "high hygiene"[33] but admit to the fact of segregation based on these categories, saying it is the wish of Roma women to be placed in one room, so much so that they will even share a bed with each other, in order to be together in one room.[34] Discrimination in providing care is also common. Interviewed women experienced ill-treatment and neglect and even denial of care.

[30] Ibid, 59-61.
[31] Ibid, 62.
[32] Ibid, 65.
[33] Ibid, 77.
[34] Ibid, 78.

On several occasions women were told to deliver their babies alone, because 'they have done it so many times, they should know how to do it.'[35] Emergency operators often refuse to send ambulance cars to settlements, when they do, the cars either take too long to arrive or the paramedics ask for money, whereas the service should be free.[36] Some women encountered physical abuse, such as hitting from doctors[37] but the most chronic manifestation of systemic bias is verbal abuse. Researchers experienced that hospital staff are not shy to undertake their racist views even in the interviews. Non-Roma women's accounts also revealed the deep rooted stereotyping and hostile attitudes towards Roma in hospitals. The endurance of such bad experience drives women to leave the hospitals after giving birth earlier than required, sometimes on the request of hospital staff. In Slovakia, there is a piece of legislation that the mother of a newborn is entitled to certain benefits, however, should she leave the hospital without a doctor's permission, she will not receive the benefits. This law, and the practice of doctors to tell Roma patients to leave is also a serious form of indirect discrimination.[38] Another problem which emerged during the course of the research was the denial of access to medical files. Patients and lawyers were both refused to look into their files due to various vague claims of hospital staff. Cases which will be discussed in detail shortly concern both the inhuman and degrading treatment endured by women in hospitals on account of their unlawful sterilization, and the denial of access to medical files.

Even though there has not been such comprehensive examination of the trends, the cases from the Czech Republic and Hungary follow a very similar pattern to what has been described in detail above regarding Slovakia, as it is evident from the facts of the cases submitted to courts in these countries. After the publication of the Body and Soul Report, Poradna decided to start

[35] Ibid, 79-80.
[36] Ibid, 80.
[37] Ibid, 83.
[38] Attorney of Poradna, 29 April 2016

litigation in cases where the evidence was strong and women agreed to take their cases to court. Ex officio criminal investigations also followed the publication of the report in Slovakia. In the Czech Republic the litigation process resulted in friendly settlements, the government has recently expressed regret over the illegal sterilizations and on the recommendation of the ombudsman, many women were and are to be awarded compensation.[39] In Hungary there have only been three cases known to lawyers, two of which resulted in lawsuits. It is worth to examine them however, because it is one of the Hungarian cases that was overviewed by the Committee on the Elimination of Discrimination Against Women, which is interesting to compare to the jurisdiction of the European Court of Human Rights. The other Hungarian case was decided by the Court as recently as June 2015, which gives a unique opportunity to look at over ten years of case-law evolution in the topic.

Section 1.3 – Methodology of interviews

This thesis draws on the evidence of altogether seven cases from the Czech Republic, Hungary and Slovakia which have been subsequently decided by an international human rights body. I have contacted the organizations representing the cases and talked to their legal teams. I have conducted four interviews with the attorneys of an average length of one hour each. Besides talking about general attitudes towards Roma women in the respective countries, the questions of the interview focused on three main areas, the civil law, criminal law and international human rights law avenues, specific to forced sterilization and discrimination cases.[40] The interview style was half-structured, which means that there were questions prepared ahead of the interview that gave the general framework for the conversation, but also allowed the

[39] Gwendolyn Albert, „Czech Republic: Hundreds of illegally sterilized victims will probably be compensated," *Romea.cz*, 14 January 2015, available: http://www.romea.cz/en/news/czech/czech-republic-hundreds-of-illegally-sterilized-women-will-probably-be-compensated (accessed: 5 August 2016).
[40] See the interview questionnaire in the Appendices.

interviewee to freely decide which topics to emphasize and even to talk about subjects not specific to the question being discussed.

Two of the attorneys have been working with their organizations for over ten years, which means they have experience with several cases. Both of them immediately started working on sterilization cases because at the time of their start the publication of the Body and Soul Report on the one hand, and the advocacy phase of the A.S. case drew significant attention to the topic of reproductive rights. One of the attorneys has left the organization which represented the client and is since working with another organization that focuses specifically on reproductive rights and advocacy.

All three organizations have a special focus on Roma rights, their main areas of protection beyond women's and reproductive rights are access to housing, prevention of police brutality, monitoring and access to justice, children's rights and education, and prevention of discrimination in employment and services. They provide legal representation and conduct strategic litigation, domestic and Europe-wide advocacy.

A.S. v Hungary Communication No. 4/2004	CEDAW	NEKI[41] and ERRC	Violation of **article 10 (h) 12** and **16 §1(e)**	29 August 2006
Ferenczikova v The Czech Republic Application no. 21826/10	ECtHR	LIGA[42] and ERRC	Friendly settlement	1 September 2010
G.H. v Hungary Application no. 54041/14	ECtHR	ERRC	Inadmissible	9 June 2015
I.G. and Others v Slovakia Application no. 15966/04	ECtHR	Poradna Prava	Violation of **Article 3** and **Article 8**	13 November 2012
K.H. and Others v Slovakia Application no. 32881/04	ECtHR	Poradna Prava	Violation of **Article 6** and **Article 8**	28 April 2009
N.B. v Slovakia Application no. 29518/10	ECtHR	Poradna Prava	Violation of **Article 3**, and **Article 8**	12 June 2012
V.C. v Slovakia Application no. 18968/07	ECtHR	Poradna Prava	Substantive violation of **Article 3**, violation of **Article 8**	8 November 2011

Table 1 - Summary of cases

Table 1 above gives an overview of the cases which will be analyzed in this thesis. These are all the cases that have reached an international human rights body, namely the CEDAW Committee or the European Court of Human Rights. The jurisprudence of these international

[41] Nemzeti és Etnikai Kisebbségi Jogvédő Iroda (Legal Defence Bureau for National and Ethnic Minorities) Hugarian NGO
[42] Leagues of Human Rights (Liga lidských práv) Czech NGO

bodies will be discussed in Chapter Four. Here I will highlight some of the most important details of the cases before going into their more detailed analysis in the following chapters.

Section 1.4 – Overview of cases

In the jurisprudence of the ECtHR the case of *V.C. v Slovakia*[43] is the leading authority, meaning that the following similar cases strongly relied upon the judgment issued in that case. As evident from the findings of the Body and Soul Report, the cases follow a very similar trend: the women have been sterilized either coercively or forcibly after their C-section delivery. In the case of V.C., the applicant was accommodated in a segregated room in Prešov Hospital, the words "Patient is of Roma origin" appeared on her medical file, and she was made to sign papers shortly before going under anesthetics.[44] N.B. from *N.B. v Slovakia*[45], an underage woman, has been sterilized in Gelnica Hospital, and only learned about her sterilization when a lawyer reviewed her medical files, which revealed that the hospital's sterilization committee approved the request ex post facto. She was accommodated in a segregated room and experienced inferior treatment from hospital staff.[46] Applicants of the case *I.G and Others v Slovakia*[47] I.G. and M.K. were both underage at the time of their sterilization, which they learnt about only years later, when they reviewed their files. The third applicant, R.H., who was not underage, was coerced into signing a consent form. All three women were accommodated in a segregated room in Krompachy Hospital, and M.K. experienced verbal abuse.[48] The aforementioned two cases were filed after a suit against Krompachy and Prešov Hospitals (subsequently reaching the ECtHR in the case of *K.H. and*

[43] *V.C. v Slovakia*, Application no. 18968/07, Judgment of 8 November 2011.
[44] Ibid, §§ 13-18.
[45] *N.B. v Slovakia*, Application no. 29518/10, Judgment of 12 June 2012.
[46] Ibid, §§ 8-19
[47] *I.G. and Others v Slovakia*, Application no. 15966/04, Judgment of 13 November 2012.
[48] Ibid, §§ 7-31.

Others v Slovakia[49]*)* which initially denied access to the medical files of women who suspected they had been sterilized and were assisted by Poradna lawyers after the fact-finding mission of the Body and Soul research project.

The Czech cases, though the facts are the same, have not resulted in a judgment on the merits by the ECtHR. The reason for this is that Czech authorities had a different approach to dealing with the cases. In the same timeframe when the Slovak lawsuits started, Czech victims of unlawful sterilization also filed complaints. In 2005 the Czech ombudsman issued a report in which the sterilizations weree found to be illegal and a range of recommendations are made to the government.[50] It was not until 2009 however, that the Government had expressed regret over the illegal sterilizations and heralded a plan for compensating victims.[51] The case of Ferencikova, which has reached the ECtHR because domestic courts dismissed her claims stating they were statute barred, was eventually stroke out after a friendly settlement of the parties.[52] "The friendly settlement procedure under the Convention – very much like an out of court settlement in national legislation – affords the parties an opportunity to resolve an issue, usually on payment to the applicant by the respondent Contracting Party of a specified sum of money or on the basis of an undertaking by the respondent Contracting Party to provide appropriate resolution of the issue, or both."[53]

[49] *K.H. and Others v Slovakia,* Application no. 32881/04, Judgment of 28 April 2009.
[50] OSCE, "The Sterilization Investigation in the Czech Republic" (2006):9.
[51] Gwendolyn Albert, „Czech Republic: Hundreds of illegally sterilized victims will probably be compensated."
[52] *Ferencikova v the Czech Republic*, Application no. 21826/10, Fifth Section Chamber, statement of facts on 1 September 2010.
[53] Alexander Morawa, Nicole Bürli, Peter Coenen and Laura Ausserladscheider Jonas „Article 3 of the European Convention on Human Rights – A Practitioner's Handbook" *OMTC Handbook Series,* Vol. 1, (2006): 193.

The case of A.S.[54] was discovered in the course of interviews conducted by ERRC and NEKI in Hungary as a result of the attention to the cases in Slovakia and the Czech Republic. "*There were signs that it was not only A. who was sterilized, but our office at that time could not find any other cases which could be litigated."*[55] The facts are similar to all of the above; the author[56] was taken to the operating theatre, within 17 minutes from her arrival to the hospital, to remove the embryo by Caesarian, which was found to be dead inside the womb. The author was in shock from the heavy bleeding when she was made to sign some forms, along with a hand-written statement by the doctor to request sterilization. It was only when she left the hospital several days later, that she learnt about the consequences of the procedure.[57] The sterilization of G.H. in *G.H. v Hungary*[58] occurred in 2008 well after the recommended legislative changes had been implemented by the Slovak and Czech governments and anti-discrimination legislations were in effect in Hungary.[59] The case is also outstanding from another point of view, the fact that the applicant herself is not Roma, which in the suit gives space to argue on the grounds of discrimination by association.

The attorneys in all cases stress that their clients fell victims to intersectional discrimination, which means the sterilization happened to them because they are Roma and also because they are women.

