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Impact of COVID-19 on Czech electoral system

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Electoral system and COVID-19 pandemics in the Slovak Republic

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EDITORIAL INTRODUCTION

The experience of elections held in the shadow of the Covid-19 pandemic in the Visegrád Region

This special issue of the *Arsboni Law Review* is published as part of a strategic partnership between the HUN-REN Centre for Social Sciences, Institute for Legal Studies (Budapest) and the Editorial Board of the *Arsboni Law Review*. This thematic compilation of academic contributions represents some main deliverables of a research project supported by the International Visegrád Fund,¹ and also by the Hungarian Academy of Sciences,² and conducted with the collaboration of the Centre for Social Sciences (Budapest), the Charles University from Prague, the Slovak Academy of Sciences and the Jagiellonian University from Cracow. The project aimed at entailing a discussion around the Visegrád region from the post-Covid experience of elections held from February 2020 until mid-2022, when the public health situation was slowly consolidated. Four national reports have been prepared by the experts of each Visegrád country to discuss country-specific experience, while based on these national reports, a fifth summarizing study analyses the regional perspectives. The nine authors from four countries cover a wide range of contemporary electoral issues from virtual campaign to electronic-, postal-, or car-voting, and from the postponement of elections to the cancellations of voting in diplomatic missions.

Although the fact that extensive international legal scholarship has been already focused on these topics, only sporadic relevant dialogue has been initiated in the Visegrád region. However, in our view, these unprecedented comparative insights in the field of electoral law should be also exploited on the regional level with special regard to those exceptional voting arrangements, which seem to remain with us on the long term in case of further disasters. The present special issue of the *Arsboni Law Review* is devoted to this ambition, and might serve as a valuable point of reference for all interested stakeholders examining the latest electoral developments in the Visegrád countries.

¹ International Visegrád Fund project no. 22120065. Crises and democracy: the long-term impacts of COVID-19 on V4 countries' electoral systems

² The research was also supported under project No. 05016764 “The responsiveness of the legal system in the post-COVID society: risks and opportunities” (Hungarian Academy of Sciences research grant on post-COVID phenomena)

Nóra Chronowski:¹
Democracy and elections in the Visegrád countries in the
shadow of the Covid-19 pandemic and beyond*

I. Introduction

The Covid-19 pandemic has affected almost every aspect of human life, including elections. The Visegrád Four countries (V4: Poland, Czech Republic, Slovakia, and Hungary) have been no exception. The pandemic has forced these countries to make changes to their electoral procedures to ensure that citizens can exercise their right to vote safely while also complying with public health guidelines. This introductory study examines the impact of the Covid-19 pandemic on elections in the Visegrád Four countries, with a particular focus on the right to vote and changes in electoral procedures. It also discusses the lessons learned from the pandemic and the implications for the future voting rights in these countries. It does not, however, undertake a detailed analysis of the situations occurred in the four states during the pandemic and their legal solutions, as this is discussed in the country-specific studies.²

Beforehand, some general and specific preliminary remarks seem necessary for the analytical framework.

1. The basic principles of constitutionalism – such as the rule of law, the protection of fundamental rights, democracy, separation of powers, parliamentarianism and so on – are requirements that are constitutionally justified, confirmed in international documents, and are an achievement of (European) constitutional culture. These are normative requirements: prescriptive rules that are binding as principles, not mere recommendations (values), i.e. the constitutional text, the content of legislation, the legislative process, the interpretation of the constitution and the law, and the application of the law must be in line with them. However, there is no general or exclusive legal definition, given their legal and social philosophical definition, their ideological development and their political science approach, but their essential characteristics can be summarised in terms of their legal relevance. The principles of constitutionalism constitute an open and evolving system: their various aspects are developed and become prominent in the specific constitutional debates of specific constitutional arrangements. While the second half of the 20th century, following two world wars, was about reaffirming the values of

¹ Hungarian Research Network, Centre for Social Sciences, Institute for Legal Studies

* The research was part of the Visegrád project No. 22120065, and also supported under project No. 05016764 “The responsiveness of the legal system in the post-COVID society: risks and opportunities” (Hungarian Academy of Sciences research grant on post-COVID phenomena).

² See the further articles in this issue, Florczak-Wątor, M. – Kuca, G., The long-term impact of COVID-19 on V4 countries' electoral systems. The Case of Poland; Krošlák, D. – Gábriš, T., Electoral system and COVID-19 pandemics in the Slovak Republic; Szilágyi, E. et al., The long-term impact of COVID-19 on V4 countries' electoral systems. The Case of Hungary; Grinc, J. - Antoš, M., Impact of COVID-19 on Czech electoral system.

constitutionalism, the beginning of the 21st century has seen a stagnation and a decline.³ The decline and retreat in the level of protection of constitutionalism, the rule of law, democracy and human rights is a sign of the times. The external cause of 'backsliding' may be when international, supranational standards, lower than national standards, erode the level of protection and undermine the guarantees provided in the Member State. An internal cause is when the constitutional arrangements of the Member State take a turn that results in a reduction of the previous level of protection. In addition, a significant part of the decline is due to extra-legal influences. The European states have been shaken by a series of crises over the last decade: the global financial and economic crisis, the refugee crisis, the exit crisis (brexit), the constitutional crises (illiberal turns) in Central and Eastern Europe (especially in Hungary and Poland), and, in recent years, the pandemic - all of which led to a narrowing of the space of freedom and, ultimately, to the outbreak of a tragic European war when Russia attacked Ukraine and started its full scale war on 24 February 2022. In such circumstances, it is even more important to explore and understand the normative elements of constitutional democracy and identify the sources of danger that could lead to its decline.

2. Against this background the Covid-19 epidemic was another global challenge, but the current state of 'constitutional democracy' is not equal in the four countries that were subject of the project. The decline of constitutional democracy has been observed in Hungary since 2010 and in Poland since 2015, leading to hybrid or illiberal⁴ constitutional arrangements in these countries. Without going into the details of the process,⁵ in different ways and to different degrees, but the positions of governmental powers have been disproportionately strengthened at the expense of the other branches of power, and the system of checks and balances has been limited in the given political set-

³ See e.g. Levitsky, S. – Ziblatt, D., *How democracies die. What history reveals about our future*. Penguin Books, 2019, Ginsburg, T. – Huq, A.Z., *How to save constitutional democracy*. The University of Chicago Press, Chicago, London, 2018, Motoc, I. – de Albuquerque, P.P. – Wojtyczek, K. (eds.), *New Developments in Constitutional Law. Essays in Honour of András Sajó*. Eleven International Publishing, The Hague, 2018., Pinelli, C., *The Populist Challenge to Constitutional Democracy*. *European Constitutional Law* 2011. 1., 5-16., Ádám, A., *A posztmodernitásról és a posztdemokráciáról*. *Közjogi Szemle* 2012. 1., 1-12.

⁴ For the terminology, see Sente, Z., *A populista alkotmányosság mítosza Magyarországon és Lengyelországban. Populista vagy tekintélyelvű alkotmányosság?* *Közjogi Szemle* 2022. 1., 11-16.; Jakab, A., *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution-Building in Hungary*, *American Journal of Comparative Law* 68. 2021. 4., 760-800.; Jakab, A., *What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law?: On the Interconnectedness of the Protection of Democracy and the Rule of Law* *Constitutional Studies* 6. 2020. 1., 5-34.

⁵ The constitutional crises and backsliding was well analysed by the literature, Landau, D., *Abusive constitutionalism*, *University of California Davis Law Review* 47. 2013. 189–260., Tóth, G. A., *Constitutional Markers of Authoritarianism*, *Hague Journal on the Rule of Law* 2019. 1., Sadurski, W., *Poland's Constitutional Breakdown*. Oxford Scholarship, Oxford, 2019.; Gárdos-Orosz, F. – Sente, Z., *Populist challenges to constitutional interpretation: an assessment*, in Gárdos-Orosz, F. – Sente, Z. (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond*. Routledge, Abingdon, 2021. 313–325.; Sente, Z.: *Populism and populist constitutionalism*, in Gárdos-Orosz, F. – Sente, Z. (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond*. Routledge, Abingdon 2021, Drinóczi, T. – Bień-Kacała, A., *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*. Routledge, 2021, Sajó, A., *Ruling by cheating. Governance in illiberal democracy*. Cambridge University Press, Cambridge, 2021.

up even without a pandemic.⁶ The Covid-19 pandemic further reinforced the predominance of governments and the executive, the policing of public administration and the militarisation of the police.

During an epidemic, the government is primarily responsible for organising health care, providing citizens with full information, and procuring or facilitating the procurement of the necessary means of protection. The cases and the specific rules and conditions for the introduction of a special legal order vary from country to country, and in general the government has the discretion to declare a special legal order (state of emergency, state of danger) on the basis of the constitution or to introduce special health protection rules within the framework of the normal legal order.

A major difference, however, is that in exceptional circumstances, fundamental rights can be restricted beyond the general limits (proportionality, respect for essential content) under special legal orders. There is also a risk if the government abuses the means given to it under a special legal order, but it can also be perilous if it introduces restrictions on fundamental rights by decree without imposing a special legal order.⁷

3. The right to vote is also a fundamental right, and as an individual right to express one's political preference it has a paramount role in a democracy, however, considering the long-term effects of Covid-19 on elections, the scope cannot be restricted to the substantive and procedural rules governing elections and right to vote. The broader context of the electoral process needs to be examined from a constitutional law perspective. Thus, the situation of the right of assembly, freedom of information, freedom of expression, the right to the protection of personal data, campaign regulation and campaign financing, and media freedom are also particularly relevant and affected. This is not to suggest that the adapting the constitutional and legal rules on suffrage and the electoral process to the epidemic situation does not raise several questions. Rather, it refers to the constitutional environment in which elections take place as a manifestation of the members of the political community legitimizing those representatives in power.

II. The Impact of the Covid-19 Pandemic on Elections

II.1. Pandemic data and type of legal order in the V4

The Covid-19 pandemic has had a significant impact on elections worldwide, and as it was empathized above, the Visegrád Four countries have not been immune to its effects. The pandemic has posed a significant challenge to the right to vote, as citizens might be reluctant to participate in person due to concerns about contracting the virus. Moreover, traditional electoral procedures might not be compatible with public health guidelines,

⁶ For the sake of historical accuracy, it should be added that the illiberal decline in Poland is expected to be reversed in the light of the outcome of the parliamentary elections of 15 October 2023.

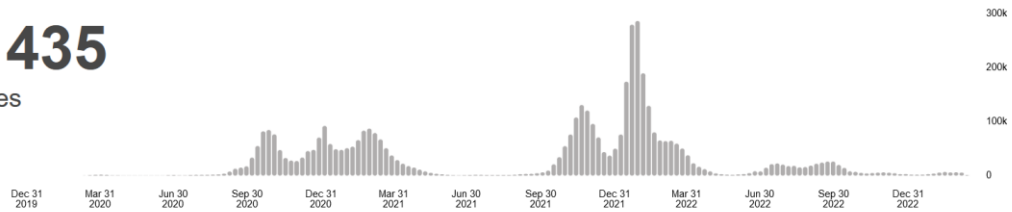
⁷ Scheinin, M. – Molbæk-Steensig, H., Human rights-based versus populist responses to the pandemic, in Kjaerum, M. – Davis, M. F. – Lyons, A. (eds.), *Covid-19 and human rights*. Routledge, London – New York, 2021.

such as social distancing and wearing masks. As a result, the pandemic has forced countries to adapt their electoral procedures to ensure that citizens can vote safely. From this point of view, it is also useful to consider the waves in which the epidemic hit the countries under examination, and the legal systems in which the surveyed countries addressed the effects of the epidemic. The charts below provide insights into whether the data reported to WHO and the imposition of a specific legal regime – or not – show a correlation, i.e., to what extent the legal regime chosen converged with the epidemic situation.⁸

Czechia Situation

4 627 435

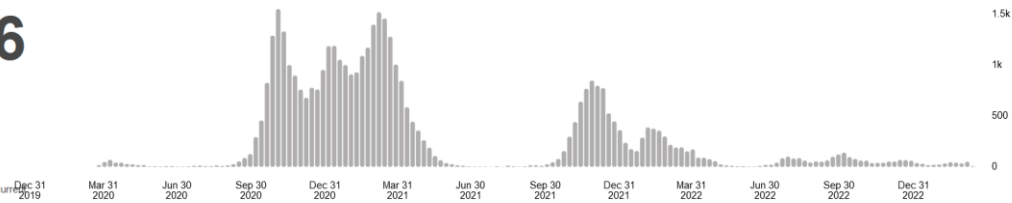
confirmed cases



42 576

deaths

Source: World Health Organization
Data may be incomplete for the current day or week.

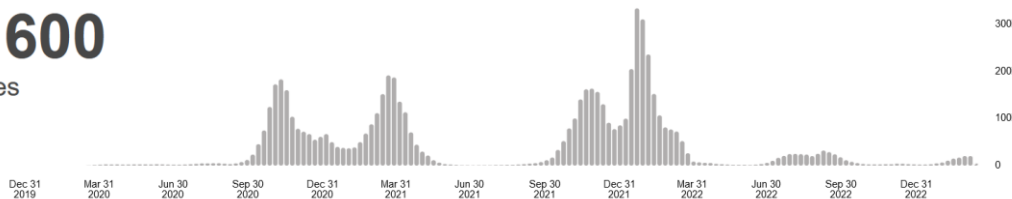


During the pandemic, the State of Emergency was declared three times and lasted from 12 March 2020 to 17 May 2020, from 5 October 2020 to 11 April 2021 and from 26 November 2021 to 25 December 2021.

Poland Situation

6 477 600

confirmed cases

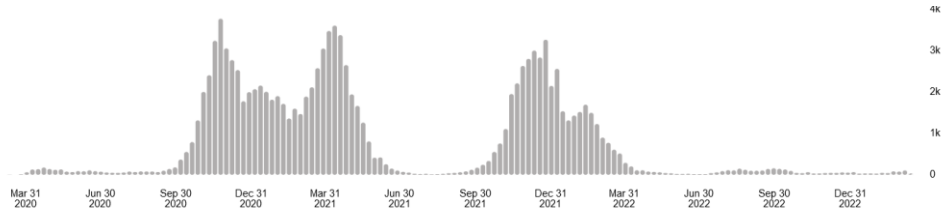


⁸ Source of the charts: WHO, <https://covid19.who.int/>

Source of periods in which the V4 countries have applied special legal regimes or different epidemiological rules from the general ones: Country policy briefs of the project, <https://jog.tk.hu/en/policy-briefs>

119 170
deaths

Source: World Health Organization
Data may be incomplete for the current day or week.

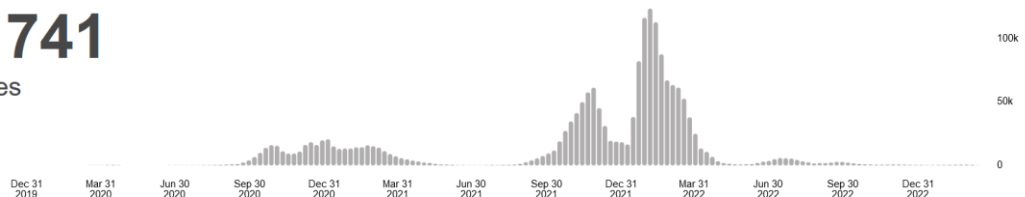


The government decided not to introduce either a state of emergency or a state of natural disaster in Poland. The Minister of Health introduced on 14 March 2020 a state of epidemic threat, and later, on 20 March 2020, a state of epidemic.

Slovakia Situation

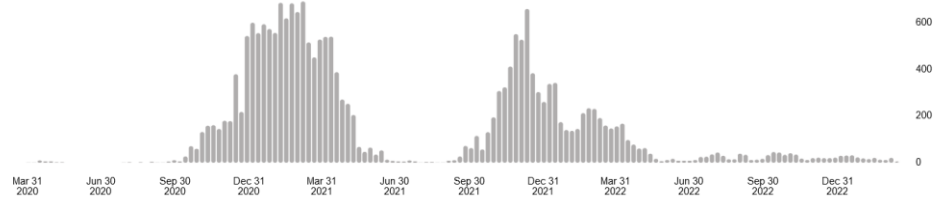
1 864 741
confirmed cases

Source: World Health Organization
Data may be incomplete for the current day or week.



