A Tale of Two Communities: Inequality and the Right to Water in *Hudorovič and Others v Slovenia*

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INTRODUCTION

Hudorovič and Others v Slovenia[1] is a case concerning Roma communities living in informal settlements in Slovenia who did not have adequate access to safe drinking water and sanitation. This case was fought in the context of Slovenia making access to drinking water a constitutional right.[2] This, however, did not become pertinent,[3] and the European Court of Human Rights (ECtHR) found no violation of Article 8[4] by a 5:2 majority in the first application, and unanimously found no violations under the other Articles and for the second application. This case note critically analyses three themes in the judgment. First, it evaluates the Court's assessment of the right to water, contrasting it with Indian constitutional jurisprudence, and the framework proposed by the dissenting judges. It further proposes a qualified right to water in European human rights law. Second, it argues that the majority decontextualised the position of the Applicants in determining socio-economic issues. They ignored the history of social exclusion and inequality faced by the Roma people and the role of the State in addressing this, contrary to the concepts of substantive equality and positive obligations. This makes this case a 'tale of two communities'. Finally, it notes the overarching theme of socio-economic rights in the European Convention on

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[1] *Hudorovič and Others v Slovenia* App nos. 24816/14 and 25140/14 (ECHR, 10 March 2020).

[2] James Hendry, 'The right to water and sanitation under the European Convention' (2020) 4 PKI Global Justice Journal 14.

[3] ibid.

[4] Right to respect for private and family life.

Human Rights (ECHR), examining how the nature of the application in *Hudorovič*[5] is difficult to fit within traditional European human rights law, and explains the tensions that emerge as a result.

Before delving into the analysis, a brief summary of the facts is helpful. The First Applicant and his son (the Second Applicant) in the first application lived in the informal Roma settlement of Goriča vas. Their hut had no access to water, sewage and sanitation because permits and documents could not be acquired to obtain access to public infrastructure, due to the irregular manner of establishing settlement. In the second application, a family of fourteen lived in an illegally built hut in an informal Roma settlement at Dobruška without access to water, sanitation or electricity. The Applicants in both applications received monthly social assistance from the government. The applications were joined by the Court in light of the facts and substantive questions they raised. They argued violations of Articles 3,[6] 8 and 14[7] of the Convention, alleging that their homes did not have access to basic public utilities and that they had been subjected to a negative and discriminatory attitude by local authorities. The opinion of the majority and the dissenting judges will be examined in the sections below.

I. HUMAN RIGHT TO WATER?

The first issue this piece discusses is whether there is a 'right to water' in European human rights law. It is submitted that the Court unduly limited the right, if recognising it at all. The majority opined that there must be a threshold of severity in assessing whether a lack of access to water and sanitation can constitute an interference with Article 8. Consequently, it held that 'access to safe drinking water is not, as such, a right',[8] but that a 'persistent and long-standing lack of access to safe drinking water can … have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8.'[9]

[5] *Hudorovič* (n 1).
[6] Prohibition of torture.
[7] Prohibition of discrimination.
[8] *Hudorovič* (n 1) [116].
[9] ibid.

This standard is notably problematic. First, it sets a high threshold with multiple components, such as the persistence and long-standing nature of the lack of access, which is complicated and may be challenging to prove. Second, the test is uncertain and ambiguous. It is unclear what the *core* of private life is in this case and what *factors* would erode it. A threat to survival would undeniably be included, but the boundary becomes blurry after that, especially when concepts such as human dignity and private life are involved, the meanings of which reasonable people may disagree on. This leads to uncertainty about whether an Applicant is protected by the Convention at all and could also lead to demarcations which may cause some injustice based on who may fall outside the standard, and thus be without protection. Third, it is not clear what is gained by categorically rejecting a right to water. Following the Court's jurisprudence on qualified rights, a right to water may have been recognised and limited in the public interest, such as the prevailing socio-economic circumstances, leading to no violation. On the other hand, to say that there is no prima facie right places the burden on the already disadvantaged Applicant to prove why she should have the right, instead of requiring the State to outline why the right was not fulfilled. Thus, a consequentialist approach (focusing on the consequences of the act, e.g., health concerns) further erodes human rights, which a deontological approach (based on the intrinsic value of the right to water) does not.

