

The right to water and sanitation under the European Convention

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By: James Hendry
The European Court of Human Rights recently released a decision about a state's obligation to provide safe drinking water and sanitation in *Hudorovi? and Others v. Slovenia*. Two Roma families

brought proceedings against two municipalities in Slovenia alleging that their lack of access to safe water and sanitation infringed their right to respect for private and family life under article 8 of the European Convention on Human Rights and the prohibition of discrimination under article 14. This article will examine how the Court interpreted the right to private life as a positive obligation on the state.

The facts

The first applicants were Roma who lived in an 'informal settlement' called Gori?a vas on land owned by Slovenia and categorized under the Ribnica municipal plan as the best category of farmland, under high-voltage power lines where construction was not allowed. Some 80 people lived in the settlement in wooden huts, some subject to demolition permits because they had no building permits and so were illegal. Ribnica agreed with one of the first applicants as representative of the Roma to share the costs of a 2-3000 litre water tank while the Roma would pay for the cost of the water supplied by the fire brigade and for chemical toilets. The applicants lived on social assistance. Generally, more than 10% of the population of Ribnica did not have access to public water and the sewage system served only those who lived within town limits, all others had septic tanks or water treatment units.

The second group of applicants were a family which lived in another small Roma settlement called Dobruška vas 41 on land belonging to the Škocjan Municipality and a local agricultural cooperative. The applicants lived in an illegally built wooden hut when the settlement was without access to safe water or sanitation. The municipality then built a group water distribution connection on municipal land to which the inhabitants of the settlement could connect at their own expense. The applicants by that time had moved to another hut on land they purchased but did not connect to the water supply, though some other families did. The applicants could have gotten their water at a municipal fountain, as some other municipal residents did, some 1.8 km away. There was no public sewage system in the municipality. Some homeowners built septic tanks or water treatment units. The municipality emptied them. These applicants also lived on social assistance.

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Admissibility

The Court held that the complaints were admissible because they raised valid issues under articles 8 and 14 of the Convention and so were not 'manifestly ill-founded' under article 35(3). This analysis seemed to strongly hint that there might be a positive right to water.

The majority initially agreed with Slovenia that article 8 did not create a right to a home (para. 114). However, the Court then explored consequence-based cases where actions of the authorities reached a point where their negative effects on living conditions of complainants infringed their right to respect for their families, private lives and homes: citing para. 105 of *Moldovan v Romania #2*. It then noted that in respect of safe drinking water, the Court had dealt with potentially elevated health risks of water pollution to complainants' health that constituted a sufficiently serious interference with their private lives and homes to engage article 8 in paras. 77-84 of *Dzemyuk v Ukraine*.

The majority concluded that the Court's jurisprudence had thus made a direct connection between clean water and individual health (para. 113).

The majority also noted that the Court had developed two different approaches to article 8 in 'private life' cases in the business context in paras. 102-117 in *Denisov v Ukraine*. When taking the first approach, the Court considers whether a 'private life' interest was the reason for the dispute before the Court, such as a loss of employment because of an individual's relationships, beliefs or even their choice of clothes. The second approach requires the Court to consider any serious negative consequences of the impugned measure on a 'private life' interest such as relationships, choice of profession or reputation. With this approach, the severity of the negative consequences is crucial and varies with context citing paras. 68-70 in the environmental pollution case of *Fadeyeva v Russia*. The majority noted that the consequence-based approach can apply to assessing the positive obligations of the state under article 8 as in paras. 89-93 in *Fedeyeva* (para. 115).

The majority concluded its admissibility analysis by noting that article 8 does not specifically protect a right to access to safe drinking water, but that a persistent and long-lasting lack could have adverse consequences for health and human dignity thereby eroding the core of private life and the enjoyment of a home and triggering the state's positive obligation to do something about it. The existence and scope of the positive obligation should be determined by the circumstances of the applicant and the legal framework and economic and social situation of the state (para. 116). There was therefore a 'strong tie' between the merits and the applicability of article 8 in conjunction with article 14 which made the complaints admissible.

The merits

The majority held that the applicants had not convincingly demonstrated that the measures the state took to provide access to safe water and sanitation resulted in 'adverse consequences for health and human dignity effectively eroding their core rights under article 8'. The state had a wide margin of appreciation in housing matters and paid the applicants social assistance that could have improved their living conditions. The majority also said that its answer to the core issue in the applicants' complaint invoking a positive obligation to provide water and sanitation had subsumed the Convention equality right's concern with how the state provided for the needs of socially disadvantaged group (paras. 158-160).

The majority's key concern then was to determine the scope of the state's positive obligation to provide utilities to a socially disadvantaged group. The materials before the Court showed that most Roma in Slovenia lived in illegally built settlements, often distant from populated areas that had a public water system and found it harder to access basic utilities than the majority population (para. 143). This raised the issues of whether special concrete measures were needed to meet a positive obligation of the state under article 8 and the necessary balance with the wide discretion that must be accorded a state in distributing resources to its people based on its detailed knowledge of the resources at its disposal and its peoples' needs.