21 069
deaths

Source: World Health Organization
Data may be incomplete for the current day or week.

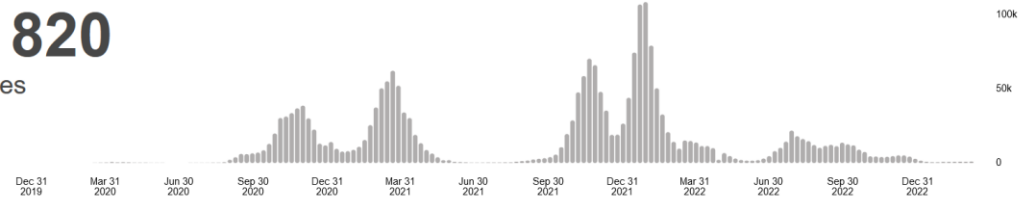


Slovak Republic and its government reacted to the Covid-19 pandemics by proclaiming an extraordinary situation as early as on March 11, 2020, subsequently introducing a state of emergency by a government resolution on September 30, 2020. While the extraordinary situation holds until these days, allowing for some economic measures, the state of emergency definitely terminated on May 14, 2022.

Hungary Situation

2 197 820
confirmed cases

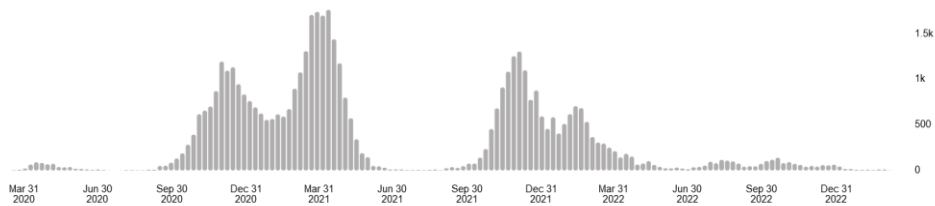
Source: World Health Organization
Data may be incomplete for the current day or week.



48 690

deaths

Source: World Health Organization
Data may be incomplete for the current day or week.



In Hungary, the situation was – and is – far more complicated than in the above mentioned V4 countries. The first (Covid) state of danger took place between 11 March and 18 June 2020, according to Government Decree 40/2020 (11 March) on the declaration of a state of danger, and then it was ceased by Government Decree 282/2020 (17 June) on the lifting of the state of emergency declared on 11 March 2020. The second (Covid) state of danger took place between 4 November 2020 and 8 February 2021,⁹. A third (Covid) state of danger was introduced as of 8 February 2021, by Government Decree 27/2021 (29 January) on the declaration of a state of danger and the entry into force of emergency measures. This state of danger has been extended by the Government with effect from 22 May 2021.¹⁰ Pursuant to Article 5(3) of that Decree, it ceased to have effect on 1 June 2022, when Act of Parliament I of 2021 on the protection against coronavirus pandemic ceased to have effect. In the meantime, however, on the Government's proposal, Parliament adopted the Tenth Amendment to the Fundamental Law (Constitution of Hungary) on 24 May 2022, which allows the Government to declare a state of danger “due to an armed conflict, war or humanitarian disaster in a neighbouring country”. On the basis of this, the Government declared a new state of danger – due to the war in Ukraine – with effect from 25 May 2022¹¹ while at the same time lifting the state of danger declared due to the Covid epidemic on the same date, from 1 June 2022.¹² The Covid-epidemic was over, but Hungary still has a special legal regime, now in the face of war and a humanitarian disaster in a neighbouring state. The Government has extended this kind of “state of danger because of war nearby” twice, for 180+180 days which until 26 November 2023.¹³ According to a bill introduced in October 2023,¹⁴ the National Assembly authorises the government to extend the state of danger due to the war in Ukraine until 23 May 2024. This would mean that participation rights – such as freedom of assembly, access to information – could be restricted during the campaign period for the 2024 European Parliamentary and general local elections (to be held on the same day), beyond the general rules for restricting fundamental rights (the necessity and proportionality tests).

II.2. Some relevant electoral or political participation issues in the V4 countries during the Covid-19 pandemic

⁹ See Government Decree 478/2020 (11 March 2020) declaring a state of danger, Government Decree 26/2021 (29 January 2021) on the lifting of the state of danger declared by Government Decree 478/2020 (11 March 2020) declaring a state of danger

¹⁰ See Government Decree 271/2021 (21 May 2021) on the renewal of the pandemic measures in force in connection with the state of danger declared as of 8 February 2021.

¹¹ See Government Decree 180/2022 (24 May 2022).

¹² See Government Decree 181/2022 (24 May 2022)

¹³ See Government Decrees 424/2022 (28 October 2022) and 167/2023 (11 May 2023).

¹⁴ T/5661, on 18 October 2023, <https://www.parlament.hu/irom42/05661/05661.pdf>

In the Visegrád Four countries, the impact of the pandemic on elections has varied. In the Czech Republic, a Senate by-election was scheduled to 27-28 March 2020, but the Government opted for a postponement, for which - following the decision of the Supreme Administrative Court - it finally provided a legal basis by submitting the necessary bill to Parliament. The Parliament adopted the necessary Act, and the postponed by-elections were finally held on 5 and 6 June (first round) and 12 and 13 June (second round). This postponement triggered also constitutional discussions among experts. Later on, 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. Except of the second round of Senate election in 2020 (9 and 10 October), none took place during a state of emergency.

Poland held its controversially postponed presidential election in July 2020. As the Polish country report points out: “Due to numerous questions concerning organisational as well as legal matters, presidential election scheduled for 10 May 2020 were cancelled, with the official reason being the sudden increase in the number of COVID-19 cases.”¹⁵ However, according to experts, there was no constitutional and legal basis for cancelling it. Finally for the elections organised in July 2020, the legislative made changes to the electoral procedure to ensure that citizens could vote safely. These changes included expanding the use of postal voting, allowing voters to request a postal ballot without providing a reason, and providing additional polling stations to reduce crowding at polling places. Despite these measures, critics argued that the election was not entirely free and fair, as opposition candidates faced obstacles in their campaigns due to the pandemic, and the candidate of the governing parties had much more opportunity to spread his messages to the voters.

In Slovakia, parliamentary elections were held in February 2020, before the pandemic had a significant impact on the country. As the national country study explained, “no general elections were taking place in Slovakia in the years 2020-2022 on a nation-wide level – only some interim elections on local levels of municipalities took place. Therefore, no special legislation was necessary to cope with the pandemics and electoral rights. Still, an explicit obstacle to electoral rights was introduced by an amendment to the respective Act of the Parliament, which allowed to deprive of electoral rights those who were in quarantine. These obstacles were in practice not widely used, given the limited scope of interim elections on municipal level only.”¹⁶ In preparation for the elections in autumn 2022, new legislation has been drafted to allow citizens in quarantine to vote using a special ballot box.

In Hungary, elections to the European Parliament and general elections for local government and mayor were held in 2019, before the pandemic. When the Covid-19 pandemic hit Hungary and the government declared a state of danger, it simultaneously suspended all by-elections and national and local referendums. In July 2021, the government allowed national referendums again¹⁷ and almost immediately initiated one

¹⁵ Florczak-Wątor and Kuca, *ibid*, note 2.

¹⁶ See Krošlák and Gábriš, *ibid*, note 2.

¹⁷ Government Decree 438/2021 (21 July) on the possibility of holding a national referendum.

about “the protection of the children” (against LGBTQ+ propaganda) which was scheduled to the day of the next general parliamentary elections on 3 April 2022. (This also required an amendment to the electoral law, because previously the date of the national referendum could not coincide with the date of the elections.) However, the Government only allowed local referendums and by-elections to be held again in March 2022 by its Decree.¹⁸ The parliamentary elections of April 2022 were held in a context of improving trends in the epidemic situation. Therefore, institutionalising e-voting or extending postal voting did not occur. The personal ballot was held under enhanced hygiene requirements and the wearing of masks by the counting board. The government made some changes to the electoral procedure, such as providing additional polling stations and encouraging voters to wear masks. However, opposition candidates faced significant obstacles in their campaigns due to restrictions on public gatherings, freedom of information and the significant government dominance in the media. The Government has also cut the parties' campaign budgets in order to combat the epidemic. Finally, the Government also used emergency powers to restrict the powers of the opposition-controlled local governments, further limiting the opposition's ability to mobilize supporters and challenge the ruling party's dominance.¹⁹ The so-called opposition primaries can also be mentioned, where e-voting was possible, but this was part of the opposition campaign and did not affect the electoral rules. The government made some changes to the electoral procedure, such as providing additional polling stations and encouraging voters to wear masks. However, opposition candidates faced significant obstacles in their campaigns due to restrictions on public gatherings.

The epidemic situation is a dynamically changing one, therefore it matters at which stage elections take place. In the early stages, neither science nor government has sufficient knowledge about the spread and infectivity of a new virus, but the state must do all it can – as part of its duty to protect human life – to prepare the health system and inform citizens. This information must cover not only the epidemic situation, but also public issues affected by the epidemic, such as the safe conduct of elections. As the pandemic progresses and the contagion increases, the circumstances for the electoral process could become more favourable.

The conclusion to be drawn from the national country studies is that the electoral systems of the V4 countries were not prepared for the difficulties caused by Covid-19. However, experience has shown that, despite differences between their electoral types and systems, it is possible to prepare for future epidemics and to share good practices in order to ensure universal suffrage (also for those in quarantine or isolation) and safe voting at the same time.

III. Lessons Learned from the Pandemic

¹⁸ Government Decree No. 103/2022 (10 March) on the possibility of holding by-elections and local referendums.

¹⁹ See Szilágyi et al., *ibid*, note 2.

1. The first lesson of the pandemic is that the rule of law cannot be abandoned even in a risky health situation. The special suffrage and electoral rules must be based on the act of parliament. It is particularly dangerous when the government abuses its exceptional legislative powers under special legal order to regulate by decree in case of voting rights. The legal conditions and procedural framework for the postponement of elections should be determined by the parliament as well. Postponement of elections is the most serious restriction of fundamental right to vote and can violate the democratic principles of regular and timely elections. It should therefore be a last resort, justified only by the seriousness of the epidemic. The justification must be based on facts and reliable epidemiological data. Postponement of local elections may be decided by the responsible government minister based on local epidemiological data, but only upon statutory authorisation. Both in regulating the relationship between elections and epidemics and in taking concrete decisions, it is necessary to rely on scientific findings and the advice of epidemiological experts. As the Czech national report highlights, “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.”²⁰

2. The Covid-19 pandemic has taught us many lessons about the importance of democracy and the right to vote as well. One of the most significant lessons is the need to ensure that citizens can exercise their right to vote safely and securely, even in times of crisis. The pandemic has shown us that traditional electoral procedures may not be compatible with public health guidelines, and countries must be willing to adapt their electoral procedures to ensure that citizens can vote safely, and poll workers, civil observers can also do their job under safe circumstances. It is the duty of the state organs responsible for organising the elections to provide and guarantee mandatory masks, face shield, regular disinfection and social distancing.

3. Another lesson learned from the pandemic is the need for transparency and accountability in electoral procedures. As countries make changes to their electoral procedures in response to the pandemic, it is essential to ensure that these changes do not undermine the integrity of the election. Moreover, countries must be transparent about any changes made to the electoral procedure to ensure that citizens have confidence in the process of remote and postal voting. The pandemic has also highlighted the importance of technology in electoral procedures. Especially in the case of voting from abroad, e-voting could be developed using the Estonian experience to guarantee secure, unambiguous identification. The rationale is that states cannot influence other countries' disease management and lock-down rules. However, the shift to remote and online voting can also raise concerns about the integrity and security of the electoral process. Some critics argue that online voting may be vulnerable to fraud and hacking, which could undermine

²⁰ Grinc and Antoš, *ibid*, note 2.

the legitimacy of the election results. Therefore, in case of online voting it is especially crucial to ensure that the remote voting system is secure.

4. An additional significant impact of the pandemic on elections is the restrictions on public gatherings. If the government imposes strict restrictions on public gatherings to limit the spread of the virus, makes it challenging for opposition candidates to campaign, to hold rallies and events, which are essential for mobilizing supporters and building momentum in an election campaign. Moreover, the government's lock-down policy and restrictions on public gatherings create a level playing field for ruling party candidates who has access to state media and resources. The restrictions make it difficult for opposition candidates to get their message out and reach potential voters. Experience has shown that it is important to build safeguards against the government using the data (contact details) obtained during vaccination registration for campaign purposes. Government's censorship of information and suppression of dissenting voices also raise concerns regarding the right to vote. Any blanket bans for indefinite terms on rights guaranteeing democratic participation are disproportionate.

A more general observation of the comparative research is that the Covid pandemic created a casuistic situation, testing the flexibility/inflexibility of the legal systems, though of course not only in relation to elections. In the unexpected situation, several temporary measures were introduced rather hastily and without specific experience. In the case of elections and the right to vote, which normally require general guarantees in laws adopted by parliaments, the emergencies also led to ad hoc legislation, which was more of an individual measure than a general rule. And unjustified transitional measures or the postponement of elections because of an epidemic (the most serious and dangerous restriction of democracy) carry the risk of political manipulation. Thus, even in the crisis created by the Covid-19, proper reasoning, scientific evidence and a strict proportionality test are needed in the electoral rules, both in terms of legislation and its judicial review.

Jan Grinc¹ - Marek Antoš:²
Impact of COVID-19 on Czech electoral system *

I. 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 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 Czech Republic. It cannot offer specific recommendations that depend on detailed epidemiological or medical assessment of particular health risks related to elections.

II. 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 Constitution³). This also applies in times of crises,

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² Charles University, Faculty of Law, Prague, Czech Republic.

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³ Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.

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 out of question.⁴ This is even truer for interference with the proper conduct of elections, because free and fair elections are at the core of a democratic polity.⁵ 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.⁶ 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 laws” protected by rigid amendment procedures, which is also the case in the Czech Republic.⁷ It is recommended not to change the fundamental elements of electoral law less than a year before the election.⁸ 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*

⁴ 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.

⁵ 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 [...].*“

⁶ 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.

⁷ Unlike ordinary laws, changes to electoral law require the consent of both chambers of Parliament, i.e. the Chamber of Deputies cannot outvote the Senate on such matters (see Art. 40 of the Constitution).

⁸ Notably by the Code of Good Practice in Electoral Matters. See 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, p. 10: <https://rm.coe.int/090000168092af01>.

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 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 in any other situation than a military emergency (“state of defence”) 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.⁹ 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

⁹ Merten, H. Wahlen in Pandemiezeiten – ein juristisches Risikogebiet. *Zeitschrift für Politikwissenschaft* 31(1), 2021, p. 61–62, <https://doi.org/10.1007/s41358-021-00259-2>. See also 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. 168, 178, <https://doi.org/10.17104/0044-2348-2021-1-147>, referring to the postponement of elections in France and in the United Kingdom.

them in sufficient numbers. In a situation like this, postponing elections for a few months is much easier to justify¹⁰ than at a later stage of the pandemic, when effective preventive measures and increased capacities of healthcare services should have been made available.¹¹ 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.

III. 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 public health.¹² The conditions for imposing a quarantine or isolation are laid down in Act on the Protection of Public Health.¹³ 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 Security¹⁴ 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

¹⁰ Indeed, national elections and referendums scheduled to be held from March 2020 onwards were often postponed for a few months. Cf. 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, p. 1-3, [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).

¹¹ See also the graph at the International IDEA website, which shows the diminishing ratio of postponed elections to held elections as the time passed from March 2020. International IDEA, Asplund, E. (ed.), *Global overview of Covid-19: Impact on elections*, 18 March 2020 (and updated). <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

¹² 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.

¹³ 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).

¹⁴ 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>

and Freedoms,¹⁵ 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 interpretation is that this includes the extension of the term of office of the institutions concerned.¹⁶

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.

The second condition is that the conditions 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.

¹⁵ 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).

¹⁶ Uhl, P. Čl. 10. 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, p. 1164-1165, Kysela, J. Čl. 10. In: Klíma, K. et al. *Komentář k Ústavě a Listině* [A Commentary of the Constitution and the Charter]. 2nd ed. Plzeň: Aleš Čeněk, 2009, p. 884.

