

Impact of COVID-19 on Czech electoral system

Policy Brief

Jan Grinc, Marek Antoš
Charles University, Prague
August 2022

1. Introduction

Pandemic diseases pose multiple challenges to the functioning of democracy. The COVID-19 pandemic has arguably been the most impactful event of this kind since the Spanish flu more than a hundred years before. While many things have changed since then, the ritual of casting the vote in person using a paper ballot has remained the main feature of elections, modern technologies notwithstanding.

The main threat for the electoral process during a pandemic is the risk that the social interaction in person during in-person campaigning and election day will contribute to the spread of the disease. Under normal circumstances, individual health risks and difficulties related to voting at a polling station may be minimised or prevented by the possibility to use special means of voting, such as mobile ballot box, postal or electronic voting, if available, or by limiting the right to vote of individuals carrying the infection. However, a pandemic may require different approaches, such as additional hygienic and organisational measures or even the postponement of elections.

The real danger of contagion is exacerbated by fear of contagion. This may result in a lower turnout, which would affect the legitimacy of the elected body. Perhaps more importantly, certain groups of citizens (e.g., the elderly, the chronically ill) may be exposed to a higher health risk and therefore discouraged from voting to a larger extent than other segments of population. The fear of contagion also affects the officials involved in the organisation and implementation of elections, most importantly the local electoral boards.

This policy brief offers legal-political advice on the conduct of elections in a state governed by rule of law during health crises, based on the recent experience of the Czech Republic and the current legal regulation of elections in the country. It cannot offer specific recommendations that depend on detailed epidemiological or medical assessment of particular health risks related to elections.

2. Rule of law, democracy, elections and the pandemic

From a formal point of view, rule of law requires that the exercise of public authority is governed by law (see Art. 2(3) of the Constitution¹). This also applies in times of crises, although more powers and flexibility may be required in comparison to normal circumstances. Still, crisis management by extra-legal means is incompatible with rule of law and should be

¹ Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic

out of question.² This is even more true for interference with the proper conduct of elections, because free and fair elections are at the core of a democratic polity.³ Therefore, especially in times of crisis, proper care must be taken to ensure that these foundations are not jeopardised. Any crisis-related changes to electoral rules must have a sound legal basis.

The legal “preparedness” of various countries for biological threats affecting the conduct of elections does of course vary and there may not always be a suitable procedure at hand. In the event of an unexpected crisis that cannot be contained effectively within existing emergency regimes or states of exception, it is rational to adapt – to establish new rules, competences and procedures tailored to the situation, while respecting the constitutional principles.⁴ In the absence of a specific competence, this task is up to the democratically accountable legislator. This reflects the cognitive nature of policymaking (and legislation), which holds true also in times of unexpected and unknown threats.

There are different constitutional approaches to the distribution and limits of emergency powers. However, electoral principles and basic rules are often constitutionally entrenched and electoral legislation is usually the domain of parliament, not of the executive. Laws regulating elections may also hold the status of “organic-like laws” protected by rigid amendment procedures, which is also the case in the Czech Republic.⁵ It is recommended not to change the fundamental elements of electoral law less than a year before the election.⁶ Of course, a crisis situation related to health risks does not require changing the electoral system as such. Still, it may require modification of voting and organisational arrangements much later than a year ahead of the elections. The constitutionality of such changes has to be assessed case by case. In general, changes aimed at increasing the safety of suffrage without limiting it or taking advantage of the situation for illegitimate purposes, should not be considered constitutionally doubtful *per se*, because they pursue a legitimate aim in a changed situation. Fast-track legislative procedures may be used to ensure that new rules are adopted swiftly and legal certainty is safeguarded.

From a material point of view, the question is what legal measures shall be taken regarding elections during a pandemic. The general legal-political guidance on this issue has to be based both on values of democracy and protection of public health. Democratic accountability is vital also – and even more so – in times of long-lasting health crises accompanied by significant restrictions of freedom. It can be supplemented, but not substituted by a thorough judicial scrutiny of crisis measures. The protection of public health and safety are important public

² We are not considering extreme situations when a disease would cause a disintegration of institutions and society and would render any legal means of reaction useless.

³ See, e.g., the judgement of European Court of Human Rights *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58 and 59, ECHR 2005-IX: „*The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention [...], and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law [...]. As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion [...].*“

⁴ This also demonstrates how important it is that constitutional bodies as well as other public authorities deliberating and taking decisions in a health crisis are able to function even under strict rules of social distancing. Methods of remote participation and voting in parliaments may be an important precondition for managing the crisis within the bounds of the constitutional system – not only in relation to elections. At the same time, such methods must safeguard the publicity and personal exercise of the rights and duties of members of parliament.

⁵ Unlike ordinary laws, changes to electoral law require the consent of both chambers of Parliament, i.e. the Chamber of Deputies cannot override the Senate on such matters (see Art. 40 of the Constitution).

⁶ Notably by the Code of Good Practice in Electoral Matters, p. 10.

goods and generally constitute legitimate reasons for limiting political rights. The democratic principle itself also requires the state to organise elections under conditions that are, among other, safe for citizens. The state shall endeavour to enable as many citizens as possible to vote without safety or health concerns, while observing the constitutional principles of suffrage. Hygienic and organisational measures reducing health risks should be introduced if necessary. If the state is unable to safeguard such conditions – even if it is a consequence of a *vis maior* – , the legitimacy of elections that are held despite those circumstances may well be called into question. On the other hand, the periodicity of elections is too important an element of democracy to be pushed aside whenever the conditions for organising elections become suboptimal. It may be argued that elections should not be among the first “victims” of the pandemic as public events subject to restrictions, but rather among the last.

Constitutional rules on holding elections during a state of exception differ dramatically. The Czech approach that we will describe below authorises Parliament to postpone elections, if necessary, while Article 228(7) of the Constitution of the Republic of Poland suspends them automatically during a constitutional state of exception and under the German Basic Law, extension of electoral terms at the federal level would require a constitutional amendment and even that would be considered problematic with respect to the democratic principle protected by the so-called eternity clause.⁷ The problem is that these rules cover a wide range of situations that may jeopardize or prevent the holding of elections in the affected territory to a different extent and length of time. Unlike floods or wildfires shortly before the election day, which may prevent elections in the affected territory, but not necessarily for months, pandemic diseases have longer timespan and are less predictable. Timing and the ability to prognosticate the development of the pandemic seem to be the major factors in deciding how to proceed with elections. In the early stages of a pandemic, the threat is new and is not yet well understood. There may not be enough time to decide on what kind of hygienic means would be necessary to diminish the health risks or to procure them in sufficient numbers. In a situation like this, postponing elections for a few months is much easier to justify⁸ than at a later stage of the pandemic, when effective preventive measures and increased capacities of healthcare services should have been made available.⁹ If there is no clear prospect of a rapid improvement of the situation (that the disease will subside) and there is enough time and capacity to implement the necessary health protection measures and diminish the health risks involved, the argument for postponing the elections as opposed to holding them under adequately adapted conditions becomes weaker.

3. The legal framework in the Czech Republic

In the beginning of 2020, the Czech Republic did not have any elaborate legal framework for conducting elections during a pandemic, or under exceptional circumstances in general. The electoral laws allow for individual limitation of the right to vote on the grounds of public health protection. They all include a provision according to which the right to vote cannot be exercised by a person, whose personal liberty has been restricted according to the law in order to protect

⁷ Merten (2021), p. 61-62. See also Golia/Hering/Moser/Sparks (2021), p. 168, 178 referring to the postponement of elections in France and in the United Kingdom.

⁸ Indeed, national elections and referendums scheduled to be held from March 2020 onwards were often postponed for a few months. Cf. Zamfir/Fardel (2020), p. 1-3.

⁹ See also the graph at International IDEA (2020-2022) which shows the diminishing ratio of postponed elections to held elections as the time passed from March 2020.

public health.¹⁰ The conditions for imposing a quarantine or isolation are laid down in Act on the Protection of Public Health.¹¹ Of course, in a normal situation, these measures only affect a few individuals.

The other important rule relates to the postponement of elections. Article 10 of the Constitutional Act on Security¹² provides that “*if during a State of Emergency, State of Threat or State of War, the conditions in the territory of the Czech Republic do not allow to hold elections within the time limits specified for regular electoral terms, it is possible to extend those time limits by an act of Parliament for no more than six months*”. This is an exception from the general rule of Article 21(2) of the Charter of Fundamental Rights and Freedoms,¹³ according to which elections shall be held within time limits not exceeding the regular electoral terms prescribed by a law. The electoral terms of the directly elected Chamber of Deputies, Senate, President of the Republic, and regional and municipal self-governing assemblies are determined in the Constitution (Art. 16, 55 and 104). Strictly speaking, the provision refers only to the extension of the time limits for holding elections, but the generally accepted understanding is that this includes the extension of the term of office of the institutions concerned.¹⁴

The main purpose of Article 10 of the Constitutional Act on Security is to prevent the development of a situation in which the election does not take place, the electoral term elapses and the elected body or office becomes vacated. The aim is to safeguard, during a state of exception, the continued existence and functioning of directly elected constitutional bodies (which, in turn, appoint or elect other public authorities). Most notably, Parliament must be able to exercise its control and other powers over the executive during a state of exception and adopt legislation as necessary.