On the state's side of this balance, the majority noted the comprehensive regulatory framework for allocation of infrastructure in Slovenia and the condition of the legality of the construction of buildings in order to benefit from it. It held it to be reasonable for the framework to allocate to the state or municipalities the responsibility for providing utilities while leaving it to property owners to pay for connecting their buildings to the services. Further, because of the inherently progressive nature of the development of a water system and the financial resources of the state, it was also reasonable for the state to rely on alternative solutions such as individual water tanks and harvesting rainwater (paras. 144-6).

However, the majority then posed the equality question of whether this legislative framework might have disproportionate effects on Roma such as the applicants who live in illegal settlements and rely on social assistance for subsistence.

The majority first noted that both parties had agreed that the state had recognized the vulnerability of the Roma community and the need for positive measures to improve their living conditions. The evidence showed that the state had created and financed a strategy and programs to legalize Roma settlements and provide public utilities. The majority then cited the applicants' submissions to note that many settlements had been regularized and their living conditions improved (though interestingly not mentioning that the very paragraphs they cited in these submissions said that this had not happened in the applicants' settlements, paras. 120-1)(para. 147). Though it was not clear to the majority whether the applicants had a realistic possibility of relocating to areas with better infrastructure or to public housing and, while noting evidence suggesting the contrary, it assumed they remained in their settlements voluntarily (para. 148, referring to para. 51).

The majority also found it important to consider that the applicants were receiving social assistance. It assumed that the applicants were not living in extreme poverty because the Gori?a vas applicants had co-purchased a water tank and agreed to pay for water deliveries and chemical toilets while the Dobruška vas 41 applicants had enough money to buy land and erect a new wooden hut. This allowed the majority to find the authorities had recognized their needs and, through the social assistance system, had ensured a basic level of income that could be used to improve their living conditions.

Also, though Slovenia argued the applicants' buildings could not be legalized because of land use legislation and so could not legally be connected to water and sanitation services, the majority noted

that water tanks had been installed and filled by the fire brigade which were concrete actions by the authorities to ensure the applicants had access to safe drinking water. Though there was a dispute on the evidence about whether Gori?a vas received a regular supply of water because their tank was either unusable or had been sold, the majority was satisfied that the applicants had access to safe water simply because there was no evidence of requests from them for financial assistance to buy a new water tank and there were no complaints about the financial burden of the cost-sharing agreement with the municipality, the quality of the water delivered by the fire brigade or specific health risks (para. 151). The majority came to the same conclusion based on similar evidence about the needs of Dobruška vas 41. There the municipality paid for a group water connection to which seven households successfully connected themselves. The majority noted the second group of applicants did not connect because of obstruction from neighbours and that they had not even applied to have water installed in their previous hut. It also noted that when they moved to a new home, it was their responsibility for ensuring they connected to the public system (para. 152). The majority held that, while providing a water tank and a group connection were interim positive measures, the authorities provided sufficient access to water. The applicants had failed to show that these measures resulted in a lower quality of life compared to permanent solutions or that the authorities had acted in bad faith (para. 153).

The majority then noted that the applicants failed to explicitly prove what measures should have been adopted. The applicants from Gori?a vas made no submissions, while those from Dobruška vas 41 submitted that more municipal water distribution points should have been created. The majority dismissed that submission by saying that they had failed to explain why they had not attempted to connect either of their huts to the water supply that was provided or how additional points of connection would affect them.

Without expressly engaging the article 14 equality right, the majority noted the applicants had not proved that the authorities had given their needs less attention than less important needs of the majority. Without such evidence, the majority focused on evidence that more than 10% of inhabitants of Ribnica did not have access to water, that some residents of Škocjan had to rely on the village fountain and further that a ‘non-negligible’ proportion of Slovenians in remote areas could not access a public water supply, but had to rely on alternatives such as water tanks (para. 155).

The majority then concluded that the authorities had taken positive measures to provide access to water despite the irregular status of their settlements and the nature of the land they were built on. In its opinion, these measures ‘allowed for the conclusion’ that the authorities had acted to meet the needs of the applicants as members of the vulnerable Roma community. Though the majority recognized that the measures were not ideal, it noted the authorities had not prevented the applicants from using their social assistance payments to provide for their essential needs by alternative means such as private water tanks or collecting rainwater. While the majority said that it recognized the state had to address inequalities, they should not have to bear the full cost of private connections to the applicants’ homes (para. 156).