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.¹⁷ 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 referendum 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,¹⁸ 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.¹⁹ 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.

According to Art. 40 of the Constitution, 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

¹⁷ 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.

¹⁸ 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>

¹⁹ See Section 5 of the Crisis Management Act.

Parliament.²⁰ 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.

IV. 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.

IV.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, which 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.

On 23 March 2020, the Ministry of the Interior published an interpretative opinion on this Government resolution.²¹ It explains that, given the risks involved in voting in this

²⁰ See decisions of the Constitutional Court Pl. ÚS 13/05 from 22 June 2005 and Pl. ÚS 4/17 from 11 February 2020.

²¹ 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

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.*”²²

Relatively soon after, 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 had still been pending when the Senate by-election was called. According to the law²³, the court cannot

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> (accessed on 1 April 2020). The document is no longer available at the Ministry of Interior website, but the authors can provide a copy of the electronic document.

²² This is a rather misleading statement. Naturally, the Decision of the President on calling the election must state 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.

²³ 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.

rule on such motion if nation-wide election is 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-election in a single Senate constituency amounts to nation-wide elections to the Senate.²⁴ 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 2020.²⁵

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 too is 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.²⁶

²⁴ 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.

²⁵ Decision of the Supreme Administrative Court Pst 19/2019-12 from 1 April 2020.

²⁶ *Ibid.*, paragraphs 10-17.

This apparently forced the Government to rethink its interpretation. On 6 April 2020, the Government introduced to 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 legislative emergency²⁷ and promulgated on 24 April 2020 under No. 187/2020 Coll.²⁸ According to its Section 1 and explanatory memorandum²⁹, 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.³⁰ The election was held on 5 and 6 June (first round) and 12 and 13 June (second round).

IV.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.³¹ 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-

²⁷ 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.

²⁸ Act No. 187/2020 Coll., on the Extension of Terms for Holding the By-Election to the Senate.

²⁹ Chamber of Deputies File No. 821 in the 8th Term: <https://www.psp.cz/sqw/historie.sqw?o=8&T=821>

³⁰ 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.

³¹ 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.

election is not held in the last year of the six-year term in the Senate constituency.³² 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 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).

³² Section 80(3) of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic.

It is important to note that between 15 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 of 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 have been 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.³³ 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

³³ 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.

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 would be the reason for the dissolution of the Chamber of Deputies). The problem is that if elections to the Chamber of Deputies are not postponed and do not take place, there will be no constitutional procedure to resolve the situation. This issue deserves the attention of the constitutional legislator. It also demonstrates that it is impossible to easily 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).³⁴ The easy interpretation would be to rule out the possibility of repeated postponement completely because it is not explicitly provided for in Art. 10.³⁵

³⁴ Uhl, P. Čl. 10. 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, 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, J. Čl. 10. In: Klíma, K. et al. *Komentář k Ústavě a Listině* [A Commentary of the Constitution and the Charter]. 2nd ed. Plzeň: Aleš Čeněk, 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, M. Čl. 10. 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, p. 163 states that the elections may only be postponed once, without providing any reasoning. 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, p. 915 asserts that 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.

³⁵ 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.

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.³⁶

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.

V. 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 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 an option constitutionally. In October 2020, the Government apparently hesitated to declare the State of Emergency and 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

³⁶ This is especially relevant during the State of War or State of Threat, which may also last longer than six months.

order to affect their course.³⁷ In addition to this, 55 extraordinary elections (*new elections*) to municipal assemblies were conducted in 2020 and 2021.³⁸

V.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.³⁹ As opposed to the automatic suspension of local and regional referenda for 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.

³⁷ 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.

³⁸ Details are available at the website of the Czech Statistical Office. Český statistický úřad. *Volby – Archiv*. [Czech Statistical Office. Elections – Archive] 6. 1. 2022, <https://www.czso.cz/csu/czso/volby-archiv>.

³⁹ 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).

8 and 100 of the Constitution). A six-month time limit would be in line with current rules for similar situations.⁴⁰

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).⁴¹

V.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.⁴² 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.⁴³ 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.⁴⁴ However, it

⁴⁰ 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.

⁴¹ 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.

⁴² 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.

⁴³ 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.

⁴⁴ 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*

was predicted that the 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 majority of the doctrine to constitute an element of direct suffrage.⁴⁵ 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).⁴⁶

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.⁴⁷ 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.⁴⁸ Special voting arrangements were not introduced for the October 2022 Senate and municipal elections. This can be explained by the (then) improved epidemic situation as well as by the fact that implementing special voting arrangements in municipal elections would have been very complicated because of the vast number of municipalities. However, expecting the spread of the disease in the winter, the legislator introduced special voting arrangements again for the January 2023 election of the President of Republic.⁴⁹

Because the laws differ from each other only in technical details, we will summarize them jointly.⁵⁰

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, https://www.irozhlas.cz/zpravy-domov/koronavirus-volby-2020-karantena-cesko-v-cesku-jan-hamacek_2007201846_ako

⁴⁵ Antoš, M. *Principy voleb v České republice*. [Principles of Elections in the Czech Republic] Praha: Linde, 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.

⁴⁶ 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.

⁴⁷ Act No. 350/2020 Coll., on Special Voting Arrangements in the Elections of Regional Assemblies and the Senate in 2020.

⁴⁸ 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.

⁴⁹ Act No. 411/2022 Coll., on Special Voting Arrangements in the Election of the President of the Republic in 2023.

⁵⁰ The genesis and implementation of the 2020 Special Voting Arrangements Act is discussed generally by 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 and Malý, M. *Wahlen in Coronazeiten*. In: Lohse, E. – Derka, V. – Grinc, J. (eds.). *Verfassungs- und verwaltungsrechtliche Fragestellungen der*

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 vote⁵¹, while other voters were not allowed to use them at all. The second and third law extended the possibility to use the special voting arrangements to persons working in the residential care facility during polling and to persons who proved that they were positively tested for the virus causing covid-19, even if they were not in quarantine or isolation. The special voting arrangements could also be used for voting in a local referendum that was taking place together with the elections.⁵²

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.⁵³ 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.⁵⁴ However, taking into account the limited number of special electoral boards, it does not seem to be a cause for major concern.⁵⁵ 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 station⁵⁶ 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.⁵⁷ According to the explanatory memorandum of the first bill,⁵⁸ in order to be able to forward the list of drive-in voters to

COVID-Pandemie in Europa. Deutsch-tschechische Aspekte. Berlin: Berliner Wissenschafts-Verlag, 2022, p. 193-216.

⁵¹ Sections 1 to 3 in all three acts on special voting arrangements.

⁵² 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>

⁵³ Sections 5 of the first two acts, Section 4 of the third act.

⁵⁴ 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. 133. The representation of political parties in electoral boards is also required by the Code of Good Practice in Electoral Matters. See 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, p. 10: <https://rm.coe.int/090000168092af01>.

⁵⁵ For example, in 2020, there were 78 special electoral boards and 13 998 “regular” electoral boards. Fišarová, L. – Jirovec, 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. 185, 189, <https://www.mvcr.cz/volby/clanek/spravni-pravo-cislo-3-2021.aspx>. This also shows the rather large area covered by each special electoral board.

⁵⁶ Sections 8 to 11 in the first two acts on special voting arrangements, Sections 7 to 10 in the third act.

⁵⁷ Section 7(6) in the first two acts, Section 6(6) in the third act.

⁵⁸ File No. 971 in the 8. Term of the Chamber of Deputies, p. 27.

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 facility⁵⁹ 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 box⁶⁰ 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.⁶¹

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.⁶² 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.

According to the electoral data, in the October 2020 elections, a total of 6 524 voters used the special voting arrangements. This includes 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

⁵⁹ Section 2(b) in all three acts and Sections 12 to 15 in the first two acts and Sections 11 to 14 in the third act.

⁶⁰ Sections 16 to 19 in the first two acts and Sections 15 to 18 in the third act.

⁶¹ 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.

⁶² Cf. 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. 136.

have been officially recorded as fulfilling the conditions for voting by special arrangements.⁶³ 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.⁶⁴ 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 1998.⁶⁵

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 be 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

⁶³ . 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. 189-191.

⁶⁴ Information provided by a representative of the Ministry of Interior in the discussion at the working roundtable on the draft of this policy paper, Faculty of Law, Charles University, Prague, 29 June 2022.

⁶⁵ 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).

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.

V.3. Beyond the pandemic – postal or internet voting?

The pandemic certainly is a strong argument for those calling for modernisation of voting arrangements in the digital era.⁶⁶ 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 and 2023 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 only 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.⁶⁷

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.

⁶⁶ See e.g. 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, <https://doi.org/10.5771/2193-7869-2021-1-3>.

⁶⁷ 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)).

In the light of the special voting arrangements implemented in 2020, 2021 and 2023, 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, 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.

V.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)⁶⁸ 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.⁶⁹ 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.⁷⁰ 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

⁶⁸ 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.

⁶⁹ This has been pointed out by the representative of the Ministry of Interior in the discussion at the working roundtable on the draft of this policy paper, Faculty of Law, Charles University, Prague, 29 June 2022.

⁷⁰ 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.

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.⁷¹

The first two 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.⁷²

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.

VI. 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

⁷¹ 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, 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. 190-194.

⁷² 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 working roundtable on the draft of this policy paper, Faculty of Law, Charles University, Prague, 29 June 2022).

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.

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Crises and democracy:
The impact of COVID-19 on V4 countries' electoral systems.
The Case of Hungary*

I. Epidemic and special legal order in Hungary

The SARS-CoV-2 virus was first detected in Hungary on 4 March 2020. On 11 March 2020, the government declared a state of emergency, imposing restrictions on education, trade and international travel.

In the light of its ninth amendment,⁴ The Fundamental Law recognizes six different special legal orders, one of these is the state of danger: the government, "in the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act."⁵ In a state of danger, the government may adopt decrees, but they remain in force only for 15 days, unless the government decides to extend the scope of the decree " on the basis of authorization by the National Assembly". In Hungary, this authorization was given to the government by the so-called First Authorization Act.⁶

According to many legal scholars, the emergency was introduced by the government on the basis of an overly broad interpretation of the relevant constitutional norms, as the Fundamental Law itself does not refer to the possibility of an epidemic situation. The concept of a human epidemic appears only in the Disaster Management Act of 2011,⁷ and some argue that the government abused the possibilities provided by the Fundamental Law,⁸ even though it could have dealt with the problems caused by the epidemic without the introduction of the emergency legal order, for example by exercising the rights⁹

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⁴ European Commission for Democracy Through Law (Venice Commission) – Ninth Amendment to the Fundamental Law of Hungary.
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)045-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)045-e)

⁵ Article 53 (1)

⁶ Act XII of 2020 on the containment of coronavirus

⁷ Act CXXXVIII of 2011

⁸ Drinóczi T., Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach. *GERMAN LAW JOURNAL* 21: (2). 105-130, 2020; Szente Z., A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái. *Állam-és Jogtudomány* 61(3), 115 – 139, 2020.

⁹ Szente Z., A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái. *Állam-és Jogtudomány* 61(3), 115 – 139, 2020.

guaranteed by the Act on Health.¹⁰ On the other hand, neither the public nor the political opposition has clearly opposed the introduction of the state of danger,¹¹ which may be related to the fact that the dynamic of the public discourse typically changes in crisis situations. On 16 June 2020, the national Assembly called on the government to lift the state of danger, while at the same time introducing a different kind of special legal regime: the so-called epidemic preparedness, which was a new quasi-extraordinary legal order outside of the Fundamental Law, has provoked a number of criticisms in the academic literature. Ex constitutional judge Imre Vörös stated that "we are still living in a special legal regime in substantive terms."¹²

The second wave of the epidemic hit the country in early September 2020 and proved to be significantly more severe than the first wave. In the light of the rapidly increasing number of cases and deaths, the government declared a state of danger again on 4 November 2020,¹³ accompanied by a number of fairly strict restrictions: a curfew between 8 pm and 5 am and the mandatory wearing of masks in public places in all of those municipalities where the population exceeds 10,000. On 10 November, the Parliament passed the Second Authorization Act¹⁴ by 180 votes to 1, by which it extended the state of emergency for 90 days. This authorization was due to expire on 8 February 2021, but as the National Assembly was not in session at the time, thus, the government decided to extend the scope of the decrees until 23 February.¹⁵ The Third Authorization Act¹⁶ confirmed this step and re-enacted 70 previous government decrees on emergency situations. These were to have been in force until 23 May 2021, but, citing the likelihood of a fourth wave of the epidemic reaching Hungary due to new virus variants and the fact that "the exceptional and transitional legal framework" previously adopted was "well suited to safeguarding public health, mitigating economic damage and protecting jobs", a new amendment by the Parliament, which was promulgated on 21 May, the Parliament extended the state of emergency until after the first day of the autumn session of Parliament in 2021.¹⁷ Government Decree No 271/2021 (21 May) again extended the validity of the emergency measures regulations. On 27 September 2021, the legislature again extended the state of emergency until 22 January 2022.¹⁸ The legislative justification was exactly the same as that annexed to the previous amendment on the same subject. Finally, in December the National Assembly decided to extend the state of danger again, this time until 1 June 2022.¹⁹ Once this deadline has been expired, the public health emergency was replaced by the special legal order justified by the

¹⁰ Act CLIV of 1997.

¹¹ Parliament adopted the legislation by 137 votes to 53, with no abstentions. Political parties announced even before the voting that they would support the bill.

¹² Vörös I.(2020), A felhatalmazási törvénytől az egészségügyi válsághelyzetig és tovább... in: Gárdos-Orosz F. Lőrincz V. O. (szerk.) *Jogi diagnózisok: a COVID-19-világjárvány hatásai a jogrendszerre* (L'Harmattan Kiadó, Társadalomtudományi Kutatóközpont Jogtudományi Intézet, Budapest) 17-43.

¹³ Government Decree 484/2020 (XI. 10.)

¹⁴ Act CIX of 2020 on the containment of the second wave of the coronavirus pandemic

¹⁵ Government Decree 27/2021 (I. 29.)

¹⁶ Act I of 2021 on the Containment of the Coronavirus Pandemic.

¹⁷ Act XL of 2021.

¹⁸ Act CII of 2021.

¹⁹ Act CXXX of 2021.

armed conflict in the neighbourhood, which has been kept in force at least until Autumn 2023.²⁰

It is noteworthy that for 7 years now, another type of “exceptional legal order” is in effect, as well. This is the crisis situation caused by mass immigration. The concept of a migration crisis situation was introduced into the Hungarian legal order by the legislator with the amendment²¹ of Act LXXX of 2007 on the Right of Asylum. It is a quasi - state of emergency, which is not included in the Fundamental Law. It was first introduced in September 2015, but then only for certain areas of the country. From March 2016, it covers the whole country for a period of six months, which is then extended for another six months before expiry.²²

In the context of the pandemic, the migration crisis may be relevant, because the Act which introduced it,²³ extended the powers of the police to ensure epidemic measures. Thus, for this purpose, the police may, during a migration crisis situation - which has been legally continuous in Hungary during the pandemic COVID-19 - "a) block roads and public areas from traffic, restrict traffic, b) restrict the operation of public institutions and institutions open to the public, (c) enter and remain in private property for the purpose of inspection, surveillance and security of the premises, if there is a specific written order; (d) close any area or building and prevent any person from entering or leaving it, or order those, who are present, to leave."²⁴

II. Exercising political rights during the COVID-19 pandemic

II.1 The one-sidedness of public discourse

The epidemic is clearly causing a "state of emergency" not only in the functioning of the legal system, but also in the development of public discourse. In crisis situations, the influence of state actors on the public discourse is naturally increased, with the official position being interpreted by the political elite or by professional organizations, who work closely with the state authorities. While in “peace-time” in the democratic public sphere a diversity of arguments and counter-arguments can be observed. Inclusive debate and the integration of different scientific and professional arguments is typical, especially when the debate is about a complex problem that can be considered economically and/or politically costly. Positions are, in many cases, conveyed by critical media that seek to identify contradictions.

In contrast, in crisis situations social deliberation becomes monotonous and one-sided, and the reference to the only possible way of solving a complex problem and the arguments that support it become dominant. Decision-makers responsible for crisis

²⁰ Hungarian Helsinki Committee – Government gains excessive powers from forever renewable state of danger. https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/HHC_Hungary_state_of_danger_24022023.pdf.