The first condition for the postponement of elections is that one of the three constitutionally regulated states of exception is in force at the time the act is adopted. For a pandemic, only the State of Emergency is relevant. According to Art. 5(1) of the Constitutional Act on Security, it may be declared by the Government in the event of natural disasters, ecological or industrial accidents, incidents, or other dangers, which to a significant extent threaten lives, health, property values or internal order and security. The duration of the State of Emergency is in general under control by the Chamber of Deputies, which may at any time terminate it by a resolution. An explicit consent of the Chamber of Deputies is required if the State of Emergency is to last longer than one month. During the pandemic, the State of Emergency was declared three times and lasted from 12 March 2020 to 17 May 2020, from 5 October 2020 to 11 April 2021 and from 26 November 2021 to 25 December 2021.

¹⁰ Section 2(a) of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, Section 4(2)(a) of Act No. 275/2012 Coll., on Elections of the President of the Republic, Section 4(2)(c) of Act No. 491/2001 Coll., on Elections to Municipal Assemblies, Section 4(2)(c) of Act No. 130/2000 Coll., on Elections to Regional Assemblies and Section 5(2)(a) of Act No. 62/2003 Coll., on Elections to the European Parliament.

¹¹ Act No. 258/2000 Coll., on the Protection of Public Health. See Sections 2(6), 2(7), 45(3), 54(1), 64(a), 67(2) and 69(1)(h).

¹² Constitutional Act No. 110/1998 Coll., on the security of the Czech Republic. English translations available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud/www/Pravni_uprava/AJ/Zakon_o_bezpecnosti_English_version_110_1998.pdf and <https://www.psp.cz/en/docs/laws/1998/110.html>

¹³ Published under No. 2/1993 Coll. It has the legal power of a constitutional act, which means it has the same legal force as the Constitution (see Art. 112(1) of the Constitution).

¹⁴ Uhl (2015), p. 1164-1165, Kysela (2009), p. 884.

The second condition is that the circumstances do not allow holding elections in the regular term. As outlined above, this has to be interpreted in view of the particular situation, as it develops. There is no detailed discussion in the scholarship on what constitutes such an impossibility. In our view, **postponement must be considered an ultimate measure, not an automatic one. In general, the decision-makers should be guided by (i) the severity of the disease, (ii) transmission mechanism of the disease and the predicted development of its spread in relation to the election date, (iii) the possibility to procure and implement effective safety measures or voting arrangements and (iv) the level of public fear and its possible adverse impact on voter turnout. The need for a reasonable increase in costs or administrative complexity should not be considered a legitimate reason for postponing elections.**

Interestingly, a completely different solution applies to local and regional referenda. According to law, time limits for these referenda are temporarily suspended during a State of Emergency or any other state of exception on the respective territory and the referenda do not take place. The Regional or Municipal Assembly decides on the new date of the referendum, which must take place within 90 days after the termination of the state of exception.¹⁵ **In our view, such a blanket approach is disproportionate and should be reconsidered. Like in the case of elections, it is conceivable that it may be necessary to postpone the referendum. However, this should not be an automatic *ex lege* measure. A more appropriate approach would be to give the Government the power to decide on a postponement if it is necessary in the light of the particular situation in the part of the territory where the plebiscite is to be held.**

Article 6(1) of the Constitutional Act on Security authorises the Government, during the State of Emergency, to restrict fundamental rights and freedoms specified in an act of Parliament, in accordance with the Charter of Fundamental Rights and Freedoms. The act referred to in Art. 6(1) of the Constitutional Act on Security is the Crisis Management Act,¹⁶ which lists the fundamental rights that may be limited and measures that may be introduced by the Government in the State of Emergency. The provisions are rather abstract, which reflects the necessary flexibility for dealing with the threat. The Government chooses *à la carte*, which measures and restrictions shall be introduced, and decides on their material, personal, temporal and territorial scope. It is noteworthy that the list of rights that the Government may limit is relatively narrow. It includes the inviolability of the person and the inviolability of the dwelling when evacuating a person from a place where he or she is in imminent danger to life or health, the right to property, freedom of movement and residence, the right to peaceful assembly, the right to engage in business and the right to strike.¹⁷ There is, quite interestingly, no explicit authorisation to limit the right to vote or introduce exceptional rules for elections. Nevertheless, it is clear that the right to vote could be affected indirectly by measures foreseen in the Crisis Management Act, such as by the order to evacuate a territory.

¹⁵ Section 5(2) of Act No. 22/2004 Coll., on Local Referendum and Section 5(2) of Act No. 118/2010 Coll., on Regional Referendum. It should be added that there is no general regulation of a national referendum in the Czech Republic. According to Art. 2(2) of the Constitution, it would have to be regulated by a constitutional act. In the past, only an ad-hoc Constitutional Act No. 515/2002 Coll. on the Referendum on Accession of the Czech Republic to the European Union was adopted.

¹⁶ Act No. 240/2000 Coll., on Crisis Management. English translation available at <https://www.hzscr.cz/hasicien/file/crisis-management-act-n-240-2000-coll-pdf>

¹⁷ See Section 5 of the Crisis Management Act.

According to Art. 40 of the Constitution,¹⁸ the adoption of an electoral law (an act of Parliament regulating elections) requires the consent of both the Chamber of Deputies and the Senate. This is an exception to the ordinary legislative procedure, where the Senate's rejection of a bill or amendments to it may be overruled by a majority of all members of the Chamber of Deputies (Art. 47 of the Constitution). The Constitutional Court and consequently also the legislator interpret the notion of electoral law broadly, as any regulation (including amendment) of the procedure for election of the Parliament, the President of the Republic, the regional and municipal assemblies and the European Parliament.¹⁹ The rule of Art. 40 also applies to acts adopted according to Art. 10 of the Constitutional Act on Security, i.e. acts postponing elections, as they too are electoral laws. Amending the constitution or electoral laws is not prohibited or restricted during any state of exception.

4. Postponement of elections

The ultimate measure that may be taken during a pandemic is to postpone the elections until it is possible to conduct them in an orderly manner. The Czech Republic experienced this very early into the pandemic.

4.1. The case of Senate by-election

Following the death of the President of the Senate on 20 January 2020, well before awareness of the impending Covid-19 pandemic spread, by-election in the affected Teplice constituency (one of the 81 single-mandate constituencies for the Senate elections) has been called by the President of the Republic and scheduled to take place on 27 and 28 March 2020. All in accordance with the law that prescribes that if a senator's seat becomes vacant (and if there is more than a year left of his or her term), a by-election is to be held in the constituency within 90 days.

On 15 March 2020, three days after the State of Emergency had been declared, the Government adopted Resolution No. 218 on the Adoption of a Crisis Measure (under the Crisis Management Act), which was promulgated under No. 88/2020 Coll. By this resolution, the Government *“postpones, due to restrictions on freedom of movement in the Czech Republic, voting in by-elections to the Senate of the Parliament of the Czech Republic called in constituency No. 32 by Decision of the President of the Republic No. 23/2020 Coll.”* and orders that *“voting in the by-elections to the Senate of the Parliament of the Czech Republic called in constituency No. 32 on 27 and 28 March 2020 and 3 and 4 April 2020 shall not proceed. For calculating deadlines pursuant to Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic..., which did not elapse by 15 March 2020, a new election date set by the President of the Republic will be decisive.”* The resolution refers in the preamble to the declaration of the State of Emergency by the Government and states as its legal basis Section 5(c) and 6(1)(b) of the Crisis Management Act. According to the first provision, freedom of movement and residence in a defined area endangered or affected by a crisis situation may be restricted for the time and to the extent necessary. According to the second, the Government is authorised to prohibit entry, residence and movement of persons in defined places or territories for the time and to the extent necessary.

¹⁸ Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.

¹⁹ See decisions of the Constitutional Court Pl. ÚS 13/05 from 22 June 2005 and Pl. ÚS 4/17 from 11 February 2020.