Contrast the majority's approach with Indian jurisprudence, which has taken a different approach to the same question. The Indian Supreme Court acknowledged that there is a right to water guaranteed by Article 21 (right to life) of the Indian Constitution.[10] Since water is essential for human life to exist (in the Indian context), the much broader concept of private life (in European human rights jurisprudence), which essentially concerns itself with the *quality* of life,[11] should include it as well. Additionally, it is worth noting that the usual constraints based on resource allocation are even more severe in a developing country such as India, so the weight attached to these arguments, at least for some countries in Europe, needs to be revaluated when balancing them against the right to a basic necessity. Even if these become critical factors for some States, they can be

[10] *Narmada Bachao Andolan vs Union of India* [2000] 10 SCC 664.
[11] See *Pretty v United Kingdom* App no. 2346/02 (ECHR, 29 April 2002).

balanced at the proportionality stage, while still acknowledging that water is a right and not a privilege.

The Partially Dissenting Opinion (Judge Pavli joined by Judge Kūris) proposed a middle ground between the majority's standard and the one proposed above, under which it would be sufficient to prove adverse consequences stemming from lack of access for an extended period. However, this leads to the issues highlighted above, related to proving consequences and their graveness, since the Applicant would have to prove that there were harmful effects on their dignity, for instance, and that these were caused by a lack of access to water for an extended period. This second limb not only requires proving causation, but also the temporal aspect of the persistence of the deprivation. Due to these difficulties, the prima facie right model is a better framework, as it would require a presumption of the adverse consequences and the State would then have to justify these. The Dissenting Opinion did allude to this subsequently, noting that '[s]uch a right cannot, of course, be absolute',[12] and consequently noted that this predicament 'adversely affects core private life interests and basic human dignity,'[13] by definition – closer to the prima facie right model explained above. Thus, the model of starting with a qualified right to water and then addressing situations in which it may be limited is better suited to tackling these issues, which the majority's opinion fails to acknowledge, but one reading of the minority opinion hints at.

II. SOCIAL EXCLUSION AND INEQUALITY

The second theme in the judgment is a lack of sensitivity to context i.e., the social position of the Roma community, both generally and, consequently, in this particular case. The Court had earlier acknowledged in *Winterstein and Others v France*[14] that the Roma constitute a vulnerable minority, and that States ought to pay special consideration towards their needs. In spite of this, the majority in *Hudorovič*[15] used the wide margin of appreciation in socio-economic matters to decontextualise their plight. Thus, once it was satisfied that Slovenia had made *some* efforts to realise its positive obligations, it did not ask whether this framework

[12] Partially dissenting opinion of Judge Pavli joined by Judge Kūris in *Hudorovič* [5].
[13] ibid [7].
[14] *Winterstein and Others v France* App no 27013/07 (ECHR, 17 October 2013).
[15] *Hudorovič* (n 1).

for providing access to utilities reached the marginalised. This is not to say that the Court should not defer to policy judgements of elected national representatives, but that it should assess the differential impact that a policy may have and whether the State is taking effective steps to mitigate that.

This can be seen in three aspects of the judgment which, at best, ignore and, at worst, legitimise the discrimination faced by the Applicants, albeit unintentionally. First, the judgment individualised a public good by noting that the State can reasonably leave installation of connections to the expense of individuals. This fails to acknowledge the disadvantaged position that many individuals (or communities) may be in, exacerbated by social exclusion. It is submitted that even if this can be the system for the majority, having positive obligations means that the State should at least assist those who do not have adequate means. Second, it was emphasised that the Applicants were receiving social benefits, which could be used to improve their conditions. However, there was no assessment of whether these would cover this infrastructural investment, since social benefits aim to aid daily expenditure. Third, the Court noted other efforts, such as water tank deliveries, made by the State to ensure access 'irrespective of how and whether it was realised' in its assessment of Article 3.[16] However, the minority pointed out the findings of independent expert missions which practically unanimously said that water tank deliveries were inadequate.[17] It is unclear why making *any* effort was seen as an end in itself, when the goal was to ensure access for the community. Therefore, whether social security benefits and other policies were effective in ensuring the right to water or whether the Applicants could in reality take matters into their own hands was never critically examined.