²¹ Act CXLII of 2015.

²² Governmental Decree 70/2022 (III. 2.).

²³ CXLII of 2015.

²⁴ Act XXXIV of 1994 on the Police.

management tend to favor this type of one-sided, centralized communication in times of crisis for reasons of efficiency, in order to avoid confusion and to create a general sense of security and the illusion of control. The need for simple narratives is reinforced by the mass media's demand for unity, while complex explanations are marginalized, and even the plural media tend to gather under a single 'flag'. Actors who, in peacetime, have a strong influence on shaping public opinion choose to remain silent, with experts, politicians, social organizations and even the media retreats, creating an impression of consensus in the public sphere. Serious threats to public safety often lead to a monotonous model of discourse under the guise of effective prevention. A state of emergency is often declared, almost without debate, and the executive is given the power to adopt emergency measures and emergency regulations. In threatening circumstances, pluralist discourse appears to be an unnecessary waste of time and a barrier to effective public policy action. Crisis managers often look for a few carefully selected, credible or even expert advocates to interpret the necessary measures to the public.

During the spread of the COVID-19 pandemic, this one-way communication has become typical in many European countries, including Hungary. The change in the dynamic of public discourse could be observed not only on the side of the speakers, but also on the side of the receiving audience (I say "audience", although this term is less and less appropriate in the age of internet media). The increasing sense of insecurity, the more or less unknown nature of the threat, the impossibility of maintaining the normal way of life in the face of restrictive measures, were leading to changes.

Several features of this process could be observed in Hungary: the problem of the epidemic became dominant in the social discourse, displacing other topics that had previously seemed significant. International news was relegated to the background - except for the reports related to the epidemic. From one day to the next, reports on forest and bush fires in Australia, the effect of global warming on Siberia or even the migration situation became irrelevant. The need for rationalization has led to an increased demand for expert opinions, and it is no coincidence that the Government has made Cecília Müller, the National Chief Medical Officer, the face of the Operational Group that reported about the situation on a daily basis. Several health experts and virologists have become public spokespersons for the epidemic, and the particular situation of the pandemic has created the possibility for health experts to become quasi-influencers. A wide variety of epidemiological statistical analyses became commonplace, and mathematicians, economists, statisticians and political analysts began to explain the epidemiological data to the public. It is also worth noting that previously less publicized views on the epidemic and their promoters have also come to the fore. This is particularly true of those who denied the danger of the virus, questioned the effectiveness of mask use and later questioned the efficacy and safety of vaccination, such as György Gődény, who, although he had previously appeared on the political scene in Hungary, had not previously received such public attention that he had during the epidemic.²⁵

²⁵ On his YouTube video channel and on social media, György Gődény promotes his views questioning the seriousness of the SARS-CoV-2 virus and the pandemic it has caused, and he regularly claims that mask-wearing and other prescribed measures are a means of social/political control and not of epidemic control. He was previously president of the bogus party 'Common Denominator 2018' and now active in the

The need to introduce an emergency was questioned in only by a relatively small number of voices, which came primarily from the legal academics. The near-consensus behind the Second Authorization Act shows that the usual political debates have died down.²⁶ For weeks, news of the epidemic dominated the headlines of the major media outlets in order to satisfy the public demand.²⁷

The measures taken to combat the pandemic also contributed to the transformation of the public discourse: social distancing, working from home, the closure of places of entertainment and meeting, curfews, thus in short the lack of social interaction obviously had an impact. At the same time, the hunger for news has increased and media consumption has grown. The COVID-19 pandemic is the first major global crisis that was broadcasted in real life on social media.²⁸ Research into the relationship between the bubble effect, which is particularly prevalent in social media, and the spread and accessibility of information about the epidemic is still to be carried out.

The switch to a so-called crisis mode of public discourse in times of crisis is often observed even in mature democracies. In Hungary, however, several measures of emergency legislation have contributed to a further narrowing of the public sphere and to the impossibility of continuing robust pluralistic debate on political matters. In the following chapter we will examine three of these measures in detail, namely the regulations that weaken the right to freedom of information, the suspension of the right of assembly and the new definition of the crime of spreading rumors, which had a chilling effect on public discourse.

II.2 Freedom of information in times of COVID-19

A prerequisite for robust and open public debate is access to the information necessary to form a well-grounded opinion. On 4 May 2020, the government issued a decree²⁹ allowing a person obliged to disclose public data to derogate from the established one-

Normal Life Party. His Normal Life Party also organized a demonstration on 11 September 2020, at Freedom Square in Budapest, which was called "COVID 911 - Demonstration for Normal Life". Around 800-1000 people gathered at the event to protest against the restrictive anti-epidemic measures, the mandatory wearing of masks and what they considered to be excessive media hype about the epidemic. On 24 September 2020, Facebook, together with several other groups, blocked his group, which had 100,000 followers and had become the most important base of the anti-epidemic and anti-masking movement in Hungary. On 11 December 2020, he was interrogated as a suspect on suspicion of scaremongering because he made a reference in a Facebook post to the fact that coronavirus vaccines are deadly. On 21 September 2021, he was convicted by the Nyíregyháza District Court and received a one-year prison sentence suspended for two years. In August 2021, the video-sharing site YouTube permanently deleted György Gődény's channel. Despite of all this the Normal Life Party was eligible to set up a party list at the general elections of 2022 and nominate 120 candidates. The party received less than 1 per cent of the votes casted on the national list.

²⁶ The Second Authorization Act was adopted by the National Assembly with 180 votes in favour and 1 against.

²⁷ See the research results of the National Media and Infocommunications Authority: https://nmhh.hu/cikk/213701/A_koronavirusjarvany_hatasa_a_mediapiacra_2020_junius.

²⁸ „People have more time to read and a greater appetite for news than ever before in the crisis caused by the COVID” - stated a press release issued by the Hungarian Advertising Association and its partners. <https://www.digitalhungary.hu/media/A-sajto-megorizte-helyet-a-mediatorotaban/11637/>.

²⁹ Government Decree 521/2020 (XI. 25.) on certain derogations from the provisions on data requests.

month deadline for the disclosure. This decree was applicable during the emergency and is still in force on the day this manuscript was closed. According to the most important provisions of the regulation, in cases where it is likely that the fulfilment of the request within the original 30 days' deadline could jeopardize the performance of the public tasks of the public body in the context of an emergency, the deadline may be extended by 45 days. However, the requesting party must be informed of this within 15 days of receipt of the request. The 45-day time limit may be extended once. In connection with the change in the time limits, the deadline for lodging a judicial appeal has also changed. The legislation has been criticized, in particular for allowing significant delays in providing the public with information on the tendencies of the pandemic. Critics stated that this was not helping but hindering the fight against the epidemic.³⁰

The rules have also been examined by the Constitutional Court (hereinafter Court or CC). The judges found that the regulation was not contrary to the provisions of the Fundamental Law, but in its decision the Court set out the range of interpretation within which the application of the emergency regulation was in line with the constitutional provisions, i.e. it established constitutional requirements. The CC highlighted that timeliness is an essential guarantee of the exercise of this fundamental right: an absurdly long time limit would render it meaningless. The judges also pointed out that it is a fundamental constitutional requirement that the government's emergency measures must be necessary to avert the danger and proportionate to the risk. The government's decision does not suspend the exercise of the fundamental right, but merely limits it in cases where it is necessary to combat the epidemic. The fight against the coronavirus epidemic is therefore a legitimate aim that constitutionally justifies the restriction of freedom of information. Nor did the Court find any disproportionality, arguing that "the constitutional objective of contributing to the fight against the coronavirus is proportionate to the disadvantage of the applicant's access to the information only within 45 or 90 days."³¹

However, in applying the Regulation, the data controller is expected to provide, in addition to a general reference to the emergency, a concrete likelihood of what public task would be at risk if it were to comply with its obligation to respond within the original 30-days time limit.³²

II.3 Freedom of expression – frozen?

According to the original regulation of the Criminal Code of Hungary the offence of scaremongering is essentially a defense against causing mass panic. A person who deliberately creates public confusion or disorder in a place of public danger by deliberately lying may be punished with imprisonment. In this context Lying means stating an untrue fact or distorting the truth, and includes knowingly spreading the lies of others. The offence cannot be committed by expressing mere opinions and the untrue

³⁰ Statement of the Hungarian Civil Liberties Union: <https://tasz.hu/cikkek/melyen-hallgat-az-alkotmanybirosag-amikor-a-legnagjobb-szukseg-lenne-az-atlathatosag-melletti-kiallasra>.

³¹ 15/2021 (V. 13.) decision of the Constitutional Court of Hungary, Reasoning [41].

³² 15/2021 (V. 13.) decision of the Constitutional Court of Hungary, Reasoning [27] – [46].

statement must be made publicly. However, it is not required that the disturbance of the peace actually takes place; it is sufficient if the lie is capable of causing panic.³³

An amendment to the Criminal Code criminalized the spreading of rumors during special legal order (such as in a state of danger), and tightened the criminal penalties. According to critics, the new definition is based on vague legal concepts and definitions,³⁴ quoting in particular the phrase "likely to hinder or frustrate the effectiveness of the defense". In short, many of the terms established by the new rules are open to interpretation, creating a sense of uncertainty. It is questionable whether the amendment meets the requirement of clarity. A further problem is that the new definition of the offence was not necessary: scaremongering was already part of the Criminal Code. Well-known media law expert Gábor Polyák drew attention to the fact that the previous criminalization of "Incitement Against a Decree of Authority"³⁵ and "Threat of Public Endangerment"³⁶ should have been sufficient means to counter any potentially damaging communication during an epidemic. These provisions had already been applied by the police before the new definition of scaremongering entered into force. Polyák also argued that the vague wording of the legislation allows proceedings to be brought in respect of any public statement, which contradicts official communications relating to the epidemic. This threat can have a chilling effect on the media, as it does not require an actual court ruling against members of the press to already exercise self-censorship while reporting on the epidemic.³⁷ András Koltay, renowned researcher of freedom of speech, however pointed out that "the prohibited act must be objectively capable of hindering the effectiveness of defense, whether taken by the government or by other public, municipal or even private actors". Koltay also noted that negligence, without proper verification of the facts and untrue statements published in good faith are not punishable under the modified rules.³⁸

The Constitutional Court, which examined the new regulations, found that those meet the requirements of constitutional criminal law. According to the Court, it cannot be established that some of its provisions are inherently vague. It also stated that "scaremongering can only be committed intentionally". This means that "the perpetrator must be aware that (s)he is committing the act during a special legal order, that the alleged fact is untrue or that (s)he has materially distorted the truth, and that the communication of the allegation is (objectively) likely to hinder the effectiveness of the defense measures taken against the danger. And the intention must be to directly aim the statement to a large, public audience. If the intention does not extend to any of these

³³ „Any conduct of uttering or publishing before the public at large a statement one knows to be false or with a reckless disregard for its truth or falsity at the scene of some emergency by which to violate public order or disturb the public peace at a place of public danger is guilty of a felony punishable by imprisonment not exceeding three years.” Section 338 of the Criminal Code of Hungary (Act C of 2012).

³⁴ Bencze M. – Ficsor K., A koronavírus kihívásai és a jogtudomány: a rémhírterjesztés tényállásának jogalkalmazási kérdései. *A Jogtudományi Intézet blogoldala*. 2020. április 02. <https://jog.tk.hu/blog/2020/04/a-remhirterjesztes-tenyallasanak-jogalkalmazasi-kerdesei>.

³⁵ Section 336 of the Criminal Code of Hungary.

³⁶ Section 338 of the Criminal Code of Hungary.

³⁷ Polyák G. – Pataki G., The Value of Personal Data from a Competition Law Perspective. *ELTE LAW JOURNAL* (1), 167-188, 2020.

³⁸ Koltay A., Koronavírus és szólásszabadság veszélyhelyzet idején. Index.hu; 24 March 2020. https://index.hu/velemeney/2020/03/24/szolasszabadsag_btk_remhirterjesztes_szigoritas/.

elements, or if the statement is not objectively capable of hindering the effectiveness of the defense, the offence is not punishable under the rules." In other words, the judges denied that the modification can be used to restrict public debate.³⁹

II.4 Restrictions on the right of assembly

From 11 March 2020, the government banned indoor events of over 100 people and outdoor events of over 500 people,⁴⁰ and from 16 March prohibited all sorts of gatherings.⁴¹ The ban remained in place for the duration of the emergency, and the government decree lifting it repealed the prohibitions.⁴² During the new state of danger declared at the height of the second wave of the epidemic, the ban on peaceful assemblies was again imposed.⁴³ This time it remained in force for more than six months, and was only lifted in spring 2021.⁴⁴ The suspension of the right of assembly was considered unnecessary by several human rights organizations, especially because of the particularly long period of time during which the restriction was maintained.⁴⁵

The provision banning assemblies was finally referred to the Constitutional Court in November 2020.⁴⁶ The legislation was no longer in force at the time when the judges delivered their decision, but since the examination was carried out in the context of a constitutional complaint procedure, the Court examined the legislation in force at the time of the submission of the petition, as applied to the particular case. The initiator, the Rainbow Mission Foundation, wished to organize an assembly on 10 December 2020. The rally would have taken place in closed vehicles and in compliance with the epidemic measures (wearing a mask). The Budapest Metropolitan Police prohibited the assembly, citing the Government Decree. The organizer appealed to the Court of Appeal, which ruled that the prohibition was lawful, pointing out that the government decree did not give any discretionary power to the Police.

The Constitutional Court in its decision pointed out that the objective of combating the coronavirus epidemic can justify the restriction of fundamental rights. Then the judges can only examine whether the restriction is justified, i.e. whether it is appropriate to

³⁹ 15/2020 (VII. 8.) decision of the Constitutional Court of Hungary, Reasoning [46]; [53].

⁴⁰ Government Decree 41/2020 (III. 11.) on the measures to be taken during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, for the elimination of its consequences, and for the protection of the health and lives of Hungarian citizens.

⁴¹ Government Decree 46/2020 (III. 16.) on the measures to be taken during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, for the elimination of its consequences, and for the protection of the health and lives of Hungarian citizens (III).

⁴² Government Decree 282/2020 (VI. 17.) on terminating the state of danger declared on 11 March 2020.

⁴³ Government Decree 484/2020 (XI. 10.) on the second phase of protective measures applicable during the period of state of danger.

⁴⁴ Government Decree 264/2021 (V. 21.) on the fifth stage in the phasing out of protection measures introduced due to the Covid-19 pandemic.

⁴⁵ Hungarian Helsinki Committee: No gyülekezési jog, no party. <https://helsinki.hu/no-gyulekezési-jog-no-party/>; Száz napja vették el mindenki mindenféle gyülekezési jogát. <https://helsinki.hu/szaz-napja-vettek-el-mindenki-mindenfele-gyulekezési-jogat/>.

⁴⁶ Orbán E., Gyülekezési szabadság a pandémia idején. *JTiblog*, 2023.03.13. <https://jog.tk.hu/blog/2023/03/gyulekezési-szabadsag-a-pandemia-idejen>.

mitigate the pandemic, while did not consider “whether there is an epidemiological risk caused by protesters sitting in cars. In the context of the petition, the Constitutional Court could decide whether, in the circumstances, the general ban on assemblies could be considered constitutional under the Fundamental Law.”⁴⁷ According to the judges, at the time of the planned demonstration, when the epidemic was at its height, it could not be established that the legislation was unconstitutional. However, regarding proportionality, the decision pointed out that the legislator must reconsider the development of the pandemic on a recurring basis and, when the pandemic situation makes it possible, must at least partially allow the exercise of the right to peaceful assembly. Whether the legislator carries out this balancing is a question of constitutionality, and if the legislator fails to do so, the restriction on the fundamental right is disproportionate. It is therefore necessary to take into consideration again and again, whether the circumstances actually justify the suspension of the right to assembly.⁴⁸ Therefore, the Court did not find that the decree was unconstitutional, but it did impose a constitutional requirement on the legislature.