[54] A.S. v Hungary, Communication no. 4/2004 Communicated 12 February 2004.
[55] Attorney of NEKI, "*Comparative Analysis of Legal Avenues to Tackle Involuntary Sterilization of Roma Women in Central-Eastern Europe*" Interview by Emma Várnagy, 1 April 2016.
[56] The ECtHR and CEDAW jurisprudence uses different terms, respective applicant and author will be used accordingly.
[57] Supra, note 54 at §§ 2.1-2.3.
[58] *G.H v Hungary*, Application no.54041/14, Judgment of 9 June 2015.
[59] Anti-discrimination laws were passed in all three countries as a requirement of accession to the EU.

Chapter Two – Civil Law Mechanisms

Section 2.1 – Protected rights and levels of protection

Sterilization is a great interference with bodily integrity and human dignity, if done without the full and informed consent of the patient, carrying out the procedure violates many rights protected internationally and constitutionally. There are a range of international human rights instruments with effect to both the Czech Republic, Hungary and Slovakia, some of which have been in effect long before the states' accession to the European Union and some came as a requirement of membership. Duties flowing from most human rights instruments are twofold, first, a state has to protect and fulfill rights enshrined in the instrument by refraining from violations, second, a state has to take affirmative measures to prevent and protect violations by third parties. When signing and ratifying a human rights instrument, a state undertakes to amend its existing laws and enact new ones to harmonize the legal system with the principles and international standards enshrined in the treaty. The enforcement mechanisms for the treaties may differ, which will be explained in detail in Chapter Four.

	Czechoslovakia	**HU**	**CZ / SK**
ICCPR	1975	1997	1993
ICESCR	1975	1974	1993
CEDAW	1982	1980	1993
CERD	1986	1967	1993
CAT	1988	1987	1993
Genocide Convention	1950	1952	1993
Rome Statute on the ICC	-	2001	2009/2002
ECHR	-	1992	1992
Human Rights and Biomedicine	-	2002	2001/1998

Table 2 – Ratification and succession of relevant treaties

Article 1 (1) ICCPR and ICESCR provide all people with the right to self-determination. Article 7 ICCPR prohibits inhuman and degrading treatment and Article 17 prohibits arbitrary interference with privacy. Article 12 ICESCR recognizes the right to enjoy the highest level attainable of physical and mental health. Article 6 of the Convention Against Torture provides guidance on investigating allegations of ill-treatment. Article 5 (e) (iv) CERD expressly prohibits discrimination on grounds of race in medical and social services. These are just a few examples of the obligations of the states parties. The extent and level of protection in domestic law varies by jurisdiction. Some of the rights are protected at a constitutional level, which lays the foundation for the implementation of lower level protection. No matter the choice of jurisdiction, international complaint mechanisms generally require the exhaustion of domestic remedies. The present and the next chapter will describe strategies for building the cases for litigating forced sterilization cases and the history of the domestic proceedings in both civil and criminal law avenues.

The constitutions of the Czech Republic and Slovakia have been adopted in 1992. The Charter of Fundamental Rights and Freedoms forms a part of the Czech constitution by an amendment.[60] Both constitutions afford a right to health in Article 31 and Article 40 respectively. The right to family life is protected under Article 41 in the Slovak constitution, and while Article 32 (1) in the Czech constitution provides the same right, Article 32 (2) expresses the need for special protection of pregnant women. Both constitutions express the right to inherent dignity in Article 19 (1) in the Slovak and Article 10 in the Czech constitution. The protection of privacy and freedom from ill-treatment are provided in the same provision, Article 7 in the Czech and Article 16 in the Slovak constitution.[61] Both documents have a non-

[60] Constitutional act No. 2/1993 Coll. on the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic.
[61] Constitution of the Slovak Republic, 460/1992 Coll.

discrimination clause, Article 12 (2) of the Slovak and Article 3 (1) of the Czech constitution, which have been there before the enactment of express non-discrimination legislation. The situation is a bit different in the case of Hungary, as the constitution in effect at the time of the sterilization of A.S. and G.H. has since been replaced. The previous constitution provided the inherent right to dignity and prohibition of inhuman treatment in Article 54 (1).[62] Article 70/A (1) prohibited discrimination on grounds of inter alia race, gender, ethnicity, social origin or financial status. Article 66 (1) further expressed that men and women have the same rights and (2) provided right to special protection of pregnant women and mothers. The enjoyment of rights enshrined by the constitutions translates to provisions of the civil and criminal codes and various acts and regulations. The new constitution places more emphasis on human dignity, expresses the importance of its protection in the preamble as well as in Sections I and II, Section XV (2) - (5) declares men and women equal, lays down the protected grounds for discrimination and expresses the special protection of children, women, the elderly and disabled.[63]

Section 2.2 – Building the cases

In all three countries the litigation was preceded by fact-finding missions as a response to allegations of illegal sterilization practices. The governmental response and thus the litigation process, however, was somewhat different in the Czech Republic. A commission was established to help investigate the allegations, and the government gradually acknowledged their liability and became prone to settling the pending cases and develop a framework for compensating victims. Thus, the following analysis of litigation strategies will focus on Hungary and Slovakia.

[62] Act XXXI of 1989 on the amendment of the Constitution of Hungary.
[63] Act XX of 1949 on the Constitution of Hungary, as amended on 18 April 2011.

The representing organizations conduct strategic litigation. Some definitions suggest that strategic litigation means leaping from the individual client to achieve large social goals and policy change, when in fact these effects are only evident in retrospect.[64] Of course, the organizations, when taking up a case do so to support their advocacy efforts in the field, but based on the accounts of attorneys, the process is not to be imagined as a straightforward machinery. "*At the time when the » Body and Soul « report was issued, there was a huge attention from the media, and the huge pressure from the public put us in a quite difficult situation because sometimes women were afraid to initiate cases. Sometimes there was pressure from their communities and from their partners not to initiate, like 'you sue our doctors, we will have problems' so the perspectives from the women were also important for us*."[65] In the course of building the cases, Poradna organized regular support groups for women to allow them to talk freely and exchange their experience in a safe space, protected from the prejudice of the media and the stigmatization for their infertility by the Roma community. Another typical obstacle to starting a case was the general mistrust in courts in Slovakia, exacerbated by the understandable fact that marginalized communities, having encountered bad experience with authorities, are even less likely to reasonably hope for redress from the same organs. The women who finally decided to go through with the litigation had various motivations besides compensation. "*It seemed that her* [A.S.] *primary motivation was to have the authorities or a court acknowledge that she was not liable. She had this inside need to assure that it was not her fault to have lost her child and been sterilized. This motivation had lasted all the way through.*"[66] In this attorney's view, the fate of a case is primarily dependent

[64] Adam Weiss "What is Strategic Litigation?" *ERRC Blog*, 1 June 2015, available: http://www.errc.org/blog/what-is-strategic-litigation/62 (accessed: 22 August 2016).
[65] Attorney of Poradna, 29 April 2016.
[66] Attorney of NEKI, "*Comparative Analysis of Legal Avenues to Tackle Involuntary Sterilization of Roma Women in Central-Eastern Europe*" Interview by Emma Várnagy, 1 April 2016.

on how much a client is determined to see it through and whether her motivation lasts. It is of course very hard to see at the beginning how the passing of time and changing of circumstances would affect the enthusiasm of the client. The attorney of Poradna says the women who decided to start the process remained very strong throughout the years of litigation. "*Finally, I think we represented around 12 Roma women at Slovak courts as for civil proceedings and as for criminal I don't remember the exact number but it was around 6 women.* (…) *We believe it is only the tip of the iceberg and there are thousands of Roma women who have been forcibly sterilized in Slovakia*." As for the numbers in Hungary, it is difficult to say how many women are affected, because there has not been an extensive research on sterilization. Interviews conducted for different purposes suggest that it is a substantive issue, but the extent to which it affects the population is impossible to estimate. On the one hand, a recent non-representative study shows that sterilization rarely comes up when Roma women are asked about their experience in health and child care system. Verbal and physical abuse, denial of proper care seem to be common, but sterilizations do not seem to be widespread.[67] On the other hand, an earlier study based on interviews with health care providers reveals that tubal ligation as a method of birth control is very problematic because of the wording of the laws in force. However, it is not a violation of the regulation to sterilize a patient after her third C-section operation, it appears from the account of a midwife that it is done automatically then.[68] There have been three cases of coercive sterilization discovered in Hungary, two of which resulted in lawsuits. "*In sterilization cases we [at ERRC] had individual suits, but as opposed to the Czech and Slovak cases, we focused on 'access to justice' claiming that the victims had not received*

[67] Születésház Egyesület „Roma nők helyzete és lehetőségei a szülészeti ellátásban" (The situation and prospects of Roma women in maternal care. Translation of the author.) (2016):12-13.

[68] Neményi Mária „Cigány anyák az egészségügyben" (Gypsy mothers in health care. Translation by the author.) Nemzeti és Etnikai Kisebbségi Hivatal, (1997):13.

effective compensation."[69] In Slovakia the cases were submitted as health damages and interference with personal dignity. The civil cases in both countries followed a general scenario: "*we look at the medical records with a medical professional to see what happened, and then we write the petition, of course in communication with the client. It is an ethical question that we usually offer a friendly settlement, we say this and this happened and we claim this and this amount of compensation, but the hospitals hardly take it. This is when the action starts. If the court accepts the petition a hearing date is set, the other party receives the petition and can react in writing, so this is a long process.*"[70]

Section 2.3 – Summary of civil proceedings

The cases at domestic courts were centered around the lack of informed consent and the coercive way consent was occasionally obtained. "*Most of the cases boil down to the fact that the women concerned do not know what happened to them. A. [being illiterate] put an X on a piece of paper, but she had no idea what it was, so this is clearly an informed consent case.*"[71] The claims were brought in cases where "*we had the most valuable evidence, meaning that there was clear evidence in the medical file that sterilization had been performed, and there was for example, a case in which the signature was obtained form the woman one hour before the delivery was terminated by Caesarian section. But all of the cases were a little bit different, some included minors, this is where there was no consent at all, and different cases came from different hospitals."*[72] The three cases from Slovakia, which were eventually heard by the ECtHR, came from three different hospitals, Prešov, Gelnica and Krompachy.

[69] Attorney of ERRC, 17 March 2016.
[70] Ibid.
[71] Attorney of NEKI, 1 April 2016.
[72] Attorney of Poradna, 29 April 2016.

