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## FORCED STERILIZATION AS A VIOLATION OF ARTICLE 3 AND ARTICLE 8 OF THE EUROPEAN CONVENTION

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**Abstract.** *Forced and coerced sterilization is a phenomenon that has a long history in Europe as well as on other continents. It is a violation of basic human rights, especially the rights of women, ethnic and racial minorities, mentally impaired persons, and the HIV-infected persons. Sterilization is a procedure that is abused for the purpose of implementing eugenic policies. The author examines the ECtHR cases referring to forced sterilization and presents the most important attitudes of the Court, regarding the violation of Articles 3 and 8 of the European Convention on Human Rights. The author criticizes the Court attitude not to consider the applicants' discrimination claims, and argues that this issue is of crucial importance for the further development of the Convention as a "living instrument".*

**Key words:** *ECHR, ECtHR, prohibition of torture and inhuman treatment, right to respect for private and family life, discrimination.*

### INTRODUCTION

*Tubal ligation* is a surgical technique first proposed in early 19<sup>th</sup> century in England. It has been promoted as a permanent birth control method ever since. While *voluntary sterilization* is an important contraceptive option (Rašević, 2002), tubal ligation has been forcibly performed upon women in marginalized populations worldwide, primarily motivated by eugenic policies. *Forced sterilization* implies that a patient is never consulted or informed about the sterilization. *Coerced or coercive sterilization* occurs when patients are encouraged to undergo sterilization, particularly by using financial or other incentives, misinformation or intimidation tactics to urge an individual to undergo the sterilization.<sup>1</sup> *Involuntary sterilization* is generic term for both forced and coerced sterilization (Gwendolyn 2011); it refers to programs and government policy motivated by intention to force people to undergo surgical or other forms of sterilization.

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<sup>1</sup> *Against her Will: Forced and coerced sterilization of women worldwide*, Open Society Foundation, 2011, p.2

Forced sterilization has a long history of practice in Europe. Many countries adopted eugenic laws during the 20<sup>th</sup> century, providing for forced sterilization through judicial procedure.<sup>2</sup> These judge-made laws provided for the sterilization of men and women alike, either because of their disability or misconduct, or because they belonged to specific ethnic groups, such as Roma people (Pichot, 1995:31). In the first half of the 20<sup>th</sup> century, there were several programs around the world (usually as part of eugenics ideology) intended to prevent the reproduction and multiplication of the population.<sup>3</sup> These programs particularly affected women, ethnic minorities, specifically Roma people, HIV-positive persons, and mentally disabled persons. Women of the Roma minority were coercively or forcibly sterilized in Slovakia, Czech Republic, and Hungary. In many of these cases, women were sterilized after the cesarean section deliveries, without ever being asked or informed about it. In other cases, women in labor were told that sterilization was required immediately as an “emergency, life-saving measure”; they were required to sign a consent form, which was often handwritten and included unfamiliar language and Latin terms.

Forced sterilization and eugenic ideology continued after the Second World War. Sterilization of Roma women, performed in Czechoslovakia ever since the 1970s, was aimed at controlling the Roma population. A lot of documents from that time prove that many women were forced and coerced to undergo sterilization, while not being fully aware of the irreversible nature of this proceeding. The European Court of Human Rights (hereinafter: the ECtHR or the Court) tackled the issue of forced sterilization in several cases versus Slovakia. In these cases, the Court had to decide whether there was a violation of Article 3 (prohibition of torture, inhuman and degrading treatment and punishment) and Article 8 (right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR or the Convention). Although all cases involved the applicants of the Roma population, it is interesting that in none of these cases did the Court decide upon the applicants request for a violation of Article 14 of the Convention (prohibition of discrimination).

#### ECtHR CASE LAW: THE CIRCUMSTANCES OF OBSERVED CASES

The case *V. C. v. Slovakia*<sup>4</sup> is the first of a number of cases brought before the European Court by women of Roma ethnic origin, who were sterilized in public hospitals after the fall of the communist regime (from 1999 to 2007). The applicant, Ms V.C., is a Slovakian national of Roma ethnic origin. She claimed that she was the victim of a forced sterilization during the delivery of her second child. She signed the sterilization consent form but she understood neither what it meant nor the nature and consequences of the procedure. Consequently, she was cast away by the Roma community and, now divorced, she claims that her infertility was one of the reasons for her separation from her ex-husband. Furthermore, the applicant claims that Roma ethnicity was a deciding factor in her sterilization and that segregation based on ethnic origin in the gynecology was a common practice in Slovakia.

<sup>2</sup> For example: in the USA (in 33 states); in Switzerland and Canada in 1928, in Denmark in 1929, in Norway and Germany in 1934; in Finland and Sweden in 1935; in Estonia in 1937.

