

ANNOTATIE

# **Toplak and Mrak v. Slovenia (ECtHR, 34591/19 and 42545/19) – Positive obligations so that persons with disabilities can effectively vote**

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*Annotatie bij Europees Hof voor de Rechten van de Mens, 26-10-2021, ECLI:CE:ECHR:2021:1026JUD3459119 (EHRC-2021-0291)*

1. Voting has been characterized as ‘the right of rights’<sup>[1]</sup> and is considered by the Human Rights Council as the most important political right to which persons with disabilities are entitled.<sup>[2]</sup> Nevertheless, research shows that voters with disabilities continue to face numerous statutory and procedural barriers to participating in elections, such as inaccessible polling stations.<sup>[3]</sup> Contracting States to the European Convention on Human Rights (ECHR) must remove these barriers to ensure full and effective participation of persons with disabilities in elections. This case comment is on the recent Chamber judgment of *Toplak and Mrak v. Slovenia*. I will primarily discuss the analysis of the European Court of Human Rights (ECtHR or Strasbourg Court) of compliance by Slovenia with their positive obligation to take appropriate measures to overcome barriers to participation in elections experienced by the two applicants who were persons with disabilities. The focus lies on analysing the extent to which the Court applied the UN Convention on the Rights of Persons with Disabilities (CRPD) as an interpretative aid of the substantive rights and obligations in the ECHR in the context of persons with disabilities.

2. International human rights law, mainly Article 29(a) CRPD include the right to vote of persons with disabilities on an equal basis with others. This provision aims to guarantee not only the *de jure* right to vote, but it also creates concrete positive obligations for State Parties to

change discriminatory practices and laws and to promote respect for differences among voters. Article 29(a) sets out the obligation of States Parties to provide accessibility in the voting environment. States Parties are also required to adopt other substantive positive measures to ensure the *de facto* realization of the right to vote by persons with disabilities, including the obligation to provide reasonable accommodations to individual voters (Article 5) and to apply universal design in the voting environment (Article 4). All these positive measures aim to render participation in elections realizable for voters with disabilities.

3. The European Court of Human Rights (ECtHR or Strasbourg Court) has recognized the importance of the CRPD as a global human rights instrument on disability rights, and its relevance for interpreting substantive rights under the European Convention on Human Rights (ECHR) in the context of disability.[4] The ECtHR applied the CRPD in the context of voting for the first time in its judgment in *Alajos Kiss v. Hungary*.<sup>[5]</sup> In that case, the ECtHR condemned the automatic disenfranchisement of persons with disabilities due to their guardianship status. This was confirmed by the ECtHR in two other judgments: *Gajcsi v. Hungary*<sup>[6]</sup> and *Sándor Harmati v. Hungary*.<sup>[7]</sup> In its case-law on the right to vote, however, the Court had not ruled on States Parties' other obligations unrelated to guardianship. The first time this occurred was in the recent Chamber judgment of *Toplak and Mrak v. Slovenia*.<sup>[8]</sup>

4. In *Toplak*, the ECtHR ruled on issues relating to the accessibility of the voting environment, and the right to equal participation of persons with disabilities in elections. Both applicants in the case had physical impairments and used electric wheelchairs for mobility. The applicants alleged a lack of adequate measures to allow them to vote in the 2015 national referendum and the 2019 elections to the European Parliament (EP), as well as a lack of effective remedies in this regard. The applicants' complaints relating to accessibility included inaccessible polling stations for wheelchair users and inaccessible voting materials to vote secretly and independently. These barriers hindered the right of the applicants to vote on an equal basis with others. The applicants' complaints were examined by the Court under Article 1 of Protocol No. 12 (general prohibition of discrimination) to the ECHR (as regards the 2015 referendum) and Article 14 ECHR (prohibition of discrimination), in conjunction with Article 3 of Protocol No. 1 (right to free elections) (as regards the 2019 EP elections). The Court found no violation of any of these provisions of the ECHR with respect to both applicants.

