

# Intersectionality and Human Rights Law: An Examination of the Coercive Sterilisations of Romani Women

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## Introduction

Romani women have endured centuries of extreme racism and discrimination and continue to experience endemic racism and discrimination throughout their lives.<sup>2</sup> Romani women have experienced widespread coercive sterilisation, legitimised by eugenic discourses of the need to control the “unhealthy” birth rate of Roma.<sup>3</sup> Following systematic state sanctioned sterilisations in the former Czechoslovakia, coercive sterilisation continued in Slovakia and the Czech Republic, and cases have also been reported in other countries such as Hungary. Adequate acknowledgement or redress for these grievous human rights abuses has still not been achieved.

An intersectional analysis of Romani women’s experiences provides a framework to understand and address the operations, interactions and patterns of subordination that resulted in widespread coercive sterilisations of Romani women. It also recognises Romani women’s experiences of unique forms of discrimination across multiple identities. When examining experiences of coercive sterilisation through an intersectional lens, one can see that the harms experienced by Romani women are motivated by multiple layers of discrimination and stem from the convergence and indivisibility of different structures of oppression. The coercive sterilisation of Romani women is an attack on Romani women, underpinned by gendered, racial and class-based stereotypes. Coercive sterilisation has also taken place in the context of generations of endemic

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2 Roma are the largest minority ethnic group in the European Union. The Council of Europe estimates that there are 10–12 million Roma in Europe. The majority of Roma live in central and eastern Europe and there are also sizeable Roma minorities in Western Europe. The term Roma is used as an umbrella term by the Council of Europe to refer to people who identify as “Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned”. For more information, see Council of Europe, “Descriptive Glossary of terms relating to Roma issues”, 18 May 2012, available at: <http://a.cs.coe.int/team20/cahrom/documents/Glossary%20Roma%20EN%20version%2018%20May%202012.pdf>.

3 Czech Public Defender of Rights, *Final Statement of the Public Defender of Rights in the Matter of Sterilisations Performed in Contravention of the Law and Proposed Remedial Measures*, 2005, p. 78.

and systematic discrimination against Roma. It is vital to reveal the breadth of interlocking oppressive power structures so that these can be dismantled. It is with this in mind that this paper examines cases of coercive sterilisations of Romani women that have come before human rights courts to investigate the possibilities for an intersectional approach in the courts. While endemic and entrenched discrimination against Romani women will not be addressed and challenged merely through legal approaches, it is one of many tactics that can be part of wider change.<sup>4</sup>

The first section of this article examines intersectionality with a particular focus on how this is employed by Romani feminists. Section two provides a contextual overview of the experiences of Roma in Europe with a focus on coercive sterilisation as an intersectional issue. This is followed by an examination of the incorporation of intersectionality in human rights law in section three, where it is argued that an intersectional approach in human rights law poses challenges to a system that has struggled to grapple with substantive equality and tended to view people from a uni-dimensional perspective. Section four then analyses judgments in relation to coercive sterilisations of Romani women. In relation to cases of Romani women before the European Court of Human Rights (ECtHR), a failure to examine discrimination can be seen, thus dislocating Romani women's experiences from the structures of oppression that resulted in coercive sterilisations. In a case under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), a single-ground analysis provided an inadequate response to the issue of coercive sterilisation of Romani women, which cannot be disconnected from racism. This section then examines the possibilities for an intersectional approach in the courts.

## 1. Intersectionality

From its beginnings in Black feminism and critical legal studies, literature on intersectionality now transcends many disciplines and has been employed widely by academics and activists.<sup>5</sup> For this paper, intersectionality is understood as a transformative tool for

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4 It is important to note the courageous resistance by Romani women survivors in their struggle to gain justice and accountability for coercive sterilisations. This activism has ranged from court action, to public demonstrations and advocacy; often in the face of great adversity. Gwendolyn Albert notes that local tabloid publications have attempted to smear women who did come forward and in Slovakia, in cases where sterilisation had taken place on underage girls, they were threatened with proceedings of statutory rape against their partners. See Albert, G., "Forced Sterilization and Romani Women's Resistance in Central Europe", *Different Takes*, 2011, available at: <http://popdevhampshire.edu/sites/default/files/uploads/u4763/DT%2071%20Albert.pdf>, p 3.

5 Across the US, Canada, Australia and Europe it is a theme that has been the focus of much contemporary research, resulting in thematic conferences, journals and books. These include special thematic journals such as *European Journal of Women's Studies'* 2006 special on the theme of Intersectionality; *Signs: Journal of Women in Culture and Society* 2013 edition, which focused on "Intersectionality: Theorizing Power, Empowering Theory"; many conferences including "Theorising Intersectionality" held at Keele University, UK in 2005; "Celebrating Intersectionality? Debates on a Multifaceted Concept in Gender Studies", in Goethe-University, Frankfurt in 2009; and edited collections such as Grabham, E., Cooper, D., Krishnadas, J. and Herman, D. (eds.) *Intersectionality and Beyond: Law, power and the politics of location*, Routledge-Cavendish, 2008.

analysis and advocacy that can reveal and dismantle the workings of power and oppression.<sup>6</sup> It can be employed to reveal multiple dimensions of our social identities, “how we simultaneously experience our race, gender, class, age, ability and so forth as unique experiences of privilege and/or discrimination.”<sup>7</sup> It is crucial to note that the transformative potential of intersectional analysis has a clear focus on power and dismantling systems of power and oppression.<sup>8</sup>

Intersectionality emerged in the late 1980s as a term to analyse the complexities of difference and the multiple axes and sites of discrimination, in the context of social movements based on identity politics.<sup>9</sup> It emerged in the context of feminist articulations of the limits of gender as a universal category that essentialised women, and the fact that articulations of women as a homogenous group rendered particular women’s experiences invisible.<sup>10</sup> US black feminists asserted that their experience of oppression at the site of gender, class and race was qualitatively different to that of middle class white women.<sup>11</sup> This prompted a critique of mainstream feminist theory and law which were seen as focusing on dominant conceptions of the middle-class, heterosexual, white woman.<sup>12</sup> The term itself was first coined by Kimberlé Crenshaw where she asserted that the single-axis framework in US discrimination law distorted the multi-dimensional experiences of Black women.<sup>13</sup>

Speaking about race and gender, Crenshaw notes that “when the practices expound identity as ‘woman’ or ‘person of colour’ as an either/or proposition they relegate the identity of

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6 See “Intersectionality: A Tool for Realizing Human Rights”, *New Tactics in Human Rights*, 11 February 2015, available at: <https://www.newtactics.org/blog/intersectionality-tool-realizing-human-rights>.

7 *Ibid.*

8 *Ibid.*

9 Although as Angéla Kóczé notes, debates about the intersections of gender and class were prevalent in debates between feminists and socialists in the 18<sup>th</sup> and early 19<sup>th</sup> centuries, in Kóczé, A., *Missing Intersectionality: Race/Ethnicity, Gender, and Class in Current Research and Policies on Romani Women in Europe*, Central European University, 2009, p. 18.

10 Leslie McCall notes that many other texts around this time used similar terms to articulate and develop this conceptual framework, McCall, L., “The Complexity of Intersectionality”, *Signs: Journal of Women in Culture and Society*, Vol. 30, 2005, p. 1771.

11 See Hull, G.T., Smith, B. and Bell Scott, P. (eds.) *All the Women Are White, All the Blacks Are Men, But Some of Us are Brave: Black Women’s Studies*, New York Feminist Press, 1982, p. 432; and Combahee River Collective, “A Black Feminist Statement” in Guy-Sheftall, B., (ed.) *Words of Fire: An Anthology of African American Feminist Thought*, New Press, 1995, pp. 232–40.

12 Vakulenko, A., “‘Islamic Headscarves’ and the European Convention On Human Rights: an Intersectional Perspective”, *Social and Legal Studies*, Vol. 16, 2007, p. 185.