<sup>3</sup> Forced Sterilization (2014), Webster University; <http://www2.webster.edu/~woolfilm/forcedsterilization.html>

<sup>4</sup> *V.C. v. Slovakia*, no. 18968/07.

The State asserted that all patients had been provided with the same care, and claimed that the applicant's sterilization was carried out for medical reasons, because of the risk of uterus rupture. The State also asserted that she had given authorization after having been warned by doctors of the risks of future pregnancy. After exhausting all remedies before national courts, Ms V.C. lodged an application before the ECtHR complaining that she was sterilized without her full and informed consent, that the authorities' investigation was not thorough, fair and effective, and that she was discriminated against on the grounds of her race and sex (i.e. that she was a victim of the eugenic policy). The Court found that there was a substantive but no procedural violation of Article 3 of the Convention. The Court also decided that there was a violation of Article 8 of the Convention.

Apart from this case, there are other cases against Slovakia, addressing similar facts. In the case *I.G., M.K. and R.H. v. Slovakia* three women of Roma ethnic origin claimed to have been victims of "forced sterilization", without their full and informed consent.<sup>5</sup> In addition to not providing informed consent, both I.G. and M.K. were minors at the time, and they were sterilized without the consent of their legal guardians, as required by the Slovak legislation. The Court found that there was a substantive and procedural violation of Article 3 of the Convention, and that there was a violation of Article 8 of the Convention. In the case *N.B. v. Slovakia*, another woman of Roma ethnic origin has been sterilized by tubal ligation, during the delivery of her second child, without her full and informed consent.<sup>6</sup> The Court concluded that there was violation of Article 3 (substantive obligation) and Article 8. There was one more case, *R.K v. Czech Republic*,<sup>7</sup> concerning forced sterilization, but it was struck out of the Court's list of cases following a friendly settlement between the parties.

### THE COURTS' STATEMENT OF VIOLATION OF ARTICLE 3

Article 3 of the Convention reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." As the Court has stated on many occasions, it enshrines one of the most fundamental values of democratic societies, and makes no provision for exceptions and no derogation thereof, even in the event of a public emergency threatening the life of the nation.<sup>8</sup> Article 3 includes the existence of negative state obligations in respect of its application, which means that states must refrain from torture and other ill-treatment.<sup>9</sup> It also imposes a number of positive obligations on the State that flow from its obligation to secure to everyone within its jurisdiction the rights protected by the Convention, in this case: the right to be free from torture and other forms of ill-treatment. The Court held that states have an obligation to take measures, designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.<sup>10</sup>

In numerous cases, the Court has defined degrading treatment or punishment, noting that treatment is considered "degrading" when it was such as to arouse in its victims

<sup>5</sup> *I.G., M.K. and R.H. v. Slovakia*, no. 15966/04.

<sup>6</sup> *N.B. v. Slovakia*, 29518/10.

<sup>7</sup> *R.K v. Czech Republic*, no. 7883/08.

<sup>8</sup> *Labita v. Italy*, no. 26772/95, § 119, ECHR 2000-IV;

<sup>9</sup> *INTERRIGHTS Manual for Lawyers – Prohibition of torture, inhuman and degrading treatment or punishment* according to ECHR (Art.3), December 2005, pp.27.

<sup>10</sup> *Z and Others v. the United Kingdom*, no. 29392/95, §§ 73-75, ECHR 2001-V;

feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience.<sup>11</sup> The Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality, in a manner incompatible with Article 3 of the Convention.<sup>12</sup> The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a finding of the violation. Finally, it is sufficient, if the victim is humiliated in his or her own eyes.<sup>13</sup>

For certain conduct to constitute a violation of Article 3, it is necessary that ill-treatment must attain a minimum level of severity. The assessment of this is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.<sup>14</sup> In this regard, since there was no explicit consent to sterilization based on providing the needed information, that treatment unambiguously contains the "minimum severity". According to the Courts' view in the case *N. B. v. Slovakia*, if a woman signed request for conducting sterilization while she was in labour, when her cognitive abilities were affected by medication, and wrongfully led her to believe that that the procedure was indispensable for preserving her life, the applicant's physical integrity was violated and it was grossly disrespectful of her human dignity.<sup>15</sup> However, even if the prior informed consent did not exist, the Court did not find that the hospital staff acted in bad faith (i.e. that the sterilization was part of an organized policy or intentionally racially motivated).<sup>16</sup>