On 23 March 2020, the Ministry of the Interior published an interpretative opinion on this Government resolution.²⁰ It explains that, given the risks involved in voting in this election, it is in public interest to postpone the election and this must be done fast. The necessity to act swiftly is given as the reason why this case of extension of electoral terms falls outside the scope of Art. 10 of the Constitutional Act on Security mentioned above. According to the Ministry of the Interior, this provision “*refers expressly to the extension of the time-limits laid down for regular terms. By-elections to the Senate are not such a case. Therefore, the postponement of voting in by-elections is not subject to the requirement that it be carried out by law (the so-called reservation of the law does not apply here). On the other hand, this does not mean that the limited material scope of Art. 10 of the Constitutional Act on Security completely precludes the postponement of other than regular elections. Postponement of voting in by-elections to the Senate during the State of Emergency falls within the competence of the Government pursuant to [the Crisis Management Act].*” The Ministry adds that according to Sections 5(c) and 6(1)(b) of this act “*Freedom of movement and residence (coming to and being inside polling stations) can thus be restricted by cancellation of voting and postponement of elections until the crisis subsides. In this manner, the above-mentioned restrictions and regulations are implemented in such a way as to preserve the essence of the right to vote. It would certainly be possible to restrict movement and residence and allow the voting to take place formally. However, the legitimacy of the results of such a vote, which almost no one could attend, would be negligible.*” The Ministry adds that a swift postponement of the election saves expenditure in the electoral process and is important for legal certainty of the voters as well as for the planning of electoral campaign. In order to protect the rights already acquired, it is appropriate to postpone only the ballot, not to “*negate the whole electoral process*”. In the opinion of the Ministry, it is appropriate to leave the determination of a new date of the election to the President of the Republic, who, according to Art. 63(1)(f) of the Constitution, calls elections to the Chamber of Deputies and to the Senate. “*In this case the election will not be called because it already have been called, but according to an existing custom, determining the term of the election is a usual content of the President's decision to call an election. ... Decision of the President of the Republic on the calling of elections published under No. 23/2020 Coll. remains in force, only the election date changes. The President of the Republic shall decide on a new election date as soon as the situation allows.*”²¹

Relatively shortly after the aforementioned interpretative opinion, the Supreme Administrative Court had to decide on the lawfulness of this action of the Government, because it came up as a preliminary issue in a pending case. On 17 December 2019, the Government filed a motion to suspend the operation of the political movement “LIST JAROMÍRA SOUKUPA” and this proposal was still pending when the Senate by-election was called. According to the law²², the court cannot rule on such motion if nation-wide election have been called and must adjourn the proceedings until the tenth day following the last day of those elections. The Supreme Administrative Court had earlier established an interpretation that even the calling of a by-

²⁰ Ministerstvo vnitra, Odbor voleb: Výkladové stanovisko k odložení termínu hlasování v doplňovacích volbách do Senátu, 23. 3. 2020. <https://www.mvcr.cz/clanek/odlozeni-hlasovani-v-doplnovacich-volbach-do-senatu-ve-volebnim-obvodu-c-32-teplice.aspx> (accessed on 1 April 2020). The document is no longer available at the Ministry of Interior website, but the authors are able to provide a copy of the electronic document.

²¹ This is a rather misleading statement. Naturally, the Decision of the President on calling the election must include the election date. When determining the date, the President is bound by time limits specified in Art. 17(1) of the Constitution and Section 1 of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic.

²² Section 15(2) of Act No. 424/1991 Coll., on Political Parties and Political Movements and Section 94(2) of Act No. 150/2002 Coll., Code of Procedure of Administrative Judiciary.

election in a single Senate constituency amounts to nation-wide elections to the Senate.²³ The court now concluded that although the by-election has not taken place on the days set in the Decision of the President of the Republic No. 23/2020 Coll., the legal obstacle for suspending the operation of a political movement has not been removed and prevents the court from further proceedings until the by-election actually takes place. Therefore, the court adjourned its proceedings on 1 April 2020.²⁴

The conclusion reached by the court is convincing because it respects the wording and purpose of the provision governing the end of the “electoral moratorium” protecting political parties from decisions affecting their operation. It was not necessary for the court, however, to also address the constitutionality and legality of the way the elections were postponed. Yet, this is precisely the content of a substantial part of the opinion of the Supreme Administrative Court, which states that Government Resolution No. 88/2020 Coll. is null and void. The court adds that it cannot decide on the suspension of operation of political parties until the elections “*take place within the constitutional and legal framework*“. The court thus asserts that holding elections according to the provisions of Government Resolution No. 88/2020 Coll. will not be in accordance with the law.

The court is of the opinion that Art. 10 of the Constitutional Act on Security applies to postponement of by-election to the Senate, as this is also an election held within the period set for regular terms. Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic does not provide for any derogations from time-limits for various actions in the electoral process in the event of an emergency. In the view of the court, it would be absurdly narrow to interpret Art. 10 of the Constitutional Act on Security as applying only to regular Senate elections, while holding by-elections would be “*at the disposal of anyone other than Parliament*” and the decision would not require the form of an act of Parliament. At the same time, the right to vote is not listed in the Crisis Management Act among the rights that may be limited in accordance with Art. 6(1) of the Constitutional Act on Security during the State of Emergency. The court concludes that when adopting Resolution No. 88/2020 Coll., the Government acted *ultra vires*, outside the scope of its powers. Elections may only be postponed by a law in accordance with Art. 10 of the Constitutional Act on Security. The court also states that the decision of the President of the Republic to determine the day of election, as envisaged by the Government, would have no legal basis at all and that the Government has no authority to determine the conditions for the exercise of the President's constitutional powers by its resolutions.²⁵

This apparently forced the Government to reconsider its former interpretation. On 6 April 2020, the Government introduced to the Parliament a bill extending the terms for holding the by-election to the Senate. This bill was debated and adopted under the fast-track procedure of

²³ Decision of the Supreme Administrative Court Pst 12/2007-20 from 10 April 2017. Subsuming by-elections in a single constituency under “nation-wide Senate elections” is a questionable interpretation, especially when the political movement against which the motion was filed had not registered a candidate for these by-elections, but falls outside the scope of this paper.

²⁴ Decision of the Supreme Administrative Court Pst 19/2019-12 from 1 April 2020.

²⁵ *Ibid.*, paragraphs 10-17.

legislative emergency²⁶ and promulgated on 24 April 2020 under No. 187/2020 Coll.²⁷ According to its Section 1 and explanatory memorandum²⁸, the bill is based on Art. 10 of the Constitutional Act on Security and its purpose is to establish legal certainty with regard to the opinion expressed by the Supreme Administrative Court. It provides the legal basis for the President of the Republic to determine the new election days within a specified time limit and confirms the validity of those decisions and actions in the electoral procedure, that have already been taken. The Government states that its previous conduct was motivated by the effort to ensure legal certainty and prevent useless expenditure. Based on this Act, the President adopted a decision determining the new election days.²⁹ The election was held on 5 and 6 June (first round) and 12 and 13 June (second round).

4.2. Rules and limits to the postponement of elections

Before 2020, the legal scholarship did not address the questions raised by the situation described above. The controversial issue of postponement of by-elections to the Senate has now been resolved in favour of the application of Art. 10 of the Constitutional Act on Security. However, the interpretation of this provision is not straightforward. Firstly, the provision refers to regular electoral terms. Its wording does not cover extraordinary elections. This was the starting point of the Government's interpretation. Secondly, we have already argued that the purpose of the provision is to safeguard the continued functioning of directly elected bodies. But is this purpose relevant in case of by-elections in a single Senate constituency? The Senate's ability to act is not affected if one seat is vacant.³⁰ For the necessary period, the Senate can indeed function with eighty (or even fewer) members and the law even allows this situation to last for a whole year, as by-election is not held in the last year of the six-year term in the Senate constituency.³¹ It would follow from this that Art. 10 of the Constitutional Act on Security does not apply to the postponement of by-elections.

However, even if we accept this conclusion, it does not make the interpretation underlying Government Resolution No. 88/2020 Coll. plausible or justified. It was based on an overbroad understanding of competencies under the Crisis Management Act. In our view, the legal

²⁶ This procedure is regulated in Section 99 of Act No. 90/1995 Coll., Rules of Procedure of the Chamber of Deputies. It is independent on the constitutional states of exception. President of the Chamber of Deputies declares the State of Legislative Emergency at the request of the Government in exceptional circumstances, when fundamental rights and freedoms or the security of the state are in jeopardy or when there is a danger of considerable economic losses for the state. This then allows bills to be passed within a few days in the Chamber of Deputies. This is followed by an expedited procedure in the Senate according to Section 118 of Act No. 107/1999 Coll., Standing Rules of the Senate. It is of note that there is also a constitutional fast-track legislative procedure in Art. 8 of the Constitutional Act on Security, which allows a government bill to be passed within 96 hours at most. This procedure may only apply during a State of Threat or a State of War, so it was not applicable in any phase of the COVID-19 pandemic.

²⁷ Act No. 187/2020 Coll., on the Extension of Terms for Holding the By-Election to the Senate.