	V.C.	N.B.	I.G.	M.K.	R.H.	K.H.	A.S.	G.H.
Claims	Art. 11 Civ Code, Art. 13 damages	Art. 420 and 444 Civ Code, and ECHR, Arts. 3, 8, 12	Articles 420 and 444 of the Civil Code		Procedure discontinued upon plaintiff's death	Constitution Art. 127 (and ECHR Art. 6 and 8)	Article 187 § 4 (a) 1997 Health Care Act damages for negligence	Focus on damages
District Court	Dismissed: claims amount only to failure of the 1972 Regulation	Dismissed: life-saving operation, consent not needed	Rejected: statute barred (decision quashed by appeal)	Dismissed: not entitled to damages		Ordered permission to consult the records and make handwritten excerpts	Rejected: conditions for sterilization were met	Absence of consent gives rise to 3000 EUR compensation
Regional Court	Upheld first instance	Ordered re-examination, awarded compensation of 1593 EUR	Upheld: life saving	Quashed, compensation of 1593 EUR		Upheld first instance	Rejected: failure occurred, but plaintiff failed to show lasting handicap	Reversed: 6500 EUR + apology (racial part quashed)
Constitutional Court	Dismissed	Upheld second instance	Dismissed			Rejected on the basis that the right does not encompass photocopying	No complaint	(supreme court) reduced compensation: deficient but not arbitrary sterilization
Time	3.5 years	5 years	5 years			2 years	3 years	5 years

Table 3 – Summary of civil proceedings

2.3.1 – Access to medical files

Prešov and Krompachy hospitals were involved in the action brought to courts in connection with access to medical files. The plaintiffs had been treated in the aforementioned hospitals on account of their pregnancies and had been unable to conceive afterwards. With the suspicion that they had been sterilized, the women authorized Poradna lawyers to access and review their medical files in 2002. The right to medical information and access to documentation is governed by Article 16 of the Health Care Act[73] which provides that a legal representative shall be entitled to inspect the health documentation and make extracts of it on the spot.[74] On the request of the lawyers to order the hospitals to allow access to the files, the Ministry of Health expressed the view that the above section was to be interpreted restrictively, and it does not allow a patient in their full legal capacity to authorize a legal representative to consult medical files.[75] Actions against the hospitals were brought by eight applicants in 2003. The District Courts of Prešov and Spišská Nová Ves ordered in their decisions that the defendants allow representatives of the women to review their files, contrary to the opinion of the Ministry, and to make handwritten excerpts.[76] The plaintiffs appealed against the second part of the judgment, because in their opinion, being able to make photocopies of the medical files were essential to support their further claims, if it was evident from the files that they had in fact been sterilized. The Regional Courts of Prešov and Košice upheld the first instance decisions in rejecting the claim for making photocopies. In 2004 the applicants filed a constitutional complaint, relying on rights enshrined in the ECHR - namely Article 6 on access to court and Article 8 on access to medical data - pursuant to Article 127 of the Slovak Constitution, which provides that the Constitutional Court decides on complaints concerning violations of rights

[73] Health Care Act of 1994, 277/1994 Coll.LL
[74] Body and Soul, 117.
[75] *K.H. and Others v Slovakia*, §§ 10.
[76] Ibid, §§ 13, 17.

ensuing from an international treaty ratified by the state. The Constitutional Court rejected the complaint, finding that the decision of the lower courts established that a fair balance was struck between the conflicting interest of access to information and data protection, the relevant section of the Health Care Act was applied correctly.[77] Subsequently, under the newly enacted Health Care Act of 2004[78] - which provides in Section 25 § 1 (c) that any person can be authorized by the patient, who, pursuant to (2) is entitled to make copies of the records – the plaintiffs were able to access and copy their files as originally requested. Regardless of the subsequent developments, the ECtHR proceeded to examine the case, which I will further discuss in Chapter Four.

2.3.2 – Procedural history of the Slovak cases

V.C. learned after the publication of the Body and Soul Report that, contrary to what she had been told by medical personnel in the hospital, tubal ligation could not be considered a life-saving procedure, therefore her full and informed consent would have been necessary before she underwent the sterilization operation. After the enactment of the new Health Care Act (2004) she could access her medical records with her lawyer and lodged a claim with the Prešov District Court,[79] relying on Article 11 of the Civil Code, which provides that *natural persons are entitled to the protection of their person, particularly life and health, civic honor and human dignity, privacy, reputation and their freedom of expression,*[80] she requested an apology from the hospital and claimed non-pecuniary damages pursuant to Article 13 (2) of the Civil Code. I.G. and Others further relied on Articles 420 and 444 of the Slovak Civil Code on liability and damage compensation for the party's health, pains and aggravation of her social

[77] Ibid, §§ 23.
[78] Health Care Act of 2004, 576/2004 Coll.LL
[79] *V.C. v Slovakia*, §§ 27.
[80] Law no 40/1964 on the Civil Code (Slovak Civil Code)

assertion. N.B. also relied on rights of the European Convention, claiming damages and reimbursement. All applicants asserted that their sterilization was contrary to legal norms, namely Article 13 (2) of the Health Care Act (1994) which requires that doctors obtain the patient's consent for procedures that may have substantive impact on their life, and Article 13 (5) provides that in the case of minors a legal representative must give consent. Article 49 (a) of the Slovak Civil Code considers consent invalid if obtained under duress.[81] In the case of V.C., the Prešov District Court dismissed the action holding that Section 2 of the 1972 Sterilization Regulation[82] permitted sterilizations to be carried out when a further pregnancy would endanger the life or health of the woman, and the fact that a committee had not previously approved the procedure, as Section 5 (1) of the Regulation requested, thus amounted only to a failure to meet formal requirements, and by no means did it violate the applicant's personal integrity. The Regional Court upheld the first instance decision, reaffirming that the sterilization was necessary and carried out in accordance with the law, relying on statements of physicians involved in the case.[83] Following this decision the applicant submitted a constitutional complaint, alleging that she had been unable to obtain redress and her constitutionally protected rights prohibiting cruel and inhuman treatment, protection from unjustified interference with her private life and protection of family had been breached.[84] The Constitutional Court dismissed her complaint, thus the domestic remedies have been exhausted in a process lasting for three and a half years.

The claims for damages in the case of N.B. were dismissed by the Spišská Nová Ves District Court on the grounds that the operation was life-saving and as such, it could have been

[81] Body and Soul, 106-107.
[82] Regulation No. Z-4 582/1972-B/1 of the Ministry of Health of the Slovak Socialist Republic.
[83] *V.C. v Slovakia*, §§ 39-40.
[84] Ibid, §§ 41-42.

performed without the applicant or her legal representative's consent.[85] On her appeal, the Košice Regional Court ordered the re-examination of the case, reiterating that by international standards, sterilization was not regarded as a life saving surgery. The applicant submitted vast documents in support of her claim that her ethnic origin had motivated the doctors to sterilize her. The court rejected these claims, but found that the hospital staff failed to obtain her consent, contrary to the legal requirements then in place and awarded an 1,593 EUR compensation.[86] The applicant appealed against the amount of non-pecuniary damages and the dismissal of damages. On the latter issue the Regional Court ordered a re-examination, but upheld the first instance decision on the merits and the amount of compensation. The Constitutional Court held that lower courts had given sufficient reasons for their decisions, ending the litigation process of almost five years.

Finally, in the case of I.G and Others the claims were rejected by the first instance court as being statute barred, which the appellate court quashed.[87] In the case of I.G., the court dismissed the case holding that even though the tubal ligation carried out on her was contrary to requirements, the reason of her permanent infertility was the hysterectomy, which was subsequently carried out on her as a life-saving surgery.[88] The Regional Court upheld this decision. In the case of M.K., the court found that the results of the procedure had neither affected the applicant's health, nor her status in the Roma community, therefore she was not entitled to a compensation. The Regional Court quashed the decision and subsequently upheld the District Court's ordering of an 1,593 EUR compensation.[89] In the case of R.H., the proceedings were discontinued upon her death.[90] In both the former applicants' cases the

[85] *N.B. v Slovakia*, §§ 23.
[86] Ibid, §§ 24, 29-31.
[87] *I.G. and Others v Slovakia*, §§ 50.
[88] Ibid, §§ 50-54.
[89] Ibid, §§ 55-60.
[90] Ibid, §§ 61.

Constitutional Court dismissed their claims.[91] The proceedings lasted for five years for both of them.

2.3.3 – Procedural history of the Hungarian cases

The Hungarian cases emerged with seven years' difference. The case of G.H. - though she claimed that her unlawful sterilization amounted to a breach of her right to self determination, privacy and equal treatment - was eventually centered around the amount of compensation. The first-instance court held that the absence of consent for the procedure gave rise to a compensation of about 3000 EUR. The appeal court reversed this judgment, awarded a 6500 EUR compensation and ordered the hospital to apologize for every account of her claim, except the racial discrimination. In a review judgment, the highest court reduced the compensation by half, holding that while the consent was formally deficient, the sterilization was not arbitrary.[92] While this case is successful in the sense of achieving some form of redress in the domestic procedures, the representing attorney regrets that the domestic courts focused on the procedural aspect of the case. "*This is why we decided to proceed to Strasbourg, but the case was rejected based on the same procedural grounds, saying something like 'what more does the applicant want'. I find this attitude from a human rights court unbelievable, because such an interference with the right to self-determination, that they practically make a decision for her, whether she can have more children – because we all know these procedures are irreversible – and the human rights court considers it a question of procedural law*."[93]

A.S. sought pecuniary and non-pecuniary damages for negligence. Her claim was rejected despite finding some negligence.[94] Similarly to the argumentation in V.C., the court accepted

[91] Ibid, §§ 72, 74.
[92] *G.H. v Hungary*, Second Section, §§ 7-10.
[93] Attorney of ERRC, 17 March 2016.
[94] *A.S. v Hungary*, §§ 2.6.

that medical conditions for the sterilization, in accordance with Article 187 § 4 (a) of the Health Care Act (Act CLIV of 1997) prevailed, therefore the lack of consent amounted to a failure insignificant to the fate of the case. The appeal court reaffirmed that given the conditions of Article 187 the procedure should still have been subject to consent, however, it rejected the claims altogether on the grounds that the applicant failed to show a lasting handicap resulting from her treatment at the hospital.[95]

Section 2.4 – Upsides and difficulties of the civil law avenue

One of the main questions of this thesis is which avenue, civil or criminal, seems better to litigate, both from the point of view of chances for success, and the strength of the message of the outcome. As every case, the Slovak and Hungarian ones had difficulties. On the one hand, a difficulty came with the statute of limitation, as some claims were rejected on grounds of being statute barred. According to the lawyer of Poradna, in cases with different claims, the courts accepted different argumentations. When the cases were built on health care damages, the lawyers argued that the limitation should apply from the moment the plaintiff became aware of her situation. The courts accepted this approach and the expert opinions submitted to testify the said moment. In personal dignity cases however, this line of argumentation seemed problematic.[96] "*In some personal dignity cases they dismissed the whole case and didn't even care about the financial compensation. (…) Then we argued that it is against the good manners of the court, and it seems that some appeal courts are okay with this argumentation. Just recently, one month ago [March, 2016] the Slovak court awarded the full amount to a Roma woman who was forcibly sterilized – but this case still started in the early 2000's.*"[97] On the other hand, attorneys point to the evident advantages of civil claims. "*The main advantage of*

[95] Ibid, §§ 2.8.
[96] Attorney of Poradna, 29 April 2016.
[97] Ibid.

civil proceedings, compared to criminal, is that you are in charge of the evidence basically."[98] Even though discrimination legislations were not yet in effect in either Slovakia or Hungary at the time when the cases emerged, this way, the discrimination aspect could appear in civil lawsuits supported by expert opinions from FIGO, WHO, experts of the Czech Republic ("*because it was difficult to find somebody in Slovakia, a gynecologist, who would talk in support of an expert opinion*"[99]) and Hungarian sociologists.