International medical standards clearly state that patients must always give their informed consent to sterilization procedures. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with a prior, free and informed consent of the person concerned, based on adequate information.<sup>17</sup> The World Health Organization (hereinafter: the WHO) clearly states that the patient's informed consent is a prerequisite for any medical intervention.<sup>18</sup> The Council of Europe's Convention on Human Rights and Biomedicine<sup>19</sup> obliges medical providers to give each patient objective and comprehensive information about his/her contemplated treatment, including its purpose, nature, consequences and risks, in order to enable the patient to make an informed decision. The UN Committee on the Elimination of Discrimination against Women (hereinafter: the CEDAW) recommends a period of at least seven days between informing the patient about the nature of sterilization, its consequences, potential risks and available alternatives, and the patient's response of her free, prior and informed consent.<sup>20</sup> According to the ECtHR case law, informed consent

<sup>11</sup> *Gafgen v. Germany*, no. 22978/05, § 89, ECHR 2010-VI;

<sup>12</sup> *Albert and Le Compte v. Belgium* judgment of 10 February 1983, Series A no. 58, p. 13, § 22;

<sup>13</sup> *Tyrer v. the United Kingdom*, no. 5856/72, § 32, ECHR 1978-IV;

<sup>14</sup> *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162;

<sup>15</sup> *N.B. v. Slovakia*, 29518/10. cited above, § 77

<sup>16</sup> *V. C. v. Slovakia*, § 126

<sup>17</sup> *Universal Declaration on Bioethics and Human Rights*, UNESCO, (2005), art. 6 (1)

<sup>18</sup> *Declaration on the Promotion of Patients' Rights in Europe*, WHO, (1994); European Consultation on the Rights of Patients, Amsterdam, Mar. 28-30, 1994, WHO Doc. EUR/ICP/HLE 121 (1994), art. 3.1

<sup>19</sup> *Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Oviedo, 04.04.1997, CETS No.: 164 (1997)

<sup>20</sup> Concluding comments of the Committee on the Elimination of Discrimination against Women: Czech Republic, CEDAW/C/CZE/CO/5, para. 35.

includes information about health status, proposed procedure and its alternatives, and time for reflection.

In several cases, the ECtHR has examined complaints about alleged ill-treatment in the contexts of medical interventions to which individuals were subjected against their will.<sup>21</sup> Some of these interventions are related to sterilization procedure. The Court notes that sterilization constitutes a major interference with a person's reproductive health status, as one of the essential bodily functions of human beings. It may be legitimately performed at the request of the person concerned, for example, as a method of contraception or for therapeutic purposes where the medical necessity has been convincingly established.<sup>22</sup>

In order for an individual to give voluntary consent, the information communicated should be provided in a manner that is understandable to patient. The WHO explains that information must be communicated to the patient in a way appropriate to the latter's capacity for understanding, minimizing the use of unfamiliar technical terminology.<sup>23</sup> In the case *V.C. v. Slovakia*, the applicant was asked to sign the typed words "Patient requests sterilization" while she was in labor, and shortly before performing a Caesarean section. The International Federation of Gynecology and Obstetrics (hereinafter: the FIGO) specifically notes that the difficulty or time-consuming nature of providing such information, for example, to patients who have had "little education," does not absolve medical providers from striving to fulfill the criteria for informed consent.<sup>24</sup> Surgical sterilization is recognized as a permanent contraceptive method by international medical bodies,<sup>25</sup> and while surgery to reverse sterilization exists, such procedures are costly, not widely available and have a low success rate (Hatcher, 1997). Women must be made aware of and have the opportunity to consider alternatives to sterilization, particularly family planning methods. In that regard, in the case *N.B. v. Slovakia*, the Court underlines that where sterilization was carried out without the informed consent of a mentally competent adult, it was incompatible with the requirement of respect for human freedom and dignity.<sup>26</sup>

The patients must be able to discuss their reproductive and child's health with their partners, because it is a decision that has a profound effect on their future family life. Undoubtedly, medical staff acted with gross disregard for human freedom of woman, including her right to freely decide, after having been given the possibility to discuss the matter with her partner, whether she would consent to the procedure".<sup>27</sup>

Moreover, it is important to emphasize that sterilization cannot be regarded as a life-saving surgery. This attitude was first taken in the case *V.C. v. Slovakia*, and later confirmed in *N.B. v. Slovakia*. The Court held that, in accordance with generally recognized standards, sterilization as such was not a life-saving medical intervention.<sup>28</sup> The FIGO emphasizes that sterilization for prevention of future pregnancy cannot be ethically justified on grounds of medical emergency. Even if a future pregnancy may endanger a woman's life or health,

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<sup>21</sup> *Hoffmann v. Austria*, no. 12875/87, judgment of 23 June 1993, 16; *Glass v. the United Kingdom*, no. 61827/00, judgment of 9 March 2004, 17

<sup>22</sup> *V.C. v. Slovakia*, no. 18968/07, § 106, ECHR 2012-II

<sup>23</sup> *Declaration on the Promotion of Patients' Rights in Europe*, WHO, (1994), art. 2.4.