III. Restrictions on party pluralism

In the previous chapters we have reviewed how political freedoms were – or rather, were not – enforced during the state of danger declared due to the COVID-19 pandemic, and how it shaped public discourse. It can be seen that political communication in the crisis situation followed a narrower thematic than before, with the issue of the public health becoming a central theme. New opinion-leaders, mainly with a medical background, appeared. News consumption among the population, when personal contact was almost completely forbidden, increased. At the same time, a kind of self-limitation was observed in the media due to the one-way communication that characterizes crisis situations. This was clearly reinforced by the limitations on freedom of information, and the chilling effect of the new rules on scaremongering. The possibility for citizens to participate actively and effectively in the public discourse has been severely limited by the long-term suspension of the right to assembly. This is the social and political context in which the impact of the party finance measures that affect the day-to-day activities of political parties can be interpreted. In this social and political context, the government took further financial steps to restrict free and pluralistic competition between the political parties.

III.1 The halving of state subsidies

On 4 April 2020, the government announced that 50 per cent of the annual state subsidies for political parties would be cut and reallocated to the fight against the epidemic. A government decree⁴⁹ set up the Epidemic Prevention Fund and the Economic Protection Fund. To demonstrate the scale, it is worth recalling that the Epidemic Prevention Fund was launched with an initial financial envelope of HUF 663.5 billion. One of the sources of this was the transfer of 50 per cent of the parties’ annual state subsidies, meaning approx. HUF 1.2 billion. Other measures affected banks and the financial sector, local

⁴⁷ 23/2021 (VII. 13.) decision of the Constitutional Court of Hungary; Reasoning [32].

⁴⁸ 23/2021 (VII. 13.) decision of the Constitutional Court of Hungary; Reasoning [34] – [36].

⁴⁹ Government Decree 92/20020 (IV. 6.).

authorities and multinational companies. The Economic Protection Fund was created with an initial HUF 1345 billion.

The government justified this step on the grounds of solidarity. Although the halving of party support was not introduced retroactively, in practice it meant that the parties were overnight deprived of their most important source of income, since annual support is transferred quarterly and by the time of the announcement they had already received their second quarterly support.

The political parties reacted to the announcement cautiously, stressing that they intend to support the fight against the pandemic despite the financial difficulties. Jobbik commented that "it is clear that the Orbán government is punishing the opposition for their failure on 13 October." They were referring to the results of the 2019 municipal elections. Dialogue stressed that "the parties live almost exclusively from state support".⁵⁰ NGOs have been more vocal in their criticism of the government's move, pointing out that the abstract amount is a drop in the ocean considering the economic impact of the epidemic, while the measure has a negative impact on society and political discourse. Attila Szabó, a lawyer of the Hungarian Civil Liberties Union, explained that the parties' duty under the Fundamental Law is to contribute to the formation and expression of the will of the people, which can be hindered by the government's decision. He argued that elected party-representatives can work effectively only if they have a stable back-up, which is weakened by the halving of the funds. He also highlighted that the measure does not affect all political actors equally, as the government uses budget support to engage in party propaganda activities on behalf of the governing parties, blurring the line between state and party communication.⁵¹

III.2 Financial support from the parliamentary groups

Following the reduction of the state subsidies, at the end of May 2020, with the agreement of the majority of the parliamentary forces, the Political Parties Act was amended to allow parliamentary groups of political parties to provide support to the parent party from their budget allocations. The bill justified the amendment by stating, "political parties typically play an active social role in the fight against the coronavirus. In view of this, the proposal creates the possibility for parliamentary groups to waive a certain part of their budget and donate it to their party in the form of a grant."⁵² The amendment also introduced a new provision in the text of the Parliamentary Act, according to which support may be granted on the basis of an individual decision by the leader of the parliamentary group. The subsidy is paid from the group's account by bank transfer.⁵³ There is no ceiling on the amount.

⁵⁰ Haszán Z., A tűzijátékra többet költ majd a kormány, mint amennyit a válságra hivatkozva elvett a pártoktól <https://444.hu/2020/07/07/a-tuzijatekra-tobbet-kolt-majd-a-kormany-mint-amennyit-a-valsagra-hivatkozva-elvett-a-partoktol>.

⁵¹ Szabó A., A pártok költségvetésének megfelezésével a társadalmat is büntetik. <https://merce.hu/2020/04/09/a-partok-koltsegvetesenek-megfelezesevel-a-tarsadalmat-is-buntetik/>.

⁵² Bill T/10307.

⁵³ Section 118/A (2) Act XXXVI of 2012 on the National Assembly.

The possibility was originally intended to be guaranteed until 1 January 2021, but due to a modification⁵⁴ the provisions remained in force until 1 January 2022., however the annual state subsidy was not reduced in 2021.

By definition this possibility is useful only for those parties which have a parliamentary group, therefore the amendment created an unequal situation between parliamentary parties and newer players of the political scene.

III.3 Evaluating these measures in the context of the financial background of political parties

The significance of the budget cuts can only be appreciated in their own right if the funding structure of political parties is taken into account. The most fundamental issues of party funding are primarily regulated by the Political Parties Act, which states that "the party's assets shall consist of fees paid by its members, subsidies from the central budget, [...], property transferred free of charge by the State, contributions from natural persons who are Hungarian citizens, bequests from natural persons by will, the economic and business activities of the party [...] and the taxed profits of a single limited liability company established by the party. No legal person or organisation without legal personality may make or accept contributions to a party, nor may the party accept contributions from them, nor may it accept contributions from other states, foreign organisations or natural persons who are not Hungarian citizens. In addition, anonymous donations are prohibited.

The annual budget reports of Hungarian political parties show that the most important source of their income is state budget support. The exact amount of this is set out in the annual budget law, and the rules for its distribution are also laid down in the Political Parties Act, which stipulates that 25% of the amount available for party support must be distributed equally among the parties that have won seats on the national list in Parliament. The remaining 75% shall be allocated to the parties in proportion to the votes cast for the party or its candidates on the basis of the results of the parliamentary elections. In the case of a joint list, the votes cast on the joint list shall be distributed among the parties on the joint list in proportion to the votes of the parties participating in the drawing up of the list. Any party which does not obtain 1% of the votes of the electors participating in the vote shall not be eligible for support.

The importance of donations from private individuals in the financing of domestic political parties is variable but, with a few occasional exceptions, rather small. Similar observations can be made about the income from the economic activities of political parties. It is also noticeable that in 2019 both Fidesz and MSZP increased the share of their revenues from the private sector: in the case of Fidesz, revenues from donations and membership fees exceeded the amount of state support, but it cannot be said yet that these changes indicate a trend reversal. The youngest party to receive state support is Momentum, which has a significantly different management than the well-established parties in that it is still heavily dependent on the state for its funding.

⁵⁴ Act CLI of 2020.

No correlation is observed between the size of party membership, the success of dues collection and electoral success in general. It is possible that parties in Hungary do not consider membership fees as a reliable and significant source of income - with the possible exception of Fidesz and Momentum, for which membership fees exceed 10% of revenues in annual aggregate.

IV. Experience of the elections held in the shadow of the Covid-19 pandemic

IV.1. Elections took place in the shadow of the Covid-19 Pandemic

After having outlined the context of the elections held during the public health emergency, now we focus on the main experience gained during the first years of the post-Covid period. Although the fact, that state of emergency has been almost constantly ordered in Hungary since the outbreak of the Covid-19 pandemic in March 2020, the extraordinary circumstances had relatively limited impact on the electoral framework, since only a few major electoral processes took place during this period, and these were also held amongst more favourable public health circumstances. In October 2020, an interim parliamentary elections was organized in one of the 106 electoral districts in the North-Eastern part of the country,⁵⁵ which was followed by an oppositional primary election not sanctioned by state authorities, but led also meaningful electoral experience. Then, parliamentary elections were scheduled to April 3. 2022, while in June 2022, after a two-year-long moratorium to arrange municipal elections, some interim municipal elections were also organized.

IV.2. Rescheduling elections

The current constitutional and legal framework of Hungary does not allow the rescheduling of the parliamentary elections even if huge unexpected challenges would occur. The authorities are obliged to hold the elections on due time, and to implement the necessary measures to making the electoral process feasible, this would enhance considerably the expenses of electoral management. In addition to the political aspirations, this may be one of the main reason why Hungary hold the parliamentary elections and the national referendum jointly,⁵⁶ and why this solution has been extended to 2024, when the European Parliamentary elections and the municipal elections will be also held concurrently on the same day.⁵⁷

However, one should raise an interesting differentiation between the national and local elections. The first package of restrictions enacted in March 2020 banned the holding of any election or referendum unless the public health emergency will be lifted. Nevertheless, during the summer of 2021, the relevant rules were modified, and allowed the initiation of national referenda, but still maintained the prohibition of local ones. This

⁵⁵ 2020. évi időközi országgyűlési választás. <http://varoshaza.tiszaujvaros.hu/index.php/2020-evi-idokozi-orszaggyulesi-valasztas>.

⁵⁶ Gál K., Two birds with one stone – the significance of joint elections in Hungary <https://jog.tk.hu/en/significance-of-joint-elections-in-hungary>.

⁵⁷ Polonyi D., Election dates “as you like it”: comparing the Hungarian and the Polish cases. Blog of the Centre for Social Sciences, Institute for Legal Studies (Budapest). <https://jog.tk.hu/en/blog/2023/05/election-dates-as-you-like-it>.

distinction was probably resulted by the aspiration of holding the national elections and nation-wide referenda jointly in April 2022.⁵⁸

Although the fact, that the schedule of national elections has not been affected by the pandemic, on the municipal level, in some smaller villages the by-elections postponed from the Autumn of 2020 could be held only after the lifting of ban on municipal elections, during the spring of 2022, leaving these villages without legally established leadership for almost two years.⁵⁹

IV.3. Oppositional primaries

Despite its political failure which should be assessed in more detail by political scientists, from a purely legal perspective, oppositional primary elections operated with some highly innovative elements, which might have influence also for the long term. This was the first occasion, when E-voting has been introduced by Hungary, and in spite of the several short-comings experienced during its implementation, this was an important step towards creating a more flexible electoral framework providing alternative tools for citizens to submit their votes.⁶⁰ Apart from this, the participation of young citizens who would attain their eighteenth age before the day of the parliamentary elections constituted also a revolutionary element, but one should also bear in mind, that Hungarian citizens without permanent Hungarian address were excluded from participation.

With the involvement of minors and the introduction of electronic voting, the primary election undoubtedly brought elements to the Hungarian electoral practice that could entail new impulses for the further development of the system that has been developed so far. However, presumably due to the short amount of time available for organization, the details of the voting method and more information about the conduct of the vote only became available to the public just a few days before the start of the voting.⁶¹

IV.4. Parliamentary elections held in April 2022.

Instead of the previous expectations which calculated with the additional challenges entailed by the pandemic, the voting in abroad, and the impact of the armed conflict in a neighbour country caused the most severe difficulties for organising the scheduled elections on April 3 2022.⁶² On the one hand, several uncertainties have been experienced

⁵⁸ Órsi E., Két választás Magyarországon. Mikszáth után szabadon. <https://arsboni.hu/ket-valasztas-magyarorszagon-mikszath-utan-szabadon/>.

⁵⁹ Gál K., The Visegrád Group and Covid-induced election postponement: A slight sacrifice for safety? Blog of the Centre for Social Sciences, Institute for Legal Studies, Budapest. <https://jog.tk.hu/en/blog/2022/10/the-visegrad-group-and-covid-induced-election-postponement>.

⁶⁰ Fazekas C., Szentgáli-Tóth B., A magyar demokrácia néhány közvetlenül előttünk álló nyitott kérdése: a választási eljárásjog várható hazai tendenciái a poszt-Covid időszak kezdetén. Blog of the Centre for Social Sciences, Institute for Legal Studies (Budapest), <https://jog.tk.hu/blog/2021/07/a-valasztasi-eljarasjog-varhato-hazai-tendenciai>.

⁶¹ Karácsony L., Primary election in the shadow of the pandemic. Blog of the Centre for Social Sciences, Institute for Legal Studies, Budapest. <https://jog.tk.hu/en/blog/2022/04/primary-election-in-the-shadow-of-the-pandemic>.

⁶² Szentgáli-Tóth B., Hungarian roundtable on the impact of Covid19 on the electoral framework. Blog of the Centre for Social Sciences, Institute for Legal Studies (Budapest). <https://jog.tk.hu/en/blog/2022/10/hungarian-roundtable-on-the-impact-of-covid19>.

as regard submitting the votes of Hungarian citizens without permanent Hungarian residence, while on the other hand, attention was also raised to the risks of voting in diplomatic missions within an inherently unpredictable public health landscape. The restrictions ordered on public health grounds varied significantly from country to country, and also evolving rapidly, which may have limited the mobility of Hungarians with Hungarian residence living abroad to approach the closest diplomatic mission of the country. The lack of sufficiently prudential regulation resulted for example, that in China, where strict quarantine measures were in place, around a hundred of Hungarian citizens were unable to cast their votes in the Hungarian consulates. This anomaly may also demonstrate the discriminatory differentiation between Hungarian citizens without permanent Hungarian residence and between those, who are resident in Hungary but were in abroad on the day of the elections.⁶³

Apart from this, due to the on-going Ukrainian war, Hungarian citizens with Ukrainian residence could not access Hungarian diplomatic missions in the country, while several Hungarian citizens from the south-west part of Ukraine fled to Hungary to wait the end of the armed conflict, and probably were unable to cast their votes there. Furthermore, the high number of refugees arriving from Ukraine during the last weeks preceding the elections, some polling stations especially from the north-eastern part of Hungary should have been removed to new venues just some days before the Election Day.⁶⁴ Regarding direct public health concerns, due to the favourable epidemiological circumstances, only additional funds were provided for the staff of polling stations to cover potentially necessary adaptive measures, while the wearing of mask was recommended for the electoral staff members.⁶⁵

V. Recommendations

The virus situation has evolved unpredictably, so the organizers of any election cannot be expected to predict the specific public health conditions of voting for many months in advance and to fix the applicable special rules accordingly. At the same time, despite these features, the elections that form the basis of democracy should be conducted in an environment that is predictable, transparent and clear for the candidates, nominating organizations and the electorate as much as possible. To this end, in our opinion, a few (at least three) months before the date of the elections, the organizers should develop several alternatives for the organization of the election, and would also record which epidemiological indicators each alternative would be used for, and by how much procedural rules are finalized before election day in light of the current public health situation. These alternatives, as well as the conditions of their application, shall be public

⁶³ Takács J., Voting at embassies and consulates during the 2022 parliamentary elections in Hungary - New problems caused, and long-existing concerns intensified by the COVID-19 pandemic. Blog of the Centre for Social Sciences, Institute for Legal Studies, Budapest. <https://jog.tk.hu/en/blog/2022/05/voting-at-embassies-and-consulates>.

⁶⁴ Karácsony L., War and democracy, or externalities of an armed conflict in the neighbourhood: recent challenges in Hungary. <https://jog.tk.hu/en/war-and-democracy>.

⁶⁵ Karácsony L., Parliamentary elections in Hungary: COVID-related RESTRICTIONS. <https://jog.tk.hu/en/parliamentary-elections-in-hungary>.

and accessible to everyone, so that one could follow what aspects were considered and how the specific method of voting was determined, even in the face of rapidly changing circumstances.

Furthermore, the legal framework for elections needs to be developed a few months before the elections, even in a public health crisis. In the case of a parliamentary election scheduled for April or May - especially when the presence of the pandemic can be planned well in advance - it would be advisable to work out a legal framework ensuring the organization of the elections adapted to the public health situation by the beginning of the given calendar year the latest.

In connection with the election campaign, during the weeks before the elections, the promotion of political opinions and candidate programs in person should be excluded only as a last resort, instead of this, the epidemiological adaptation of events serving these purposes should be promoted with a well-thought-out set of requirements. Of course, even then, a campaign period during a pandemic will not be quite the same as if we did not have to take this factor into account, but especially in the sociological environment perceptible in Hungary and neighboring countries, physical presence still has weight in political communication, especially for certain voter groups. Therefore, in terms of maintaining pluralism and ensuring equality between candidates and nominating organizations, it is important that, as long as this is feasible from a public health point of view, the right to assembly should not be abolished, but only limited, especially during the campaign weeks.⁶⁶

Special weight should be given to the enforcement of the rights of voter groups that can easily be excluded from the exercise of the right to vote in the midst of the conditions of the pandemic, and thus may even become victims of indirect disenfranchisement. Two such groups can be identified: persons infected with Covid-19 or potentially infected with Covid-19 at the time of the election, and citizens living abroad or residing abroad on the day of the vote but with a Hungarian address.⁶⁷ As for the first group of voters, which as not been discussed earlier, to resolve such situations, we would use electronic voting, which allows people infected with Covid-19 to cast their vote without any personal contact.⁶⁸ When voting by ballot box, by car, or by mail, the officials involved in casting the vote and later in counting the votes come into contact with objects from an infected person, which can become potential carriers of the virus.