13 Crenshaw, K., “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, *University of Chicago Legal Forum*, Vol. 4, 1989, p. 139.

women of colour to a location that resists telling.”<sup>14</sup> This captures the experience of Romani women who have been marginalised within the Roma movement, the women’s movement, the lesbian gay bisexual transgender and questioning movement and indeed within class based movements and others. A focus on privileged group members within categories marginalises those experiencing multiple forms of oppression and distorts conceptions of oppression which “become grounded in the experiences that actually represent only a subset of a much more complex phenomenon”.<sup>15</sup>

### **a. Roma Feminists and Intersectionality**

The notion of intersectionality is of crucial importance for the analysis of the experiences of Romani women. The movement to progress Roma rights, as with other minority ethnic groups has been based in identity politics. As Crenshaw notes, the difficulty with identity politics, has not been a failure to transcend difference, as critics have charged, but rather a failure to acknowledge different experiences within groups.<sup>16</sup> Indeed, this is the experience within the Roma movement whereby Roma have been posited as a homogeneous group, thus rendering invisible intersectional identities within Romani communities.<sup>17</sup> Some Romani women activists now employ feminist theories of intersectionality in their statements and point to multiple sites and axes of oppression in the analysis of their social position.<sup>18</sup> Kóczé writes “I have come to see my own subject position as a Romani woman as a site where multiple forms of power and hierarchy are enacted.”<sup>19</sup> She notes that along with other feminist Romani women:

*[H]ave struggled to untangle the complex social, political, and economic issues that structure our lives, and develop a language to understand our experiences with multiple inequalities. Finally, we have encountered a “new way of thinking” (about) emerging issues in intellectual and policy circles: that of intersectionality. Though an intersectional approach is now used almost exclusively by highly educated Romani women, a much wider audience understands its implications in a tangible or practical sense and uses individualised vocabularies to express this.*<sup>20</sup>

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14 Crenshaw, K., “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”, *Stanford Law Review*, Vol. 43, 1991, p. 1242.

15 See above, note 13, p. 140.

16 See above, note 14, p. 1242.

17 Oprea, A., “The Arranged Marriage of Ana Maria Cioaba, Intra-Community Oppression and Romani Feminist Ideals: Transcending the ‘Primitive Culture’ Argument” *European Journal of Women’s Studies*, Vol. 12, 2005, p. 134.

18 See above, note 9, p. 24.

19 *Ibid.*, p. 9.

20 *Ibid.*, p. 9.

She notes that the relevance of gender to understanding anti-Roma racism has been controversial. Indeed, the political and representational intersectionality that Crenshaw theorised comes into play, as this is debated among Romani activists and non-Roma. One of the dilemmas noted by Romani feminists in advocating for an intersectional approach is that they are challenged on the logic of differentiation and fracturing the Roma movement.<sup>21</sup> Attempting to expose axes of oppression can be seen to further stigmatise Roma by exposing intra-group hierarchies and fuelling non-Roma stereotypes of Roma culture as backward or oppressive.<sup>22</sup> Alexandra Oprea notes that this becomes even more difficult at peaks of racial oppression as Romani women may “defend harmful practices when these practices are used to legitimise racist attitudes about Roma.”<sup>23</sup> She notes an example of when “child marriages are used to portray Roma as primitive and to reject pleas for equality as long as Roma ‘abuse the rights of their own people’”.<sup>24</sup> Prevailing narratives that ignore patriarchy and structural discrimination in non-Romani communities locate Romani women’s experience of gender discrimination as discrimination in the context of an oppressive community. An intersectional approach is sometimes pitted as a choice between ethnic identity and gender identity. In this context, the very structures and axes of discrimination that intersectionality seeks to uncover and challenge are a barrier to an intersectional approach being taken in the first place. Intersectionality exposes generations of oppression by non-Roma. However, in the context of what Crenshaw refers to as representational intersectionality, it is the intra-group hierarchies that are focused upon in dominant representations of Roma, while discrimination by non-Roma and institutional racism is normalised, legitimised and hegemonised.<sup>25</sup> Oprea states that neither the Roma movement, nor the women’s movement have adequately conceptualised the intersectional position of Romani women, resulting in marginalisation and exclusion.<sup>26</sup> The next section examines the situation of Roma in Europe in this light.

## 2. Situation of Roma in Europe

Thomas Hammarberg notes that “Europe has a shameful history of discrimination and severe repression of the Roma. There are still widespread prejudices against them in country after country on our continent.”<sup>27</sup> The former Commissioner for Human Rights notes that anti-gypsyism is deeply rooted in Europe, “[p]ublic leaders and opinion bodies – both elected officials and others – have openly defamed Roma and Travellers using racist or stigmatising

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21 *Ibid.*, p. 20.

22 *Ibid.*, p. 21.

23 Oprea, A., “Romani Feminism in Reactionary Times”, *Signs: Journal of Women in Culture and Society*, Vol. 38, 2012, p. 15.

24 *Ibid.*, p. 15.

25 See above, note 17, p. 136.

26 Interview with Alexandra Oprea, February 19, 2008, New York, see above, note 9, p. 22.

27 Amnesty International, “Human Rights on the Margins – Roma in Europe”, Briefing paper, available at: [http://www.amnesty.org.uk/sites/default/files/roma\\_in\\_europe\\_briefing.pdf](http://www.amnesty.org.uk/sites/default/files/roma_in_europe_briefing.pdf), p. 3.

rhetoric.”<sup>28</sup> This continues to this day; the European Roma Rights Centre (ERRC) has raised concerns about rising violence in Slovakia, Hungary and the Czech Republic and noted that:

*These countries have seen a strengthening of extremist and openly racist groups, which spread hate speech and organise anti-Roma marches through the very same villages where people are being attacked or killed.*<sup>29</sup>

In particular there is an accelerating pattern of violence in Hungary which is taking place in the context of far right parties in Government and extremist organisations. This has included “the use of firearms, firebombs, grenades, and Molotov cocktails against Roma, and the humiliation of Romani children and adults.”<sup>30</sup>

The way in which institutions enshrine dominant discourses around issues such as gender relations, ethnicity and conceptions of social justice can work to consolidate, produce and reproduce inequalities. In this context racism, patriarchy, class oppression, and other discriminatory systems operate through institutions to exacerbate inequalities. This can be seen in the experience of Roma who experience direct and indirect discrimination in housing, education, employment, health, access to goods and services, and decision making. A survey by the European Union Agency for Fundamental Rights (FRA) covering 11 EU countries shows that one in three Roma is unemployed and 90% live below national poverty lines.<sup>31</sup> In 2011, the rate of unemployment among Roma aged 15 to 64 in Slovakia was 70%.<sup>32</sup> The ERRC note that in Slovakia many Roma face forced eviction and live in poor and segregated settlements; with substandard housing, a lack of infrastructure and a prevalence of environmental hazards.<sup>33</sup> In Hungary it is estimated that about 60% of Roma live in secluded rural areas, segregated neighbourhoods, settlements, or ghettos.<sup>34</sup> Roma have been subjected to extremist groups engaging in violence, paramilitary activities, including rallies in uniform and “patrolling” their neighbourhoods.<sup>35</sup> Roma children in many European countries remain excluded from

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28 Council of Europe, *Human Rights of Roma and Travellers in Europe*, 2012, p. 11.

29 European Roma Rights Centre (ERRC), “Attacks against Roma in Hungary, the Czech Republic and the Slovak Republic”, 15 July 2012, available at: <http://www.errc.org/article/attacks-against-roma-in-hungary-the-czech-republic-and-the-slovak-republic/3042>.

30 François-Xavier Bagnoud Center for Health and Human Rights and Harvard School of Public Health and Harvard University, *Accelerating Patterns of Anti-Roma Violence in Hungary*, 2014, p. 9.

31 European Union Agency for Fundamental Rights, *The Situation of Roma in 11 EU Member States: Survey Results at a Glance*, 2012, p. 12.

32 ERRC, *Country Profiles: Czech Republic, France, Italy, Macedonia, Romania, Russian Federation, Serbia, Slovakia, Turkey and Ukraine*, 2013, p. 264.

33 *Ibid.*, p. 275.