<sup>24</sup> *Guidelines regarding informed consent* FIGO, (2009), para. 3

<sup>25</sup> *Medical eligibility criteria for contraceptive use*, WHO, (2004), *Guidelines on female contraceptive sterilization*, FIGO, (2011), para. 11

<sup>26</sup> *N.B. v. Slovakia*, cited above, § 73

<sup>27</sup> *V.C. v. Slovakia*, cited above, § 112; *N.B. v. Slovakia*, cited above, § 78

<sup>28</sup> *V.C. v. Slovakia*, cited above, § 106 with further references; *N.B. v. Slovakia*, cited above, § 73

she will not become pregnant immediately, and therefore she must be given the time and support she needs to consider her choice. Her informed decision must be respected, even if it is considered to be harmful to her health.<sup>29</sup> In its well-established case law, the Court stated that the procedure was therefore incompatible with the requirement of respect for the applicant's human freedom and dignity. The fact that the doctors had considered the procedure necessary, because the applicant's life and health would be seriously threatened in the event of her further pregnancy, cannot affect the position.<sup>30</sup>

When assessing, whether certain behavior is a violation of Article 3 of the Convention, the Court shall take into account the duration of the treatment, its physical and mental effects as well as the sex, age and state of health of the victim. So, the age may be an important factor in determining whether a particular behavior is inhuman and degrading, and whether it constitutes a violation of the physical and mental integrity of the person in question. In the cases *V.C. v. Slovakia* and *N.B. v. Slovakia*, applicants were sterilized at an early stage of their reproductive life. The sterilization grossly interfered with their physical integrity, as they were thereby deprived of reproductive capacity.<sup>31</sup> The applicant was in a supine position and in pain, resulting from several hours in labour.<sup>32</sup> Accordingly, given the serious nature and consequences of sterilization, the Court held that the sterilization procedure, including the manner in which the applicant was asked to agree to it, was likely to arouse the feelings of fear, anguish and inferiority and to entail lasting suffering as the applicant's depressive and pessimistic moods could be linked to the inability to conceive.<sup>33</sup> Although there was no proof that the medical staff had intentionally ill-treated the patient, they acted with gross disregard to her right to autonomy and choice as a patient.

The Court has also reiterated that the very essence of the Convention is respect for human dignity and human freedom. It has held that in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with the right to physical integrity.<sup>34</sup> Therefore, based on all the above relevant medical facts, given the lack of informed consent to sterilization and wrongful information (as it was not a life-saving surgery), and given that the use of alternative methods could lead to the birth of a healthy child, the health personnel acted with gross disregard for woman's right to autonomy and choice as a patient. Such treatment constitutes a breach of Article 3 of the Convention.

Articles 1 and 3 of the Convention impose positive obligations on the Contracting Parties, designed to prevent and provide redress for various forms of ill-treatment. In particular, in a similar manner to cases raising an issue under Article 2 of the Convention, there is a requirement to conduct an effective official investigation.<sup>35</sup> Procedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not

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<sup>29</sup> *Guidelines on female contraceptive sterilization*, FIGO, (2011), *supra* note 14, para. 10

<sup>30</sup> *V.C. v. Slovakia*, cited above, §§ 76-77 and 105, with further references; *N.B. v. Slovakia*, cited above, § 74

<sup>31</sup> *V.C. v. Slovakia*, cited above, § 116; *N.B. v. Slovakia*, cited above, § 79

<sup>32</sup> *V. C. v. Slovakia*, cited above, § 118

<sup>33</sup> *Ibidem*; *N.B. v. Slovakia*, cited above, § 80

<sup>34</sup> *Jehovah's Witnesses of Moscow v. Russia*, no. 302/02, § 135, ECHR 2010-VI

<sup>35</sup> *Biçici v. Turkey*, no. 30357/05, § 39 with further references, ECHR 2010-V

theoretical or illusory, but practical and effective.<sup>36</sup> Specifically, the State has a general obligation to ensure that all persons under its jurisdiction are protected from various forms of abuse. In particular, where an individual raises an arguable claim that he/she has been seriously ill-treated, the State is obliged to take measures to prevent such forms of treatment. In such cases, the investigation must be thorough and expeditious.<sup>37</sup> Such an investigation should be capable of leading to the identification and punishment of those responsible.<sup>38</sup>

