

# Race discrimination, focus Roma: Case-law of CJEU and ECtHR

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*19.01.2021 precedent:  
Lacatus v. Switzerland*

## Protected ground: concept(s)

- **No definitions** 'race/ ethnicity' in RD
- **Races do not exist** (preamble, RED)
  - Social construct, source of prejudice
- CJEU: **non-exhaustive** definition 'ethnicity', *CHEZ/Nikolova* (C-83/14)
  - Reference to ECtHR: race/ ethnicity 'related, overlapping'; discrimination based **on ethnicity = racial**
  - Covering '**by association**': individuals without characteristic part of targeted group
- *Hudorovič* (ECtHR, 2020): 'specificity as a social group', 'minority', 'disadvantaged, vulnerable community', 'specific needs' - **Roma identity = communal** plight v. (shared) individual trait(s)

## Hudorovič v. Slovenia, app. nos. 24816/14 and 25140/14 (2020)

### Introduction

- **Key** case for 2020 (Court's own case law analysis)
- '**Novel** issue', 'important' (dissent)
- **1st case** on right to **access drinking water** and **sanitation**
- 1st European country to make water a constitutional right (2016)
- Controversial judgment – 'a **blow** to Roma communities', 'will contribute little'
  - Deficiency of **contextual analysis** and '**effective v. nominal** rights'

# Hudorovič v. Slovenia

## Context

- Roma - community **worst** affected by **inequality in access** to water
  - Int'l NGO (ERRC, Amnesty): great number of European Roma lack access
    - > Manifold higher mortality, esp. infants/ children
    - > Disproportionate impact pandemic
  - Factors: **historical exclusion** from land ownership/rent + **laws barring** servicing based on **housing 'illegality'** + **hostile majorities/** authorities using refusal to force relocation (dissent)
  - **No genuine choice/** freedom to (re)settle – opposing majorities

# Hudorovič v. Slovenia

## Context

- **EU acknowledgment**
  - **Drinking Water** Directive Proposal (2020): 'specific situation', 'lack of access to drinking water' > 'particular attention', '**necessary measures** to improve access', 'providing alternative supply systems'
  - Commission Report on the implementation of the EU Framework for National Roma Integration Strategies (2019)
  - Council Recommendation on effective Roma integration measures in the Member States (2013)

## Hudorovič v. Slovenia

### Facts No. 1

- Residents (**child**) of long-standing informal Roma settlement (**30 yrs**)
- Small, **near** – 1 km from centre (serviced)
- **Tolerated** by authorities – ex., waste collection
- **Illegal** construction, public land > **excluded by law** from utilities > **no drinking water** or **sewerage**
- Claim: **discriminatory attitudes** major role in refusal of connection
  - No demand to use free of charge
- Impact: water from cemetery (**1km**)/ **polluted stream, unsanitary grounds** > **diseases, stigmatization**/ isolation in **school, unemployment**

## Hudorovič v. Slovenia

- **Relocation** plans sabotaged by non-Roma
- Co-financed public-private water tank - **ineffective**
- Residents to bear cost of chemical toilets and clean-up
- Dependent on **social benefits**
- Ombuds: **violation**
- **Deplorable living conditions** > health/ dignity, isolation

## Hudorovič v. Slovenia

### Facts No. 2

- **Many children**; born on site
- Settlement created by authorities in **1963**
- Pressure to **relocate** outside municipality
- **No water, sanitation**, electricity
- 2011 group connection; unable to individually connect at own expense
- **Drinking water** - village fountain (**1.8 km**)

## Hudorovič v. Slovenia

- **Other municipalities** enabled access, waiving '**legality**' req.
- **ECRI, Ombuds, CoE Commissioner HR, UN Spec. Rap.:** applicants' settlements **continuing breach** > immediate solution
- Social isolation: no education, illiteracy, language barrier > v. difficult communication w/ legal representatives (judgment)
  - Court acceptance: admissible despite irregularities
- Allegations Articles **3, 8, 14**: discriminatory **refusal** to adequately **address disadvantage** > impaired **integrity, home, private/ family life**

## Third Party Interveners

- Human Rights Centre Univ. of Ghent
  - ‘Preferential treatment of non-Roma in development of infrastructure’
  - ‘**Systemic failure** to develop **infrastructure** in **Roma** communities’
  - Urban planning, utilities – **remit of State**
  - **Law** must be adequate
  - **Deprivation** of access to utilities > **perpetuation** of entrenched **disadvantage**
- ERRC
  - Evidence prevalent lack of access - number of settlements/ various countries (2014)
  - Between 72% and 30% lacking water connection (UNDP, 2011)

## Hudorovič v. Slovenia

### Judgment

- ‘**Continuing situation**’: no time-limit (runs from cessation)
- No effective remedy: no domestic proceedings, no ‘exhaustion’ objection by gov’t
- **No finding if A3, A8, A14 applicable** – not necessary to decide
- **No violations, assuming applicable**