34 See above, note 30, p. 14.

35 Commissioner for Human Rights of the Council of Europe, *Report by Nils Muiznieks, following his visit to Hungary from 1 to 4 July 2014*, 16 December 2014, p. 4.

quality education, segregated in Roma-only classes or schools, and placed in schools for children with intellectual disabilities. The ERRC points out that recent numbers in Slovakia show Roma constitute 60% of all students in special education; and up to 80% of children in special classes in mainstream schools are Roma.<sup>36</sup> In 2013, the ECtHR found “there was a long history of wrongful placement of Romani children in special schools in Hungary and that the State must change this practice.”<sup>37</sup>

Throughout Europe, the average life expectancy of Roma is shorter than that of non-Roma and infant mortality rates are higher. Life expectancy for Roma in Hungary is 10 years less than non-Roma.<sup>38</sup> Roma face significant barriers in accessing health care, including lack of resources to pay for insurance or treatment and discrimination in health care provision.<sup>39</sup> FRA research reports discrimination against Roma by health care personnel to be a particular problem. Twenty-five percent of respondents reported experiencing discrimination in the previous five years.<sup>40</sup>

Roma experience human rights issues in all aspects of their lives. This is particularly exacerbated for Romani women, “[o]n average across the 11 EU Member States surveyed, the situation of Roma women in core areas of social life, such as education, employment and health is worse in comparison to that of Roma men.”<sup>41</sup> Romani women have experienced racist attacks, racial abuse at the hands of health practitioners and a disproportionate removal of their children by social workers when compared to other groups.<sup>42</sup>

The level of discrimination against Romani women in particular can be seen in the practice of their coercive sterilisation across Europe over the course of the last decades. The above section outlines a litany of human rights issues faced by Roma and, in particular, Romani women. The response to these issues has often been the perpetuation of myths about Roma in public discourse, while historical and contemporary state discrimination is not acknowledged or addressed. The focus is placed on the victim and not the perpetrators. When the situation of Romani women is disconnected from the operation of power and

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36 See above, note 32, p. 285.

37 ERRC, “*Horváth and Kiss v Hungary*”, 29 January 2013, available at: <http://www.errc.org/cikk.php?cikk=4200>.

38 See above, note 30, p. 14.

39 See above, note 28, p. 22.

40 European Union Agency for Fundamental Rights, “Speech by Morten Kjærum Director of the European Union Agency for Fundamental Rights at the High-level event on Roma inclusion, Bratislava”, 23 May 2011, available at: <http://fra.europa.eu/en/speech/2013/high-level-event-roma-inclusion>.

41 European Union Agency for Fundamental Rights, *Analysis of FRA Roma survey results by gender*, 2013, p. 2.

42 See Centre for Reproductive Rights, Counselling Centre for Citizenship, Civil and Political Rights, *Body and Soul: Forced Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia*, 2003, p. 16; and above, note 28, p. 16.

subordination, this pattern of human rights abuses and state culpability is obscured. Such impunity paves the way for future abuses. This has been the case with coercive sterilisations, discussed in the next section.

#### **a. Coercive Sterilisation of Romani Women throughout Europe**

Coercive sterilisation has disproportionately impacted women from marginalised populations and an intersectional perspective can reveal the interlocking power structures that placed some women more at risk to this violation than others.

*While voluntary sterilisation is an important contraceptive option, tubal ligation has also been forcibly performed upon women in marginalised populations worldwide, motivated all too often by frankly eugenic considerations.<sup>43</sup>*

This has been true for Romani women, who have a long history of being forcibly sterilised, including under the Nazi regime, particularly prior to full-scale efforts to kill Jews, “Gypsies” and those deemed “unworthy of life”.<sup>44</sup> In Czechoslovakia, the Ombudsperson in the Czech Republic found that the practice of sterilisation was “directly encouraged by eugenic state policy until at least 1991.”<sup>45</sup> From the 1970s until the 1990s, state policy posited sterilisation as a birth control method and this was disproportionately promoted to members of the Romani minority by social workers, including by using financial incentives or threats to remove social benefits.<sup>46</sup> Coercive sterilisations were part of a policy to assimilate Roma into wider society and to stop the “social risk” that Roma posed by reducing their “unhealthy” birth rate.<sup>47</sup> The Czech Ombudsman estimates that as many as 90,000 Romani women from the former Czechoslovakia became infertile due to coercive sterilisation between 1970 and 1990.<sup>48</sup>

Coercive sterilisation of Romani women continued after the post-Communist period, including more widely across Europe. Research by the ERRC in Slovakia and the Czech Republic revealed that coercive sterilisation of Romani women continued after the post-Communist period.<sup>49</sup>

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43 See above, note 4, p. 1.

44 See above, note 28, p. 98.

45 See above, note 32, p. 27.

46 See above, note 28, pp. 93, 94.

47 See above, note 3, p. 3.

48 Walker, B., (ed.), *State of the World’s Minorities and Indigenous People*, Minority Rights Group International, 2013, p. 183.

49 ERRC, *Ambulance not on the Way: The Disgrace of Health Care for Roma in Europe*, 2006, p. 42.

*In the post-communist era in the Czech Republic and Slovakia, social workers were no longer involved, but a recurrent scenario involved doctors sterilising Roma women either during or shortly after a second caesarean-section delivery.<sup>50</sup>*

Cases in the Czech Republic have been documented from as recently as 2007.<sup>51</sup> Although there are fewer reported cases, coercive sterilisation also occurred in recent years in other countries including Hungary.<sup>52</sup> Cases documented in Hungary, Slovakia and the Czech Republic include those where no consent was provided or where consent was given in advanced stages of labour. Other cases noted the lack of a full explanation of the procedure, no explanation of alternate family planning methods, the provision of manipulative information and the use of financial incentives and threats to withdraw social protection payments.<sup>53</sup>

The practice of coercive sterilisation of Romani woman in Slovakia was documented in detail in a 2003 report.<sup>54</sup> The report documented 110 cases since the fall of communism. The research undertaken uncovered consistent patterns of health providers not gaining informed consent to sterilisation. In many cases women were given misleading or threatening information and women were coerced into giving last-minute authorisations for sterilisations.<sup>55</sup> The report also outlined “patterns of systematic and glaring racial discrimination”, including segregation in maternity wards.<sup>56</sup> This includes Romani women being prevented from using the same toilets and dining facilities as non-Romani woman.<sup>57</sup> The report notes that Romani woman were delayed or denied treatment in hospitals and ambulances from certain hospitals were reported to refuse or delay services for pregnant women in Romani settlements. Romani women identified experiencing physical and verbal abuse and racial hatred at the hands of health care providers.<sup>58</sup>

There has been a marked difference in the responses by states to these violations. The Czech Republic issued an apology for “instances of error” in 2009, whereas Slovakia’s government has

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50 See above, note 28, p. 94.

51 ERRRC, “Romani Victims of Coercive Sterilisation Still Denied Justice in the Czech Republic”, 11 October 2010, available at: <http://www.errc.org/article/romani-victims-of-coercive-sterilisation-still-denied-justice-in-the-czech-republic/3757>.

52 See above, note 4, p. 2.

53 See above, note 49, p. 42.

54 See above, note 42, Centre for Reproductive Rights, Counselling Centre for Citizenship, Civil and Political Rights.

55 *Ibid.*, p. 14.

56 *Ibid.*, p.15.

57 *Ibid.*, p.15.

58 *Ibid.*, p.16.

denied existence of these practices and Hungary has not expressed any regret.<sup>59</sup> While outside the focus of this paper, several Romani women in the Czech Republic have won redress for involuntary sterilisations through domestic courts and extra-judicial settlements.<sup>60</sup> However, overall the shortcomings in the remedies available for Roma women victims remain.<sup>61</sup>

### ***b. Intersectionality and Coercive Sterilisation***

The experiences of Romani women who have been coercively sterilised demonstrate a deeply disturbing picture of intersectional discrimination. Class oppression, patriarchy and racism all intersect and operate to subordinate Romani women. Coercive sterilisation cannot be linked to just one discreet aspect of discrimination. This can be seen in the narratives that were employed to legitimise discrimination. Coercive sterilisation of Romani women in Czechoslovakia was built on a racial narrative of a “high and unhealthy” population of Roma. Roma sterilisations were legitimised in that they applied to:

*[C]itizens showing an extensively negative attitude to work and learning, a high crime rate, an inclination to alcoholism, female promiscuity, and last but not least, lagging behind the cultural and social development of other population groups.*<sup>62</sup>

These narratives remain at large. A 2003 report revealed that a physician working in a hospital where Romani women were sterilised stated that Roma did not know the value of work and had children simply to obtain more social welfare benefits.<sup>63</sup> In 1995, the Slovak health minister at the time stated that “[t]he government will do everything to ensure that more white children than Romani children are born.”<sup>64</sup> The use of women’s bodies to assimilate the Roma community and to attack the wider ethnic group reveals a unique experience of discrimination and subordination. Class-based discrimination also comes into play whereby financial incentives or punitive measures have been used promote sterilisation. Furthermore, the historical experience of state sanctioned sterilisation in the former Czechoslovakia cannot be disconnected from the continued experience of coercive sterilisation by Romani women in Slovakia and the Czech Republic.