In the case *I.G., M.K. and R.H. v. Slovakia*, the Court found that the State authorities failed to conduct the investigation in an expeditious manner, and that the State did not put in place effective legal safeguards to protect the reproductive health of Romani women. With regard to the application of Ms. R.H, the Court decided to strike it down, due to her death during the proceedings. In case of medical negligence, the obligation to carry out an effective investigation may be satisfied if the legal system affords to victims a remedy in the civil courts, alone or in conjunction with a remedy in criminal courts, in order to establish liability of the doctors and any appropriate civil redress, such as an order for damages and for the publication of the decision.<sup>39</sup>

The Human Rights Committee urged the State to adopt all necessary measures to investigate all alleged cases of coerced or forced sterilization, publicize the findings, provide effective remedies to victims and prevent any instances of sterilization without full and informed consent.<sup>40</sup> However, Article 3 is phrased in substantive terms.<sup>41</sup> In cases of ill-treatment, Article 13 obliges the State authorities to investigate promptly and impartially. Article 13 of the Convention guarantees the right to effective remedy before national courts. The Court case-law establishes that the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation, capable of leading to the identification and punishment of those responsible for any ill-treatment, and permitting effective access for the complainant to the investigatory procedure.<sup>42</sup> Yet, the responsible party may not be punished for a violation of the right to an effective legal remedy. In this regard, the Committee against Torture has urged States to establish the criminal liability of medical personnel, conducting sterilizations without free, full and informed consent.<sup>43</sup>

#### FORCED STERILIZATION AS A VIOLATION OF THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

Article 8 of the Convention reads as follow: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of

<sup>36</sup> *Ilhan v. Turkey*, no. 22277/93, § 91, ECHR 2000-VI;

<sup>37</sup> *Mikheyev v. Russia*, no. 77617/01, §§ 107-109 with further references, ECHR 2006-I;

<sup>38</sup> *Gafgen v. Germany*, cited above, § 114;

<sup>39</sup> *N.B. v. Slovakia*, 29518/10. cited above, § 84.

<sup>40</sup> *Concluding Observations: Slovakia*, U.N. Doc. CCPR/CO/78/SVK (2003), para. 12

<sup>41</sup> *Ilhan v. Turkey*, cited above, § 92

<sup>42</sup> Separate opinion of judge Sir Nicolas Bratza in case *Poltoratskiy v. Ukraine*, no. 38812/97, ECHR 2003-IV

<sup>43</sup> *Concluding Observations: Slovakia*, para. 14, U.N. Doc. CAT/C/SVK/CO/2 (2009)

others.” “Private life” is a broad term, encompassing, *inter alia*, aspects of an individual’s physical, psychological and social identity, such as the right to personal autonomy and personal development, the right to establish and develop relationships with other human beings, and the right to respect for both the decisions to have and not to have a child.<sup>44</sup> The sterilization affected reproductive health status and had repercussions on various aspects of private and family life. Therefore, it amounted to interference with the rights under Article 8.

Although the object of this Article is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.<sup>45</sup> The Contracting States are under a positive obligation to secure to persons, within their jurisdiction, effective respect for their rights under Article 8.<sup>46</sup> Positive obligation requires from States to actively work towards the effective protection of the rights in question, even where this involves regulation of private relations between people. The Court considers it important to examine whether the respondent State complied with its positive obligation under Article 8. It was fulfilled if the State secured the rights guaranteed by that Article, by adopting effective legal safeguards to protect the reproductive health of, in particular, women of Roma origin.<sup>47</sup>

In determining whether or not such a positive obligation exists, the Court will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual concerned, the aims in the second paragraph being of a certain relevance.<sup>48</sup> The State is also under a positive obligation to secure to its citizens their right to effective respect for physical and psychological integrity.<sup>49</sup> Also, positive obligations may involve the adoption of measures, designed to secure respect for private life, even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures.<sup>50</sup>

In particular, the Court held that a positive obligation arose to provide an effective and accessible procedure, enabling the applicants to have access to all relevant and appropriate information.<sup>51</sup> Based on the judgments in *V.C. v. Slovakia*, and *N.B. v. Slovakia*,<sup>52</sup> the woman had a right to information to allow her to understand and react to the risks and dangers to which she had been exposed. If it was the lack of adequate information, that led to the destruction of her private and family life. In the case *K. H. and others v. Slovakia*,<sup>53</sup> the Court took the view that positive obligations should extend, in cases where personal data are concerned, to making

<sup>44</sup> *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I, and *E.B. v. France* [GC], no. 43546/02, § 43, 22 January 2008

<sup>45</sup> *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 15, § 31;