# Hudorovič v. Slovenia

## Applicability A8

- **Unsanitary living conditions** caused by authorities (*Moldovan*)
- **Health risks contaminated water** irrespective of actual damage (*Dubetska and Others, Dzemyuk*)
- No right to be provided wi/ home (*Chapman*)
  - Limited duty to house homeless
- ‘Consequence-based approach’ to **pollution** (*Fadeyeva*)
  - Applicant to prove impact on health/ **quality of life**

# Hudorovič v. Slovenia

- **Access** to safe **drinking water** - **no right under A8**
- Yet, recognition that **survival** at stake >
- **Test** - multi-pronged, ‘**stringent**’:
  - 1) ‘**persistent** and **long-standing** lack of access’
  - 2) ‘adverse **consequences** for health and human dignity’
  - 3) ‘**effectively eroding**’
  - 4) ‘the **core** of private life and the enjoyment of a home’

> **Possible positive duties**

# Hudorovič v. Slovenia

- Existence and content positive duties <
  - Specific **circumstances**
  - **Legislation**
  - Socio-**economic** status State

## Critique

- No entitlement to sine qua non for survival yet case law protecting lesser interests, ex. quality of life (noise pollution, smells - dissent), relationships
- Forbidding burden of proof on applicant yet consequences validly presumed (no need to prove; permanent sanitation crisis - dissent)

# Hudorovič v. Slovenia

- 'Stringent' <> practical v. illusory rights?
  - Persistent *and* long-standing
  - 'Long-standing' unclear
  - 'Effectively eroding' > 'eroding'?
  - 'Core' unclear; at odds w/ case law – more onerous than for other A8 rights
  - Strict construction
- Legislation determinative of Convention rights?
  - At variance w/ case law – legality insufficient to justify serious A8 interferences (dissent)
- Socio-economic status of State?
  - No evidence of cost-related reason for non-provision, rather legal/ administrative
  - Relevance to Slovenia? (GDP pc EUR 20 000+; dissent)
  - Differential rights across Europe to detriment of poor (by definition more vulnerable)?

# Hudorovič v. Slovenia

## Merits – general principles

- **‘Socio-economic matters’** > ‘necessarily’ **wide margin** of appreciation
  - Debatable dualism (dissent)
- Priorities/ allocation of resources – authorities’ call
- **Necessary** to take **account** of Roma vulnerability and **disadvantage**
- **Special consideration** their [different] **needs** both in legislation and in decisions in particular cases
- **Failure** to attempt to **correct inequality** through different treatment may in itself **breach A14** (*D.H. and Others*)
- Roma specificity as a social group and their needs - factor in due proportionality assessment (*Yordanova and Others*)

# Hudorovič v. Slovenia

## Merits –application of principles

- Insufficient provision (**omission**) **v. activity** restricting access
- Considerable part of **Roma greater obstacles** than majority accessing basic utilities >
- **‘Possible need** for **concrete measures** tailored to specific situation’
- **Country-specific** assessment **funding** needs/ **priorities**
  - No discussion actual cost of provision for 20- people. Seen against State budget? No ‘expenditure’ argument by gov’t
  - No discussion existing municipal solutions > bearable cost

## Hudorovič v. Slovenia

- **'Reasonable' framework:** cost-sharing authorities/ consumers
  - No reasons, evidence, comparative analysis
  - No admission inherent disparate impact on poor
  - **'Possible disproportionate effects on Roma'**
  - **Offset** by general **Roma programmes**; no discussion
    - Relevance to applicants (gov't admission: none)
    - Needs assessment, funds allocated <> needs, implementation rates, actual impact
- Public water supply **dependent resources** individual State
  - No discussion Slovenia GDP

## Hudorovič v. Slovenia

- **'Not clear if realistic** possibility of **relocating** to settlements with better infrastructure or alternative (municipal) accommodation'
- **'Irrespective**, can only conclude applicants **remained by choice'**
  - No reasons, no contextual/ genuine choice analysis
- Social **benefits > no extreme poverty**
- Benefits **could/ should have been used** for living conditions
  - No analysis subsistence costs pp v. benefits amounts pp (children)
  - No comment other expenses v. cost of own water provision
  - No discussion investment in water tank v. persistent lack of access

## Hudorovič v. Slovenia

- **Some measures:** water tank
  - Dismissal points about unusability, infrequent deliveries
  - Held against applicants: they did not request tank replacement
    - No account taken of social exclusion (language, etc.)
  - They did not argue co-investment disproportionate
  - They did not join group connection
  - Relocation to escape violent neighbors
- Conclusion: **‘possibility of accessing drinking water’**
- **‘Were themselves responsible** for taking steps to ensure their individual connection’
- **Authorities’** measures – **‘in good faith’**
  - **‘No proof to the contrary’:** dismissal evidence of prejudice/ hostility/ systemic plight