We strongly believe that the time of elections based predominantly on personal presence (or more broadly: on one voting option) has expired, or at least is about to expire. As a

⁶⁶ Sevaracz L., Do We Need a Neutral State in the Election Campaign? Blog of the Centre for Social Sciences, Institute for Legal Studies, Budapest. <https://jog.tk.hu/en/blog/2022/10/do-we-need-a-neutral-state-in-the-election-campaign>.

⁶⁷ Takács J., Voting at embassies and consulates during the 2022 parliamentary elections in Hungary - New problems caused, and long-existing concerns intensified by the COVID-19 pandemic. Blog of the Centre for Social Sciences, Institute for Legal Studies, Budapest. <https://jog.tk.hu/en/blog/2022/05/voting-at-embassies-and-consulates>.

⁶⁸ Takács J., How did the pandemic influence the role of the virtual communication in election campaigns? <https://jog.tk.hu/en/how-did-the-pandemic-influence202204>.

consequence, we should thereby making them more flexible, but at the same time more expensive.⁶⁹ It can also be assumed that the role of modern technologies will continue to grow, both in the conduct of the election campaign and the voting itself.⁷⁰

Finally, we can count on the fact that the examination of the resilience of electoral systems in times of special legal order will come to the fore, and in this regard even constitutional or legal amendments are expected both in Hungary and abroad in order to clarify the legal framework of such situations. The pandemic also pointed out that the constitutional rules that describe the resilience of electoral systems in times of public health or other crisis situations are not sufficiently precise. It is also not clear how the remaining period until the postponed elections should be bridged: by extending the mandate of the public law actors in office, or by setting up a government specially mandated for the transitional period.

VI. Concluding remarks

Our contribution aimed to provide a contextual analysis of the latest development of Hungarian electoral administration, and also underlined the necessity of further broad discussions on adapting the electoral framework to the constantly changing environment, the pandemic probably entailed some long-term novelties how to draft electoral policies. Hungary has only limited experience until the date to holding elections in the shadow of the pandemic, the schedule of already-held nation-wide elections fall into favourable dates from a public health perspective. Nevertheless, the epidemiological situation impacted the electoral development in certain regards and may have larger weight in the future, when any elections should be held during more challenging periods. Therefore it is worthy to assess further either the Hungarian development or the known international samples with special regard to the V4 countries to elaborate feasible policy options for disadvantageous public health circumstances.

However, the topic of Covid-19 and the election is a sub-field whose true significance we will perhaps only be able to assess in its proper place in the longer term. In fact, when we discuss the relationship between the epidemic situation and voting, we are not only scrutinizing the mapping of a specific public health challenge to political participation rights, but in general we are examining, how the election systems of the post-Covid era will look like. As one of the first steps of this work, we summarized the experiences in Hungary so far.

⁶⁹Szentgáli-Tóth B., Hungarian roundtable on the impact of Covid19 on the electoral framework. Blog of the Centre for Social Sciences, Institute for Legal Studies (Budapest). <https://jog.tk.hu/en/blog/2022/10/hungarian-roundtable-on-the-impact-of-covid19>.

⁷⁰ Gál K., Alternative voting methods – Can we outsmart the pandemic? <https://jog.tk.hu/en/alternative-voting-methods>.

Monika Florczak-Wątor¹ - Grzegorz Kuca:²

The long-term impact of COVID-19 on the electoral system of the Republic of Poland*

I. Political background to the COVID-19 pandemic

The COVID-19 pandemic emerged in Poland in March 2020³ at a particular moment, namely after the parliamentary elections that took place in autumn 2019⁴ and just before the universal elections for the office of the President of the Republic of Poland, which were ordered in February 2020⁵ and were due to take place on 10 May 2020. In addition, the pandemic overlapped with the ongoing constitutional crisis that had been playing out since 2015, compounding the problems associated with it.⁶ During the first five years of this crisis, the ruling Law and Justice Party subjugated almost all institutions that, according to the Constitution of the Republic of Poland, should remain independent from the government, namely the Constitutional Tribunal, the National Council of the Judiciary, the National Broadcasting Council, and partially also the common courts, the State Electoral Commission (SEC) and the Supreme Court.

The latter two bodies, it should be stressed at this point, are directly involved in the electoral process, and therefore the changes affecting them must be taken into account when assessing the fairness and integrity of the elections held during the pandemic period. The SEC ensures the proper conduct of elections and is responsible for their organisation, while the Supreme Court examines election protests and adjudicates on the validity of elections. In 2018, the method of electing members of the SEC was changed and judges appointed by the highest courts were replaced with those appointed by political parties.⁷ As a result of this change, in the autumn of 2019 – a few months before

¹ Jagiellonian University Faculty of Law, Cracow, Poland.

² Jagiellonian University Faculty of Law, Cracow, Poland.

* The research was part of the Visegrád project no. 22120065: Crises and democracy: the long-term impacts of COVID-19 on V4 countries' electoral systems.

³ In Poland, the first case of infection with the COVID-19 virus was found on 4 March 2020.

⁴ As a result of these elections, the majority of seats in the lower house of parliament (the Sejm), namely 235 out of 460, were won by the ruling Law and Justice Party and its coalition partners. The opposition and independent candidates won a majority of seats in the upper house of parliament (the Senate).

⁵ The election for the office of the President of the Republic was ordered by the Speaker of the Sejm on 5 February 2020 (Journal of Laws of 2020, item 184).

⁶ For more on the constitutional crisis see, for example, W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, 2019; A. Kustra, *Poland's Constitutional Crisis: From Court-Packing Agenda to Denial of Constitutional Court's Judgments*, Toruń Polish-Italian Studies No. 12/2016; M. Wyrzykowski, *Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland*, Hague Journal on the Rule of Law No. 11/2019, pp. 417–422.

⁷ The new SEC composition emerged after appointments were made shortly after the parliamentary elections. Until 2019, the SEC consisted of nine judges (three each from the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court), and after the reform, this body consists of two judges (one each from the Constitutional Tribunal and the Supreme Administrative Court) and seven

the presidential elections – a new SEC composition emerged with members having been appointed through the new method, and at the same time the mandates of those who were previously members of this body have been terminated. In 2019, the Supreme Court was also reformed and a new chamber adjudicating on the validity of elections was established (the Chamber of Extraordinary Review and Public Affairs), which included judges appointed in violation of the Constitution. The reform of the Supreme Court was the culmination of changes to the judiciary, that began in 2017 and ended with the undermining of the independence of the Polish courts. The latter was ultimately confirmed both by the case law of the Court of Justice of the European Union⁸, as well as the case law of the European Court of Human Rights.⁹

II. Absence of emergency measures and the consequences thereof

Unlike other Visegrád countries, Poland never declared emergency measures due to the COVID-19 pandemic, despite having constitutional grounds to do so. In fact, the 1997 Constitution of the Republic of Poland provides for three types of emergency measures, two of which, namely, a state of emergency and a state of natural disaster, could have been introduced due to the COVID-19 pandemic. The reason that justifies the introduction of any of the emergency measures is the occurrence of a situation of 'special threats' under which 'ordinary constitutional means are insufficient' (Article 228(1) of the Constitution). The COVID-19 pandemic, for obvious reasons, could be regarded as such a situation.

A state of emergency may be imposed by the President of the Republic of Poland at the request of the Council of Ministers, *inter alia*, in the event of a threat to public safety – and an epidemic can undoubtedly be regarded as just such a threat. A state of emergency may be declared for a limited period of time, not exceeding 90 days, with the possibility of extending it once for a further 60 days with the consent of the Sejm (Article 230 of the Constitution). The President of the Republic would have to submit the decree on the state of emergency to the Sejm within 48 hours of signing it, and the Sejm could repeal it, for example, if it found no grounds for the state of emergency. A state of natural disaster, in turn, may be imposed, *inter alia*, in order to prevent the effects of a natural catastrophe bearing the hallmarks of a natural disaster, and to remedy those effects (Article 232 of the Constitution). The COVID-19 pandemic can be classified as a natural disaster under the Act on the State of Natural Disaster¹⁰, which defines a natural disaster as 'an event associated with the action of natural forces, in particular (...) infectious diseases of humans'. An epidemic is also a 'natural disaster' within the meaning of Article 3, paragraph 1, point 1 of the same Act, as its effects threaten the life or health of a large number of people, and assistance and protection can only be provided effectively through

persons appointed by the Sejm (the lower chamber of parliament). These changes were introduced by the Act of 11 January 2018 on amending certain acts to increase the participation of citizens in the process of electing, functioning and controlling certain public bodies (Journal of Laws of 2018, item 130).

⁸ See e.g. Judgments of the CJEU of 24 June 2019, C 619/18, and of 19 November 2019, C-585/18, C-624/18, and C-625/18.

⁹ See ECtHR Judgment of 7 May 2021. 4907/18 in *Xero Flor v. Poland*.

¹⁰ Act of 18.04.2002 on the State of Natural Disaster (Journal of Laws of 2017, item 1897).

the application of emergency measures, with the cooperation of various bodies and institutions, as well as specialised services and formations acting under unified direction. A state of natural disaster is declared by the Council of Ministers for a fixed period, not exceeding 30 days, with the possibility of its extension for subsequent periods with the consent of the Sejm (Article 232 of the Constitution).

However, during the COVID-19 pandemic, the Polish government decided not to introduce either a state of emergency or a state of natural disaster. Various arguments were put forward in this regard, including that there was no need to introduce a state of emergency due to the government's effective fight against the pandemic and that there was no need to excessively restrict individual rights and freedoms, which, it was argued, would have to be done if emergency measures were introduced. The first of these arguments was not true, as it quickly became apparent that the fight against the COVID-19 pandemic was beyond the government's normal capacity to act, which gave rise to the need for the Minister of Health to introduce, on 14 March 2020, a state of epidemic threat¹¹, and later, on 20 March 2020, a state of epidemic.¹² Neither of these emergency measures is provided for in the Constitution and does not have the same legal effects as a state of emergency or a state of natural disaster.¹³ The second argument concerning the automaticity of far-reaching restrictions on the rights of individuals in the event of the introduction of constitutional emergency measures was also incorrect. Such restrictions are provided for in the Act on the State of Emergency¹⁴, as well as in the Act on the State of Natural Disaster¹⁵, but they are activated only in the case of such a need and on the basis of the decision of the authority introducing those emergency measures.

In fact, the decision not to impose any constitutional emergency measures was based on entirely different reasons, closely linked to the planned presidential elections. The imposition of those measures would have made it impossible to amend the Constitution of the Republic of Poland, the electoral laws and the laws on states of emergency (Article 228(6) of the Constitution). Furthermore, no general elections, including elections to the office of President of the Republic of Poland, may be held during the period of introduction of the state of emergency and for a period of 90 days following its termination (Article 228(7) of the Constitution). The imposition of emergency measures would, therefore, have made it impossible for the ruling party to amend the electoral law,

¹¹ See Ordinances of the Minister of Health of 12.03.2020 on the proclamation of a state of epidemic threat on the territory of the Republic of Poland (Journal of Laws, item 433) and of 20.03.2020 on the cancellation of a state of epidemic threat on the territory of the Republic of Poland (Journal of Laws, item 490).

¹² Ordinance of the Minister of Health of 20.03.2020 on the proclamation of a state of epidemic on the territory of the Republic of Poland (Journal of Laws, item 491).

¹³ It is assumed in the literature that the Constitution contains a closed catalogue of emergency measures, which may not be supplemented by the ordinary legislator. Hence, the state of epidemic threat and the state of epidemic cannot be treated as emergency measures within the meaning of the Constitution. Similarly, see E. Łętowska, *Za głupstwa królów płacą ich narody*, at <https://konstytucyjny.pl/za-glupstwa-krolow-placa-ich-narody-indemnizacja-w-czasie-zarazy-cz-i/> (downloaded on 28.10.2023).

¹⁴ See Chapter 3 of the Act of 21.06.2002 on the State of Emergency (Journal of Laws 2017, item 1928, as amended).

¹⁵ See Chapter 3 of the Act of 18.04.2002 on the State of Natural Disaster (Journal of Laws 2017, item 1897, as amended).

which in turn would have made it necessary to postpone the already ordered elections for the office of the president. Although Article 228(7) of the Constitution provides for the extension of the term of office of the incumbent president, at the time Andrzej Duda, a supporter of the ruling party, it was feared that postponing the presidential elections would reduce his chances of re-election. As the pandemic progressed, there was a risk of economic problems and social discontent, that could have led to a decline in support for the ruling party and its candidate. Probably for these reasons, and therefore closely related to the electoral strategy of the ruling party, a constitutional state of emergency was not declared. Instead, as previously mentioned, a state of epidemic threat was introduced, followed by a state of epidemic, during which the constitutional prohibitions on holding elections and adopting amendments to electoral law did not apply. Some representatives of the constitutional law doctrine claimed that constitutional emergency measures were introduced in Poland 'de facto, although not de iure', or that they were 'material, although not formal'¹⁶, or even that Poland was in a hybrid state of emergency¹⁷, but from the constitutional point of view, no emergency measures provided for in the Constitution of the Republic of Poland were introduced.

III. Legal grounds for elections for the President of the Republic of Poland

Similar to Slovakia¹⁸ and contrary to the Czech Republic¹⁹ and Hungary²⁰, the President of the Republic of Poland shall be elected by the nation in universal, equal and direct elections conducted by secret ballot (Article 127(1) of the Constitution).²¹ The principle of universality provides that the right to vote is vested in each Polish citizen who, not later than on the day of the vote, reaches 18 years of age (Article 62(1) of the Constitution) and was not deprived of this right (Article 62(2) of the Constitution) or did not lose this right (e.g., by renouncing citizenship), and the right to stand as a candidate shall be vested in Polish citizens who, not later than on the day of the elections, reach 35 years of age and have full electoral rights to the Sejm (Article 127(3) of the Constitution). A presidential candidate shall be proposed by at least 100,000 citizens who have the right to vote in elections to the Sejm (Article 127(3) (sentence 2) of the Constitution).

The election is won on the basis of the principle of the absolute majority, which means that a candidate who receives more than half of the valid votes shall be considered elected President of the Republic of Poland (Article 127(4) (1 sentence) of the Constitution). If none of the candidates receive the required majority of votes, then a repeat ballot shall be held, and voters choose from among the two candidates who received the largest number

¹⁶ See P. Kardas, *Konstytucyjne podstawy rozstrzygnięcia kolizji obowiązków i konfliktu dóbr w czasie pandemii*, 'Palestra' No. 6/2020, p. 9.

¹⁷ M. Krzeminski, *Hybrydowy stan nadzwyczajny*, <http://konstytucyjny.pl/marcin-krzeminski-hybrydowy-stan-nadzwyczajny/> (downloaded on 28.10.2023)

¹⁸ See Article 101(2) of the Constitution of Slovakia.

¹⁹ See Article 54(2) of the Constitution of the Czech Republic.

²⁰ See Article 10(1) of the Constitution of Hungary.

²¹ See Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, corrected: Journal of Laws of 2001, item 319, amended: Journal of Laws of 2006 No 200, item 1471; of 2009 No. 114, item 946, hereinafter referred to as 'The Constitution').

of votes in the first ballot (Article 127(5) of the Constitution). The candidate who receives the higher number of votes in the repeat ballot shall be elected President of the Republic of Poland (Article 127(6) of the Constitution). The Supreme Court adjudicates on the validity of the election (Article 129(1) of the Constitution). It shall first decide on protests against the election and then, after hearing the protests, it shall decide on the validity of the election of the president. If the election of the president is declared invalid, a new election shall be held in accordance with the rules established for the case of a vacancy in the office of the President of the Republic of Poland (Article 129(3) of the Constitution).