<sup>46</sup> *V.C. v. Slovakia*, cited above, § 140

<sup>47</sup> *V.C. v. Slovakia*, cited above, § 145

<sup>48</sup> *Roche v. the United Kingdom*, no. 32555/96, § 157, ECHR 2005-X; *K.H. and Others v. Slovakia*, no. 32881/04, § 45, ECHR 2009-IV

<sup>49</sup> *Tysiāc v. Poland*, no. 5410/03, § 107, ECHR 2007-III

<sup>50</sup> *X and Y v. the Netherlands*, no. 8978/80, § 23, ECHR 1985-III; *Tysiāc v. Poland*, cited above, § 110

<sup>51</sup> *Roche v. the United Kingdom*, cited above, § 162, with further reference; *K.H. v. Slovakia*, cited above, § 46

<sup>52</sup> *V.C. v. Slovakia*, cited above;

<sup>53</sup> *K. H. and others v. Slovakia*, no. 32881/04.



the relevant data or copies of medical files available to the patient. This applies particularly when medical records contained information which the applicants considered important from the point of view of their moral and physical integrity, and when they had been subjected to intervention affecting their reproductive status.

Negative obligation means that the State is obliged to refrain from interfering with the right to private and family life, except in cases provided in Art. 8 par. 2 of the Convention. According to the Court's established case-law, 'private life' covers various aspects such as physical, psychological and moral integrity of a person, including one's sexual life,<sup>54</sup> one's ability to develop relationships with others,<sup>55</sup> to determine one's own personal identity,<sup>56</sup> to develop a sex life free from any interference,<sup>57</sup> the right to respect for both the decisions to have and not to have a child.<sup>58</sup> The Court noted that a person's body concerns the most intimate aspects of one's private life, and decided that any interference with the physical integrity of a person must be prescribed by law and require the consent of that person.<sup>59</sup> According to the ECtHR case-law, in order for an intervention to represent violation of rights, it is necessary for it to be compulsory.<sup>60</sup> On the contrary, if sterilization came as a result of the applicant's free will deliberation and the exercise of the right to patient autonomy, the State fulfilled its negative obligation not to interfere.

Sterilization performed without a woman's informed consent severely violates her right to respect for her private and family life. This includes the rights of individuals to decide freely on the number and spacing of their children, and the means necessary to enable them to exercise these rights.<sup>61</sup> In the case *V.C. v. Slovakia*, the Court established that the applicant's sterilization affected her reproductive health status and had repercussions on various aspects of her private and family life.<sup>62</sup> Therefore, subjecting a woman to sterilization without her free and informed consent deprives her of reproductive autonomy and bodily integrity, and thus constitutes a violation of her right to private life.

In addition to violation of the right to private life, forced sterilization also led to a violation of the right to family life. The right to family life entails the right of family members to live together and develop mutual relations. In the case *Marckx v. Belgium*, the Court has established that the domestic legal system must enable people to have a normal family life and to develop family relations normally (Leach, 2007:290). From the moment of the child's birth and by the very fact of it, there is a bond between him and his parents amounting to "family life".<sup>63</sup> The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life.<sup>64</sup>

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<sup>54</sup> *Glass v. the United Kingdom*, no. 61827/00, § 70, ECHR 2004-III; *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-VII

<sup>55</sup> *Niemietz v. Germany*, no. 13710/88, § 29, ECHR 1992-XII

<sup>56</sup> *Gaskin v. the United Kingdom*, no. 10454/83, § 36-7, ECHR 1989-VII

<sup>57</sup> *Dudgeon v. the United Kingdom*, no. 7525/76, § 41, ECHR 1983-II

<sup>58</sup> *E.B. v. France*, no. 43546/02, § 43, ECHR 2008-I; *V.C. v. Slovakia*, cited above, § 138

<sup>59</sup> *Y.F. v. Turkey*, cited above, § 43

<sup>60</sup> *X v. Austria*, no. 8278/78, Commission decision of 13 December 1979, Decisions and Reports (DR) 18, p. 155

<sup>61</sup> *Guidelines on female contraceptive sterilization*, FIGO, (2011), para. 1

<sup>62</sup> *V.C. v. Slovakia*, cited above, § 143

<sup>63</sup> *Gül v. Switzerland*, no. 23218/94, § 32, ECHR 1996-II;

<sup>64</sup> *W. v. the United Kingdom*, no. 9749/82, § 59, ECHR 1987-VII

Under Article 8, par. 1, any interference by public authorities must be justified in terms of being “in accordance with the law” and “necessary in a democratic society” for one or more of the legitimate aims listed in Article 8 para. 2. The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities.<sup>65</sup> The interference must have some basis in domestic law. The Court has established that the phrase “in accordance with the law” does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention. The phrase thus implies, and this follows from the object and purpose of Article 8, that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1.<sup>66</sup>