5. In its judgment, the ECtHR applied relevant principles developed in its case-law. It reiterated that the prohibition of discrimination under Article 14 ECHR is violated, among others, 'when States without an objective and reasonable justification fail to treat differently people whose situations are significantly different.' (para. 111) The Court observed that a certain threshold is required to find that the difference in circumstances is significant.<sup>[9]</sup> It noted that for this threshold to be reached 'a measure must produce a particularly prejudicial

impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked.’ (para. 111). The Court found that domestic legislation ensured the free expression of opinion of the applicants in elections, as required by Article 3 of Protocol No. 1 to the ECHR. It therefore considered that the question was not one of direct discrimination by way of unjustified differentiation but rather of the compliance of the State with its positive obligation to take steps to enable the applicants to vote on an equal basis with others. The Court reiterated that the effective enjoyment of the substantive rights under the ECHR by persons with disabilities may require the implementation of various positive measures by the State.[10] This interpretation of the Court is important to understand how negative and positive obligations of States overlap in practice, and particularly in the context of the right of persons with disabilities to vote.

6. The Court also recalled that States enjoy a margin of appreciation in assessing the needs of voters with disabilities and the means to provide them with ‘adequate access to polling stations within the context of the allocation of limited State resources.’ (para. 119). Furthermore, the Court noted that providing accessibility of polling stations ‘may take time’. (para.121) In the meantime, according to the Court, national authorities must act with due diligence to ensure that persons with disabilities can vote. In *Toplak*, the Court held that national authorities responded promptly and constructively to the applicants’ request that their respective polling stations be rendered accessible. The Court observed that both applicants were able to vote in elections because national authorities equipped with ramps the applicants’ polling stations on election day as it was requested by them. The Court argued that although other adaptations to the voting materials were not made in advance, the applicants could be assisted by a companion to vote. In the Court’s view, any of the accessibility problems encountered by the applicants in elections produced a particular prejudicial impact on them and was such as to had reached the threshold of discrimination.

7. The ECtHR referred separately to the circumstances of the first applicant who requested to use a voting machine to vote in the 2019 EP elections because he could not hold a pen to mark his ballot paper. The Court found that the use of voting machines was terminated following a legal reform to the Elections Act in 2017. Consequently, the applicant could not be provided with a voting machine during the 2019 EP elections. The Court considered, however, that the applicant could have voted either in person at his polling station, by post or at his home as established in the domestic electoral law. If the applicant had attempted to vote in person, personal support to help him to vote would have been a reasonable accommodation in the Court’s view. In such a case, the voting assistant was obliged to respect the secrecy of the voting under the electoral law. The Court therefore held that providing personal support to help the first applicant to vote was in compliance with the international standards, and

particularly Article 29 CRPD.

8. At this level, the Court recalled that the CRPD is a relevant interpretative guide of the rights of persons with disabilities. Article 29(a) CRPD explicitly requires States Parties to ensure accessible voting procedures, materials, and polling stations. It also provides that assistive and new technologies are one of the means to ensure the right of persons with disabilities to vote. Furthermore, the CRPD Committee in its General Comment on Article 9 (addressing the obligation to provide accessibility) argued that non-compliance with the obligation to provide accessibility in the context of public premises and services is a form of disability discrimination.<sup>[11]</sup> Nevertheless, in practice, the Court did not apply the CRPD as an interpretative aid of the European legal framework regulating the right to vote in the context of persons with disabilities in *Toplak*.

9. The Court did not interpret the difference between the obligation to provide accessibility and the duty to make reasonable accommodations under the relevant provisions of the ECHR in accordance with Article 29(a) CRPD and related provisions, namely Articles 9 (accessibility) and Article 5 CRPD (addressing the right to reasonable accommodation). Such a difference was a relevant matter in *Toplak*. Pursuant to Articles 9 and 29(a) CRPD, the respondent State has the duty to provide accessibility (*ex ante* duty) before receiving the applicants' request to enter their polling stations.<sup>[12]</sup> This is an unconditional obligation of the State.<sup>[13]</sup> Moreover, the right to accessibility is a precondition for persons with disabilities to participate in elections, which is not expressly recognized in the ECHR. Nevertheless, the Court did not systematically interpret the accessibility standard set by the CRPD as a necessary element of the right of the applicants to vote under Article 3 of Protocol No. 1 and the right to be free from discrimination under Articles 14 and 1 of Protocol No. 12 to the ECHR despite applying these provisions to the situation of persons with disabilities. Consequently, the applicants did not have the opportunity to call Slovenia to account for their actions concerning the relevant provisions of the ECHR in light with Articles 9 and 29(a) CRPD.