The election (the first round) shall be held on a day not earlier than 100 days and not later than 75 days before the expiry of the term of office of the incumbent President of the Republic of Poland (Article 128(2) of the Constitution). The election must be held before the expiry of the term of office of the latter and within a period which ensures that its validity is confirmed by the Supreme Court by that time. If necessary, a second round shall be held on the fourteenth day after the first round. In the case of a vacancy in the office of the President of the Republic of Poland, elections must be ordered not later than 14 days after the occurrence of the vacancy and held not later than within 60 days from the day of when the election was ordered. As already stated, only as an exception after introducing one of the three states of emergency can elections be held 90 days after its termination, and in such cases, the term of office of the incumbent president shall be respectively prolonged (Article 228(7) of the Constitution), and the institution for the replacement of the head of the state should not be used (Article 131 of the Constitution).²²

The organisation of the election is specifically regulated by section V of the Electoral Code of 5 January 2011²³ (chapters I–VII), which sets out rules for proposing candidates (chapter II), rules for the preparation of voting cards (chapter III), the manner of voting together with conditions for the vote's validity (chapter IV), rules for determining the results of the vote and the validity of the election (chapter V), as well as rules for an electoral campaign and the financing of the election (chapters VI–VIII). There were two reforms that were significant for the conduct of the presidential election of 2020 – the reform of the Supreme Court and the reform of the SEC. The new Act on the Supreme Court²⁴ (which entered into force on 2 January 2018) granted competencies to hear electoral protests as well as to determine the validity of elections for the newly established Chamber of Extraordinary Review and Public Affairs, which replaced the Chamber of Labour, Social Insurance and Public Affairs. Doubts have been raised about the independence of the judiciary as regards the persons who sit in this chamber of the Supreme Court, and these doubts have been finally confirmed by judgments of the Polish

²² See: M. Florczak-Wątor, *Constitutional grounds for the question of substitution of the President in the Republic of Poland and neighbouring states*, 'Przegląd Prawa Konstytucyjnego' No. 2–3/2010, pp. 185 and next.

²³ See: the Act of 5 January 2011 Electoral Code (Journal of Laws of 2020, item 1319, as amended).

²⁴ See: the Act on Supreme Court of 8 December 2017 (Journal of Laws of 2019, item 825, as amended).

Supreme Court²⁵, the Court of Justice of the European Union²⁶, and the European Court of Human Rights.²⁷

Furthermore, in 2018, Article 157 of the Electoral Code²⁸, which determines the composition and manner of the appointment of the SEC, was amended. The above-mentioned Act introduced provisions according to which the SEC shall be composed of one judge of the Constitutional Tribunal appointed by the President of the Constitutional Tribunal, one judge appointed by the President of the Supreme Administrative Court and seven persons who qualified to be judges appointed by the Sejm, with the reservation that the term of office of the SEC appointed by the Sejm shall coincide with the term of office of the Sejm, and that candidates for the SEC appointed by the Sejm shall be proposed by the deputies' clubs. In addition, the number of such members must be proportionate to the number of members of particular clubs. Although those changes do not raise doubts about their constitutionality, as the SEC is not a constitutional authority, they do represent a departure from the previous standards for the appointment of the members of the highest electoral authority. It was decided in the 1990s that the SEC would be composed of judges because of their apoliticality and professionalism, as well as their professional practice of acting independently, shaped by laws determining their legal status. The previous system of electoral authorities assumed their independence from both the governmental administration and politicians. It should be noted that it was the significant representation of judges in the composition of these authorities, particularly the SEC, that guaranteed such independence.²⁹ The amendments introduced paved the way for the appointment of the SEC, both procedurally and in terms of a new composition. Finally, on the basis of the amended provisions, on 20 January 2020, the President of the Republic of Poland appointed the new SEC members in line with the amendments, which definitively sealed the changes in electoral law that were introduced in 2018.

IV. The course of the presidential election in 2020

On 5 February 2020, the presidential elections were ordered to be held on 10 May 2020.³⁰ At first, the electoral process was in compliance with the provisions of the Electoral Code; however, after the introduction of the state of epidemic threat (14 March 2020), followed by the introduction of the state of epidemic (20 March 2020), the SEC, acting as the supreme electoral authority, stated that in view of the threats posed by COVID-19,

²⁵ See: Judgement of the Supreme Court of 23 January 2020, case file No. BSA I-4110-1/20.

²⁶ See: Judgements of the Court of Justice of the European Union of 24 June 2019, C-619/18, re: European Commission v. Poland and of 19 November 2019, C-585/18, C-624/18, and C-625/18.

²⁷ See: Judgement of the European Court of Human Rights of 7 May 2021 4907/18, re: Xero Flor v. Poland.

²⁸ See: The Electoral Code was amended by the Act of 11 January 2018 on amending some acts with the aim of increasing citizen participation in the process of electing, operating as well as controlling some public authorities (Journal of Laws, item 130).

²⁹ A. Rakowska-Trela, *Wybory prezydenckie 2020. Kontekst prawny*, Fundacja Batorego, Warsaw 2020, p. 2.

³⁰ Order of the Marshall of the Sejm of the Republic of Poland of 5 February 2020 on ordering the election of the President of the Republic of Poland (Journal of Laws, item 184), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000184/O/D20200184.pdf> (downloaded on 28.10.2023).

conducting elections would face technical as well as organisational difficulties related to the lack of both adequate regulations and consensus between political powers.³¹ As a result, on 31 March 2020, an act (called the anti-crisis shield) was passed counteracting the consequences of the epidemic, which allowed for the possibility of postal voting for two groups of voters: persons 'who on the day of vote were subject to obligatory quarantine, isolation or isolation at home' and 'voters who attained 60 years of age'.³²

On 6 April 2020, the Sejm passed the act on special rules for conducting universal elections for the President of the Republic of Poland³³, which enabled postal voting as the only form of voting. The above-mentioned act eliminated the possibility of traditional voting; that is, in a polling station. This was incompatible with the standards of universal and direct elections, as the inability to hold elections in polling stations meant that elections could not be held within the scheduled time, and according to the Constitution, a state of emergency should be declared in such a situation.

Controversies related to this act resulted in its rejection by the Senate. Nevertheless, on 7 May 2020, the Sejm overturned the Senate's resolution and passed the law allowing for *all-postal voting* in the presidential elections scheduled for 10 May 2020. At the same time, the SEC was deprived of the right to organise the elections, and instead of the SEC, the minister in charge of state assets was involved in the process and ordered the printing of voting cards. The same minister then handed the cards over to the post office, which had been appointed to deliver them. Due to numerous organisational and legal questions, the elections scheduled for 10 May 2020 were cancelled, with the official reason being the sudden increase in the number of COVID-19 cases.

This was the first time in Poland's history that universal elections ordered on the basis of the Constitution and the Electoral Code were cancelled, and there were no constitutional or statutory grounds for this decision.³⁴ On 7 May 2020, the SEC issued an announcement stating that the SEC had been deprived of tools essential to the performance of its duties. As a result, other provisions of the Electoral Code relating to voting could not be applied, including 1) municipal and city mayors, as well as consuls had not prepared a list of voters; 2) there was no electoral silence, that is, the campaigning and the publication of the results of electoral surveys; 3) and the polling stations remained closed. Finally, the SEC stated that, as a result of depriving the SEC of the legal possibility of printing voting cards, voting in presidential elections was

³¹ See: <https://pkw.gov.pl/aktualnosci/informacje/przewodniczacy-pkw-rzeczpospolita-polska-jest-dobrem-wspolnym-wszystkich-polakow-wywiad> (downloaded on 28.10.2023).

³² See: Article 40 of the Act of 31 March 2020 on the amendment of the act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them, as well as some other acts (Journal of Laws, item 568).

³³ See: The Act of 6 April 2020 on special rules for conducting universal elections of the President of the Republic of Poland (Journal of Laws, item 827).

³⁴ It is worth mentioning that the order of the Marshall of the Sejm of 5 February 2020 on ordering the election of the President of the Republic of Poland (Journal of Laws, item 184) was issued on the basis of Article 128(2) of the Constitution and Article 289 § 1 and Article 290 of the Act of 5 January 2011 – Electoral Code (Journal of Laws of 2019, items 684 and 1404).

impossible.³⁵ Finally, the SEC passed a resolution stating that, in the elections of the President of the Republic of Poland scheduled for 10 May 2020, there was no possibility of voting for candidates and that this situation should be treated as equivalent to the lack of the possibility to vote due to the lack of candidates, as provided for in Article 293 § 3 of the Electoral Code.³⁶

In this situation, there was no 'come back' to the constitutional procedure for conducting elections, but instead, the Act of 2 June 2020 was passed, which introduced a hybrid method of voting, that is, traditional voting in a polling station together with postal voting. In addition, this Act created a specific, hitherto unknown, type of election, combining the elections scheduled for 10 May 2020 with other elections to be ordered, with all the consequences that this entailed, including the procedures for proposing candidates as well as matters related to conducting, financing and settling the electoral campaign.³⁷ On 3 June 2020, another order was issued on the ordering of the presidential election, setting the election for Sunday, 28 June 2020.³⁸ According to the new Article 2(3), a voter was entitled to vote by post, except if voting abroad in countries where there was no organisational, technical or legal possibility to carry out voting in this way. The intention to vote by post could be declared up to the fifteenth day before the polling day in the case of a foreign voter, up to the twelfth day before the polling day in the case of a domestic voter, and up to the fifth day before the polling day in the case of a voter who was in compulsory quarantine, isolation or seclusion at home on the polling day (Article 3(1) (1)). If a voter began his or her period of compulsory quarantine, isolation or isolation at home after the above-mentioned deadline, he or she could notify his or her intention to vote by post up to two days before the polling day.³⁹

Candidates who were registered for the cancelled election of 10 May 2020 had the right to stand in the new election, and all voters had the right to vote by post. In the first round, 143.5 thousand voters declared their intention to do so, and in two municipalities – Baranów and Marklowice – elections were held solely in the form of postal voting due to the high rate of COVID-19 infections. Many voters who had remained abroad due to restrictions related to COVID-19 had limited opportunities to vote, and some of them (in North Korea, Afghanistan, Kuwait, Venezuela, Peru and Chile) were deprived of the right to vote in the election.

³⁵ *Announcement of the State Electoral Commission of 7 May 2020*, the State Electoral Commission, <https://pkw.gov.pl/aktualnosci/wyjasnienia-stanowiska-komunikaty/komunikat-panstwowej-komisji-wyborczej-z-dnia-7-maja-2020-roku> (downloaded on 28.10.2023).

³⁶ Resolution No 129/2020 of the State Election Commission of 10 May 2020 on stating the lack of the possibility to vote for candidates in election of the President of the Republic of Poland. www.pkw.gov.pl (downloaded on 28.10.2023).

³⁷ A. Rakowska-Trela, *op. cit.*, p. 7.

³⁸ Order of the Marshall of the Sejm of 3 June 2020 on ordering the election of the President of the Republic of Poland (Journal of Laws, item 988).

³⁹ An interesting discussion concerning this matter is presented in M. Musiał-Karg, *Correspondence voting during Covid-19 pandemic: Experience of Polish presidential election in 2020*, 'Przegląd Prawa Konstytucyjnego' 2021 vol. 2, p. 31 and next.

The electoral campaign was one of the most intense in the history of the Polish elections since 1989. The governmental administration, together with the public media, was engaged in the campaign for the incumbent President Andrzej Duda on an unprecedented scale. In support of the incumbent president, the prime minister visited municipalities, announcing the allocation of public sources from a programme that had not then even been adopted by the parliament. The Ministry of the Interior prepared a campaign in favour of electoral attendance designed for small municipalities that offered new fire engines as prizes. The aim of the campaign was to increase the chances of the incumbent president's re-election. This situation was further corrupted by the lack of any real debate between the candidates, which would have allowed the voters to form their opinion.

Under these circumstances, the first round of the elections was held on 28 June 2020. It brought victory to the incumbent President of the Republic of Poland, Andrzej Duda, who received 43.50% of the votes. In second place was Rafał Trzaskowski, with 30.46% of the votes. As no candidate received the required absolute majority of votes, on 12 July 2020, a second round was held. Despite the even greater engagement of the government and public media, the final result of the second electoral ballot was not decided until the last moment. Both candidates exceeded the threshold of 10 million votes; however, the incumbent President Andrzej Duda received slightly more votes (51.03%) and his opponent, Rafał Trzaskowski, 48.97%. Voter turnout was even higher than in the first electoral round, at 68.9%.⁴⁰ On 27 July 2020, the SEC published a report on the election in which it stated that 'no infringements of electoral law were found which would have impacted on the result of voting and the result of the election of the President of the Republic of Poland'.

V. Hearing election protests and declaring elections valid

As already stated, the validity of the election of the President of the Republic of Poland shall be declared by the Supreme Court (Article 129(1) of the Constitution) and voters are entitled to file electoral protest against the validity of the election of the president (Article 129(2) of the Constitution). The Act of 2 June 2020 shortened this time limit to 3 days (whereas the Electoral Code provides for 14 days for filing claims) and, for declaring the validity of the election, to 21 days (whereas the Electoral Code provided for 30 days). In the Supreme Court, 5847 electoral protest were filed, which was a significantly higher number of protests compared to the 2015 elections, when only 58 electoral protests were filed. Only 92 filed protests were found to be wholly or partly justified. The main reasons for not dealing with the vast majority of these electoral protests were a failure to file the protests within the prescribed time limit, protests being filed a person who was not entitled to do so, allegations made that fell outside the scope of grounds for filing an electoral protests, and failure to provide evidence in support of a protest.

⁴⁰ Results of the presidential elections according to the SEC: <https://prezydent20200628.pkw.gov.pl/prezydent20200628/> (downloaded on 28.10.2023).

The Electoral Code provides for a two-stage mechanism to verify the validity of the election, which is carried out by the improperly formed Chamber of Extraordinary Review and Public Affairs. Firstly, single electoral protests are heard by three judges of this Chamber, and thereafter, a resolution on the validity of the election is adopted by the whole Chamber. Although the assessment reasons for a resolution concerning the validity of the election are widely determined, as they concern elections as a whole process preceding as well as accompanying the voting itself, the reasons for an electoral protest are strictly determined. This allows the Supreme Court to relativize judgments that can possibly be seen and corrected on the basis of periodic, comparative studies in jurisdiction (concerning both claim and election validity) in numerous electoral cycles. Such studies require research that correlates the assessment of electoral protests with (and based on these protests) the assessment of election validity. A comparative assessment of these correlations across different elections should then be undertaken. It is worth indicating that protest allegations may refer solely to 'crimes against elections' (there is a closed catalogue of crimes) and infringements of provisions of the Code (although this is a broad notion, it may refer solely to 'voting, determining the result of voting or the result of elections' – the final element of the whole electoral procedure), and what is more (yet another restriction when it comes to providing evidence) – the violations should 'have an impact' on the result of elections. The latter requirement, in particular, provides a significant margin of judgment to the authority assessing electoral claims.⁴¹

Secondly, the Supreme Court stated that the filed electoral protests did not affect the outcome of the election, which was the reason for the adoption of the resolution of 3 August 2020 declaring the validity of the election of Andrzej Duda to the office of the President of the Republic of Poland.⁴² The resolution of the Supreme Court did not contain detailed reasoning regarding the character of the presidential election in the context of its conformity with the Constitution and presented a characteristic lack of symmetry in terms of its analysis and assessment. In particular, it did not indicate its methods and analysis, leading to a holistic, final judgment on the validity of election, and therefore it was superficial and not based on the situation. There was no attempt to resume public reporting, nor to report on the violations of the standards of credibility of the electoral claims that the Supreme Court would consider adequate and sufficient. Nothing was even written about the allegations contained in the complaints. This created a dissonance between social expectations and the way in which electoral complaints were regulated, particularly within the framework of the mechanism for monitoring the electoral process as a whole, which is carried out by the Supreme Court.⁴³

VI. The role of social observers

⁴¹ E. Łętowska, *Electoral claims and elections validity: Question matters*, <http://konstytucyjny.pl/protesty-wyborcze-a-waznosc-wyborow-znaki-zapytania/> (downloaded on 28.10.2023).

⁴² See: Resolution of 3 August 2020, case file No. I NSW 5890/20 (Journal of Laws, item 1335).

⁴³ Ibid.