Finally, also noteworthy in the judgment is the lack of attention paid to the bigger picture, i.e., unequal social relations. The Human Rights Centre at Ghent University[18] noted that 'forms of unequal treatment in Slovenia included preferential treatment of non-Roma in the development of infrastructure and the systemic failure to develop infrastructure in Roma communities.'[19] Moreover, issues related to water and sanitation can not only be a *form* of discrimination, but

[16] *Hudorovič* (n 1) [166].
[17] Partially dissenting opinion of Judge Pavli joined by Judge Kūris in *Hudorovič* (n 12) [16].
[18] A third-party intervener in the case.
[19] *Hudorovič* (n 1) [131].

also *perpetuate* discrimination. Unsanitary living conditions can lead to stigmatisation of a historically disadvantaged community and further alienate them from the majority. In light of this, it is questionable why the Court did not examine the Article 14 claim separately. What the Applicants claimed was not merely a *lack* of access to water, but *differential* access, based on them belonging to the Roma community. The majority instead noted that access to sanitation facilities was limited in Slovenia, even in the majority areas, to absolve the State of its obligation to extend facilities to a marginalised community. This was exacerbated by an emphasis on the illegality of their housing, which meant that the State could forsake its positive obligations. This has rightly been criticised as an 'overly formalistic approach',[20] and the minority too criticised this eloquently:

> [T]here is nothing objectionable about a State seeking to discourage illegal constructions and preserve public order by legally restricting their access to public utilities. However, in the specific context of Roma communities … the legality argument has been repeatedly rejected by this Court ...[21]

The minority also explicitly acknowledged the acts of 'less-than-friendly' local authorities.[22] This alludes to direct discrimination, a claim made by the Applicants themselves, who argued that the State had failed to consider their needs as members of a disadvantaged group, indicated by discriminatory attitudes, prejudice and stereotypes of local authorities.[23] Thus, it is important to focus on the historical *context* to closely scrutinise the Applicants' claims, but in the majority opinion it seemed as though the role of the State in discrimination against Roma communities was not only ignored, but also inadvertently legitimised by focusing on formalism and uncritically accepting any policy effort.

[20] Valeska David, 'The Court's first ruling on Roma's access to safe water and sanitation in Hudorovic et al. v. Slovenia: reasons for hope and worry' (Strasbourg Observers, 9 April 2020) <https://strasbourgobservers.com/2020/04/09/the-courts-first-ruling-on-romas-access-to-safe-water-and-sanitation-in-hudorovic-et-al-v-slovenia-reasons-for-hope-and-worry/> accessed 17 July 2020.
[21] Partially dissenting opinion of Judge Pavli joined by Judge Kūris in *Hudorovič* (n 12) [13].
[22] ibid [10].
[23] *Hudorovič* (n 1) [160].

III. SOCIO-ECONOMIC RIGHTS AND THE CONVENTION

The ECHR, a product of the post-war period, 'focuses almost entirely on the traditional canon of civil and political rights,'[24] even purposefully omitting socio-economic rights.[25] However, the Court's case law has laid down the foundation for socio-economic rights as complementing the Convention.[26] Contrary to being unfaithful to the text, this is a means of ensuring that the Convention remains dynamic and evolves with changing times, such as the inclusion of rights based on sexual orientation and gender identity, which found no mention in the original text.

Yet this chasm between text and jurisprudence leads to certain tensions. For instance, the Article 14 jurisprudence has been criticised for being formalistic.[27] This can be seen in the present case too. A wide margin of appreciation led to minimal examination of the claims the State was making about its infrastructure, which means deference to executive authorities. Subsequently, an ahistorical assessment meant that factors such as the illegality of the housing were taken into account, an instance of the underlying formalism in *Hudorovič* (see above).[28] In spite of this critique, an examination of Article 14 was crucial in this case for reasons explained previously, i.e., the unequal distribution of public utilities.