It is important to briefly mention the role of other actors, such as equality bodies and ombudsmen, which in theory, function as a guardian of the constitutional right to equality and could potentially have a great role in civil cases. Especially so with regard to the complex nature of the discrimination issue at hand. "*In the case of A.S. the woman concerned was Roma, she identified as one, but in the other case, which started and reached Strasbourg under my work, the sterilized woman was not Roma, she did not look like a Roma, so we cannot say the hospital assumed she was, but we asked the courts to establish that she was discriminated by association, as her husband was Roma, they lived in a settlement, thus from her address card it was obvious.*"[100] Slovak attorneys requested the courts to recognize the cases as intersectional discrimination based both on gender and ethnicity. Unfortunately, neither the courts nor other actors addressed this specific issue. "*In the Czech Republic the ombudsman issued some reports and was actively involved. (...) turning to an equality body is primarily a choice for clear discrimination cases and sterilizations are more complex, because it is a case of interference with integrity, privacy and family life, plus the discrimination. (...) A strategically good choice is asking the ombudsman to investigate a case, because he has the authority to access*

[98] Attorney of ERRC, "*Comparative Analysis of Legal Avenues to Tackle Involuntary Sterilization of Roma Women in Central-Eastern Europe*" Interview by Emma Várnagy, 26 March 2016.
[99] Attorney of Poradna, 29 April 2016.
[100] Attorney of ERRC, 17 March 2016.

documents, which our organization doesn't, and based on his findings we start a civil lawsuit."[101] The case is different in Slovakia where both attorneys say the equality body is not functioning at all. One possibility is in public interest litigation which Slovak organizations take use of. Poradna started actio popularis cases in the issue of maternity ward segregation and indirect discrimination of Roma women from lump-sum maternity benefits. However, the disadvantage of public interest claims is that because there is no individual complainant, they cannot reach the international stage. Nevertheless, the involvement of actors outside the suit can have great influence on the case. Unfortunately, in Slovakia "*the media never became supportive, not even after the ECtHR decision. The most media attention came when the Body and Soul Report came out, then it was really strong. When they achieved justice at the European Court, we reported these cases but it was not really supported. Also at the beginning women's organizations in Slovakia were not supportive with only some exceptions. This situation slightly has changed, but the common reaction was that something like this cannot happen in the 21st century, it's a lie, they are lying - that was a very common approach*."[102] "*After the first decision of the ECtHR, that was V.C., there was a statement from the Minister of Justice that she regrets that such human rights violation has been performed on the victim and also on other women.*"[103]

As to the message conveyed to society directly from the outcome of the cases the attorneys differentiate between attitudinal changes in the society a whole, and the stopping of an unlawful practice. Whether the outcome of the case is capable of either one is arguable. "*the question is always what happens next, whether the case is capable of initiating a change.* "*I think in a civil case the damages can be awarded on an individual basis, which is also the sanction, but it's*

[101] Ibid.
[102] Attorney of Poradna, 29 April 2016.
[103] Ibid.

not about punishing the person responsible, because the institution is obliged to pay. (…) But I still think that criminal proceedings towards the individual who committed the crime is the stronger message."[104]

[104] Supra, note 102.

Chapter Three – Criminal Law Mechanisms

Section 3.1 – Upsides and difficulties of the criminal law avenue

Although most attorneys agree that a criminal conviction carries a stronger message, they point out that compared to the civil law avenue, litigating a criminal case seems much harder for many reasons. First of all, the statute of limitation is longer, although the civil rules apply for the financial compensation part. "*For example if the sterilization happened in 2001 and the person found out in 2007, in Slovakia the maximum limitation is 10 years, but the subjective period is two years, that means two years since you found out about it. If you file a criminal complaint in 2010, a criminal lawyer can still proceed, get the punishment for the person, however compensation is gone anyway, because you did not meet the criteria*."[105] A huge difficulty however, is that the client and representation are not in charge of the evidence, "*the role of the victim is rather passive, rules of procedure are limited, as opposed to a civil suit, where we were the plaintiff, thus having more influence on the outcome of the case. In a criminal case the investigating authorities do their job. Whatever these authorities do not discover, the victim can bring to their attention in a case of substitute private prosecution, but it is extremely difficult because the victim does not bear the same authority as the prosecution*."[106] Substitute private prosecution comes up in racist violence cases quite often. It is a "means of instituting criminal proceedings and permits victims of a criminal offence to bring a case that was previously instituted but then terminated by the public prosecutor before the court."[107] The legislative aim is to give further possibility to compensate for inactions of the investigating authority. However, as pointed out by ERRC at numerous instances, requiring

[105] Attorney of ERRC, 26 March 2016.
[106] Attorney of ERRC, 17 March 2016.
[107] Karsai, Krisztina, Szomora Zsolt, "Criminal Law in Hungary" *Kluwer Law International*, (2010):162.

members of vulnerable groups to avail themselves of such legal avenues, puts them at risk of reprisals from the authorities, and due to said difficulties of access to evidence it is not effective. Closely related is the difficulty by the burden of proving. "*Whatever you say, you have to prove it. In a criminal case there is no shifting of the burden of proof - because in criminal cases that would be too harsh - if you cannot prove yourself beyond reasonable doubt, you don't have a crime, you don't have a case*."[108] With this burden comes the question of what sections of the criminal code can be invoked.

Section 3.2 – Summary of criminal proceedings

Article 221 et seq. of the Slovak Criminal Code[109] govern punishments for damage to health, grievous bodily harm and bodily harm caused by negligence or recklessness, § 221 sets aggravated punishment if the deed is racially motivated.[110] Similar provisions appear in the Hungarian Penal Code[111] in force at the relevant time Section 171 on malpractice, Section 170 on battery. Section 173/H § 1 (a) explicitly prohibits violation of rights to autonomy concerning medical procedures, including medical procedures in connection with human reproduction. "*After the Body and Soul Report was published in January 2003, the Slovak authorities immediately ex officio initiated criminal proceedings and they pressured the authors of the report to give them the names of the interviewed Roma women, which the authors refused, so they also started the proceedings against the authors and afterwards they had some names from the hospital. (...) They started the investigation and interviewed Roma women and collected some medical reports and interviewed doctors and concluded that no crime has been committed, as the doctors were saving their lives in principle."* [112]

[108] Attorney of ERRC, 17 March 2016.
[109] Criminal Code of Slovakia, Act No. 140/1961 Coll.
[110] Body and Soul, 104.
[111] Criminal Code of Hungary, Act IV of 1978.
[112] Attorney of Poradna, 29 April 2016.

	V.C.	N.B.	I.G. and Others
Initiation	Ex officio	On the grounds of serious bodily harm	Ex officio
District Prosecutor	No individual proceedings were initiated after discontinuation	Dismissed complaints against the discontinuation of criminal investigations	Dismissed complaints against the discontinuation of criminal investigations
Regional Prosecutor		Upheld the conclusion that no criminal offence had been committed	Denied request to review the lawfulness of the criminal investigations. Reached the same conclusion following an order for review from the Constitutional Court
General Prosecutor		Admitted that the sterilization was unlawful, but did not find criminal activity	Upheld the previous conclusion and stated that the women had no victim status
Time		3 years	5 years

Table 4 – Summary of criminal proceedings

V.C. was among the women whose cases were ex officio investigated by the Section for Human Rights and Minorities of the Government Office and when the proceedings were discontinued she did not initiate individual criminal proceedings.[113] I.G., M.K. and R.H. were also among the injured parties in the case initiated by the Government Office, they also acted as witnesses. The proceedings lasted for ten months before the regional criminal investigation department discontinued the investigation concluding that "nothing indicated any offence under the

[113] *V.C. v Slovakia*, §§ 26.

Criminal Code had been committed."[114] The women complained to the regional prosecutor's office against the decision, however, they were rejected holding that they were not entitled to lodge complaints against that decision.[115] They requested the General Prosecutor to submit a complaint on their behalf to the Supreme Court, which request had been refused. At the same time, the women lodged a complaint with the Constitutional Court with regard to the regional prosecutor's above decision. The Constitutional Court found that the regional prosecutor erroneously rejected the complaint without addressing its merits, and ordered the re-examination of the case.[116] The regional prosecutor again found that it could not be established that medical staff had taken unauthorized actions.[117] This decision was challenged at the Constitutional Court complaining that the investigating authorities failed to prosecute those responsible for the sterilization. The Constitutional Court ordered the re-examination of the case, as they found that the prosecuting authorities did not duly examine the circumstances. Furthermore, the prosecuting authorities were ordered to reimburse the costs of proceedings and the complainants were awarded a compensation of 1,430 EUR.[118] The investigator, to whom the case was referred back, discontinued the proceedings again, which decision was complained against at the Constitutional Court and with the General Prosecutor's Office. Precisely because of this way of extraordinary remedy, the Constitutional Court concluded that they lacked jurisdiction over the case.[119] Further complaints to the Constitutional Court addressing the circumstances of the sterilization had been rejected as manifestly ill-founded. The reasons given by the various authorities involved in the proceedings were inter alia that the sterilizations had been carried out in accordance with the law, that no objective or subjective

[114] *I.G. and Others v Slovakia*, §§ 37.
[115] Ibid, §§ 38.
[116] Ibid, §§ 63.
[117] Ibid, §§ 41.
[118] Ibid, 64-67.
[119] Ibid, §§ 70.

appearance indicated that any offence had been committed, and that the complainants could not be considered injured parties, because they had suffered no harm to their health.[120] The proceedings started in January 2003 and ended in May 2008.[121]

N.B. filed an individual criminal complaint for her exposure to serious bodily harm, which was dismissed, concluding that the doctors carried out the surgery with a specific view to protecting the complainant's health. Her appeal against this decision was also dismissed, which the Regional Prosecutor subsequently quashed. As a result, police started a criminal investigation, hearing statements of the applicant and doctors. Eventually, the investigation was discontinued and N.B.'s complaint against the decision was dismissed by the district and the regional prosecutors as well. At her request, the General Prosecutor reviewed the case to find that the operation had in fact been carried out contrary to the relevant law, which however did not mean that the doctors had committed an offence, because they acted in good faith.[122] Evidently, the provisions of the Criminal Code, which could have protected women from such violations, failed to do so in practice. So much so, that in the three Hungarian cases that are known to the attorneys only one used the criminal law avenue, unsuccessfully. "*It was in one case that a sterilized woman turned to the then-ombudsman Ernő Kállai, who referred her case to us. But in her case the problem was that she was sterilized a long time ago, so a civil case would have been statute barred.*"[123]

Section 3.3 – Grave crimes

Besides the procedural peculiarity of criminal cases, the specific section of the criminal code, under which claims had been brought often made the burden of proving even more difficult.