²⁸ Chamber of Deputies File No. 821 in the 8th Term: <https://www.psp.cz/sqw/historie.sqw?o=8&T=821>

²⁹ Decision of the President of the Republic No. 240/2020 Coll., Determining the Date of By-Elections to the Senate of Parliament of the Czech Republic.

³⁰ The Supreme Administrative Court (paragraph 11 of the discussed decision) rejects this argument: "*Nor is it possible to rely on the fact that by-elections have been called in only one constituency and that the Senate's ability to act will therefore not be affected in any way. The numbers do not matter, the voting situation in the Senate may depend on a single vote, and furthermore, one can theoretically imagine that it might be necessary to hold by-election in more than one or even in all Senate constituencies.*" However, this is not a question of the Senate's ability to act. The result of a vote may depend at any time on the presence or absence of one Senator, but the Senate is prevented from adopting resolutions only when more than two thirds of the Senators are absent.

³¹ Section 80(3) of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic.

provisions referred to in the Resolution are certainly not a sufficient legal basis for postponing elections. It must be admitted that the Government's approach was not entirely illogical. In terms of legal basis, Government Resolution No. 88/2020 Coll. followed Government Resolution No. 85/2020 Coll., which, according to Sections 5(c) and 6(1)(b) of the Crisis Management Act, restricted free movement of persons in the Czech Republic as a whole, with a closed list of exceptions. Unless we maintain a position that voting was covered by one of these exceptions, "*travel to settle urgent official matters*" according to Point I(f) of the Resolution No. 85/2020 Coll., we may conclude that travelling in order to vote has already been prohibited and Resolution No. 88/2020 Coll. only confirmed this. Generally speaking, implicit restrictions of fundamental rights not enumerated in the Crisis Management Act cannot be completely avoided. Crisis measures restricting freedom of movement may affect, for example, the right to protection of family life, although this right is not listed in the Crisis Management Act. The exercise of the right to vote may be made impossible by a restriction of the freedom of movement. But unlike the protection of family life, the possible interference with elections is only expressly regulated by Art. 10 of the Constitutional Act on Security and not by the Crisis Management Act. Therefore, and also because of the fundamental role of elections in democracy, we are of the opinion that although the Government may drastically restrict the freedom of movement under Article 6(1) of the Constitutional Act on Security and the provisions of the Crisis Management Act, it may not, as a "side-effect" in the absence of an explicit competence, restrict the exercise of the right to vote or suspend the electoral process regulated by electoral laws.

It cannot be assumed that the powers under the Crisis Management Act may be interpreted as broadly as necessary to allow the Government to deal with any situation without the need to amend laws, establish new powers of public authorities etc. Such a broad interpretation would be hard to reconcile with the principle of legality according to Art. 2(3) of the Constitution. Consequently, it is up to the legislator to find an appropriate solution in accordance with the constitution, if the process prescribed by electoral laws cannot be executed due to *vis maior*. **Under the current law, postponement of elections must always have the form of a law (an act of Parliament). For regular elections, Art. 10 of the Constitutional Act on Security applies. For extraordinary elections, this is a necessary consequence of the fact that exceptions from the electoral process regulated by a law may only be made by another law (or by a decision based on an explicit provision of a law). In both cases the law in question would be an electoral law and would require the consent of both the Chamber of Deputies and the Senate (Art. 40 of the Constitution).**

It is important to note that between 15 March and 27 March, Parliament was in session and adopted laws related to the pandemic crisis using a fast-track procedure. There was enough time to decide on the postponement by-elections using the form of a law. Even if there had not been enough time, because of a sudden development of the situation just hours or a few days before the election, there would be no reason to conclude that somehow an implicit power of executive authorities is established to decide when and under what conditions will the electoral process resume. There is no law authorising the Government to make such a decision.

If the electoral procedure prescribed by the law has not been followed due to *vis maior* in a sudden emergency, the further conduct must be resolved by a law, because there is no competence to decide in such a case but the legislative power of Parliament. Because of the variability of the situations and their timing as well as the elaborate clockwork of the electoral process, a general constitutional or legal solution does not seem possible, if it is not to be a broad authorisation of the executive to decide, using considerable discretion,

on exceptions from electoral law.³² Such an authorisation would be deeply problematic in terms of constitutionality because of the requirement that elections and the right to vote are regulated by a law.

The disadvantage of our interpretation compared to the Government's original approach is that the adoption of an act of Parliament is never as fast as the adoption of a Government resolution. Until the law is adopted, the electoral authorities would be required to conduct the electoral process within the legally prescribed deadlines, which may lead to useless expenditure not only by public authorities, but also by the running political parties and candidates. From this point of view, **it is reasonable for the Government to declare the intent to postpone elections immediately after it becomes clear that the circumstances do not allow to hold elections (e. g. together with ordering evacuation from the affected territory) and to inform the citizens. The Government should work closely with Parliament** to secure support for the (technically rather simple) bill postponing the elections. Ideally, there should be a broad political consensus. This would allow the bill to be passed in a few days, using the fast-track legislative procedure.

A different situation, that cannot be resolved under the current constitution, is the postponement of early elections to the Chamber of Deputies after it is dissolved (Art. 35 of the Constitution). In such a case, the election must take place within 60 days from the dissolution according to Art. 17(2) of the Constitution. During this time, a pandemic may break out. The problem is that Senate, authorised to adopt legislative measures in urgent cases when the Chamber is dissolved, is expressly prevented from adopting legislative measures concerning electoral law (Art. 33 of the Constitution). This would mean that early elections to the Chamber of Deputies cannot be postponed by any means. Given the broad interpretation of the notion of electoral law, the same rule would also prevent the Senate from introducing any special voting arrangements or other legislative measures aiming at the safety of elections. This problem could probably be overcome by interpretation in an extreme situation, if the Senate acted solely with the purpose to enable the elections to take place safely, thus protecting the democratic principle. However, it is also possible to amend the Constitutional Act on Security, preferably authorising the Senate to introduce special voting arrangements and other necessary measures, but not to postpone the election, because such a power could be abused, especially in times of a possible political crisis (that led to the dissolution of the Chamber of Deputies). This issue also demonstrates that it is impossible to cover all emergency situations, however improbable, without a broad authorisation for a constitutional body to take all the necessary measures, notwithstanding the law.

There is also a debate whether Art. 10 of the Constitutional Act on Security allows the elections to be postponed only once, repeatedly within the six-month limit, or repeatedly beyond the six-month limit (where each individual law could postpone the elections for six months at most).³³

³² This is also a reply to the possible argument that an ad hoc electoral law would violate the rule of law principle that laws must be general. The very nature of emergencies and the threat they may pose for an individual election in a specific time defy strict adherence to the principle. The legislator must be able to react to the situation it faces here and now. This is more in line with the democratic principle and the role of Parliament in the constitutional system of the Czech Republic than the alternative solution – to entrust in effect the same decision-making to an executive body.

³³ Uhl (2015), p. 1164-1165 argues for repeated postponement because the obstacle for holding elections may last longer and it would not make sense to render the state non-functioning after six months. Kysela (2009), p. 883-884 does not take a clear stance but mentions the problems resulting from the impossibility of repeated postponement and the adoption of a constitutional law as a way to overcome them. Mareš (2019), p. 163 states that the elections may only be postponed once, without providing any reasoning. Antoš (2022), p. 915 asserts that

The easy interpretation would be to rule out the possibility of repeated postponement completely because it is not explicitly provided for in Art. 10.³⁴

In case of emergencies caused by natural forces, a single postponement, combined, if necessary, with special safety measures should suffice. It is indeed hardly conceivable that, for example, a flood or a wildfire would last for months with undiminished intensity. While territorial effects of serious industrial accidents may last longer, the time gained by the first postponement should be enough to establish legal conditions allowing the elections to take place safely. On the other hand, the purpose of the provision (to safeguard the continued functioning of directly elected bodies) would be defeated if the elections objectively could not take place even on the postponed date and no further postponement was allowed. In the unlikely event that the elections have already been postponed due to an emergency and just before the new election day, another (even completely different) emergency arises, it could be in line with the purpose of Art. 10 of the Constitutional Act on Security to postpone the elections repeatedly.³⁵

In our opinion, it is possible to interpret Art. 10 as allowing the elections to be postponed repeatedly within the six-month time limit, if necessary. However, allowing elections to be postponed repeatedly beyond the six-month time limit is a different situation because it would interfere more seriously with the periodicity of elections and could be abused to dispose of elections indefinitely under the pretext of an emergency. This could be, nonetheless, countered by initiating a review of constitutionality of the law postponing elections. If it is manifestly possible to hold elections instead of postponing them, such a law would be in violation of Art. 10 of the Constitutional Act on Security. Our conclusion is that **Art. 10 of the Constitutional Act on Security should be amended in order to clarify whether repeated postponement of elections (i) is possible at all and, if so, (ii) whether the six-month limit is absolute or relative to each individual postponement.**

5. Conduct of further elections during the pandemic

Since the Senate by-elections, the postponement of further elections has not been pursued by the Government, although it was being mentioned from time to time as the ultimate instrument in the electoral emergency toolbox.