Others have argued that there is also an inherent bias in the Court's Article 8 jurisprudence, towards negative interference instead of positive obligations associated with socio-economic rights.[29] While the Court has produced some path-breaking judgments on positive obligations in the past, this critique finds some support in *Hudorovič*.[30] The traditional role of Article 8 was to prevent

[24] Ellie Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2(4) Erasmus Law Review 397.
[25] See Aoife O'Reilly, 'The European Convention on Human Rights and the Socioeconomic Rights Claims: A Case for the Protection of Basic Socioeconomic Rights through Article 3' (2016) 15 Hibernian LJ 1.
[26] Palmer (n 24).
[27] See generally Oddný Mjöll Arnardottir*, Equality and Non-Discrimination under the European Convention on Human Rights* (Kluwer 2002).
[28] *Hudorovič* (n 1).
[29] Palmer (n 24).
[30] *Hudorovič* (n 1).

adverse state action and not to mandate it to do something, the classic distinction drawn between negative and positive rights. Thus, there is some hesitation in examining the State's current efforts and legally mandating it to do more in the judgment, which would require significant infrastructural investment. Another tension can also be seen in balancing the role of judges and the government,[31] which invites the criticism of deference made above, but also raises questions about the limits of the law and judicial expertise. For instance, to what extent can a court assess the budgetary allocations the State must make in order to fulfil its legal obligation of providing public utilities? Hence, there is some reluctance to find socio-economic rights as coming within the protection of private and family life.[32]

Ultimately, *Hudorovič*[33] was about social inequality. In side-stepping that, the judgment shows the uneasy position of socio-economic rights in European human rights law. The Dissenting Opinion captures the crux of the issue perfectly:

> If one looks beyond formalities, the case of the first applicants from Goriča vas is ultimately a tale of two communities, one Roma and one belonging to the majority, living a stone's throw from each other – one of them has running water coming out of their taps, and the other has never had it at all for over thirty years. This in a country with an annual GDP per capita upwards of 20,000 euros.[34]

One may argue that remaining faithful to the original text is more important than its judge-led evolution, and the tensions noted above only reinforce that. However, the context in which cases are argued in front of the Strasbourg Court has changed considerably since the Second World War, and as state action into the lives of individuals and communities increases, so do the state's obligations

[31] Hendry (n 2).
[32] Liam Thornton, 'The European Convention on Human Rights: A Socio-Economic Rights Charter?' in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014).
[33] *Hudorovič* (n 1).
[34] Partially dissenting opinion of Judge Pavli joined by Judge Kūris in *Hudorovič* (n 12) [17].

and responsibilities,[35] especially towards those who have historically been at the margins of European society. To turn a blind eye to what some may call 'state-sanctioned poverty' is as much a human rights violation as any other.[36] This judgment, unfortunately, does nothing to recognise that, and the consequence of that is upholding an unequal status quo:

> The finding of no violation by the majority … will contribute little, I fear, to alleviating the plight of inequality and disadvantage that many European Roma continue to face.[37]

CONCLUSION

This case note has examined the tensions in the case of *Hudorovič and Others v Slovenia*[38] under the umbrella of the relationship between socio-economic rights and the ECHR. It has critiqued the judgment for its failure to protect, or sufficiently protect, the right to water. It has also contextualised this right in a historically unequal society, noting that the Court did not pay adequate attention to this factual background. Finally, it located this case and others like it within a larger debate about whether and how non-traditional rights are to be enforced in European human rights law, concluding that while the jurisprudence may have its shortcomings, the cost of not recognising these rights is far too high. Since human rights law is constantly evolving and recognising new rights and rights-bearers, one can hope that the status quo would change some day.

[35] O'Reilly (n 25).
[36] O'Reilly (n 25).
[37] Partially dissenting opinion of Judge Pavli joined by Judge Kūris in *Hudorovič* (n 12) [24].
[38] *Hudorovič* (n 1).