[120] Ibid, §§ 37, 45, 47.
[121] Cf. Article 3 procedural limb in Chapter Four.
[122] *N.B. v Slovakia*, §§ 35-43.
[123] Attorney of ERRC, 17 March 2016.

The above listed provisions of the Hungarian and Slovak criminal codes focused mainly on the medical aspect of the interference. Shifting our focus to the discrimination aspect, we are left with two criminal concepts which, by their definition, seem applicable to the cases of forced sterilization of Roma women. These concepts in the national legislation reflect on international treaty obligations and are such, that the International Criminal Court has also jurisdiction over these crimes. Article 7 § 1 of the Rome Statute (establishing the ICC) lists crimes considered to be crimes against humanity, with Article 7 § 1 (g) expressly mentioning enforced sterilization of any civilian population. Article 6 of the Rome Statute on genocide adopts the same definition as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, namely that the imposition of measures intended to prevent births within a national, ethnic, racial or religious group, with the intent to destroy, in whole or in part the protected group exhausts the crime of genocide. It is possible to bring complaints regarding internationally protected rights to domestic courts, even if there is no express provision in the criminal code. However, national criminal codes generally do contain a provision, usually with the same wording as in the UN Convention, on the crime of genocide. The ex officio initiated investigations in Slovakia were conduced under the relevant part, § 259 on genocide, of the Criminal Code of Slovakia. The attorneys agree that theoretically the definition of the crime of genocide is applicable, however, it is almost impossible to prove it. "*To prove genocide the person accused had either said so, or committed so many crimes at the same time that the intent is obvious. Otherwise it is quite difficult. Also in civil proceedings you can sue the ministry or some state body to say there is this practice, with the crime of genocide you have to accuse the very person who commits it.*"[124] Though there are some examples, it is rare that domestic courts convict someone, especially a national of the country, for the crime of genocide.[125] The

[124] Attorney of ERRC, 26 March 2016.
[125] There is an extended list of domestic convictions for international crimes in domestic courts published by Prevent Genocide International based on press reports. According to this list, a

importance of convictions at domestic courts would be crucial in establishing a culture of legal justice in balance with international tribunals.[126] One of the possible explanations why there is considerable reluctance to give significant relevance to the possibility of convictions for grave crimes in the domestic procedures will be outlined in the final section of the following chapter.

Section 3.4 – Message conveyed

Interestingly, there is a substantive divide between the interviewees as to the strategic importance of a criminal conviction. "*In short, what is important in these cases is that they are manifestations of some kind of discriminative practice. When conducting strategic litigation, our goal is not only to remedy the individual wrongs, but to achieve systemic change, attitudinal change, and not only in one convict, but in the whole system. In these cases, a criminal conviction would have stated that XY doctor committed Z crime, XY is guilty, but it does not give an answer to the systemic problem, that these women are sterilized because they are Roma and because they are women. I don't think that it is the fault of one doctor, but of those who are parts of the system with a biased way of thinking. (...) They are not even some kind of radical racist doctors necessarily. When I did fact-finding for the G.H. case, I talked to many successful, prominent doctors, who seemed to believe that their colleagues act in the best interest of the women. (...) In any event, even if the case is won and one perpetrator is convicted, it is not a good way to develop a strategy for achieving systemic change."*[127] In fact, there is substantial scholarly debate of social, behavioral and forensic professionals, centered around the deterring effect of criminal law and an effective criminal justice system. It seems

significant majority of these cases concern foreigners who had committed grave crimes elsewhere and been convicted in a different country, in line with the exclusion clauses of the 1951 Refugee Convention. „Genocide and international crimes in domestic courts" published: 21 July 2003, available: http://www.preventgenocide.org/punish/domestic/ (accessed: 29 August 2016)

[126] Ibid.

[127] Attorney of ERRC, 17 March 2016.

that legislators believe that criminal law rules influence conduct, whereas their critiques point to behavioral hurdles obstructing the desired effect.[128] The basis for the debate seems to be the presumption that people make rational choices. If so, the considering of risks and benefits of criminal engagement could be affected by harsher sentencing and increased probability of conviction, therefore an amendment of criminal law could simply result in deterring effects. However, this is often not the case, as people might not be aware of the possible legal sanctions, modifications of sentencing policies, or simply their consideration methods alter from the rational choice model, some of the factors which the above mentioned theory of behavioral hurdles touch upon. In assessing the deterrence effect, researchers primarily focus on the severity and certainty of punishments, usually finding that more severe punishments may prevent re-offenses successfully, but they have little effect in themselves on crime rates, as opposed to the enhancement of certainty of the punishment.[129] In our case however, the question is whether a conviction, as opposed to civil liability, conveys such a message that is capable of inducing attitudinal changes in the society. "*I don't know whether it's a question for a lawyer to say how to address the society. I can say what has the bigger effect legally, but for the society as such, in terms of prevention of similar events, or the view on sterilization, that's debatable. I think these cases have a very strong emotional message, and I think then it would probably be a successful conviction, but it's really difficult. It's rather a psychological than a legal question, but my opinion is this. It of course depends on how the media will serve this case."*[130] The media did not support forced sterilization cases, stemming from the prevalent

[128] Paul H. Robinson and John M. Darley, „Does Criminal Law Deter? A Behavioral Science Investigation" Oxford Journal of Legal Studies, Vol.24, No.2. (2004): 173-174.
[129] Valerie Wright, „Deterrence in Criminal Justice" Report by The Sentencing Project, 2010 available: http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf (accessed: 29 August 2016).
[130] Attorney of ERRC, 26 March 2016.

prejudicial views of Roma in the society, sterilized women were portrayed throughout the litigation process as "*liars who want only the money.*"[131] The case might have been different, had there been successful criminal convictions. While it might not immediately affect the public opinion about ethnic minorities, reports on rigorous convictions link back to the deterring effect of the certainty of punishment. If the sentencing reflects the legislative point of view that intolerance of any kind is not to be tolerated by authorities, attitudinal changes might be induced. *"It goes without question that qualifying these cases as criminal obviously carries a stronger message than a civil sanction. No doubt. Because of the dangerousness of the action to society, it is a legislative will to award criminal qualification to unlawful sterilizations, it is perfectly legitimate. In Slovakia and the Czech Republic, it is grounded especially by the number and systemic nature of the cases. It is always a question of legislation against the context of the state concerned."*[132]

Section 3.5 – Policy implications after the cases

Let us now turn to the assessment of this legislative context of the concerned states. There are some important developments following from the aftermath of the litigation process of forced sterilization cases. Most significant is the extensive amendments of the Slovak Health Care Act in 2004, which included an extended definition of consent and introduced a mandatory waiting period before sterilization for any reason can be carried out. The Criminal Code was also amended in 2005[133] to include a section on criminal sterilization and impose a prison sentence of two to eights years on the perpetrator in line with Article 159 (2). Attorneys however are unsure of its subsequent interpretation. Both Slovak and Hungarian attorneys stress there was no proper monitoring after the litigation process ended. Similar to before the cases arose, there

[131] Attorney of Poradna, 29 April 2016.
[132] Attorney of NEKI, 1 April 2016.
[133] Criminal Code of Slovakia, Act 300/2005 Coll.

have not been inquiries into whether Roma women are still being sterilized in Hungary, where the systemic nature of such practices has not been evident. Hungarian attorneys would not be surprised if there were still forceful sterilizations occurring, but because of the lack of common knowledge and publicity, even the women themselves might not be aware of their situation, let alone be powerful enough to have their voices heard. In this regard the insufficient attention devoted to the issue in the media is regretful. However, as already mentioned above, press coverage could also be damaging, as in some Slovak cases. Still, the professionally appropriate international critiques of the Slovak authorities' response to allegations of sterilization and subsequent pressure from international human rights bodies resulted in the enactment of formally proper safeguards. "*I can imagine that the implementation of informed consent is still problematic, because the Ministry of Health adopted a regulation on informed consent which they have also in Roma language, in Romanes, but we are all the time communicating with them that it is not about the form of the template, but about the communication between the health care provider and the woman, and it seems they do not really understand what informed consent is about.*"[134] In terms of government response "*the fact is that the Slovak government now, when reporting to the human rights treaty bodies, claim that it was not a practice but only individual failure, not even the European Court concluded that there was discrimination, that's their argument.*"[135] There are some recent practical developments. Just this year a Slovak court awarded the right to compensation in the full amount originally requested to a woman sterilized in 1999. The decision of February 2016 is yet to take effect, as the hospital appealed, but in their reasoning the court pointed to the decision of the ECtHR in the case of *V.C. v Slovakia* where it was established that the proportionate compensation for illegal sterilization is EUR 31 000.[136]

[134] Attorney of Poradna, 29 April 2016.
[135] Ibid.
[136] „Forcibly sterilized Roma woman achieved justice at the domestic court in Slovakia" Press release of Poradna Prava on 25 April 2016, available: https://www.poradna-

Chapter Four – International Human Rights Law Mechanisms

The final chapter will focus firstly on how the international human rights bodies, namely the European Court of Human Rights and the CEDAW Committee dealt with the forced sterilization cases. I will introduce and compare general principles drawn from both jurisdictions and outline the reasoning of the decisions. The second part of the chapter will focus specifically on discrimination claims in the ECtHR jurisprudence.

Section 4.1 – CEDAW and ECtHR

The Convention on the Elimination of All Forms of Discrimination Against Women was adopted in 1979. The Optional Protocol, which allows individual complaint mechanisms, entered into force in 2000. The main difference between the jurisdictions of UN Treaty Bodies and the ECtHR, is the enforcement of judgments. While the compensation awarded by the ECtHR is enforceable and legal consequences are binding, the CEDAW Committee recommends to the State party that it shall "provide appropriate compensation"[137] and "give due consideration to the views of the Committee, together with its recommendations."[138] In the present case of A.S. the attorney representing the author recalls the advocacy phase after the judgment as a period of very hard work, precisely because of this peculiarity of the chosen jurisdiction. "*It was a lot of background work and for two years we achieved nothing. Yes, I have published a few articles about the decision and we gave some interviews, but there were no other means really. I even talked to an MP. A. received compensation in the end, but this*

prava.sk/en/news/forcibly-sterilized-romani-woman-achieved-justice-at-the-domestic-court-in-slovakia/ (accessed: 29 August 2016)

[137] *A.S. v Hungary*, §§ 11.5.