There were three major elections in the Czech Republic during the COVID-19 pandemic. In early October 2020, elections to regional assemblies and to one third of the Senate took place. The regional election and first round of the Senate election were organised jointly on 2 and 3

although it is possible to imagine situations in which an extension for a longer period of time would be necessary and proper, exceptions from the constitutionally enshrined principle of regular elections shall not be interpreted broadly, given its fundamental importance in democratic society. If it were to be possible to postpone elections beyond six months, there would have to be explicit support for this in the wording of the Constitutional Security Act.

³⁴ Logically, we must ask, whether a repeated postponement is possible by a *constitutional* act making an exception from the constitutional electoral terms. While this would conveniently require an even broader consensus in the Parliament, it could still be problematic because of Art. 9(2) of the Constitution which forbids the constitutional legislator to “*change the essential requirements for a democratic state governed by the rule of law*”. Postponing elections for more than six months may be viewed as a serious violation of the requirement of periodicity of elections. With reference to this article, the Constitutional Court has in the past struck down a constitutional law that shortened the term of the Chamber of Deputies because it was concerned that it circumvented normal constitutional procedures (see decision Pl. ÚS 27/09 from 10 September 2009). A constitutional law extending the term would obviously be even more suspect.

³⁵ This is especially relevant during the State of War or State of Threat, which may also last longer than six months.

October 2020. The second round of the election to the Senate followed a week later. On 8 and 9 October 2021, Chamber of Deputies was elected. With the exception of the second round of Senate election in 2020 (9 and 10 October), none took place during a State of Emergency, so the postponement was not even a constitutional option. In October 2020, the Government apparently hesitated to declare the State of Emergency and to introduce unpopular restrictions before the regional elections in order to avoid electoral backlash, despite the growing number of new infections since the end of summer. It eventually yielded to the worsening situation and declared the State of Emergency on 5 October, just before the second round of Senate elections, but not in order to affect their course.³⁶ In addition to this, 55 extraordinary elections (*new elections*) to municipal assemblies were conducted during 2020 and 2021.³⁷

5.1. New elections to municipal assemblies

New elections to a municipal assembly take place mainly in the event that the membership of the municipal assembly falls below one half of the number prescribed by law before the end of the four-year term. This usually happens in the smallest municipalities, so these elections have a very limited scope. On the other hand, given there is a large number of municipalities in the Czech Republic, about 6,250 in total, which vary considerably in population (from a few dozen to more than a million), new elections are held quite frequently. Sixteen of those elections took place on 16 March 2020, four days after the State of Emergency has been declared for the first time. Apparently, no special measures have been taken regarding these elections because of the timing and the negligible personal scope. Further nine elections took place during the second State of Emergency in December 2020. The remaining 30 elections were conducted in between the first, second and third State of Emergency.

In connection with the debate whether Art. 10 of the Constitutional Act on Security applies to extraordinary elections, it seems that, of all the types of elections, **postponement of new elections to municipal assemblies could be subject to a general legal regulation, as these elections take place multiple times each year and their scope is relatively limited. The Government (or the Ministry of Interior alone) could be authorised to postpone these elections during a State of Emergency. However, this would require a clear regulation in the electoral law, including the condition that it is impossible to conduct the elections on the territory of the municipality, the specification of effects of postponement (suspension of time limits according to the electoral law) and the maximum time limit for the postponement.**³⁸ As opposed to the automatic suspension of local and regional referenda for

³⁶ The political parties forming the (minority) government at that time, ANO and ČSSD, only had remaining candidates in 12 of the 26 districts where the second round took place between the two most successful candidates from the first round. Many candidates from government parties did not have good prospects for the second round and indeed, only one was elected eventually. Parties tolerating the minority government in the Chamber of Deputies did not have even a single candidate to the second round. Therefore, there was not much to lose for the Government when it declared the State of Emergency before the second round.

³⁷ Details are available at the website of the Czech Statistical Office: Český statistický úřad. Volby – Archiv. Available at: <https://www.czso.cz/csu/czso/volby-archiv>

³⁸ It is also of note that the current rules for calling extraordinary municipal elections leave quite some room to decide on the date of election, which could be exploited to some extent in case of a long-lasting emergency. According to Section 58(4) of Act No. 491/2001 Coll., on Elections to Municipal Assemblies, the new election is called by the Minister of Interior (which is an exception to the rule that elections are called by the President of the Republic). First, the Mayor of the municipality must request the calling of new election within 30 days after the conditions have been fulfilled. The Minister of Interior calls the election within 30 days after receiving the request. The election must be called at least 90 days before the election date, according to Section 3(1) in connection with Section 58(3).

the whole duration of the state of exception, there should be a specific time-limit, because prolonged absence of an elected assembly in a municipality would undermine the constitutional right to territorial self-government (Art. 8 and 100 of the Constitution). **A six-month time limit would be in line with current rules for similar situations.**³⁹

Regarding local and regional referenda, the 2021 Special Voting Arrangements Act made an exception from their automatic postponement during a state of exception if the referendum is scheduled to take place jointly with elections (which is the usual practice).⁴⁰

5.2. Special voting arrangements

In order to facilitate electoral participation, the state should mitigate potential health concerns connected with polling. This may be achieved by various organisational and hygienic measures as well as by introducing special voting arrangements that reduce physical contact or concentration of people in and around polling places. These measures have to respect the constitutional principles of elections.

The Czech electoral law before COVID-19 did not provide for any special voting arrangements such as postal or electronic voting, not even for voters abroad. The only exception is the possibility to use a mobile ballot box. This can be requested by a voter for “serious, especially health-related reasons” before or even on the day of election. The electoral board of the voter’s polling station will then dispatch two of its members with a mobile ballot box to the voter’s residence.⁴¹ However, this voting method does not aim primarily at diminishing the danger of infection, but rather at facilitating the exercise of the right to vote for persons who would not have been physically able to travel to the polling station. For elections of Parliament, European Parliament and the President, voters staying in healthcare or social care institutions, who cannot vote at the polling station according to their domicile, are registered in special electoral rolls based on information from the institution.⁴² These voters will then usually vote using the mobile ballot box.

As the October 2020 Senate and regional elections were approaching, the Government had not been planning any special measures for voters in quarantine or isolation and declared that they will be disenfranchised according to the standard rules.⁴³ However, it was predicted that the

³⁹ Besides the obvious parallel in Art. 10 of the Constitutional Act on Security, there is Section 58(2) of Act No. 491/2001 Coll., on Elections to Municipal Assemblies, according to which new elections are not held in the last six months before the end of the regular electoral term, because the newly elected assembly would only remain in power for less than three months before the regular election.

⁴⁰ The new Section 5(3) of Act No. 22/2004 Coll., on Local Referendum and Section 5(3) of Act No. 118/2010 Coll., on Regional Referendum.

⁴¹ Section 19(7) of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, Section 41(8) of Act No. 275/2012 Coll., on Elections of the President of the Republic, Section 33(7) of Act No. 491/2001 Coll., on Elections to Municipal Assemblies, Section 31(8) of Act No. 130/2000 Coll., on Elections to Regional Assemblies and Section 36(8) of Act No. 62/2003 Coll., on Elections to the European Parliament.

⁴² Section 6 of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, Section 28(2) of Act No. 62/2003 Coll., on Elections to the European Parliament and Section 32 of Act No. 275/2012 Coll., on Elections of the President of the Republic.