## Hudorovič v. Slovenia

- **‘Applicants failed** to explicitly address the issue of **what measures should** have been adopted by the State’
- **‘Or how** additional [measures] **would impact** their personal situation’
  - Punishing burden of proof – no competence/ resources, vulnerable minority
  - Gov’t not required to show how general programmes impacted applicants
- Or information if **authorities de-prioritised** their interests **in favour** of less urgent measures benefitting **majority**
  - Grounds for such comparison under A8?
  - Onus on applicants?
  - No discussion of gov’t omission to explain failure to apply municipal solutions used elsewhere

## Hudorovič v. Slovenia

- More than **10% of population** in municipality lack access to public drinking water; supply from **village fountain**
- Non-negligible proportion of **population** living in **remote areas lack** public water supply, rely on private supply
  - No discussion comparability of situations: distance from fountain, resources, socio-economic status, distance from serviced areas
- **Authorities** shown **degree of active engagement** w/ specific needs of applicants as vulnerable community
  - No close scrutiny of gov't justifications (historical racist context - dissent)
- Household connections - applicants' responsibility (benefits)

## Hudorovič v. Slovenia

- State **duty to address inequalities** in safe water provision – Roma disadvantage – **no duty to bear entire burden** of providing water to applicants' homes
  - No standard for measures: any measures sufficient regardless of effect?
  - No onus on State to show effect/iveness of measures
- **No measures** to ensure **sanitation, considerable part** of population no public sewerage
- No proof applicants' needs accorded less importance than those of majority
  - No discussion comparability of situations

## Hudorovič v. Slovenia

- 'Only **particularly convincing reasons**, such as a **serious risk to health**, could **justify burden** on the State to take any steps'
  - **Applicants' claim/proof insufficient**
- **Measures** provided applicants with opportunity to access drinking water, **irrespective** of how and whether it was **realised = sufficient**
  - Going against conclusions of int'l bodies/field missions (dissent)
  - Nominal/ illusory v. practical/ effective?
  - No account taken of perpetuation of stigmatisation/ exclusion (degrading of children - dissent)
  - No discussion proportionality of State-imposed 'legality' hurdle
  - No discussion proportionality of omission to do more
  - Less favourable treatment than other A8 rights, at odds case law

## Denial

'The law, in its majestic equality,  
forbids the rich, as well as the poor,  
to sleep under bridges, to beg in the streets,  
and to steal bread.'

- Anatole France

## Lacatus v. Switzerland

app. no. 14065/15

- **Precedent:** penalty for **begging** > protection under A8?
- **Extremely poor**, illiterate, no work, no social benefits, no support > unobtrusive begging to meet **basic needs**
- **Fine** > **inability** to pay > **prison** 5 days
- **Violation** A8 (unanimous)
- **Blanket prohibition** + sanction > **prevented** her from seeking help = unnecessary interference
- Dignity > **right to call on others for help** = **very essence** of A8 rights

## Other 2020 ECtHR Roma cases

- **Hirtu v. France**
  - **Forced evictions** procedurally flawed: **no consideration needs/** consequences > **no proportionality** assessment; no effective remedy
  - Violations **A8** and **A13**
- **Lingurar v. Romania**
  - Explicit **ethnic profiling**, **police raid/** brutality, explicit **racist bias investigation**
  - Violations **A3** + **A14** (substantive, procedural )
- **A.P. v. Slovakia**
  - **Police brutality** v. child, **ineffective investigation**
  - Violations **A3** (substantive, procedural)

## Firma Feryn

C-54/07 (2008)

- Leading judgment (precedent)
- Public statement excluding 'immigrants' < 'client preferences'
- Director = employer
- Equality authority loses case
  - No individual affected (no job applicant rejected) – no proof or presumption

## CJEU:

- Directive's purpose – effective protection, inclusion/participation of all > lack of victim not an issue
- Statement able to demotivate applicants > obstacle to access
- Direct discrimination
- Equality authority standing with no identified/ identifiable victim – admissible
- Burden of proof – national court to consider
  - Statement – sufficient for presumption (prima facie)
  - Rebuttal – statement not corresponding to actual policy

## CJEU:

- Sanctions
  - Equally, with no victim – effective, dissuasive
  - Admissible:
    - Compensation for equality authority
    - Publicity of judgment at expense of respondent
    - Fine
    - Instruction to discontinue and refrain in future

## CHEZ/ Nikolova C-83/14 (2015)

- **Inaccessible electricity meters** – done since 1998 primarily where predominant **Roma** population
- Alleged consumer **offences** in Roma areas
- Ms. N – expressly **non-Roma**; direct discrimination on grounds of ‘ethnicity’