On the sanitation issue, the majority found that though the authorities had not ensured access to sanitation, the applicants had failed to prove their lack of access breached article 8 because it deprived them of access unequally in comparison to the majority population. It noted that many Slovenians had no access to a public sewage system and so the applicants had not proved they were worse off than the majority. Additionally, considering the progressive nature of public infrastructure development and the wide margin of appreciation due the state, the applicants had not provided convincing reasons such as a serious risk to health to justify allocating the burden of providing sanitation to the state citing Denisov, above. The evidence provided by the applicants of their health problems were not sufficiently connected with their claim. They also had not submitted that they were prevented from installing their own septic tanks or other alternatives (para. 157).

The majority then found it unnecessary to conduct a separate article 14 analysis, which would have been unsuccessful because of its findings on the equality issue as embedded in its article 8 analysis (para. 162).

The majority quickly dealt with the applicant's argument that their discomfort and pain resulting from a lack of basic amenities amounted to degrading and inhuman conditions contrary to article 3 of the Convention. It speculated that states might be liable where an applicant who was wholly dependent on state support was faced with official indifference in a situation of serious deprivation or want incompatible with human dignity citing *Budina v Russia*. The Court held that this was not the case here because the applicants were provided with 'the opportunity to access safe drinking water' (para. 166).

Though the majority assumed article 8 applied for its analysis, because the applicants had failed to prove a breach, it ultimately decided it was not necessary to decide whether article 8 actually applied (para. 159).

The dissent on Gori?a vas

Two dissenting judges were of the view that lack of access for extended periods to water and sanitation, by definition, adversely affected core private life interests and human dignity because of the fundamental nature of the need for water for human survival (paras. 4, 6, 7). In their view, the requirement of proof of 'stringent conditions' was too onerous, when the effects of extended lack of water created a greater danger than the effects of pollution recognized as a breach of article 8, as noted above. They thought that barriers to access of a legal or administrative nature were more in the nature of a negative interference than a claim for positive measures (para. 9). They also thought greater weight should have been given to the discrimination in lack of access to utilities often used by authorities to make the Roma move on (para. 10).

They were of the view that Gori?a vas was not remote from the municipality and noted than non-Roma households there were supplied with water (para. 11). They noted that the Court has repeatedly rejected the illegality argument as justification for a serious interference with article 8 rights as discussed in paras. 52 to 55 in *Ivanova v Bulgaria*. The history of discrimination against the Roma

justified this approach.

The dissenters noted that formality had not prevented authorities from creating a connection avoiding a breach of article 8 in Dobruška vas 41.

They would have resolved the evidentiary dispute about the supply of water to Gori?a vas differently, according greater weight to the unanimous conclusions of experts about the general treatment of Roma minorities. In their view, the ‘practical and effective rights’ approach required the Court to look behind formal justifications to the reality of the impact on human beings which was that water supply was provided to non-Roma but not to Roma for 30 years. They reached no separate conclusion on article 14. While noting that the psychological impact of unequal access to water might generate feelings of humiliation in Roma children amounting to degrading treatment under article 3, the dissenters agreed with the majority that a breach had not been proved.

Conclusion

In this positive obligation case about the provision of water and sanitation to a state’s populace, the Court asked whether the state had acted reasonably in meeting its duties. All judges analyzed the article 8 positive obligations through an article 14 equality lens that focused on the recognition of the needs of the Roma as a vulnerable groups, as necessitated by a modern equality analysis which seeks to level playing fields. The Court’s division between majority and dissent arose from the difficulties inherent in judging socio-economic issues: the difference between a narrow review of a negative interpretation of article 8 looking to prevent adverse state action and a potentially wide-open positive obligation to secure the content of the right, all the while balancing what judges are entitled to do and what must be left to states’ constitutional role and its knowledge of possibilities. It is interesting to note that none of the judges considered *Slovenia*’s imposing on itself the right of everyone to drinking water in a constitutional amendment made after the case commenced in addition to a constitutional duty to recognize the special needs of the Roma (set out in para. 36).

Here, the Court’s decision on admissibility seemed to point to a connection between the essential commodities of water and sanitation and private life interests protected by article 8. The dissenters noted that the very high standard of adverse effect set by the majority to establish a breach of the positive obligation on the state to provide water ‘seems’ to have been adopted to avoid unreasonable burden on states (para. 5). Additionally, the majority seems to have resolved questions of evidence and submissions against the applicants, further lowering the state’s potential article 8 burden. In the end, the majority held that its decision had not decided the issue of the applicability of article 8 because the standard of adverse effect was not met, on the assumption that it even applied (para. 159). The dissenters thought that the state should be held to a higher standard of obligation based on equality considerations. The debate about how to interpret socio-economic rights goes on. The principle applied by this regional international court allowing adverse effects to create positive rights if the effects are serious enough advances the progress of such rights. The Court seems to acknowledge the importance of water to private life, already recognized in pollution cases. Perhaps

the next case will carry this interpretation further.

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