[138] Ibid, §§ 11.6.

fact is only thanks to one person in the ministry. I have not said this publicly before, but I very much undertake this statement, that there was no systemic consistency or government responsibility in her compensation, it was due to the fact that the one person from the ministry had to fly to New York and represent Hungary in front of the CEDAW Committee and it was personally embarrassing that in two years from the communication nothing happened."[139] The reason why CEDAW at the time seemed nevertheless the right choice was twofold. On the one hand, the Committee was welcoming of all cases, as it was shortly after the introduction of the individual complaint mechanism, pursuant to Article 7 of the Optional Protocol. On the other hand, "*Strasbourg at that time had not much practice in reproductive rights issues, while CEDAW was specifically a women's rights body, with experts very much experienced in this field.*"[140] The communication accordingly relies not on existing case-law, opposed to the operation of the ECtHR (especially because the A.S. case was the very first sterilization case considered by the Committee) but on the Committee's general comments and recommendations. The author complained on three grounds, namely Article 10 (h) of the Convention on the right to access to information to ensure the health and well-being of families, Article 12 on the elimination of discrimination against women in the field of health care and Article 16 1 (e) on the right to decide freely on the number and spacing of children. The rights complained of are also different from those enshrined in the ECHR, which bring the same core issues under the scope of prohibition of ill-treatment and protection of family life.

4.1.1. – The A.S. decision

When considering the merits of the case, the first issue is whether to declare them admissible ratione temporis, because the incident leading to the claims preceded the entry into force of the

[139] Attorney of NEKI, 1 April 2016.
[140] Attorney of ERRC, 17 March 2016.

Optional Protocol, making individual complaints possible. The author submits that she had suffered long lasting and ongoing damages, which continuous nature justify the admission of the case.[141] Examining the claims under Article 10 (h)[142] the Committee reiterates its General comment No. 21 stating that the well-being of the family improves, where there are "freely available appropriate measures for the voluntary regulation of fertility."[143] "In order to make an informed decision about reliable contraceptive measures, women must have information"[144] which in the present case the State party failed to provide, as evident from the medical records, showing that only 17 minutes passed from the admittance of the patient to the hospital to the completion of a tubal ligation, which could not have provided ample time for detailed information about the sterilization, therefore amounting to a violation of he author's rights.[145] The same fact is decisive in view of the claims under Article 12.[146] According to the Committee's General recommendation No. 24 "acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity (…) and is sensitive to her needs and perspectives."[147] The fact that the author asked her doctor when it would be safe to have another baby, clearly shows that she was unaware of the consequences of the operation, furthermore the ignorance of her state of health at the time of

[141] *A.S. v Hungary*, §§ 10.4.
[142] CEDAW Article 10 - States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: (…) (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.
[143] CEDAW General Comment No. 21, §§ 23 (13th session, 1994).
[144] Ibid, §§ 22.
[145] *A.S. v Hungary*, §§ 11.2.
[146] CEDAW Article 12 (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.
[147] CEDAW General Recommendation No. 24 (20th session, 1999) §§ 22.

her admittance and the use of a Latin word, unknown to the author, were also not in compliance with the standards set out above.[148] Finally, recalling its General recommendation No. 19, the Committee takes note of the fact that "compulsory sterilization adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.[149]" Accordingly, the Committee found that the State party violated the author's rights under Article 16 § 1 (e).[150]

Section 4.2 – Principles and practice of the ECtHR

Similar to the case of A.S., three main issues come into play regarding the sterilization of the applicants in the jurisdiction of the ECtHR: the right to be free from inhumane and degrading treatment and the corresponding obligation to effectively investigate and punish such interference; the right to privacy and private life; and the right to information. These translate to Article 3 and Article 8 of the Convention. Both articles impose positive and negative duties on states parties, which are assessed separately by the Court.

4.2.1. - Article 3 substantive limb

The applicants complained under Article 3 that on account of their sterilization, they had been subjected to inhuman and degrading treatment, as they had been in a vulnerable position, and the abusive and humiliating treatment violated their dignity and had caused them lasting physical and mental suffering.[151] As a general principle established in the ECtHR case-law, „ill

[148] *A.S. v Hungary*, §§ 11.3.
[149] CEDAW General Recommendation No. 19 (11th session, 1992) §§ 22.
[150] CEDAW Article 16 (1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (…)(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.
[151] *I.G. and Others v Slovakia*, §§ 113.

treatment must attain a minimum level of severity if it is to fall within the scope of Article 3" and „the suffering or humiliation involved must, in any event, go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment."[152] What is specific to these cases is the mentioning of ill-treatment in the context of medical treatments, stating the principle that a therapeutic measure is not to be seen as inhuman or degrading, if it is in line with established principles of medicine, and procedural safeguards exist. Another principle in this context is that the imposition of a treatment on a a patient is seen as an arbitrary interference with the patient's right to physical integrity, even if the refusal of the treatment is fatal.[153] Thus, if a treatment is capable of driving a person to act against her conscience, it is considered to raise an issue under Article 3.[154] The Court established that sterilization is a major interference with the patient's health, should it not be performed at the request of the patient, the treatment falls within the scope of Article 3. Relying on the Convention on Human Rights and Biomedicine, the WHO Declaration on the Promotion of Patients' Rights in Europe, and CEDAW's General Recommendation No. 24, the Court also establishes that the patient's informed consent is necessary in all cases before sterilization is carried out. The only exception under this principle would be in an emergency situation when consent is not obtainable and the treatment cannot be delayed.[155] However, sterilization in general is not considered a life saving treatment.

In light of these principles, the Court proceeds to examine the circumstances of the cases before it, and assess them against the established principles. It finds in the case of V.C. that the applicant was not informed in line with the medical standards in force at the time and the conditions in which her consent was obtained were contrary to requirements by Article 3 as

[152] *V.C. v Slovakia*, §§ 101-104.
[153] Ibid, §§ 105 (cf. *Pretty v UK*, no. 2346/02).
[154] Ibid, §§ 102.
[155] Ibid, §§ 108.

they were "liable to arouse in her feelings of fear, anguish and inferiority."[156] The Court cannot establish that the hospital staff acted with the intention of ill-treating the patient, however, the disregard for her rights enshrined in the Convention amounted to a substantive violation of Article 3.[157] Based on this decision in its case-law, the Court in the following case of N.B. reiterated its position and held that the treatment given by hospital staff in the Gelnica hospital was also in violation of Article 3.[158] At its third instance of hearing a forced sterilization case, the Court reiterated both previous decisions, but this time the case had a special focus on the emergency situation, which the Government maintained to have justified the intervention. The case also differs in the first applicant's being underage at the time of her sterilization, and the fact that she found out about the procedure some years later.[159] When stating that in none of the cases had there been evidence that the doctors acted in bad faith, the Court nevertheless acknowledges the gross disregard for the patients' dignity and integrity and well established medical standards. Because the cases are such clear cut examples of the gross disregard of rights within the meaning of Article 3, the racial elements are not awarded a major role. In fact, the individual claims regarding the verbal abuse and segregation of the applicants were not addressed, it is only noted that the applicants were in a vulnerable position, and particularly at risk due to various shortcomings.[160]

4.2.2. - Article 3 procedural limb

The applicants also complained that the actions of the authorities following their complaints regarding their sterilization were not in line with the procedural requirements of Article 3. States parties have the obligation to prevent and provide redress for alleged violations,

[156] Ibid, §§ 118.
[157] Ibid, §§ 120.
[158] *N.B. v Slovakia*, §§ 81.
[159] I.*G. and Others v Slovakia*, §§ 120, 123.
[160] *N.B. v Slovakia*, §§ 96.

including the conduct of a thorough and expedition investigation. The effectiveness of the investigation means it should be capable of identifying those liable, it must further be thorough, impartial, objective and prompt, however, it is not an obligation of results but of means.[161] In the specific case, which concerns medical negligence or malpractice, the Court notes that a provision of criminal-law remedy is not necessary in every case.[162] The Court, looking at the domestic procedural history of the cases of V.C. and N.B., finds that the applicants had the opportunity to a review by the authorities of the actions they considered unlawful, and in the latter case acknowledged a breach of statutory requirements.[163] Therefore, no procedural violation of Article 3 was found. In the case of I.G. and Others however, the Court finds that the period of time for which the actions lasted, five and a half years in the first applicant's case and six and a half years in the second applicant's case, with the Constitutional Court establishing errors of the prosecuting authorities, failed to meet the requirement of promptness and reasonable expedition.[164]

4.2.3. – Article 6 and Article 8 in the case of access to information

The nature of the case of K.H. and Others differs in that it concerns access to information and it does not address the human rights violations which flow from the sterilization itself. The case resulted in an important decision, because despite the domestic authorities' initial reluctance to allow access to the medical files, based on various vague reasons already discussed above, they were ordered to the contrary, thus valuable evidence could be accessed and used for example in the case of I.G. and Others. Article 6 § 1 of the Convention provides access to courts as an inherent safeguard to the right to fair trial. As a general principle, when the

[161] *V.C. v Slovakia*, §§ 123-124 (cf. *Assenov and Others v Bulgaria*, no. 24760/94 and *Mikheyev v Russia*, no. 77617/01)
[162] *V.C. v Slovakia*, §§ 125.
[163] *N.B. v Slovakia*, §§ 85-86.
[164] *I.G. and Others v Slovakia*, §§ 132-133.

individual is limited in this access, the Court applies a limitation test to assess whether the limitation was legitimate and proportionate.[165] A similar test is applied in Article 8 cases. Because "the complain in issue concerns the exercise by the applicants of their right of effective access to information concerning their health and reproductive status,"[166] the Court applies the limitation test under this article and reiterates its findings when declaring a violation of Article 6. In the specific case of medical data, the Court has held that confidential handling is extremely important not only as an individual right, but to ensure confidence in the medical profession which ultimately has an effect on the individual's health and the community as well.[167] In assessing the issue, the Court puts the emphasis on the effectiveness of the access of information and procedure. The Court has held in previous cases that „the public interest in disclosure must outweigh the individual's right to privacy, having regard to the aim pursued and the safeguards surrounding its use" [168] however, in the present case the argument concerning the authorities' discretion was not sufficiently compelling to justify such restrictions, [169] which would normally be acceptable for the holder of the documents to determine arrangements on disclosure. The Court stated that while „protection of medical data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life"[170] protection against abuse can be guaranteed by "incorporation in domestic law of appropriate safeguards with a view to strictly limiting the circumstances under which such data can be disclosed and the scope of persons entitled to accede to the files."[171] Failure to do so, as appears in this case, amounts to a breach of Article 8 of the Convention.

[165] *K.H. and Others v Slovakia*, §§ 64.
[166] Ibid, §§ 44.
[167] Ibid, pp 39-40.
[168] Ursula Kilkelly, "The right to respect for private and family life - A guide to the implementation of Article 8 of the European Convention on Human Rights", *Human Rights Handbooks* No.1, (2001): 39.
[169] *K.H. and Others v Slovakia*, §§ 53.
[170] Ibid, §§ 55.
[171] Ibid, §§ 56.