The articulation of coercive sterilisation of Romani women as an issue of just gender or ethnic or class discrimination would completely obscure the structures of domination that shaped

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59 See above, note 28, p. 95.

60 ERRC, *Parallel Report by the European Roma Rights Centre Concerning the Czech Republic: For Consideration by the Committee on the Elimination of Discrimination Against Women at the 63<sup>th</sup> Pre-sessional Working Group (27–31 July 2015)*, 2012, p. 6.

61 See above, note 28, p. 96.

62 See above, note 3, p. 28.

63 *I.G. and Others v Slovakia*, Application no. 15966/04, 13 November 2012, Para 32.

64 Hoyle, L., “*V.C. v Slovakia: A Reproductive Rights Victory Misses the Mark*”, *Boston College International and Comparative Law Review* Vol. 36, 2014, p.19.

these human rights abuses. Also, the experience of Romani women cannot be said to be simply be an issue of additive discrimination. The history of discrimination, combined with the full dynamics of subordination that Romani women still experience, creates a unique and intersectional experience. It is with this in mind that the following section discusses the possibilities for an intersectional approach in human rights law.

### 3. Intersectionality and the Human Rights Framework

Despite the wide body of literature on intersectionality and calls in particular by feminists since the 1990s for intersectionality to be incorporated into the human rights framework, progress has been slow. Significantly, in 2000, the Committee on the Elimination of Racial Discrimination (CERD Committee) adopted a General Recommendation that recognised “that some forms of racial discrimination have a unique and specific impact on women”.<sup>65</sup> In its later General Recommendation No. 32, the CERD Committee specifically mentions intersectionality as expanding the grounds of discrimination in practice.<sup>66</sup> While slow to embrace intersectionality, General Recommendation No. 28 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) outlines that “states parties must legally recognise and prohibit [such] intersecting forms of discrimination and their compounded negative impact on the women concerned.”<sup>67</sup> While this represents a significant shift, overall progress is still slow. As Johanna Bond notes, achieving a theory of human rights is only a partial development; the fragmented structure of human rights bodies across different categories, such as racial discrimination and gender discrimination acts as an impediment to intersectionality in practice.<sup>68</sup>

Articulations of intersectionality are not featured in documents published by the ECtHR. Indeed, in the 2010 Handbook on European Non-Discrimination Law, jointly published by the Court and the FRA, intersectionality does not feature at all.<sup>69</sup> The European Commission against Racism and Intolerance highlights intersectionality in its General Policy Recommendation No. 14. It notes that intersectionality which “has only recently been recognised, at least in international fora, refers to a situation where several grounds interact with each

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65 Committee on the Elimination of Racial Discrimination, *General Recommendation no. 25 on gender related dimensions of racial discrimination*, UN Doc A/55/18, 20 March 2000.

66 Committee on the Elimination of Racial Discrimination, *General Recommendation no. 32 the meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc. CERD/C/GC/32, 2009.

67 Committee on the Elimination of Discrimination against Women, *General Recommendation no. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2, 2010.

68 Bond, J., “Intersecting identities and human rights: The example of Romani women’s reproductive rights”, *The Georgetown journal of gender and the law*, Vol. 5, 2004, p. 909.

69 European Union Agency for Fundamental Rights and European Court of Human Rights, *Handbook on European non-discrimination law*, Council of Europe, 2010.

other at the same time in such a way that they become inseparable.”<sup>70</sup> However, it does not make a recommendation to states in relation to this. In all intersectionality has not become a significant part of discussion in relation to the European Convention on Human Rights. The following part therefore examines what an intersectional approach may look like in practice in human rights law.

### **a. Intersectionality and Human Rights Law – Approaches and Challenges**

#### *i. Beyond Formal Equality*<sup>71</sup>

The human rights framework has been widely critiqued by feminists for essentially being a male-centred system. Feminists have pointed to the precedence given to civil and political rights, the public/private divide and a focus on formal equality.<sup>72</sup> While the model of formal equality has been central to some seminal human rights struggles including, for example, women’s suffrage, it does not address intersectionality. Dianne Otto notes that formal equality:

*Does not challenge the underlying social, political and economic institutions that reproduce gender hierarchies. It is also not enough because it does not redress the inequitable access to rights that differently situated women (and men) have.*<sup>73</sup>

Formal equality adopts a symmetrical approach to equality which is seen as individualised and does not take into account structural and systematic discrimination as it is enshrined in institutions. Inequality when systematically enshrined in institutions may be so normalised that it is not even recognised. As former Justice L’Heureux-Dubé states:

*[D]omination always appears neutral to those who possess it, and the law insidiously transforms the fact of domination into a legal right. Inequality permeates some of our most cherished and long-standing laws and institutions.*<sup>74</sup>

This is particularly relevant for an analysis of policies or practice that may not explicitly target Roma, but have a disproportionate impact on the Roma community.

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70 European Commission Against Racism and Intolerance, *General Policy Recommendation No. 14*, CRI (2012) 48, 22 June 2012.

71 Formal equality is based on the Aristotelian understanding that equality means treating likes alike. For a detailed discussion of this see Fredman, S., *Discrimination Law*, Oxford University Press, 2002.

72 See Charlesworth, H., Christine, C. and Wright, S., “Feminist Approaches to International Law”, *The American Journal of International Law*, Vol. 85, 1991, p. 613.

73 Otto, D., “Holding up half the sky but for whose benefit?: A Critical Analysis of the Fourth World Conference on Women”, *Australian Feminist Law Journal*, Vol. 28, 1996, p. 23.

74 L’Heureux-Dubé, C., “Making a Difference: The Pursuit of Equality and a Compassionate Justice”, *South African Journal of Human Rights*, Vol. 13, 1997, p. 338.

In a formalistic approach, dominant groups are seen as the norm and those who do not fit in with the characteristics of dominant groups are then attributed as the other. The need for comparison prompts a critique of essentialism and the problem of positioning groups as undifferentiated and uni-dimensional. Majury notes that “differences among women, as among men, are ignored; other sites of oppression are treated as irrelevant.”<sup>75</sup> This approach is seen as incapable of addressing the intersectional discrimination of those who are more than one identity removed from the dominant group.<sup>76</sup>

In contrast, substantive equality is cognisant of the need to recognise historic and socially-based differences in order to further equality.<sup>77</sup> Substantive equality looks beyond whether people are treated in the same way by policies or practices to the impact and effect of such policies or practices. It recognises that equal treatment may mean that dominant and subordinate groups are treated differently.<sup>78</sup> A substantive understanding of equality acknowledges that discrimination may be so entrenched against certain groups that in addition to the obligation of non-discrimination, this may infer a positive obligation on the government to provide systematic remedies to past injustices.<sup>79</sup> A substantive model is key to intersectionality; as intersectionality is inherently substantive.<sup>80</sup>

## *ii. Challenges to Intersectionality in Human Rights Law*

Intersectionality has been critiqued as a concept that reifies categories and thus inequality.<sup>81</sup> This has provoked much debate on the use of social categories (such as gender, ethnicity, or sexual orientation), which can be seen as too rigid to capture the complexities of identity.<sup>82</sup> In response to this critique, Catherine MacKinnon asserts that categories “are the ossified outcomes of the dynamic intersection of multiple hierarchies, not the dynamic that creates them. They are there, but they are not the reason they are there.”<sup>83</sup> Chandra Mohanty states that although they are based on social constructions, the processes of racialisation and racism are realities that need to be analysed and engaged with in order to place them on the political

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75 Majury, D., “The Charter, Equality Rights, And Women: Equivocation And Celebration”, *Osgoode Hall Law Journal*, Vol. 40, 2002, p. 306.

76 *Ibid.*, p. 306.

77 *Ibid.*, p. 304.

78 *Ibid.*, p. 304.

79 Smith, A., “Bills of Rights as process: the Canadian experience”, *International Journal of Law in Context*, Vol. 4, 2008, p. 351.

80 MacKinnon, C., “Intersectionality as Method: A Note”, *Signs: Journal of Women in Culture and Society*, Vol. 38, 2013, p. 1024.

81 See above, note 10, p. 1776.

82 *Ibid.*, p1776.