In any case lodged before it, the Court assesses whether there was a legitimate aim for the interference with the applicant's right under Article 8. If the interference cannot be justified on any of the grounds provided for in Article 8 par. 2, interference is considered not to pursue a legitimate aim, and the Court will treat this action as a violation of this Article. In the case *V.C. v. Slovakia*, there is no dispute that the interference pursued the legitimate aims: the protection of health or morals, and the prevention of mother-to-child transmission of HIV during childbirth. Moreover, the State explicitly prescribed *inter alia* the existence of alternative methods of contraception, planned parenthood and the medical consequences of sterilization.<sup>67</sup>

#### FORCED STERILIZATION AS A POTENTIAL DISCRIMINATION

Article 14 of the Convention reads: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color of skin, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Prohibition of discrimination is a fundamental human right, guaranteed by numerous international documents.

For Article 14 to become applicable, it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols.<sup>68</sup> In the context of forced sterilization, a woman could be discriminated against on the grounds of her pregnancy and sex. The ability to reproduce plays a major role in women’s status and position in society. The sterilization performed on her without her full and informed consent amounted to a form of violence against women. As such, it is contrary to Article 14 of the Convention.

A failure by health services to accommodate the fundamental biological differences between men and women in reproduction is in breach of the prohibition of discrimination on the ground of sex. In its case-law, the Court has established that discrimination means a different treatment, without an objective and reasonable justification, of persons in relevantly similar situations.<sup>69</sup> However, as confirmed in the further ruling of the Court, Article 14 does not prohibit a member State from treating groups differently, in order to correct “factual

<sup>65</sup> *A, B and C v. Ireland*, no. 25579/05, §§ 218-241, ECHR 2010-XII; *V.C. v. Slovakia*, cited above, § 139

<sup>66</sup> *Malone v. the United Kingdom*, no. 8691/79, § 67, ECHR 1984-VIII;

<sup>67</sup> *V.C. v. Slovakia*, cited above, § 153

<sup>68</sup> *Laduna v. Slovakia*, no. 31827/02, § 50, ECHR 2011-XII;

<sup>69</sup> Dissenting opinion of judge Mijovic in case *V.C. v. Slovakia*, cited above

inequalities” between them; indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.<sup>70</sup>

In addition, the Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a *de facto* situation.<sup>71</sup>

In the case *V.C. v. Slovakia*, as in other similar cases, the Court has found that it is not necessary to separately examine the alleged violation of Article 14. Bearing in mind that the applicant was Roma, this is somewhat surprising. From the Courts' decision, we can see that the focus was on the intention of the doctors rather than on the effects of the irregular sterilization practices involving members of the Roma community. The practice of forced sterilization affected Roma women, in particular, but the Court does not find this sufficient to examine the State's duty to investigate whether the applicant's sterilization was racially motivated. In the case *Mizigarova v. Slovakia*,<sup>72</sup> the Court did not find a violation of the procedural obligation of the State to investigate alleged police abuse of Roma in Slovakia. In particular, the Court was not persuaded that the objective evidence had been sufficiently strong in itself to suggest the existence of a racist motive for the incident. While examining the alleged violation of procedural obligations from Article 8, in the cases *V. C. v. Slovakia* and *N.B. v. Slovakia*, the Court stated that practice of forced sterilization without informed consent was found to affect vulnerable individuals, belonging to various ethnic groups. Roma women are at particular risk, due to a number of shortcomings in domestic law and practice at the relevant time.<sup>73</sup>

Bearing in mind the past practices in the eugenic policy implementation, the Court should demonstrate more resolve to consider potential discrimination in similar cases. That orientation would be in line with the Court standing that, in case of racially motivated violence, motives should be thoroughly investigated.<sup>74</sup> The Court actually confirmed the existence of different treatment in similar situations, while reasoning on the breach of Article 3. The Court underlined that the hospital staff acted in a paternalistic way, which practically means that the applicant was not offered any option but to agree to the procedure which the doctors considered appropriate. However, *in similar situations*, informed consent was required, promoting autonomy of moral choice for patients.<sup>75</sup> This standpoint of the Court confirms the existence of racial discrimination against the Roma, although formally there is no decision on alleged violation of Article 14.

Considering the Caesarean section and forcibly performed sterilization, in the case *V.C. v. Slovakia*,<sup>76</sup> the Court stated that the FIGO considered it unethical for a physician to perform a sterilization procedure as an adjunct to a Caesarean section simply because he or she considered it to be in the patient's interest, unless the physician had fully discussed the matter with the patient before delivery and received her voluntary consent. Finally, it is necessary to underline that the advancement of the equality of the sexes is

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<sup>70</sup> *Stec v. United Kingdom*, § 51

<sup>71</sup> *Kurić v. Slovenia*, no. 26828/06, § 388, ECHR 2012-VI

<sup>72</sup> *Mizigarova v. Slovakia*, no. 74832/01 .