4.2.4. - Article 8 and 12 in the case of private and family life

Article 8 of the ECHR demands respect for private and family life. It comes into play in very different contexts, because the focus (unlike other Convention rights) is broader, covering multiple, but still related concepts. Private life is understood as to encompass the individual's autonomy, various aspects of identity, including the decision to have children.[172] In guarding various aspects of private life, the essential objective is to protect the individual from arbitrary interference, which, if occurs, is assessed through a limitation test already referred to in the preceding section. Apart from protecting the individual from arbitrary interference, Article 8 imposes a positive obligation on the contracting state. Although there are no explicit procedural requirements, respect for the rule of law is a presupposition, thus the Court examines whether the legal system affords effective safeguards for the protection of rights.[173] It has not been disputed in either of the cases that there has been an interference with the applicants' private life. In light of the findings under Article 3, the Court only finds it necessary to examine whether the Government complied with its positive obligations required by Article 8. In all three cases the Court finds that, although there was a requirement for informed consent in the laws in force at the relevant time, neither the 1972 Sterilization Regulation, nor the 1994 Health Care Act provided appropriate safeguards. With special regard to the government's argument that in certain cases the sterilization was carried out under considerations of avoiding further possibly fatal risks, the Court relied on international materials, most of all the Convention on Human Rights and Biomedicine. The convention states, reaffirming the relevant part of Article 8 on justifiable interventions, that all interference must, even in the case of an emergency, be carried out in accordance with the law, including relevant professional obligations and

[172] *V.C. v Slovakia*, §§ 138 (cf. *Evans v UK*, no. 6339/05).
[173] Ibid, §§ 140-141, 145.

standards.[174] In the Explanatory Report to the Convention, it is provided that „an intervention must meet criteria of proportionality between the aim pursued and the means employed."[175] Reiterating that sterilizations are not regarded as emergency treatment, the Court does not accept the government's argumentation and finds a breach of Article 8 including the failure to respect statutory provisions and also the absence of safeguards at the time. The Court notes that is was especially alarming considering that „such practice was found to affect vulnerable individuals of various ethnic groups (...) and Roma women had been at particular risk."[176] It is this legislative shortcoming that the court finds to affect members of the Roma community in particular, which later in the judgment is invoked when dismissing a separate determination of the facts in view of Article 14.

The applicants in all cases complained of a breach of Article 12 of the Convention as well. This article provides the right to marry and found a family, subject to national laws. Because the essence of this right is closely related to those protected by Article 8, the Court, by finding already a breach of that right, does not see it necessary to separately examine the complaints under Article 12. The same argumentation is applied with regards to Article 13, the right to an effective remedy, since under Article 8 the Court already found the state's failure to incorporate effective safeguards to be in breach of their obligations.

Section 4.3 – Discrimination and the ECtHR (Article 14)

Eliminating all forms of discrimination, most importantly racial discrimination has been an important goal in the European Union. Especially so, because events of the Second World War have greatly shaped the measures associated with the fight against race discrimination and the

[174] Article 4, Convention on Human Rights and Biomedicine.
[175] §§ 33 of the Explanatory Report to the Convention for the Protection of and Dignity of the Human Being with Regard to the Application of Biology and Medicine (DIR/JUR(97)5).
[176] *I.G. and Others v Slovakia*, §§ 143.

whole ideal of the European Union. More recently, the Race Equality Directive[177] has compelled member states to transpose into national law the objectives therein. The European Court of Human Rights has also improved its non-discrimination jurisprudence and case-law, most importantly recognizing and adjusting to the issue of indirect discrimination and shifting from a strictly formal equality model to a substantive understanding of the enjoyment of rights.[178] This section will focus on the two aspects relevant to the subject of this thesis, namely gender based discrimination and racial discrimination. After a short review of the general principles of the non-discrimination jurisprudence of the ECtHR and discussion of the evolution of race and gender discrimination case-law the problems with the forced sterilization decisions will be assessed.

4.3.1. – General principles, difficulties, developments

Article 14, the non-discrimination provision of the ECHR requires states not to discriminate against persons with protected characteristics, unless there are weighty reasons to justify the discrimination.[179] Such weighty reasons are ones which pursue a legitimate aim and are reasonably proportionate. In Article 14 cases the contracting states generally enjoy a wide margin of appreciation, which means that the Court will more likely accept that the state party is better placed to assess whether the difference in treatment is justifiable.[180] Article 14 and its application differs from other provisions of the Convention. Firstly, it does not have an individual standing, but has to be read in conjunction with another convention right. Even

[177] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[178] Rory O'Connel, "Cinderella Comes to the Ball: Art. 14 and the Right to Non-Discrimination in the ECHR*," Legal Studies,* Vol. 29, No. 2. (2009): 213.
[179] Ibid, 211.
[180] Carmelo Danisi, „How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence" *International Journal of Constitutional Law*, Vol.9, No.3-4, (2011):794.

though this requirement does not presuppose a violation of the other right, such application leaves a narrower scope.[181] This ambit requirement, that the discrimination concern another conventional right, has made it common that cases are decided on the basis of other rights, even where the discrimination is central to the case.[182] Indeed, it has been shown that Articles 3 and 8 are much more likely to be applied as protection of marginalized groups.[183] Second, to establish that indeed the case concerns discrimination, a comparator is required to test the difference in treatment of the applicant and a similarly situated reference group.[184] The comparator requirement often overshadows the particularities of the individual cases and focuses merely on whether there has been a difference. Combined with the possibility of a wide margin of appreciation, a third issue comes up, the burden of proof. The Court follows an investigatory model of proceedings, insofar as it takes an active role in fact finding, in which setting the margin of appreciation awarded to the state can also be seen as to function as the burden of proof: a wide margin places the burden of proof on the applicant by relying on the evaluation of domestic authorities, while narrowing the margin will shift the burden to the respondent state.[185] It is evident that the application of Article 14 is highly evaluative and the above mentioned peculiarities of the provision led to some difficulties in building a consistent Article 14 case-law.

It is without doubt that the Court has come a long way in easing up some of the above mentioned difficulties and developing a strong jurisprudence in many aspects. Some of the more recent developments provide an answer to very general questions of applicability of Article 14, for example by interpreting the list of protected characteristics as illustrative, as

[181] O'Connel, 211.
[182] Ibid, 211.
[183] Ibid, 214.
[184] Ibid, 217.
[185] Oddny Mjöll Arnardottir, "Equality and Non-discrimination under Article 14 ECHR: The Burden of Proof" *Scandinavian Studies in Law*, Vol.51, No.13, (2007):17, 19.

opposed to exhaustive, or recognizing the applicability of covert discrimination, as opposed to de jure discrimination, and emphasizing a substantive interpretation focused on the effective enjoyment of rights, rather than a formal model of equality.[186] With the landmark case of *D.H. and Others v The Czech Republic*[187] the Court accepted the relevance of statistical data in establishing a prima facie case of indirect discrimination.[188] Another revolutionary decision of the court was to recognize domestic violence as a form of gender based discrimination and consider it a breach of positive obligations, when the state fails to protect victims in a situation where the authorities ought to have known about the dangerous conditions.[189] In the case of *Opuz v Turkey*[190] the Court also relied on statistical evidence and findings of international bodies and non-governmental organizations,[191] overriding the similarly situated person requirement.[192]

4.3.2. – Racist violence beyond reasonable doubt

Quite to the contrary, when race discrimination comes into play in violence cases the Court's case-law seems to remain immune to these changes and strictly resolve to national criminal law standards.[193] The difficulty following from this approach is the 'beyond reasonable doubt' standard, placing the burden of proof on the applicant, which renders the situation extremely difficult, if not virtually impossible, for victims of violence who are also members of a marginalized community. This fact has been reiterated by many third party interveners

[186] Ruth Rubio-Marín and Mathias Möschel, „Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism" *European Journal of International Law*, Vol.26, No.4, (2015): 884.
[187] *D.H. and Others v The Czech Republic* [GC], Application no. 5732/00, Judgment of 13 November 2007.
[188] Supra, note 186 at p 886.
[189] Ibid, 887.
[190] *Opuz v Turkey,* Application no. 11146/11, Judgment of 29 January 2013.
[191] Supra, note 188, at p 887.
[192] Danisi, 800.
[193] Rubio-Marín and Möschel, 888.

especially in police violence and (insufficient investigations of) hate crime cases, where the involvement of the authorities makes the burden ever more difficult. It seems that recently the Court has taken these recommendations into consideration and, at least in the procedural limb, avails itself to finding violations. The idea of extending the doctrine of procedural violations comes from judge Bonello's key dissenting opinion in *Anguelova v Bulgaria*[194] in which he criticizes the Court regarding its obsession with hard evidence, as if "*misfortunes punctually visit[ed] disadvantaged minority groups, but only as the result of well-disposed coincidence.*"[195] He proposes two further procedural strategies to forward change, departing from the self-inflicted burden of proving standard on the one hand, and shifting the burden in situations "*when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high*"[196] on the other hand.

4.3.3. – Discrimination claims in forced sterilization cases

In all forced sterilization cases before the ECtHR, discrimination claims were raised in conjunction with Articles 3, 8 and 12. The Court considered these claims under Article 8 as the interference at issue affected the applicants' bodily integrity and had adverse consequences on their private lives. Examining the materials, the Court concludes that vulnerable individuals from various ethnic groups were in fact affected, however this evidence – FIGO's third party intervention, the findings of the civil proceedings, the Body and Soul Report followed by the Ministry of Health's statistical report, ECRI's recommendations and CEDAW's General recommendations nos. 19 and 24 – was not sufficiently convincing to the Court to establish either that the sterilizations were part of an organized policy, or that the hospital staff acted in

[194] *Anguelova v Bulgaria*, Application no. 38361/97, Judgment of 13 June 2002. (Custodial death)
[195] Ibid, §§ O-3.
[196] Ibid, §§ O-18.

bad faith with intentionally racist motives.[197] With regard to the initial finding that sterilizations indeed affected the Roma community, the Court reiterates its findings under Article 8 alone. Having found a breach of positive obligations to afford effective enjoyment of the Convention rights, the Court does not find it necessary to separately determine whether there has been a breach of Article 14.[198] The Court has not departed from this decision in *V.C.* in the following cases. "*In some cases we requested the Court to issue a Grand Chamber judgment. You might know, that in these cases at the European Court we submitted the claims on ethnic but also on gender discrimination, but the Court did not address any of these claims, not even gender discrimination. The Grand Chamber refused our request.*"[199]

The attorneys and supporting organizations were left uncomprehending as to why these textbook cases of intersectional discrimination were unaddressed. "*Even in the V.C. case where all the statistical data, and an ombudsman's report were available, it was even written on the patient's file that she is Roma, and it was all common knowledge that women are being sterilized in hospitals, the Court did not find a violation. I think it is a political decision that the Court did not want to make it a 'Roma-case' and acknowledge that it was a racist policy applied by the Czech Republic and Slovakia*." [200] Similar answers suspecting political motivation behind the Court reluctance come up in every interview as a wild guess, but even more common is a nervous laughter followed by awkward silence; there is no answer convincing enough. "*A year and a half ago* [in 2014] *there was a meeting of litigators at the Court where you can address certain questions for the Court. When we asked about this* [why they are reluctant to rule under Article 14 in forced sterilization cases] *the answer was that* [the

[197] *V.C. v Slovakia*, §§ 177.
[198] Ibid, §§ 178-180.
[199] Attorney of Poradna, 29 April 2016.
[200] Attorney of ERRC, 17 March 2016.