10. The Court centred its analysis in the respondent State's compliance with Articles 14 and 1 of Protocol No. 12 to the ECHR and Article 3 of Protocol No. 1 to the ECHR read in accordance with Article 5 CRPD (reasonable accommodations). This analysis, however, did not substantially follow the criteria articulated by the CRPD Committee in this regard.<sup>[14]</sup> The Committee has observed that reasonable accommodations must be 'negotiated' with persons with disabilities and not determined exclusively by States Parties.<sup>[15]</sup> Furthermore, the Committee has cautioned that accommodations are distinct from other forms of assistance that persons with disabilities may require.<sup>[16]</sup> This includes live or technological voting assistance to help voters with disabilities to vote under Article 29(a)(iii) CRPD. In *Toplak*, the Court did not engage with these international standards. It found the measures adopted by the

respondent State, namely installing ramps at the entrance of the applicants' polling stations on election day and providing them with personal support to vote as reasonable accommodations in compliance with the ECHR. In the Court's view, these 'accommodations' detracted the respondent State from its obligation to ensure accessibility in the voting environment in advance.

11. In reaching its conclusion, the Court argued that since the ECHR is a system for the protection of human rights, it had to pay attention to the consensus among Contracting States regarding the standards to be achieved.[17] The Court found that there was no indication of a consensus regarding the use of voting machines as a requirement for the effective exercise of the right to vote by persons with disabilities. The ECtHR also noted that the use of assistive technologies in elections 'no doubt requires significant financial investment', as well as that the operation of voting machines 'poses potential problems for the secrecy of the voting procedure.' (para. 128) These statements were, however, not demonstrated by the Court. Indeed, the Court did not engage with existing relevant research that shows that current application of assistive technology to promote greater accessibility for voters with disabilities occurs either through easily understandable and affordable products, or more complex and expensive devices and systems.[18] The Court thus restricted its assessment to a seemingly lack of consensus among Contracting States regarding the provision of assistive devices to be used by voters with disabilities to help them vote. As a result, the Court did not make the connection between the obligation to provide voters with disabilities with assistive technology and the specific question of the right of the first applicant to be enabled to vote in the way he wanted (i.e., voting secretly and independently) under the relevant provisions of the ECHR in light with Article 29(a)(iii) CRPD. In the Court's view, the respondent State did not fail to strike a fair balance between the protection of the interests of the community and respect for the rights of the applicant under the ECHR.

12. Overall, in *Toplak*, the Court did not hold that the failure to ensure accessibility in the voting environment is a disability-based discrimination in violation of Article 1 of Protocol No. 12 to the ECHR and Article 14 ECHR, in conjunction with Article 3 of Protocol No. 1 to the ECHR. This stands in contrast with its earlier decisions on Article 14 ECHR read in accordance with the right to reasonable accommodation as established in Articles 2 and 5 CRPD.[19] In *Toplak*, the Court did not provide Contracting States with clear guidance on how to fulfil their positive obligations regarding the right of persons with disabilities to vote under the ECHR, and particularly their obligation to provide accessibility in the voting environment. As a result, applicants have fewer opportunities to call Contracting States to account for their actions concerning Article 3 of Protocol No. 1 to the ECHR, in light with the CRPD.

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[1] See Seyla Benhabib, 'On Hospitality: Rereading Kant's Cosmopolitan Right', *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004).

[2] UN General Assembly, 'Human Rights Council, Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Participation in Political and Public Life by Persons with Disabilities, A/HRC/19/36, 21 December 2011'  
<[https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-36\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-36_en.pdf)> accessed 30 September 2021, para 7.

[3] See for instance Lisa Schur, Meera Adya and Mason Ameri, 'Accessible Democracy: Reducing Voting Obstacles for People with Disabilities' (2015) 14 *Election Law Journal* 60; Janet Lord, Michael Ashley Stein and János Fiala-Butora, 'Facilitating and Equal Right to Vote for Persons with Disabilities' (2014) 6 *Journal of Human Rights Practice* 115; Virginia Atkinson, Rebecca Aaberg and Staffan Darnolf, 'Disability Rights and Election Observation: Increasing Access to the Political Process' (2017) 35 *Nordic Journal of Human Rights* 375; International Foundation for Electoral Systems (IFES) & National Democratic Institute (NDI), 'Equal Access: How to Include Persons with Disabilities in Elections and Political Processes' (2014) 1  
<<https://www.ifes.org/publications/equal-access-how-include-persons-disabilities-elections-and-political-processes>>.