⁴³ Even as late as 20 July 2020, the Minister of the Interior believed there is no time to amend electoral law in order to allow citizens in quarantine or isolation to vote. See iROZHLAS. Lidé v karanténě nebudou volit. „Hlasování pro ně do voleb nelze zařídit,“ tvrdí Hamáček. 21. 7. 2020. Available at: <https://www.irozhlas.cz/zpravy-domov/koronavirus-volby-2020-karantena-cesko-v-cesku-jan-hamacek-2007201846-ako>

number of infected persons will start increasing again in autumn. The Government was criticised for not trying to find a safe way to enable this potentially significant group of voters to exercise their right. Political talks ensued and following a broad political agreement, the Government submitted to the Parliament a bill establishing special voting arrangements for the October 2020 elections, namely (1) voting at a drive-in polling station, (2) voting in a residential care facility, and (3) voting using a special mobile ballot box. A fourth method, voting by proxy, had also been considered early on, but ultimately rejected because of constitutional concerns. Although the Czech constitution does not explicitly require personal (individual) suffrage (only electoral laws do), it is understood by the doctrine to constitute an element of direct suffrage.⁴⁴ It may also be argued that proxy voting, which has no tradition in the Czech Republic, would violate the secrecy of voting and the freedom of elections (elections as a manifestation of genuine will of the voters).⁴⁵

The special voting arrangements bill was submitted to Parliament on 17 August 2020, swiftly adopted in the fast-track procedure mentioned above and promulgated on 24 August 2020, five weeks before the elections.⁴⁶ For the October 2021 elections of the Chamber of Deputies, this solution was repeated. The same special voting arrangements as in 2020 (with some minor adjustments) were proposed and the resulting law was promulgated on 21 July 2021, more than eleven weeks before the elections.⁴⁷

Because the laws differ from each other only in technical details, we will summarize them jointly.⁴⁸

Their main feature was that the special voting arrangements were only available to persons who would have otherwise been temporarily disenfranchised because of quarantine or isolation imposed as a protective measure against covid-19 or because a residential care facility, where they are, has been closed off in connection with this disease. For these voters, the special voting methods were the only possible way to vote⁴⁹, while other voters were not allowed to use them at all. The special voting arrangements could also be used for voting in a local referendum that was taking place together with the elections.⁵⁰

Special electoral boards were organized for the special voting, staffed with servicemen of the Army of the Czech Republic and with civilians appointed by the head of Regional Authority.⁵¹ This is a notable and perhaps questionable departure from the general rule of the electoral laws that electoral boards are staffed with delegates of all running political parties as a means of mutual control.⁵² However, taking into account the limited number of special electoral boards,

⁴⁴ Antoš (2008), p. 65-67 with further references. Direct suffrage is required by Art. 18(2), 18(3), 56(1) and 102(1) of the Constitution.

⁴⁵ Art. 21(1) and (3) of the Charter of Fundamental Rights and Freedoms. See also Code of Good Practice in Electoral Matters, p. 8-9, 21-22.

⁴⁶ Act No. 350/2020 Coll., on Special Voting Arrangements in the Elections of Regional Assemblies and the Senate in 2020.

⁴⁷ Act No. 296/2021 Coll., on Special Voting Arrangements in the Elections of the Chamber of Deputies of Parliament of the Czech Republic in 2021.

⁴⁸ The genesis and implementation of the 2020 Special Voting Arrangements Act is discussed generally by Pecháček (2021) and Malý (2022).

⁴⁹ Sections 2 and 3 in both acts.

⁵⁰ This was the case of 36 out of 48 local referenda conducted in 2020 and 2021. See the list available at the website of the Ministry of Interior: <https://www.mvcr.cz/soubor/mistni-referenda-tabulka-hlaseni.aspx>

⁵¹ Sections 5 and 6 in both acts.

⁵² Pecháček (2021), p. 133. The representation of political parties in electoral boards is also required by the Code of Good Practice in Electoral Matters, p. 10.

it does not seem to be a cause for major concern.⁵³ The point of the special electoral boards was to separate the potentially infected voters from regular electoral boards in regular polling places.

Voting at a drive-in polling station⁵⁴ meant voting from a car. The procedure was not regulated in detail by the law, notably as regards the secrecy of voting in the event of more persons voting from the same car (which could raise concerns about the problem of *family voting*). Both acts only generally confirmed that the voter must cast the vote personally and that proxy voting is prohibited.⁵⁵ According to the explanatory memorandum of the first bill,⁵⁶ in order to be able to forward the list of drive-in voters to regular electoral boards and prevent double voting, the drive-in voting was conducted ahead of the standard election days (Friday and Saturday), on the second day before the first day of elections (Wednesday).

Voting in a residential care facility⁵⁷ concerned residential social service facilities, educational facilities providing institutional upbringing and hospitals, but only if they were temporarily closed off by public health authorities. The rules were similar to the abovementioned special electoral rolls with the exception that the voting proceeded one day before the first day of the elections and on the first election day. Again, detailed rules were not provided by the law.

Voting using a special mobile ballot box⁵⁸ was similar to regular mobile ballot boxes, the difference being that it was serviced by the special electoral board.

No notable problems occurred with the special voting arrangements. During the subsequent judicial review of elections, only one case was related to special voting arrangements. However, the voting method itself was not the subject of review.⁵⁹

A third ad-hoc special voting arrangements act is currently being drafted for the late September and early October 2022 Senate and municipal elections and the January 2023 election of the President of the Republic. **From the legislative point of view, the procedure and conditions for casting the vote under the special voting arrangements could be regulated in more detail in order to protect the personality and secrecy of vote as much as possible.**⁶⁰ At the same time, no practical problems or violations of these principles have been reported, so there is no pressing need to fundamentally rethink the arrangements. **Enabling representatives of political parties to become members of special electoral boards could also be considered.**

⁵³ For example, in 2020, there were 78 special electoral boards and 13 998 “regular” electoral boards. Fišarová, Jirovec (2020), p. 185, 189. This also shows the rather large area covered by each special electoral board.

⁵⁴ Sections 8 to 11 in both acts.

⁵⁵ Section 7(6) in both acts.

⁵⁶ File No. 971 in the 8. Term of the Chamber of Deputies, p. 27.

⁵⁷ Sections 2(b) and 12 to 15 in both acts.

⁵⁸ Sections 16 to 19 in both acts.

⁵⁹ Decision of the Supreme Administrative Court Vol 102/2021-46 from 5 November 2021. The core of this case was the interpretation of the deadline for a withdrawal of a candidate from the list by the political party or coalition, which ends “48 hours before the beginning of elections” according to Section 36(1) of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic. The beginning of elections means the time when polling stations open on the first day of elections. However, voting by special means was conducted a few days earlier. In the opinion of the court, during the election days, voters must have legal certainty about who is standing for election. Therefore, the deadline has to be counted from the date and hour when the special voting begins. The court also noted that although voting from abroad also begins earlier than voting in the state territory, there is a special rule in Sections 1(5) and 1(6) of the Act on Elections to the Parliament which clarifies that this does not constitute the beginning of elections. There is, however, no such provision in Act No. 296/2021 Coll., on Special Voting Arrangements in the Elections of the Chamber of Deputies of Parliament of the Czech Republic in 2021. See paragraphs 22, 28, 33 and 45 of the abovementioned decision.

⁶⁰ Cf. Pecháček (2021), p. 136.

According to the electoral data, in the October 2020 elections, a total of 6 524 voters used the special voting arrangements. This includes and 5 598 voters in regional election (~0,20% of total number of votes cast) and first round of Senate elections and 926 voters in the second round of Senate elections (also ~0,20% of votes cast), which only concerned one third of the state territory. During these elections, around 14 000 persons have been officially recorded as fulfilling the conditions for voting by special arrangements.⁶¹ The approximate voter turnout of 40 % in this segment does not deviate significantly from the total voter turnout of 36,7 % in the first round of Senate elections and 37 % in regional elections. In the October 2021 elections, only around 2700 votes (~ 0,05 %) were cast using the special voting arrangements.⁶² Although we cannot quantify the effects of the pandemic on electoral participation, no significant drop in voter turnout can be observed. In fact, the turnout in the 2020 regional election was the second highest of the six regional elections held so far and the turnout in the 2021 Chamber of Deputies election was the highest since 1998.⁶³

It is understandable that special voting arrangements were only available to persons who would otherwise have been prevented from voting. Offering these types of voting as optional to all voters would have been costly and unpredictable in terms of personal capacities required for the organisation of electoral boards. It would have also increased the risks connected with these voting arrangements, such as *family voting* at drive-in polling stations. It is also reasonable that special voting arrangements were not introduced for the extraordinary municipal elections, due to their limited scope.

Special voting arrangements fulfilled their purpose of allowing individual voters in COVID-19 quarantine or isolation to exercise their right to vote, but because of the limited number of voters affected by this impediment, they were arguably not indispensable for guaranteeing the legitimacy and fairness of the elections as a whole. However, the relatively low use of these methods in past elections should not be an argument against them, because as pandemics develop in waves, it is impossible to be sure in advance how many people will be affected by either the disease or the quarantine on election day. It is therefore highly advisable that special voting arrangements should be rest in place.

Cost-effective special voting arrangements that can be implemented quickly may help to mitigate the possible negative impact of an emergency on voter turnout. They may be introduced by ad hoc laws as necessary. As an alternative, a general regulation of special voting arrangements may be incorporated into electoral laws. In such a case, the decision to employ the special voting arrangements in any particular election should be entrusted to a politically accountable constitutional body (Government or Parliament) and should be bound by material conditions and a time limit (how far ahead of the election day should the arrangements be activated). However, it is important to bear in mind that different diseases (or threats in general) may require different voting arrangements. The necessity of an ad hoc reaction cannot be ruled out.

⁶¹ Fišarová/Jírovec (2021), p. 189-191.

⁶² Information provided by a representative of the Ministry of Interior. Discussion at the policy roundtable, 29 June 2022.