83 See above, note 80, p. 1023.

agenda for change.<sup>84</sup> Proponents of intersectionality note that rather than being focused on an infinite number of categories, intersectionality is seen as primarily concerned with structures of power and exclusion.<sup>85</sup>

*It is not so much an either/or in regard to categorical thinking but much more about the need to always pay consistent attention to the historical and social contexts in which the categories being invoked (analytically and/or experientially) are produced, made meaningful and deployed.*<sup>86</sup>

This is crucial in terms of applying intersectionality to human rights law. In reality, there are ways in which human rights law works against this notion of substantive equality. Feminists have critiqued the theoretical framework of human rights that centres on rigid categories and the fragmented structure of human rights institutions.<sup>87</sup> A challenge to an intersectional approach is that non-discrimination law is based on discreet categories of discrimination and often individuals are forced to place themselves in one of these discreet and rigid categories. This raises concerns in terms of the reification and over-simplification of social constructions. MacKinnon sums this up when she notes that:

*The conventional framework fails to recognise the dynamics of status and the power hierarchies that create them, reifying sex and race not only along a single axis but also as compartments that ignore the social forces of power that rank and define them relationally within and without. In this respect, conventional discrimination analysis mirrors the power relations that form hierarchies that define inequalities rather than challenging and equalising them.*<sup>88</sup>

Crenshaw identifies the pattern of only being able to claim discrimination on one ground as exclusionary of the most marginalised. For example, a single-axis claim of gender discrimination by a white women is thus because race does not contribute to her disadvantage. Therefore a single-ground approach excludes people who are being marginalised on multiple grounds.<sup>89</sup> In an analysis on multiple discrimination (described as the experience of discrimination across more than one ground), Gay Moon notes that even though multiple discrimina-

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84 Mohanty, C.T., "Under Western Eyes: Feminist Scholarship and Colonial Discourses" *Feminist Review*, Vol. 30, 1988, p. 61.

85 Cho, S., Crenshaw, K. and McCall, L., "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis", *Signs: Journal of Women in Culture and Society*, Vol. 38, 2013, p. 797.

86 Lewis, G., "Celebrating Intersectionality? Debates on a Multi-faceted Concept in Gender Studies: Themes from a Conference", *European Journal of Women's Studies*, Vol. 16, 2009, p. 205.

87 See Bond, J., "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations", *Emory Law Journal*, Vol. 71, 2003, p. 72.

88 See above, note 80, p. 1023.

89 See above, note 13, p. 145.

tion is widely acknowledged, it has not been incorporated into legal remedies, policy development or data collection and “in practice lawyers will tend to take up cases on the strongest grounds available to them and ignore the other aspects. They will craft the case to meet the limitations of the law.”<sup>90</sup> The further difficulty for human rights law is the crucial point that encompassing experiences of inequality at multiple sites and axes of oppression requires an interactive approach, rather than an additive approach. An additive model wrongly assumes that structures of oppression can be separated, while intersectionality recognises that converging systems of oppression are mutually reinforcing and produce an entirely different experience of discrimination.<sup>91</sup> This poses challenges for a legal system that separates out grounds of discrimination and finds even addressing multiple grounds difficult.

### ***b. Can Human Rights Law Adopt an Intersectional Approach?***

MacKinnon notes that international law has fluctuated between missing opportunities to recognise intersectional discrimination and truly encompassing intersectionality. For instance, in the case of *Lovelace v Canada*, an indigenous woman complained that the law considered her no longer a member of her nation because she married a non-member of the community.<sup>92</sup> This marriage ended and when Ms Lovelace returned to the reservation and tried to purchase a home she could not do so as members of the group are prioritised by the Council.<sup>93</sup> The Human Rights Committee ruled that her right to enjoy her culture and use her language had been violated but did not rule on her claim of sex discrimination, reflecting a very narrow judgment that did not consider gender discrimination. However, in the landmark *Kadic v Karadzic*<sup>94</sup> case, which is internationally recognised, an intersectional approach is visible. This case recognised rape as a tool of genocide, which had previously not been recognised in international law. This was a crucial recognition of the indivisibility of women’s experience of rights violations in terms of gender and ethnicity. MacKinnon notes that women moved from the margin to the centre in conceptions of genocide:

*The fact that this genocide was in part conducted through gender crimes did not mean that the acts were not also ethnically and nationally and religiously destructive. It meant that they were (...) A violation that had been seen as just something men do to women all the time, even trivialised as surplus repression, was in this case reconfigured by law as the weapon of genocide its perpetrators*

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90 Moon, G., “Multiple Discrimination: Justice for the Whole Person”, *Journal of the European Roma Rights Centre*, Vol. 2, 2009, p. 7.

91 See above, note 87, p. 72; and The Association for Women’s Rights in Development, *Intersectionality: A Tool for Gender and Economic Justice*, 31 July 2004, p. 2.

92 *Lovelace v Canada*, Communication No. 24/1977, UN Doc. CCPR/C/OP/1, 30 July 1981, Para 10.

93 ESCR-Net, “Sandra Lovelace v Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977”, available at: <https://www.escr-net.org/caselaw/2010/sandra-lovelace-v-canada-communication-no-241977-canada-300781-un-doc-ccprc13d241977>.

94 *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995).

*knew it to be and deployed it as. When its intersectional reality was surfaced and believed, a vast underworld of violated women who had been unnamed and unspoken moved into the legal centre.*<sup>95</sup>

This is extremely important when one thinks of coercive sterilisation of Romani women as an attack on Romani women and an attack on the wider Roma community aimed at assimilation and stopping the “social risk” of the Roma community.<sup>96</sup> MacKinnon notes that when an intersection approach is used “it aims at the moving substantive reality ‘where systems of race, gender, and class discrimination converge,’ not one or another or even all static abstract classifications.”<sup>97</sup> She asserts the need to move on from formal equality and fit the law to reality, rather than trying to fit reality to the law.<sup>98</sup>

Intersectionality is a major challenge to the human rights framework and legal system that has grappled to deal with substantive equality and that has tended to address non-discrimination in terms of single categories. Crucial to intersectionality is an application of substantive equality and the ability to move beyond a single-ground or additive approach. This paper contends that it is of crucial importance to reenvision human rights law from this perspective to bring it closer to the lived experiences of people experiencing human rights violations. This is examined further below through the examination of cases of coercive sterilisations of Romani women.

#### **4. Coercive Sterilisation of Romani Women in the Courts**

This section examines judgments in cases of coercive sterilisation that have been taken to the ECtHR by applicants from Slovakia. It also examines a complaint to the CEDAW Committee under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol).<sup>99</sup> Part one of this section outlines the complaints and judgments in these cases. This is followed by an analysis of the judgments and the extent to which intersectionality was applied. The final part of this section examines other case law to evaluate the possibilities for an intersectional approach in human rights law.

##### ***a. Cases before the ECtHR and the CEDAW Committee***

In the case of *V.C. v Slovakia*,<sup>100</sup> the ECtHR examined the claim of a Romani woman that her rights were violated under Articles 3, 8, 12, 13 and 14 of the European Convention on Human

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95 See above, note 80, p. 1028.

96 See above, note 3, p. 3.

97 See above, note 80, p. 1023.

98 *Ibid.*, p. 1023.

99 UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. A/RES/54/4, 1999.

100 *V.C. v Slovakia*, Application No. 18968/07, 8 November 2011.

Rights.<sup>101</sup> On 23 August 2000, the applicant was sterilised in a public hospital without her full and informed consent. The applicant stated that she did not understand the term sterilisation and signed a consent form in fear that if she did not, the consequences would be fatal. At this point she was also in the final stage of labour and in pain.<sup>102</sup>

In the case of *N.B. v Slovakia*,<sup>103</sup> the applicant also alleged a breach of Articles 3, 8, 12, 13 and 14 of the Convention due to her coercive sterilisation in a public hospital.<sup>104</sup> She stated she felt intoxicated under the influence of medication when signing the consent form and remembers a doctor saying she would die unless she signed the papers.<sup>105</sup> At the time of delivery, the applicant was underage and her mother had not been asked to give consent for the sterilisation. The case of *I.G. and Others v Slovakia*,<sup>106</sup> involved three applicants who claimed breaches of Articles 3, 8, 12, 13 and 14 on account of their sterilisations in a public hospital.<sup>107</sup> All applicants claimed they were sterilised without their full and informed consent.<sup>108</sup>

*i. Claims of Discrimination*

For all of the above cases, Article 14 was alleged to be violated in conjunction with Articles 3, 8 and 12.<sup>109</sup> In the case of *V.C.*, the applicant relied on a number of international reports to make the point that “discrimination against Roma in Slovakia extended to all facets of their lives.”<sup>110</sup> She argued that the procedure should be seen:

*[I]n the context of the widespread practice of sterilising Romani women which had its origins in the communist regime and in the enduringly hostile attitudes towards persons of Roma ethnic origin.*<sup>111</sup>

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101 Article 3, prohibition of torture; Article 8, right to respect for private and family life; Article 12, right to marry; Article 13, right to an effective remedy; and Article 14, prohibition of discrimination, of the European Convention on Human Rights.