Court] *usually tends to go for discrimination when the discrimination is in the heart of the case. Probably the Court wasn't persuaded that this was a systemic policy*."[201]

4.3.4. – A possible explanation and a way forward

As referred to above, the exceptionalism in discrimination cases seems to concern anti-Roma violence only. Authors Ruth Rubio-Marín and Mathias Möchel derive an explanation from Marie-Benedict Dembour's theory of 'post-colonial denial,' stating that the Court's reluctance to rule on Article 14 in anti-Roma violence cases is caused by a structural failure to recognize the relevance of some historical factors.[202] The pair of authors identify this rationale resulting in unconscious influence of history on the decision-making as the 'Holocaust Prism'.[203] Simply put, racist violence cases, especially ones which per definicionem might qualify as genocide or crimes against humanity (remember Articles 6 (d) and 7 (g) of the Rome Statute), seen through the lenses of the horrors of the Holocaust, will invoke the standards developed as a response to these horrors, making it extremely hard to denounce 'ordinary institutional racism' as racial discrimination under the Convention. The first problem is that the Holocaust Prism ultimately contributes to developing double standards in decision-making, when in fact any unjustified difference in treatment is to be treated equally.[204] The second problem closely following, is that the closer the form of violence to those that actually occurred under the Holocaust (like forced sterilization of groups denounced inferior, including the Roma) the less likely it will fall within the ambit of discrimination.[205] These, combined with the fear of political reactions for accusing state authorities of serious crimes, which of course is also exacerbated by the

[201] Attorney of ERRC, 26 March 2016.
[202] Rubio-Marín and Möschel, 892.
[203] Ibid, 893.
[204] Ibid.
[205] Ibid, 894.

Holocaust Prism, will force the Court to carefully restrict itself from finding race discrimination.

Striking is also the fact, that the race discrimination element overshadows the gender violence, in which respect the Court's jurisprudence has rapidly developed in a direction very much welcomed by women's rights organizations. It is interesting to draw comparison between the Inter-American Court of Human Rights' and the ECtHR's approach in treating forced sterilization cases as gender discrimination. Under the administration of Fujimori between 1996 and 2000 more than a quarter million indigenous women have been forcibly sterilized in Peru, with dreadfully similar methods and underlying ideologies to those in Central-Eastern Europe. The most recent case is still pending before the IACtHR, but a 2014 IA Commission report allows insight to the first instance judicial approach. The case of *I.V. v Bolivia* concerns a Peruvian refugee who was forcibly sterilized in a Bolivian hospital after delivering her third child by Caesarian section.[206] The IACHR has held in previous cases that affirmative measures shall be adopted especially in the area of health care to take into consideration "the distinctive features and factors that differentiate women from men, namely (a) biological factors […], such as […] their reproductive function."[207] The Commission considers that certain groups of women are subject to discrimination on multiple grounds in addition to their sex – referring in the present case to the applicant's immigrant status and economic position – identifying the present case as an example of intersectional discrimination in violation of the IA Convention's relevant provision in conjunction with the rights guaranteeing respect for private and family life and the right to found a family.[208] The Commission recommends that the State party investigates the case and similar allegations with due diligence to establish liability and punish

[206] *I.V. v Bolivia*, Report No. 72/14, Case 12.655, Delivered 15 August 2014
[207] Ibid, §§ 159.
[208] Ibid, §§ 160-163.

those responsible. It is unlikely that the Court will employ an approach significantly departing from the Commission's. This in fact implies that a focus on the gender based aspect of discrimination can easily lead to identifying a violation, an approach which could be taken over by the ECtHR to award Roma victims of sterilization the full recognition for the violation they had suffered and rendering visible the structural background of these cases.

The attorneys agree that in either avenues of domestic procedures, a finding of Article 14 violation would have been instrumental. The failure of the Court of concluding otherwise makes it very hard to advocate for legislation and policy addressing the structural dimension of the issue, because the judgment is left on an individual level, not giving visibility to the core issue. "*Individual redress is not our only goal when conducting strategic litigation, after all we want to change more actors' the society's behavior in a particular area, this would be our utopist goal. Of course it is very hard to achieve, and I think it also very much depends on the topic at issue. Today's context is very difficult especially in terms of Roma rights*."[209]

[209] Attorney of ERRC, 17 March 2016.

Conclusion

The purpose of this thesis was to explore the possible legal avenues which can be taken to litigate forced sterilization cases of Roma women in Hungary, Slovakia and partly the Czech Republic. The main questions were whether the civil or criminal avenue seems strategically easier and which one carries a stronger message to the society if a case is successfully won. Before answering these questions, the background and context in which forced sterilization cases emerged had to be explored, to give a better understanding of the legal response and developments and societal attitudes. We have found that forced sterilizations emerged as a population control and economic policy method in the socialist era, with roots in the Nazi regime's eugenic agenda. The continuing of the sterilization after the regime changes in Central-Eastern Europe is a manifestation of the widespread negative attitudes towards the Roma and its special sub-category, institutional racism. The cases emerged following the publication of the Body and Soul Report in Slovakia which shed light to the practice of forced sterilizations still prevailing in hospitals in the beginning of the 2000's. The Report gives a thorough overview of the trends how sterilizations are carried out forcibly or coercively, and points to a range of other human rights violations, such as segregation and harassment of the women in maternity wards. Though the practice is similar in all three countries examined, the depth and effectiveness of both civil and governmental investigations differ, so do the avenues of litigating. In Hungary, the few cases discovered were tried without a question at civil courts. In the Czech Republic, most cases ended with friendly settlements, due to the government's subsequent undertaking of responsibility and the establishment of an independent expert commission to assist the compensation process. In Slovakia, however, both criminal and civil suites were initiated and proceeded for years. To better understand the litigation process, we have relied on interviews conducted with attorneys who represented the cases at courts. Their

experience is complemented by the domestic procedural histories of the six cases which were ultimately heard by an international human rights body. Even though the attorneys, based both on the practical experience of the cases and legal theory, agreed that a criminal conviction of the responsible doctor carries the strongest message to society never to allow such violation to happen again, the cases on the criminal front were not successful. This is partly due to the procedural order of a criminal suit, which limits the role of the victim to provide evidence, but partly because proving beyond reasonable doubt that a crime was committed is extremely difficult, when the allegation concerns such a serious crime as genocide. On the civil law avenue, the lack of informed consent and procedural advantages made the building of cases easier. However, justice was not fully achieved at domestic courts, because the shift of focus to the amount of compensation left behind the moral weight of the detriment of the victims, and opened up a dangerous discourse in the public opinion to target and condemn victims as greedy liars, instead of addressing the structural issue of racial and gender bias.

In the second half of the thesis, we focused on the two international bodies which were involved in the hearing of forced sterilization cases, the Committee on the Elimination of Discrimination Against Women and the European Court of Human Rights. We carefully examined their jurisprudence from a comparative and individual perspective, and found that both bodies addressed the cases mainly on the grounds of privacy and family rights, and on the grounds of prohibition of inhuman and degrading treatment. The overview of the ECtHR's case-law under Article 14, the anti-discrimination provision, led to the identification of the second main question of this thesis: why was the Court reluctant in all forced sterilization cases to establish that they are examples of intersectional discrimination; the sterilization happens to these women because they are of Roma ethnic origin and also because due to their gender they are in a vulnerable position when giving birth. To answer this question, we looked at the Court's development of case-law in race and gender discrimination through the lenses of the

revolutionary cases of *D.H. and Others v The Czech Republic* and *Opuz v Turkey.* We found that in both cases by allowing a significant role to reports by professional organizations and simple statistical data, the Court made a doctrinal evolution in the battle against discrimination. However, in racist violence cases the Court still seems to apply rules as strict as national criminal provisions. An explanatory hypothesis was proposed by Ruth Rubio-Marín and Mathias Möschel, which they call the 'Holocaust Prism.' The authors state that the Holocaust drastically shaped the approach to race issues in Europe, so much so that the more similar a racially motivated crime is to the horrors of the Holocaust (like in this case the forcible sterilization of an ethnic group deemed inferior) the less likely the legal systems is to denounce the practice as racial discrimination.

The importance of overcoming the difficulty of proving both in the domestic and international arena that intersectional violence is to be taken seriously is twofold. First, acknowledging the discriminative nature of forced sterilization affords women full recognition for the wrongs they have suffered. Second, it sheds light to the structural dimension of bias in the whole society, which ultimately catalyzes and contributes to the much needed attitudinal changes. The message that Slovakia sends by amending its Penal Code to include a section on criminal sterilization, or the development of a framework for compensating victims of sterilization in the Czech Republic are all mayor steps towards more inclusive societies, in which strategic litigation by the organizations representing the cases examined in this thesis played an indispensable role.

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Appendices

Interview Questions for Attorneys
Comparative Analysis of Legal Avenues to Tackle Involuntary Sterilization of Roma Women in Central-Eastern Europe
Supervisor: Judit Sándor
CEU Human Rights Master Thesis
Emma Várnagy

This interview is for the purpose of research for a human rights master thesis. The interviews are recorded with the consent of the interviewee. Before starting the interview questions of anonymity are discussed, any information on the identity of the interviewee and their organization will be disclosed under the conditions previously agreed by the parties. The questions below indicate the structure of the interview and they are answered voluntarily.

Part I - general information

How long have you been a lawyer with *this* organization? (Have you held a similar position before with another organization?)

How did you become involved in forced sterilization cases?

Do you have other experience with similar /intersectional discrimination/ cases? Please tell me a little bit about this perspective.

How would you summarize attitudes towards Roma in your country?

Would you address the intersectional nature of forced sterilization cases? How?

How would you define a successful case? Are there more aspects to it?

What happens after a case is won? Are there different scenarios?

Part II - criminal proceedings

Do you have any experience with criminal proceedings in forced sterilization cases?

Would you highlight any aspect of your country's criminal code which might be particularly interesting in comparative perspective? /The interviewer has at disposal excerpts of all countries' criminal codes/

What might be possible articles to invoke? (From a theoretical point of view, not a practical one) In an ideal setting, what could be the advantages of each?

From a more pragmatic perspective, what could be the procedural disadvantages of criminal proceedings? Is there any other disadvantage to it, personal or societal?

Part III - civil proceedings

How do you decide what strategy to follow in litigation?

What type of evidence is needed in a civil case? How do you build a case?

What is the victim's role in civil proceedings? (Compared to criminal?)

Please describe the goal of civil litigation (both from the point of view of any possible desire of the victim and, if there is such, the desire of the representative organization)

Do you think the outcome of a civil lawsuit can send a powerful message against discrimination? How?

Part IV - human rights

Do you have experience working with the ombudsman (any equal treatment authority) on a forced sterilization case?

Do you have experience with different international human rights bodies? How would you compare the CEDAW and ECtHR system?

Why do you think the ECtHR is reluctant to address the Article 14 nature of these cases?

Do you see any changes coming in this regard in the jurisprudence due to successful advocacy?

Does your institution have any specific advocacy strategy addressing this issue? How successful would you say it is?