<sup>73</sup> *V.C. v. Slovakia*, cited above, §§ 146-149 and 152-153

<sup>74</sup> *Načova v. Bulgaria*, no. 43577/98 43579/98, § 57

<sup>75</sup> *V.C. v. Slovakia*, cited above, § 114

<sup>76</sup> *V.C. v. Slovakia*, cited above, § 175

today a major goal in the member states of the Council of Europe, and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention.<sup>77</sup>

Finally, the Court provided an opinion why the Roma population was at particular risk, which was perceived to be a result of widespread negative attitudes towards the relatively high birth rate among the Roma, as compared to other parts of the population, as well as the fear of the increasing portion of the population living on social benefits.<sup>78</sup> Moreover, the Court stressed that inability to have children strongly diminished the applicant's position as a woman, living within a Roma community, and entailed mental suffering.<sup>79</sup> In *V. C. v. Slovakia*, the applicant was cast away from the Roma community after the sterilization and her infertility contributed to her divorce. Given the fact that sterilization caused significant consequences for woman in the Roma community, one of the crucial points in the context of involuntary sterilization is the importance of examining alleged violation of Article 14.

#### CONCLUSION

The eugenics ideology and forced sterilization still exist in many countries. In some countries, sterilization is encouraged, proposed and suggested to vulnerable groups of the population. The decisions of the ECtHR unambiguously condemned national policies of incitement to sterilization. Protection from forced and coerced sterilization should be guaranteed in particular to vulnerable groups, such as the Roma. The only form of sterilization, which is unambiguously legal and moral, is the medical or therapeutic one, when the sterilization is medically inevitable and carried out within a therapeutic treatment. One of the women's fundamental right is to exercise autonomy over their reproductive life. Forced or coerced sterilization implies that women are treated like second-class citizens. They are humiliated, abused, deprived of reproductive life, unable to ever have children again and left physical and emotionally deficient.

Forced and coerced sterilization should be treated like any other form of torture. Remedies must be effective. The States should implement international and national policies, stating that such practices are unacceptable and promoting the concept of full and informed patient's consent as an indispensable element of all medical treatment. Forced sterilization violates the rights of the most stigmatized members in society. Such practices represent discrimination against marginalized groups. Inadequate law, policy and practice create environments in which forced and coerced sterilization practices are largely unchecked.<sup>80</sup> Thus, we consider it necessary that the ECtHR should examine the aspect of discrimination in cases involving forced or coerced sterilization (under Article 14 ECHR), which is of crucial importance for a further development of the Convention as a "living instrument".

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<sup>77</sup> *Ünal Tekeli v. Turkey*, no. 29865/96, § 59, ECHR 2004-XI

<sup>78</sup> *V.C. v. Slovakia*, cited above, § 146, 147

<sup>79</sup> *N.B. v. Slovakia*, 29518/10, cited above, § 79

<sup>80</sup> *Against her Will: Forced and coerced sterilization of women worldwide*, 2011, p.9

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### **PRISILNA I PRINUDNA STERILIZACIJA: POVREDA PRAVA IZ ČLANA 3 I ČLANA 8 EVROPSKE KONVENCIJE O LJUDSKIM PRAVIMA**

*Prisilna i nevoljna sterilizacija je pojava koja ima dugu istoriju, kako u Evropi tako i na drugim kontinentima. Ona predstavlja povredu osnovnih ljudskih prava, pre svega žena, ali i etničkih i rasnih manjina, duševno obolelih, kao i lica obolela od HIV-a. Sterilizacija je postupak koji je zloupotrebljavan u svrhu sprovođenja eugenične politike. Autor se u radu bavi slučajevima pred Evropskim sudom ya ljuds prava koji se onose na prisilnu i prinudnu sterilizaciju. Presentovani su najznačajniji stavovi Suda po pitanju povrede prava iz člana 3 i člana 8 Evropske konvencije o ljudskim pravima. Autor se kritički osvrće na stav Suda da ne razmatra zahteve aplikanata o postojanju diskriminacije, te iznosi stav da je to pitanje od suštinskog značaja za dalji razvoj Konvencije kao "živog instrumenta".*

Ključne reči: *ECHR, ECtHR, zabrana mučenja i nečovečnog postupanja, pravo na poštovanje privatnog i porodičnog života, diskriminacija.*