102 See above, note 100, Para 15.

103 *N.B. v Slovakia* Application No. 29518/10, 12 June 2012.

104 *Ibid.*

105 *Ibid.*, Para 10.

106 See above, note 63.

107 *Ibid.*

108 The case of the third applicant was not considered by the Court as she died before judgment was made.

109 See above, note 100, Para 169; See above note 103, Para 111; and see above, note 63, Para 158.

110 See above, note 103, Para 19.

111 See above, note 100, Para 90.

She asserted that this climate had influenced medical personnel in her segregated treatment in the hospital and her sterilisation, which constituted ethnic discrimination.<sup>112</sup> The applicant submitted documents that outlined a history of coercive sterilisation of Roma women in Czechoslovakia. Figures were submitted showing that a disproportionate number of Romani women were sterilised in the region where she was from.<sup>113</sup> This was supplemented with a variety of reports, including information from Amnesty International researchers working in Finnish refugee reception centres. These researchers had noted unusually high rates of sterilisation of Romani women who were seeking asylum from eastern Slovakia in Finnish refugee reception centres, with Presov Hospital (where the applicant was sterilised) being specifically identified.<sup>114</sup>

Also relying on these reports and others, the applicants in *N.B. and I.G. and Others* submitted that their ethnicity played a determining role in their sterilisation.<sup>115</sup> In *I.G. and Others*, a 2003 Body and Soul report was referenced, which included an interview with the chief gynaecologist at Krompachy Hospital, where the women were sterilised. This included a statement from the chief gynaecologist that “Roma did not know the value of work, that they abused the social welfare system and that they had children simply to obtain more social welfare benefits.”<sup>116</sup> The applicants submitted that they had received inferior treatment at the hospital due to racial prejudice on the part of medical personnel.<sup>117</sup> The applicants also pointed to statements by public figures calling for regulation of Roma fertility.<sup>118</sup> The applicants in all of the above cases submitted that they had a segregated service in “gypsy” rooms.<sup>119</sup> The second applicant in *I.G. and Others* submitted that she had experienced verbal abuse from health practitioners during her stay.<sup>120</sup>

Each of the applicants submitted that they were also discriminated against on the grounds of sex.<sup>121</sup> *V.C.*, referring to documents from the CEDAW Committee, submitted that a failure to accommodate the fundamental biological differences between men and women in reproduction was discriminatory, and her sterilisation without informed consent was a form of

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112 *Ibid.*, Para 170.

113 *Ibid.*, Para 45.

114 *Ibid.*, Para 47.

115 See above, note 103, Para 47; and see above, note 63, Para 75.

116 *Ibid.*, and see above, note 63, Para 32.

117 *Ibid.*, Para 30.

118 *Ibid.*, Para 159.

119 See above, note 100, Para 18; see above, note 103, Para 19; and see above, note 63, Para 31.

120 See above, note 63, Para 31.

121 See above, note 103, Para 118.

violence against women.<sup>122</sup> In *I.G. and Others*, the applicants also submitted that their sterilisations were a form of violence against women and that:

*[T]heir ensuing infertility resulted in a psychological and social burden which was much heavier on women, in particular in the Roma community where a woman's status was often determined by her fertility.*<sup>123</sup>

ii. *Court Judgments*

In *V.C.*, the Court found that although there was no indication that medical staff intentionally ill-treated the applicant, they displayed “gross disregard for her right to autonomy and choice as a patient.”<sup>124</sup> The Court subsequently found a violation of Article 3.<sup>125</sup> Similar to the case of *V.C.*, in *N.B.*, the Court stated that the procedure was incompatible with the requirement of respect for the applicant’s human freedom and dignity and violated Article 3.<sup>126</sup> The same conclusion was reached in *I.G. and Others*.<sup>127</sup>

In *V.C.*, the Court considered that the Article 14 complaint should be read in conjunction with Article 8, based on the assessment that the forced sterilisation affected the applicant’s bodily functions and had adverse consequences for her private and family life.<sup>128</sup> In its consideration of the Article 8 complaint, the Court concluded “that the documents before it indicate that the issue of sterilisation and its improper use affected vulnerable individuals belonging to various ethnic groups.”<sup>129</sup> The Court further concluded there was no evidence to suggest that doctors acted in bad faith with intentional racial motivation or that the sterilisation of the applicant was part of an organised policy.<sup>130</sup> The Court found that Slovakia failed to comply with its positive obligation under Article 8 of the Convention because:

*[T]he absence at the relevant time of safeguards giving special consideration to the reproductive health of the applicant as a Roma woman resulted in a failure by the respondent State to comply with its positive obligation to secure to her a suf-*

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122 See above, note 100, Para 171.

123 See above, note 63, Para 160. Emphasising this could be seen as problematic as it implies that fertility is primarily important as a matter of status granted by others, not that its importance is for each woman to determine for herself.

124 See above, note 100, Para 119.

125 *Ibid.*, Para 120.

126 See above, note 103 Para 81.

127 See above, note 63, Paras 124 and 126.

128 See above, note 100, Para 176.

129 *Ibid.*, Para 146.

130 *Ibid.*, Paras 119 and 177.

*efficient measure of protection enabling her to effectively enjoy her right to respect for her private and family life.*<sup>131</sup>

Having found a violation under Article 8, the Court did not consider it necessary to determine whether there was a breach of Article 14.<sup>132</sup> In *N.B.*, the Court noted that an issue had arisen in Slovakia regarding improper sterilisations and that:

*Such practice was found to affect vulnerable individuals belonging to various ethnic groups. However, Roma women had been at particular risk due to a number of shortcomings in domestic law and practice at the relevant time.*<sup>133</sup>

A violation of Article 8 based on the same reasoning as in *V.C.* was found in *N.B.* and in *I.G. and Others* also.<sup>134</sup> As in *V.C.*, in *N.B.* and *I.G. and Others*, the Court stated that it did not find it necessary to separately determine if Article 14 of the Convention was also breached on the basis that a violation of Article 8 had been found.<sup>135</sup>

iii. *A.S. v Hungary*<sup>136</sup>

In 2004, the CEDAW Committee examined a complaint by Ms A.S. under the Optional Protocol. A.S. claimed to have been subjected to coerced sterilisation in a Hungarian hospital. Medical records show that upon arrival at the hospital the author was dizzy, bleeding more than average and was in a state of shock.<sup>137</sup> While on the operating table, after finding out that she had lost her child, she was asked to sign a “barely legible” note, handwritten by the doctor with the word sterilisation written in Latin.<sup>138</sup> In stating the facts of the case, the author pointed to her extremely vulnerable situation as a woman who lost her child and as a member of a marginalised group of society – the Roma.<sup>139</sup> It was noted that “she and her partner live in accordance with traditional Roma customs – where having children is said to be a central element of the value system of Roma families.”<sup>140</sup>

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131 *Ibid.*, Para 154.

132 *Ibid.*, Para 180.

133 See above, note 103, Para 96.

134 *Ibid.*, Para 99; and see above, note 63, Para 146.

135 See above, note 100, Para 180; See above, note 103, Para 123; and see above, note 63, Para 167.

136 *A.S. v Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2004.

137 *Ibid.*, Para 2.3.

138 *Ibid.*, Para 2.2.

139 *Ibid.*, Para 9.4.

140 *Ibid.*, Para 2.4.

The Committee first considered the alleged violation of Article 10(h) of the CEDAW which provides the right “to access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”<sup>141</sup> The Committee noted that given the author’s poor health on arrival, any information she received was under stressful and therefore inappropriate conditions which constituted a violation of her rights under Article 10(h).<sup>142</sup>

The Committee also considered whether the author’s rights had been violated by performing the sterilisation without her informed consent. The Committee noted the poor health of the author and that fact that the author had to sign a barely legible consent note where the Latin term had been used for sterilisation. The Committee therefore found her rights under Article 12, which requires the state to eliminate discrimination in access to health care services, including family planning, were violated.<sup>143</sup> Given the sterilisation was performed without full and informed consent and deprived the author of her natural reproductive capacity, the Committee further found that the author’s right to decide freely on the number and spacing of children under Article 16 was violated.<sup>144</sup> The author’s ethnicity was not addressed by the Committee.