## CJEU:

- Applicability – teleological v. narrow interpretation; purpose – participation of all; nature of the rights, fundamental principle
  - Directive consumers’ right to monitor and regulate
- ‘Ethnic origin’ = ‘social groups marked by **common** ethnicity/nationality, religion, **language, culture** and traditions’
  - **Roma** origin – indisputably ethnic
  - Does the ban on ethnic discrimination cover affected non-Roma?
- ‘On grounds of ethnic origin’ – not necessarily that of the person affected > **also non-bearers** (*Coleman*, C-303/06, 2008) < protection of ‘all persons’

## CJEU:

- Ms. N. – **victim** of **direct/ indirect** discrimination on grounds of ethnic origin – suffering along with targeted group
- Direct/ indirect discrimination – **national court** to decide. **Factors:**
  - **Only** in **predominantly Roma** areas
  - Allegations that **offences** mainly in those – **racist stereotypes**
  - Said allegations – **unproven, unspecific** – ‘common knowledge’
    - Respondent’s refusal to provide information – relevant for presumption of discrimination (*Meister*, C-415/10, 2012)
  - Practice – **coercive**, comprehensive – **indiscriminate, long-lasting** – **not reassessed**

## CJEU:

- **Unfavourable** treatment – **stigmatization; inability to control** consumption
- **Comparable** situation – **all consumers** in general area vis-à-vis same supplier
- If practice introduced/ sustained **due to ethnic origin > direct D**
  - Rebuttal – factors are objective, no link to ethnic origin

## CJEU:

- **Indirect** discrimination:
  - ‘Apparently neutral’ = based on factors unrelated to ethnic origin
    - There may be no provision defining indirect D as treatment based on a protected ground, i.e. different treatment
    - ‘Area where offences prevalent’ – possible criterion
  - Treatment applicable to all but, in practice, **disproportionately** disadvantaging persons of a particular ethnic origin – **‘at a particular disadvantage’**
    - **No ‘seriousness’ criterion**; ‘particular’ – those of the ethnic origin in question who are **affected = greater share** than others
    - If predominantly Roma areas prove to be particularly affected by the application of the apparently neutral ‘offences’ criterion – **justification necessary**

## CJEU:

- **Justification potential:**

- Small
- **Strict interpretation** of 'objective justification'
- **Proof** of alleged **offences**: actual existence, extent
- If yes, national court to check if **other, less restrictive means** available to pursue prevention as legitimate aim
- Other means **available > no justification**
- **No other means > national court to verify if interference not excessive** as juxtaposed to prevention aim, i.e. exceeding what **aim capable of justifying**
  - **Indiscriminate** – comprehensive
  - **Consumer interest recognised** by EU: access to monitoring, conditions **not offensive**

## Jyske Finans

### C-668/15 (2017)

- Credit institution **demands additional ID** from a **Danish citizen not born** in Denmark (Bosnia)
- Does not demand such from one born in Denmark

## CJEU:

- Difference in treatment **not based on ethnic origin**
  - **Country of birth = no particular ethnic origin**
  - Various factors for ethnic origin, not one; listing in *CHEZ* – illustrative

## CJEU:

- **Indirect** discrimination: concept **not applicable** to disadvantaging **various ethnic origins** – all those not born in Denmark
  - A **particular** ethnic origin **required**

Critique: **restrictive** interpretation

- Questioned in legal commentary
- **Contradiction** with *Feryn*? “Immigrants”, i.e. all originating from outside; direct discrimination.

## Meister

### C-415/10 (2012)

- Multiple discrimination – gender, ethnic origin, age
  - Russian national: education recognised in Germany
- Employment
  - Not invited to interview for position she was qualified for
  - Repeatedly
  - No explanation
  - In court, the employer did not allege she was insufficiently qualified
- Ms. M requests information – file of preferred candidate to prove she was better qualified
  - Such entitlement? Consequences of refusal?

## CJEU:

- No entitlement to information for purposes of establishing presumption of discrimination
- **National court** to take into account potential of refusal to hinder protection aim – to prevent that
  - **Take it into account** when considering whether **inference** established – inasmuch as it is **indicative**
  - Along with other factors: her undisputed qualifications, the repeated failure to invite her to interview

## Maniero

### C-457/17 (2018)

- Italian citizen born in Germany
- Obtained law degree in Armenia
- Inquiry about private foundation's terms to grant educational scholarship
- Requirement of state exam in Germany
- Does not apply

## CJEU:

- Applicability: Access to scholarships > access to education > 'education'
  - Teleological v. narrow interpretation by national court
- **Indirect** discrimination?
  - Those excluded have **no particular ethnic origin** – 'particular disadvantage' does **not cover** such '**general abstract** comparison'
  - A **specific ethnic group must** be affected – *Jyske Finans*

Thank you for your attention!

**Shall we discuss?**

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