[4] The Court referred to the CRPD for the first time in *Glor v Switzerland*, ECtHR 30 April 2009, no. 13444/04. Other cases include *Enver Şahin v. Turkey*, ECtHR 02 February 2018, no. 23065/12; *Çam v. Turkey*, ECtHR 23 May 2016, no. 51500/08; *Guberina v. Croatia*, ECtHR 12 September 2016, no. 23682/13.

[5] *Alajos Kiss V. Hungary*, ECtHR 20 May 2010, no. 38832/06,

ECLI:CE:ECHR:2010:0520JUD003883206.

[6] *Gajcsi v. Hungary*, ECtHR 23 September 2014, no. 34503/03,

ECLI:CE:ECHR:2006:1003JUD003450303.

[7] *Harmati v. Hungary*, ECtHR 21 October 2014, no. 63012/10,  
ECLI:CE:ECHR:2014:1021JUD006301210.

[8] *Toplak and Mrak v. Slovenia*, ECtHR 26 October 2021, nos. 34591/19 and 42545/19,  
ECLI:CE:ECHR:2021:1026JUD003459119.

[9] See for instance *Ádám and Others v. Romania*, ECtHR 13 October 2020, nos. 81114/17 and 5  
others ECLI:CE:ECHR:2020:1013JUD008111417; *Napotnik v. Romania*, ECtHR 20 October 2020,  
no. 33139/13

ECLI:CE:ECHR:2020:1020JUD003313913.

[10] *Mótká v. Poland* (dec), ECtHR 11 April 2006, no. 56550/00,  
ECLI:CE:ECHR:2006:0411DEC005655000.

[11] CRPD Committee, General Comment No 2 (2014) Article 9: Accessibility, CRPD/C/GC/2,  
22 May 2014.

[12] *ibid*, para 26.

[13] *ibid*, para 25.

[14] CRPD Committee, General Comment No. 6(2018) on Equality and Non-Discrimination,  
CRPD/C/GC/6 of 26 April 2018; CRPD Committee, General Comment No. 2 (2014) Article 9:  
Accessibility, CRPD/C/GC/2, 22 May 2014 (n 11).

[15] CRPD Committee, General Comment No. 6(2018) on Equality and Non-Discrimination,  
CRPD/C/GC/6 of 26 April 2018 (n 14), para 24(b).

[16] *ibid*, para. 25(c).

[17] See *Enver Şahin v. Turkey*, ECtHR 02 February 2018, no. 23065/12 (n 4); *Glor v Switzerland*,  
ECtHR 30 April 2009, no. 13444/04 (n.4).

[18] See for instance European Parliament, ‘Assistive Technologies for People with  
Disabilities. Part IV: Legal and Socio-Ethical Perspectives’ (2018); Whitney Quesenbery and  
Jennifer Sutton, ‘Assistive Technology in the Polling Place: Current and Emerging Technology  
(A White Paper for the EAC-NIST Human Factors Public Working Group)’ (2016)  
<[https://www.researchgate.net/publication/338684746\\_Assistive\\_Technology\\_in\\_the\\_Polling\\_Place\\_Current\\_and\\_emerging\\_technology](https://www.researchgate.net/publication/338684746_Assistive_Technology_in_the_Polling_Place_Current_and_emerging_technology)>; Piers Gooding, Arstein-Kerslake and Eilionoir

Flynn, 'Assistive Technology as Support for the Exercise of Legal Capacity' (2015) 29  
International Review of Law, Computers & Technology 245.

[19] *Çam v. Turkey*, ECtHR 23 May 2016, no. 51500/08 (n 4); *Enver Şahin v. Turkey*, ECtHR 02  
February 2018, no. 23065/12 (n 4); *Guberina v. Croatia*, ECtHR 12 September 2016, no. 23682/13.