⁶³ Even the turnout in the Senate by-elections in June 2020 does not seem to have been significantly affected by the pandemic. In the first round, the turnout was 15,79 % and in the second round it was 9,26 %. These numbers may seem shockingly low, but are actually common for Senate by-elections. For comparison, in the three previous by-elections, the turnout was 18,48 % and 11,45 % in the first and second round respectively (April 2019), 22,90 % and 59,43 % (January 2020 – the abnormally high turnout in the second round was caused by the fact that it was held jointly with the election of the President of the Republic) and 15,95 % and 10,40 % (May 2020).

5.3. Beyond the pandemic – postal or internet voting?

The pandemic certainly is a strong argument for those calling for a modernisation of voting arrangements in the digital era.⁶⁴ However, as the Czech experience shows, this is a long-term discussion. Under the time pressure created by the sudden outbreak of the pandemic, only constitutionally and politically uncontroversial arrangements that could have been swiftly prepared and implemented were introduced in 2020 and then repeated in 2021 with only minor technical adjustments. Postal, or even internet voting was not seriously considered, not only because it is politically disputed in the Czech Republic, but also because it would have taken much more time and effort to introduce it and because it would only make sense if available to all voters and not just to those quarantined or isolated. Postal voting usually requires the vote to be cast before the election day, i.e. before the voters may learn that they will not be able to vote in person. In a pandemic, it would be useful for those who decide early that they do not want to visit the polling station. Internet voting infrastructure created only for a few thousand voters would not be a justifiable expense. Besides, once these voting methods were introduced, there would surely be calls for keeping them after the pandemic. And that was something the government parties were not ready to support.

However, it is undeniable that a general possibility of postal and especially internet voting would be useful in a pandemic and could significantly reduce the social contact, although measures in polling stations would still need to be taken. If it were to be introduced, it could also be done stepwise, for example first for quarantined voters and voters abroad, who constitute a significant group whose access to elections is rather complicated under the current law.⁶⁵

The introduction of proxy voting for quarantined voters, on the other hand, cannot be recommended. In addition to the constitutional problems, it would not necessarily reduce physical contact as effectively as postal voting, unless the rules for authorising the proxy and for presenting the authorisation to the electoral board were so flexible that they would be prone to be abused, especially in elections where only a few votes may decide, such as in smaller municipalities.

In the light of the special voting arrangements implemented in 2020 and 2021, which allowed quarantined voters to exercise their fundamental right, we may question whether the general voting impediment for quarantined voters is constitutionally tenable. Unfortunately, there do not seem to be any data on persons affected by this impediment because of a disease other than COVID-19. There is also no list of infectious diseases for which quarantine may be imposed. The level of threat and required degree of isolation and required protective measures differ among various infectious diseases. A differentiated regulation would therefore be necessary,

⁶⁴ See e.g. Bretthauer (2021).

⁶⁵ Another impulse for introducing postal voting in the Czech Republic may come from common EU rules on the election of European Parliament. In May 2022, European Parliament proposed a reform of these rules that would require the EU member states, among other, to provide the possibility of postal voting in the European Parliament election to all their citizens (not only those abroad). If postal voting is introduced for European Parliament election, a spillover effect on national elections is to be expected. However, the adoption of this rule requires unanimous decision of the Council. See Art. 8 of the European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL), 2022/0902(APP)). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0129_EN.html

which may not be easy to draft as regards the categorisation of diseases. At least for the more dangerous infectious diseases (e.g. infectious hepatitis, suspected contraction of Ebola virus disease), the voting impediment remains legitimate. **If the legislator decides to refine the regulation of quarantine or isolation as a voting impediment, the special voting arrangements could be extended to persons quarantined because of infectious diseases similarly or less dangerous than COVID-19.**

5.4. Other measures

While the Czech electoral law did not provide for any hygienic measures before COVID-19, the fact that in almost all elections it is possible to vote for two days according to the law (Friday from 14:00 to 22:00 and Saturday from 8:00 to 14:00)⁶⁶ together with the high number of polling stations helps to limit social contact during elections, compared to countries where polling is limited to a single day.⁶⁷ In practice, crowded polling stations are uncommon for the Czech Republic.

For the October 2020 elections, and similarly for the October 2021 election, a number of organisational measures were taken in order to safeguard safe and lawful conduct of elections.

Hygienic measures in the polling stations included the obligatory wearing of a mask, hand disinfection, 2-metre distance between the voters and the electoral board and disinfection of the polling booth. Protective measures for members of electoral boards were distributed.⁶⁸ There were two interesting court cases related to these measures. In the first one, the court declared that the electoral board was authorised to ask a voter to take off the mask for a brief moment, if the board was unable to check the voter's identity with the mask put on. In the second, the court found that the prohibition of political agitation in the polling station was violated by a member of the electoral board wearing a mask with the name and logo of a political party, but concluded that this does not constitute a ground for declaring the results of voting in the polling station invalid, as it cannot be proven that the incident affected the results.⁶⁹

Both laws on special voting arrangements also decreased the minimum number of members of an electoral board from six to five, or even four in polling stations with less than 300 voters in the electoral roll, and slightly increased their remuneration.⁷⁰

Last but not least, information towards voters, also regarding the special voting arrangements, and training of members of electoral boards had to be stepped up.

⁶⁶ Only extraordinary elections to municipal assemblies are held in one day according to Section 2(4) of Act No. 491/2001 Coll., on Elections to Municipal Assemblies.

⁶⁷ This has been pointed out by the representative of the Ministry of Interior. Discussion at the policy roundtable, 29 June 2022.

⁶⁸ Fišarová/Jírovec (2021), p. 182-194.

⁶⁹ Decision of Regional Court Brno 67 A 4/2020-121 and Decision of Regional Court Ústí and Labem 115 A 1/2020-32 as reported by Fišarová/Jírovec (2021).

⁷⁰ Section 24(5) and 27(12) of Act No. 350/2020 Coll., on Special Voting Arrangements in the Elections of Regional Assemblies and the Senate in 2020 and Section 24(5) and 28(12) of Act No. 296/2021 Coll., on Special Voting Arrangements in the Elections of the Chamber of Deputies of Parliament of the Czech Republic in 2021. The increased remuneration of members of electoral boards was highlighted by a representative of the Ministry of Interior as an important motivational factor. Discussion at the policy roundtable, 29 June 2022.

6. Summary of recommendations

1. Postponement of elections must be considered an ultimate measure, not an automatic one. In general, the decision-makers should be guided by (i) the severity of the disease, (ii) transmission mechanism of the disease and the predicted development of its spread in relation to the election date, (iii) the possibility to procure and implement effective safety measures or voting arrangements and (iv) the level of public fear and its possible adverse impact on voter turnout. The need for a reasonable increase in costs or administrative complexity should not be considered a legitimate reason for postponing elections.
2. A similar approach applies to referenda, especially when they are held only in part of the territory (municipality, region). Blanket *ex lege* ban on referendums during a State of Emergency is disproportionate and should be reconsidered. A more appropriate approach would be to give the Government the power to decide on a postponement if it is necessary in the light of the particular situation in the part of the territory where the referendum is to be held.
3. Under the current law, postponement of elections must always have the form of a law (an act of Parliament). For regular elections, Art. 10 of the Constitutional Act on Security applies. For extraordinary elections, this is a necessary consequence of the fact that exceptions from the electoral process regulated by a law may only be made by another law (or by a decision based on an explicit provision of a law). In both cases the law in question would be an electoral law and would require the consent of both the Chamber of Deputies and the Senate (Art. 40 of the Constitution).
4. If the electoral procedure prescribed by the law has not been followed due to *vis maior* in a sudden emergency, the further conduct must be resolved by a law, because there is no competence to decide in such a case but the legislative power of Parliament. Because of the variability of the situations and their timing as well as the elaborate clockwork of the electoral process, a general constitutional or legal solution does not seem possible, if it is not to be a broad authorisation of the executive to decide, using considerable discretion, on exceptions from electoral law. Such an authorisation would be deeply problematic in terms of constitutional because of the requirement that elections and the right to vote are regulated by a law.
5. Given the disputes over the interpretation, Art. 10 of the Constitutional Act on Security should be amended in order to clarify whether repeated postponement of elections (i) is possible at all and, if so, (ii) whether the six-month limit is absolute or relative to each individual postponement.
6. Postponement of new elections to municipal assemblies could be subject to a general legal regulation, as these elections take place multiple times each year and their scope is relatively limited. The Government (or the Ministry of Interior alone) could be authorised to postpone these elections during a State of Emergency. However, this would require a clear regulation in the electoral law, including the condition that it is impossible to conduct the elections on the territory of the municipality, the specification of effects of postponement (suspension of time limits according to the electoral law) and the maximum time limit for the postponement in line with the time limit in Art. 10 of the Constitutional Act on Security.
7. Special voting arrangements for the purpose of allowing individual voters in COVID-19 quarantine or isolation to exercise their right to vote help to mitigate the possible negative impact of an emergency on voter turnout. The relatively low use of these methods in past elections should not be an argument against them, because as pandemics develop in waves, it is impossible to be sure in advance how many people will be affected by either the disease

or the quarantine on election day. It is therefore highly advisable that special voting arrangements be in place. They may be introduced by ad hoc laws as necessary. As an alternative, a general regulation of special voting arrangements may be incorporated into electoral laws. In such a case, the decision to employ the special voting arrangements in any particular election should be entrusted to a politically accountable constitutional body (Government or Parliament) and should be bound by material conditions and a time limit (how far ahead of the election day should the arrangements be activated). However, it is important to bear in mind that different diseases (or threats in general) may require different voting arrangements. The necessity of an ad hoc reaction cannot be ruled out.