### ***b. Analysis of Decisions***

While all cases examined above recognised that Romani women’s rights were violated; from an intersectional perspective, they are extremely disappointing. Both the ECtHR and the CEDAW Committee missed an opportunity to apply an intersectional lens to their decisions. The ECtHR’s decisions not to examine discrimination in any of the cases is quite shocking. Given the extent of material submitted demonstrating endemic discrimination against Romani women, and assertions by the Court itself which indicate an implicit acknowledgement of discrimination, an examination of discrimination was warranted. The CEDAW Committee, while asserting that the coercive sterilisation constituted discrimination against women, made no reference to ethnicity and thus failed to get to the root of the case as one of intersectional discrimination. This part of the article analyses the missed opportunities in these cases in more detail.

In the cases before the ECtHR, it is difficult to understand how the Court felt it was not necessary to examine the discrimination claims. In each of the three cases, the Court noted (in these or similar terms) that:

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141 Convention on the Elimination of All Forms of Discrimination against Women, United Nations, G.A. Res. 34/180, 1979, Article 10(h).

142 See above, note 136, Para 11.3.

143 *Ibid.*, Para 11.3; and CEDAW, Article 12(1).

144 See above, note 136, Para 11.4.

*[T]he objective evidence is not sufficiently strong in itself to convince the Court that it [sterilisation] was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated.*<sup>145</sup>

However, in line with its own previous case-law, the burden of proof should have shifted to the Government. In *Timishev v Russia*,<sup>146</sup> the Court noted that “[o]nce the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified.”<sup>147</sup> Lindsay Hoyle notes “that the moment at which the court is persuaded to shift the burden depends on the specific circumstances, the nature of the charges, and the Convention right violated.”<sup>148</sup> The case law of *D.H. and Others*<sup>149</sup> is analogous in that although no discriminatory intent was evidenced, the disproportionate placement of Roma children in special schools created a presumption of indirect discrimination. Given the evidence of discrimination provided by the applicants in each of *V.C.*, *N.B.* and *I.G. and Others*, and the pattern of cases appearing before the Court, the burden of proof should have shifted to the Government.

The Court’s own acknowledgement that Romani women are more likely to experience coercive sterilisations points to a clear need to examine the allegations of discrimination. In all cases, the Court noted the submission by the Council of Europe Commissioner for Human Rights that indicated that improper sterilisation affected vulnerable individuals belonging to various ethnic groups, of which Roma were at particular risk.<sup>150</sup> The Court also states in *V.C.* that “the same was implicitly admitted by the group of experts established by the Ministry of Health, who recommended special measures in respect of the Roma population.”<sup>151</sup> In previous case law, discrimination has been interpreted by the Court as “treating differently, without an objective and reasonable justification, persons in relevantly similar situations.”<sup>152</sup> Even if the policy of sterilisation could not be considered directly discriminatory, it is very evidently indirectly discriminatory; in *D.H. and Others*, the Court established that different treatment may take the form of a general policy or measure that has disproportionate effects on an ethnic group, in breach of the Convention.<sup>153</sup> These cases were an opportunity to build on the progressive approach adopted by the Court in *D.H. and Others* where a pattern of discrimination was examined. This was an

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145 See above, note 100, Para 171; See above, note 103, Para 78; and see above, note 63, Para 165.

146 *Timishev v Russia*, Application Nos. 55762/00 and 55974/00, 13 December 2005.

147 *Ibid.*, Para 57.

148 See above, note 64, p. 23.

149 *D.H. and Others v Czech Republic*, Application No. 57325/00, 13 November 2007, Paras 194–195.

150 See above, note 100, Para 146; see above, note 100, Para 96; and see above, note 63, Para 143.

151 See above, note 100, Para 178.

152 *Willis v the United Kingdom*, Application No. 36042/97, 11 June 2002, Para 48.

153 See above, note 149, Para 175.

opportunity for the Court to apply a substantive notion of equality to the analysis in line with an intersectional approach.

Instead, by sidestepping the applicants' claims of discrimination "the majority diminished the focus of the case to the hospital's improper sterilisation procedures, rather than the Government's systematic sterilisation of Romani women."<sup>154</sup> The judgments of the Court individualised the applicants' cases and dislocated their experiences from the structures of oppression that resulted in them, as Romani women, experiencing coercive sterilisations. As the dissenting Judge Mijovic states in *V.C.*, the Court missed the essence of the case, and this is also true of *N.B* and *I.G. and Others*.<sup>155</sup> The history of sterilisation policies targeted at Romani women, and the ongoing negative attitudes towards Roma, combined with a number of cases being presented to the Court, demonstrate discrimination. Judge Mijovic's states:

*The fact that there are other cases of this kind pending before the Court reinforces my personal conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia. To my mind, the applicant was "marked out" and observed as a patient who had to be sterilised just because of her origin, since it was obvious that there were no medically relevant reasons for sterilising her. In my view, that represents the strongest form of discrimination and should have led to a finding of a violation of Article 14 in connection with the violations found of Articles 3 and 8 of the Convention.*<sup>156</sup>

In each of the three cases, the Court posits Roma as a vulnerable group without making reference to the structural factors that result in the marginalisation of Roma. The judgments in relation to Article 8 note that the State failed to comply with its positive obligation to protect the applicants as members of the "vulnerable Roma community".<sup>157</sup> The description of the applicants as members of the vulnerable Roma community without reference to state policies or an examination of discrimination dislocates this vulnerability from the structures that have caused this. The role of the state in this is obscured. The Court received numerous reports that revealed systematic state discrimination against Roma, across a number of areas. These included segregated maternal health services, the delay and denial of health care to Roma and discrimination in other areas of health, education and employment.<sup>158</sup> An intersectional analysis by the Court would have considered the structural factors at work and linked this "vulnerability" of Romani women to the policies and practices of Slovakia.

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154 See above, note 64, p. 27.

155 See above, note 100, Dissenting Opinion of Judge Mijovic, p. 43. Judge Mijovic was the only Judge who dissented in relation to discrimination in the three cases.

156 *Ibid.*, p. 44.

157 *Ibid.*, Para 179; see above, note 103, Para 122; and see above, note 63, Paras 143-145.

158 See above, note 100, Para 47; see above, note 103, Para 47; and see above, note 63, Paras 32 and 75.

Another key issue with the Court's interpretation was the focus on the intention of the medical practitioners. Whether discrimination is intentional is not the relevant factor in determining if the legal test for discrimination has been satisfied.<sup>159</sup> In any event, at least in the case of *V.C.*, intent could be seen despite the Court's finding the contrary.<sup>160</sup> In *V.C.*'s case, her ethnicity was specifically recorded on her medical details and she had subsequently experienced segregated services, was provided with misinformation and coerced into signing a consent form in labour. Thus, the assertion by the Government that the ethnicity of the applicant was recorded on medical records in order to ensure "special" treatment is extremely problematic.<sup>161</sup> The Court notes that this indicates "a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed"<sup>162</sup> and that "it does not suggest that special care was to be, or was in fact, exercised to ensure that the full and informed consent of such a patient was obtained before any sterilisation was contemplated."<sup>163</sup> The State "explained that the reference to the applicant's Roma origin had been necessary as Roma patients frequently neglected social and health care"<sup>164</sup> This recording of ethnicity suggests a mindset based on stereotypes that resulted in different and discriminatory treatment for Romani women. This surely demonstrates intentional discrimination.

Furthermore, the Court made no reference to gender discrimination in any of the three cases. Given the decision of the CEDAW Committee in *A.S. v Hungary*, and the similarity of experiences between the circumstances of *A.S.* and the applicants before the ECtHR, it is very clear that the sterilisations in the cases before the Court constituted discrimination against women. The CEDAW Committee's General Comment No. 19 outlines various forms of gender-based violence, including coercive sterilisation, as discrimination against women.<sup>165</sup> Since the Court found in all of the cases that the applicants had been coercively sterilised, violating their rights to freedom from inhuman and degrading treatment, it should also have found that these cases constituted gender discrimination.