8. The future special voting arrangements could also be extended to persons quarantined because of infectious diseases similarly or less dangerous than COVID-19. The procedure and conditions for casting the vote under the special voting arrangements could be regulated in more detail in order to protect the personality and secrecy of vote as much as possible. Enabling representatives of political parties to become members of special electoral boards could also be considered.
9. If postal or internet voting were introduced for disadvantaged groups of voters in general (e.g. voters abroad, in hospital, etc.) it would be a very useful tool also for elections during a pandemic.

Sources

Legislation

Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic
Constitutional Act No. 110/1998 Coll., on the security of the Czech Republic
Charter of Fundamental Rights and Freedoms, published under No. 2/1993 Coll.
Act No. 424/1991 Coll., on Political Parties and Political Movements
Act No. 90/1995 Coll., Rules of Procedure of the Chamber of Deputies
Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic
Act No. 107/1999 Coll., Standing Rules of the Senate
Act No. 130/2000 Coll., on Elections to Regional Assemblies
Act No. 240/2000 Coll., on Crisis Management
Act No. 258/2000 Coll., on the Protection of Public Health
Act No. 491/2001 Coll., on Elections to Municipal Assemblies
Act No. 150/2002 Coll., Code of Procedure of Administrative Judiciary
Act No. 62/2003 Coll., on Elections to the European Parliament
Act No. 22/2004 Coll., on Local Referendum
Act No. 118/2010 Coll., on Regional Referendum
Act No. 275/2012 Coll., on Elections of the President of the Republic
Act No. 187/2020 Coll., on the Extension of Terms for Holding the By-Election to the Senate
Act No. 350/2020 Coll., on Special Voting Arrangements in the Elections of Regional Assemblies and the Senate in 2020
Act No. 296/2021 Coll., on Special Voting Arrangements in the Elections of the Chamber of Deputies of Parliament of the Czech Republic in 2021
European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (2020/2220(INL), 2022/0902(APP)). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0129_EN.html

Case-law

Decision of the Constitutional Court Pl. ÚS 13/05 from 22 June 2005
Decision of the Constitutional Court Pl. ÚS 27/09 from 10 September 2009
Decision of the Constitutional Court Pl. ÚS 4/17 from 11 February 2020
Decision of the Supreme Administrative Court Pst 12/2007-20 from 10 April 2017
Decision of the Supreme Administrative Court Pst 19/2019-12 from 1 April 2020
Decision of the Supreme Administrative Court Vol 102/2021-46 from 5 November 2021
Judgement of the European Court of Human Rights Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, § 54 and 55, ECHR 2005-IX

Other official sources

Český statistický úřad. Volby – Archiv. [Czech Statistical Office. Elections – Archive] 6. 1. 2022. Available at: <https://www.czso.cz/csu/czso/volby-archiv>
Český statistický úřad. Volby.cz. [Czech Statistical Office. Volby.cz website] 2022. <https://www.volby.cz>

Ministerstvo vnitra, Odbor voleb: Výkladové stanovisko k odložení termínu hlasování v doplňovacích volbách do Senátu [Ministry of Interior, Electoral Department: Interpretative opinion on the postponement of voting in the Senate by-election], 23. 3. 2020. Originally available at: <https://www.mvcr.cz/clanek/odlozeni-hlasovani-v-doplnovacich-volbach-do-senatu-ve-volebnim-obvodu-c-32-teplice.aspx> Electronic copy available from authors of this policy brief.

Ministerstvo vnitra. Místní referenda v České republice 2006-2022 [Ministry of Interior. Local Referenda in the Czech Republic 2006-2022] 3. 8. 2022. Available at: <https://www.mvcr.cz/soubor/mistni-referenda-tabulka-hlaseni.aspx>

Literature

Antoš, M. Volební právo a právo na přístup k veřejným funkcím (čl. 21). In: Kühn, Z./Kratochvíl, J./Kmec, J./Kosař, D. et al.: Listina základních práv a svobod. Velký komentář. [Charter of Fundamental Rights and Freedoms. Large Commentary] Praha: Leges, 2022

Antoš, M. Principy voleb v České republice. [Principles of Elections in the Czech Republic] Praha: Linde, 2008

Bretthauer, S. Online-Wahlen zu Parlamenten als modernes Instrument demokratischer Partizipation in Zeiten von Pandemie und Digitalisierung. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 104(1), 2021, p. 3-33, doi.org/10.5771/2193-7869-2021-1-3

European Commission for Democracy Through Law (Venice Commission). Code of Good Practice in Electoral Matters. Opinion no. 190/2002, CDL-AD (2002) 23. Strasbourg, 30. 10. 2002. Available at: <https://rm.coe.int/090000168092af01>

Fišarová, L./Jírovec, T. Organizace voleb v době pandemie. Volby do zastupitelstev krajů a do Senátu 2020 [Organisation of elections during the pandemic. Election to regional assemblies and to the Senate in 2020]. Správní právo, 54(3), 2021, p. 182-194. Available at: <https://www.mvcr.cz/volby/clanek/spravni-pravo-cislo-3-2021.aspx>

Golia, A./Hering, L./Moser, C./Sparks, T. Constitutions and Contagion – European Constitutional Systems and the COVID-19 Pandemic. Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law, 81(1), 2021, p. 147-234. doi.org/10.17104/0044-2348-2021-1-147

International IDEA, Asplund, E. (editor), Global overview of Covid-19: Impact on elections, 18 March 2020 (and updated). Available at: <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

iROZHLAS. Lidé v karanténě nebudou volit. ‚Hlasování pro ně do voleb nelze zařídit,‘ tvrdí Hamáček. [People in quarantine will not vote. ‘Voting for them cannot be arranged by the electoral date’ says Hamáček] 21. 7. 2020. Available at: https://www.irozhlaz.cz/zpravy-domov/koronavirus-volby-2020-karantena-cesko-v-cesku-jan-hamacek_2007201846_ako

Kysela, J. in Klíma, K. et al. Komentář k Ústavě a Listině [A Commentary of the Constitution and the Charter]. 2nd ed. Plzeň: Aleš Čeněk, 2009.

Malý, M. Wahlen in Coronazeiten. In: Lohse, E./Derka, V./Grinc, J. (eds.). Verfassungs- und verwaltungsrechtliche Fragestellungen der COVID-Pandemie in Europa. Deutsch-tschechische Aspekte. Berlin: Berliner Wissenschafts-Verlag, 2022, p. 193-216.

Mareš, M. in Mareš, M./Novák, D. Ústavní zákon o bezpečnosti České republiky. Komentář. [Constitutional Act on the Security of the Czech Republic. A Commentary.] Praha: Wolters Kluwer, 2019.

Merten, H. Wahlen in Pandemiezeiten – ein juristisches Risikogebiet. Zeitschrift für Politikwissenschaft 31(1), 2021, p. 61–69. <https://doi.org/10.1007/s41358-021-00259-2>

Pecháček, P. Konání voleb v době pandemie – mezinárodní komparace. [Conducting elections during a pandemic – international comparison.] In: Antoš, M./Wintr, J. (eds.). Ústavní právo a koronavirus. [Constitutional law and coronavirus] Praha: Leges 2021, p. 111-137.

Uhl, P. in Rychetský, P./Langášek, T./Herc, T./Mlsna, P. et al. Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář. [Constitution of the Czech Republic. Constitutional Act on the Security of the Czech Republic. A Commentary.] Praha: Wolters Kluwer, 2015.

Zamfir, I./Fardel, T. Impact of the pandemic on elections around the world: From safety concerns to political crises. European Parliament Research Service, PE 652.017, June 2020.

Available at:
[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652017/EPRS_BRI\(2020\)652017_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652017/EPRS_BRI(2020)652017_EN.pdf)

Other sources

Discussion with a representative of the Ministry of Interior of the Czech Republic at a working roundtable on the draft of this policy paper, Faculty of Law, Charles University, Prague, 29 June 2022