The CEDAW Committee decision in *A.S. v Hungary* focuses on the issue of informed consent, including availability of adequate information. The Committee found that the sterilisation was coercive and therefore constituted gender discrimination. However, the Committee did not consider the author's identity beyond her gender. This resulted in a partial and incomplete examination and articulation of the author's situation. Such an approach does not capture the complexity of the issue, nor will it place the appropriate demands on states to pro-

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159 See above, note 69, p. 127.

160 See *V.C. v Slovakia*, above note 100, Para 119.

161 *Ibid.*, Para 151.

162 *Ibid.*, Para 151.

163 *Ibid.*, Para 151.

164 *Ibid.*, Para 151.

165 CEDAW Committee, *General Recommendation no 19: Violence against women*, 1992.

vide appropriate remedies. For example, even the simple measure of including a requirement for translation to the Romani language in the Committee's recommendation that its views be widely distributed to all sectors of society.<sup>166</sup> The approach of the CEDAW Committee is partly due to the UN structures which have often addressed racial and gender discrimination as two separate problems. This can be seen in how the complaint to the Committee was tailored with an almost exclusive focus on gender. The facts of the case note the author's ethnicity and religion as relevant factors,<sup>167</sup> however, the complaint itself focuses on Articles 10 (h), 12 and 16(1)(e), of the CEDAW.<sup>168</sup> Drawing on Crenshaw's analysis of the experiences of Black women, this single ground analysis relegated the identity of the Romani woman to a location that resists telling.<sup>169</sup>

### ***c. Possibilities for an Intersectional Analysis***

The ECtHR has at some points moved closer to an intersectional analysis than observed in the above cases. In the case of *B.S. v. Spain*,<sup>170</sup> the applicant alleged that she had been discriminated against on account of her skin colour and her gender.<sup>171</sup> Third party interventions in this case emphasised intersectional discrimination.<sup>172</sup> The Court found a violation of Article 14 of the Convention taken in conjunction with Article 3 in its procedural aspect. The wording of the Court shows some moves towards a more intersectional approach, which states "domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute."<sup>173</sup> This acknowledgment of the applicant's position as an African woman is a progressive move by the Court. Although, the vulnerability could be posited in different terms rather than ascribing it as "inherent" to the applicant's position. *D.H. and Others*, as mentioned above, does address structural discrimination and acknowledged that the history of discrimination of Roma must be taken into account when examining cases.<sup>174</sup> This is important as intersectionality is not just about naming different grounds but linking experiences of discrimination across grounds to the structures that cause such discrimination. Although the ECtHR could not be said to have adopted a fully intersectional approach in cases thus far, these cases demonstrate that it is possible for the Court to move towards an intersectional analysis. The ERRC have recently submitted a third-party intervention to the ECtHR in the yet to be decided case of *Maděrová*

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166 *A.S. v Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2004, Para 11.6.

167 *Ibid.*, Paras 2.4, 9.4.

168 *Ibid.*, Para 3.1.

169 See above, note 14, p. 1242.

170 *B.S. v Spain*, Application No. 47159/08, 24 July 2012.

171 *Ibid.*, Para 29.

172 *Ibid.*, Para 57.

173 *Ibid.*, Para 62.

174 See above, note 143, Para 182.

*v Czech Republic*,<sup>175</sup> a case of forced sterilisation.<sup>176</sup> The intervention identifies forced sterilisation as a form of intersectional discrimination against women and urges:

*The Court to apply the notion of intersectional discrimination under Article 14 of the Convention and recognise the particular vulnerability of victims of forced sterilisation and their need for a separate remedy apart from the ordinary legal procedures open generally to victims of ill treatment.*<sup>177</sup>

Such an approach if adopted by the ECtHR would be a major step in recognising intersectional discrimination.

Since the decision in relation to *A.S. v Hungary*, the CEDAW Committee has explicitly recognised intersectionality in General Recommendation No. 28.<sup>178</sup> Further, since the publication of the General Recommendation, the Committee has also considered intersectionality in its judgments, including making explicit reference to it. In *Pimentel v Brazil*,<sup>179</sup> the Committee ruled on a case of maternal death, finding that the author was discriminated against on the basis of her sex, her status as a woman of African descent and her socio-economic background.<sup>180</sup> In *Kell v Canada*, the Committee found that Kell was a victim of intersectional discrimination based on her status as an Aboriginal woman who had also experienced domestic violence.<sup>181</sup> The Committee states that “as the author is an aboriginal woman who is in a vulnerable position, the State party is obliged to ensure the effective elimination of intersectional discrimination.”<sup>182</sup> These cases represent a significant and progressive shift in the approach of the CEDAW Committee in applying an intersectional lens to decisions.

## Conclusion

The experiences of Romani women as outlined above demonstrate a deeply disturbing picture of endemic discrimination and human rights abuses. Such abuses have been legitimised by narratives of the need to control the social risk that Roma pose and narratives of Roma

175 *Maděrová v Czech Republic*, Application No.32812/13, 16 May 2013.

176 ERRC, “Third Party Intervention, Application No.32812/13”, 11 December 2015.

177 *Ibid.*, p.1.

178 CEDAW Committee, *General Recommendation no. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2, 2010.

179 *da Silva Pimentel v Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 27 September 2011.

180 *Ibid.*, Para 7.7.

181 *Kell v Canada*, Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008, 26 April 2012.

182 *Ibid.*, Para 10.3.

as abusing social protection systems.<sup>183</sup> These narratives are all too familiar today across Europe. Analysis of the widespread practice of coercive sterilisation of Romani women demonstrates the importance of an intersectional approach. The attack on Romani women and the abuse of Romani women's bodies to control the Roma community reveals a unique experience of discrimination and subordination. Class-based discrimination also comes into play whereby financial incentives or punitive measures have been used promote sterilisation. Furthermore, the historical experience of state sanctioned sterilisation in the former Czechoslovakia cannot be disconnected from the continued experience of coercive sterilisation by Romani women in Slovakia and the Czech Republic. When dislocated from structures of power and experiences of discrimination across multiple identities, an incomplete and inadequate analysis of coercive sterilisations ensues. The pattern of human rights abuses and state culpability is obscured. Such impunity paves the way for future abuses.

The failure by the ECtHR to even examine discrimination in the cases of coercive sterilisation of Romani women is egregious. The focus of the cases was diminished to the individual hospital's sterilisation procedures, rather than the State's systematic sterilisation of Romani women. Furthermore, the Court's lack of analysis of structural discrimination represented a set-back from previous judgments. Speaking about the case of *V.C.*, the dissenting Judge Mijovic noted that the judgment failed to grasp the essence of the case.<sup>184</sup> Likewise, the CEDAW Committee decision in *A.S. v Hungary* demonstrated a one dimensional and inadequate approach to intersectionality. An intersectional approach in the courts is important so that the courts will not miss the essence of discrimination in their judgments. Patterns of discrimination and subordination are not straightforward and can appear neutral and benign. An intersectional analysis is key to revealing the insidious ways in which oppression and discrimination operate. This is crucial to bring human rights law closer to the lived experiences of people experiencing human rights violations.

There are some positive signs for the incorporation of an intersectional approach in human rights law. The ECtHR has shown that it does have the capacity to address multiple identities and structural discrimination. However, its approach has not been consistent. The ECtHR could build on its progressive judgments and substantive understandings of equality in *B.S. v Spain* and *D.H. and Others*. The role of third party interventions would seem quite important in progressing intersectional analysis in the Court. The CEDAW Committee offers hope as a potential driver of intersectionality in human rights law, as its recent decisions were underpinned by an explicit articulation of intersectionality. Intersectional approaches in the courts have the capacity to articulate different types of remedies that more effectively bring justice to people and communities facing human rights abuses. The suggestions by the ERRC of special remedies to support claims in the cases of coercive sterilisation provide such an example.

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183 See above, note 3, p. 28.

184 See *V.C. v Slovakia*, above note 100, Dissenting Opinion of Judge Mijovic.

While endemic and entrenched discrimination against Romani women will not be addressed and challenged merely through legal approaches, it is one of many tactics that can be part of wider change. Roma rights activists are pursuing a range of advocacy approaches seeking acknowledgement and redress for coercive sterilisations. Human rights law is just one avenue for this. However, in the context of states that continue to obstruct justice and deny the discrimination that they are accountable for, it is important that human rights bodies are naming and challenging discrimination effectively. In this respect, an intersectional analysis in human rights cases is of crucial importance for Romani women.