Various forms of monitoring of the election were significant from the point of view of the correctness of the conduct of the elections. According to the Electoral Code, there are three types of monitoring: 1) political monitoring (a trustee); 2) international monitoring (foreign observer); and 3) social monitoring (social observer). Social monitoring, introduced by means of the Act of 2018⁴⁴, was the most popular in the presidential elections in 2020. Despite the increase in COVID-19 infections, many organisations (associations and foundations) whose statutory objectives include concern for democracy, civil rights and the development of civil society delegated social observers to the electoral commissions.

The observers had the right to be present at all the activities of the commission to which they were assigned, including the monitoring of the preparation of the polling station for voting, the work of the commission to determine the result of the voting and to draw up the voting protocol, the transfer of data from the protocol together with the protocol by a circuit electoral commission to a commission of higher rank, and the monitoring of the input of data into the network for electronic data transfer. Social observers could record all the activities of the circuit electoral commissions using their own radio or video tools. These materials could then be considered electoral documents⁴⁵ and could therefore be sent to state archives for at least 5 years and disclosed as archive material.

VII. Permissible limitations on the right to vote and to stand as a candidate in presidential elections

The right to vote in presidential elections is guaranteed to all Polish citizens who are over 18 on the day of the vote and are not deprived of public and electoral rights or legal capacity (Article 62 of the Constitution). In turn, the right to stand for election to the office of the President of the Republic of Poland is vested in Polish citizens who, no later than the day of the elections, have reached 35 years of age and have full electoral rights to the Sejm (Article 127(3) of the Constitution). Participation in elections, both as a voter and as a candidate, may involve the exercise of other constitutional rights and freedoms, such as the freedom of assembly, freedom of speech, the right to public information or the right to a fair trial. Any restriction of these rights and freedoms may translate directly into a restriction of electoral rights. On the other hand, however, the restriction of electoral rights may also limit the possibility of exercising the said other rights and freedoms.

Electoral rights, like any other constitutional rights, are not of an absolute nature and may be subject to limitations under the conditions laid down in Article 31(3) of the Constitution. It follows from this provision that limitations to the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, for the protection of

⁴⁴ See: The Act of 11 January 2018 on amending some other acts in order to increase participation of citizens in the process of elections, operations as well as controlling some public authorities (Journal of Laws, item 130).

⁴⁵ See: Article 8 of the Electoral Code.

the environment, health and public morals, or for the freedoms and rights of other persons, and that such limitations may not infringe upon the essence of freedoms and rights. Article 31(3) of the Constitution sets out the conditions for the restriction of the constitutional rights and freedoms of the individual that are in force during the normal functioning of the state. However, these conditions are formulated in a slightly different way in the event that limitations on the rights and freedoms of the individual are to be introduced during a state of natural disaster or a state of emergency. In accordance with Article 228(5) of the Constitution, all state activities undertaken as a result of the introduction of emergency measures, including activities consisting of restrictions of individual rights and freedoms, must correspond to the degree of threat and should aim to restore the normal functioning of the state as soon as possible. The fundamental difference between the two regimes of the restriction of individual rights and freedoms under Articles 31(3) and 228(5) of the Constitution lies in the fact that firstly, during the normal functioning of the state, the essence of constitutional rights and freedoms may not be violated, and secondly, from among the various possible restrictions of individual rights and freedoms useful to achieve the intended purpose, those that are the least onerous should be selected, rather than those that are the most effective. In turn, during a period of emergency measures, different principles apply; that is, the prohibition to infringe on the essence of constitutional rights and freedoms applies only to certain rights and freedoms indicated in Article 233 of the Constitution, which, however, do not include electoral rights. The latter may therefore not be restricted during a period of emergency measures, either. The afore-mentioned Article 228(5) of the Constitution, however, allows for the introduction of far-reaching limitations to the rights and freedoms of the individual, including electoral rights, in the event of the introduction of emergency measures, provided that such limitations correspond to the degree of threat and are useful for the quickest possible restoration of the normal functioning of the state.

In conclusion, it should be noted that the electoral rights of citizens in Poland may not be suspended either during the normal functioning of the State (this prohibition follows from Article 31(3) of the Constitution) or during a state of emergency or a state of natural disaster (which follows from Article 233(1) and (3) of the Constitution). Where constitutional emergency measures have not been introduced, these rights may be restricted only under the conditions set out in Article 31(3) of the Constitution. Pursuant to this provision, limitations require to be in statutory form and may be introduced when it is necessary for the protection of the security of the state or its public order, or to protect the environment, health and public morality, or the freedoms and rights of other persons. Any such restriction should be made with due respect to the principle of proportionality and the standards of a democratic state.

VIII. Voting right restrictions under the COVID-19 pandemic

When assessing the constitutionality of restrictions on electoral rights introduced during the COVID-19 pandemic, one should take into account both those restrictions that directly concerned electoral rights and those that concerned other rights and freedoms of the individual, indirectly limiting the possibility of exercising an active or passive

electoral right. Such restrictions related primarily to the manner in which the presidential elections scheduled for 10 May 2020 were organised, their subsequent cancellation and the holding of those elections in two rounds in June/July 2020 under conditions of the pandemic and the related restrictions on other individual rights and freedoms.

The elections on 10 May 2020, as mentioned earlier, were to be held only by postal vote, which was determined by a law passed a month earlier and entered into force just before the elections. Depriving citizens of the opportunity to vote in the traditional way, that is, at the polling station, raised serious constitutional doubts. Although the right to vote in person at a polling station is not expressly guaranteed by the Constitution of the Republic of Poland, in a democratic state, traditional voting is undoubtedly the basic form of voting, while voting by post is a non-traditional and additional form. Leaving the latter form as the only one may discourage many voters who are not convinced about participating in elections through postal voting. Moreover, postal voting was not possible for the majority of voters outside the country, which deprived them of the possibility of exercising their constitutionally guaranteed right to vote. It should also not be overlooked that postal voting was to take place in a situation of restrictive limitations on the ability of voters to exercise many other individual rights and freedoms, which were introduced in connection with the COVID-19 epidemic. The ban on travelling without a legitimate reason and the ban on organising meetings, visits and rallies, which was in force at that time, meant that there was no possibility of running the election campaign in any other way than via the Internet. The only candidate who was able to meet with voters in the then-pandemic reality was the incumbent President Andrzej Duda, who was running for re-election. Due to his office and duties, he had to travel around the country and meet people fighting the epidemic or those affected by its effects. Other candidates were banned from organising and attending such electoral meetings. This situation contradicted the principle of equal opportunities for candidates for the office of president, which is one of the three aspects of the principle of the equality of elections.

Serious doubts were also raised by the fact that the law introducing postal voting as the only possible option was adopted at a rapid pace, within one day, without public consultations, and that the new voting rules were to be applied during the ongoing electoral process.⁴⁶ This law entrusted the organisation of elections to the Minister of State Assets, who was also Deputy Prime Minister in the government formed by the political party whose candidate (Andrzej Duda) was running in this election. In other words, the elections were to be organised by those who were most interested in their outcome. In addition, the SEC was stripped of its powers to organise elections and supervise their conduct, that is, the body appointed to oversee the fairness and integrity of the electoral process. This body had previously been politicised as a result of the above-mentioned change in the way its members were selected. The election packages were to

⁴⁶ The Act on special rules for conducting general elections for the President of the Republic of Poland, ordered in 2020 (print 328), was submitted to the Sejm on 6 April 2020 and, on that day, it was passed by the Sejm by a government majority and sent to the Senate, in which the opposition had a majority. The Senate, in its position of 5 May 2020, called for a rejection of the law. However, the Sejm, at its session on 7 May 2020, rejected the Senate's resolution. The following day, the law was signed by the president, and was published and entered into force on 9 May 2020, that is, one day before the scheduled election date.

be collected by an institution subordinate to the minister, that is, the Polish Post Office, to which the minister made the personal data of all voters available for this purpose. This also raised serious doubts, as Article 51 of the Constitution guarantees citizens the protection of their personal data, and the minister had no legal basis to hand over the voters' personal data in his possession to the Polish Post.⁴⁷ The same minister also ordered the printing of ballot papers before parliament had completed the law that would have given him the authority to do so. These ballots were then destroyed after the elections were cancelled, exposing the State Treasury to enormous costs.⁴⁸

This way of organising the presidential elections gave rise to serious doubts about their reliability and fairness, which was repeatedly flagged up by the Ombudsman.⁴⁹ Doubts were also raised due to the fact that many issues of importance to citizens concerning the conduct of postal voting, such as the manner and procedure for delivering election packages to electors subject to compulsory quarantine or isolation on voting day, were to be regulated by the minister. Such a solution was incompatible with the requirement of the purely statutory interference of the state in the sphere of individual rights and freedoms.

Eventually, as mentioned earlier, the elections were cancelled following an agreement between the political leaders of the two ruling parties. The decision to cancel the elections had no constitutional or statutory basis. Nor did it find expression in any formal act of cancelling the elections.⁵⁰ In other words, the presidential elections were not held, despite the fact that the law does not provide for a procedure for cancelling elections that have already been ordered or for abandoning them. The cancellation of elections by politicians of the ruling party was tantamount to depriving citizens of the possibility of exercising their constitutionally guaranteed electoral rights. Such far-reaching interference in the sphere of electoral rights was contrary to Article 31(3) of the Constitution. In fact, the cancellation of the elections meant a ban on citizens' participation in the elections that had already been ordered, or – looking at the situation from a different perspective – a failure on the part of the State to fulfil its obligation to hold elections as a precondition for citizens' ability to exercise their electoral rights. It should be added that holding presidential elections under the then-pandemic conditions was very difficult, which should have prompted those in power to introduce emergency measures justifying the postponement of these elections and an extension of the term of office of the incumbent president.

⁴⁷ See the Judgment of the Voivodship Administrative Court in Warsaw of 26.02.2021, case file No. IV SA/Wa 1817/2020, confirming the illegality of the Minister's actions.

⁴⁸ See the Supreme Audit Office report on the so-called envelope elections of April 2021, available at: <https://www.nik.gov.pl/kontrola/D/20/502/> (downloaded on 28.10.2023).

⁴⁹ See, for example, the Ombudsman's address to the Minister of State Assets of 24.04.2020 (VII.602.9.2020): <https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-pyta-jacka-sasina-o-rozporzadzenia-wyborcze> (downloaded on 28.10.2023).

⁵⁰ In Resolution No 129/2020, it found that in the election of the President of the Republic, ordered for 10 May 2020, it was not possible to vote for candidates, which is equivalent, in effect, to the failure to vote provided for in the Electoral Code due to the absence of candidates.

Following the cancellation of the presidential elections, the Electoral Code was amended, reinstating the possibility of voting by traditional means and preserving the possibility of voting by post. However, the re-run presidential election on 28 June 2020 also saw a number of violations of the electoral rights of both candidates and voters. Public television and the government administration were involved in the election campaign of the ruling party's candidate on an unprecedented scale. As part of this campaign, the prime minister visited more than 80 cities, urging people to vote for the incumbent president and promising municipalities public funds from a programme that had not even been adopted by parliament. In turn, during the election campaign, public television – as the Office for Democratic Institutions and Human Rights (OSCE) stated in its final report on the observation of the presidential election – 'failed to meet its legal obligation to provide balanced and impartial coverage. Instead, the TVP played an instrumental role in the election campaign of the incumbent president, often portraying his main rival as a threat to Polish values and state interests. At times, the broadcast had xenophobic and anti-Semitic overtones.'⁵¹

For all these reasons, there are serious doubts about whether the 2020 presidential election held during the COVID-19 outbreak was fair and democratic.

IX. Conclusions

The above findings lead to the following conclusions:

- a) Constitutional emergency measures were not imposed in Poland during the COVID-19 outbreak because those in power wished to circumvent the prohibition on holding universal elections during a state of emergency or a state of natural disaster,
- b) The failure to impose constitutional emergency measures allowed those in power to change the electoral law and hold elections for the office of president, which ultimately led to the re-election of the ruling party's candidate for the office, Andrzej Duda,
- c) The presidential election, which had been scheduled for 10 May 2022, was cancelled (and not postponed), even though the fact that the applicable legislation did not provide for the possibility of cancellation (postponement),
- d) The cancellation of the elections was preceded by the removal of the power to organise them from the SEC and the transfer of this power to the Minister for State Assets, which involved the violation of a number of provisions of electoral law,
- e) The cancellation of the elections that had already been ordered constituted a violation of the electoral rights of voters and candidates for the office of the President of the Republic of Poland.
- f) During the presidential elections in the June/July 2020 there were a number of irregularities that may constitute the violations of the electoral rights of candidates and voters,

⁵¹ See the final report from the ODIHR Special Election Assessment Mission of 23 September 2020, at: <https://www.osce.org/files/f/documents/6/2/464601.pdf> (downloaded on 28.10.2023).

- g) The adopted model for verifying the correctness of the elections, including the narrow inclusion of grounds for lodging election protests and the broad inclusion of grounds for the validity of the whole election, turned out to be inadequate in regard to the existing factual and legal circumstances,
- h) The COVID-19 epidemic was clearly used by those in power to push through the election of their candidate seeking re-election (i.e., Andrzej Duda), which was made possible to some extent by the government's 'reform' of both the SEC and the Supreme Court.

Daniel Krošlák¹ – Tomáš Gábriš:²
Electoral system and COVID-19 pandemics in the Slovak Republic*

I. Introduction

Slovak Republic and its government reacted to the COVID-19 pandemics by proclaiming an extraordinary situation as early as on March 11, 2020, subsequently introducing a state of emergency by a government resolution on September 30, 2020. While the extraordinary situation related to pandemics was in force until September 15, 2023, allowing for some economic measures, the state of emergency definitely terminated earlier – on May 14, 2022. It was proclaimed mostly in order to be able to force the health workers to perform their duties, not allowing them to terminate their employment during the state of emergency. These concerns were solved by introducing an amendment to the Act on economic mobilization, which allows to meet the same goals without introducing the state of emergency. Of course, many other important measures were introduced to mitigate the risks of spreading the pandemics, by prohibiting assemblies, forcing citizens to wear facemasks, and by completely shutting down the economy of the Republic – closing all shops and service providers in the country, limiting their economic activities on online and at-distance provision of goods and services.

The whole period of COVID-19 pandemics was hence marked with important interferences in fundamental rights, mostly performed via binding ordinances of the Public Health Authority, which was entrusted the task to coordinate the fight against pandemics. The legality and constitutionality of the measures was subsequently confirmed by the Constitutional Court of the Slovak Republic, hence the measures themselves are now considered to have been appropriate.

The measures introduced during the pandemics thereby mostly concerned limitation of basic human rights and freedoms, and in fact exerted far lesser influence on the government and on the parliament of the Slovak Republic. These bodies continued to fulfil their duties and continued their activities in a standard manner even during the pandemics, and no major obstacle arose in their performance of duties.

Interestingly, no general elections were taking place in Slovakia in the years 2020-2022 on a nation-wide level – only some interim elections on local levels of municipalities took place. Therefore, no special legislation was necessary to cope with the pandemics and electoral rights. Still, an explicit obstacle to electoral rights was introduced by an amendment to the respective Act of the Parliament, which allowed to deprive of electoral rights those who were in quarantine. These obstacles were in practice not widely used, given the limited scope of interim elections on municipal level only.

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However, in 2022, nation-wide elections were planned to take place in Autumn, combining elections to municipalities and regional bodies, which indeed required a new legislation, taking into account potential problems with quarantine and connected deprivation of the people of their right to vote – which was no longer perceived a viable solution. Therefore, new legislation was introduced on possibilities to exert the right to vote from home, using a special ballot box transported by a special electoral commission formed for those who report to the municipality their quarantine and express their wish to vote even while in quarantine. Hence, a solution was proposed to allow the exercise of the right to vote even to people who were confined in quarantine during the Autumn 2022 elections.

However, before introducing this specific piece of legislation, the general framework of the electoral system in Slovakia needs to be addressed first, to be able to point to potential risks of the newly introduced electoral measures, which might have been easily abused, and also made inefficient in case the numbers of people in quarantine would rise substantially.

II. Development of the electoral system in the territory of Slovakia since 1989

After the fall of the former communist regime in 1989, there was an evident demand to change the existing electoral system in Slovakia. The elections served only as a means of manifesting the status of the ruling Communist Party during the pre-November period. Their statement about the state of public opinion at the time was zero, as evidenced by the election results of the Communist Party at the level of more than 99.9 %.³ Moreover, the old electoral system with a majoritarian character did not meet the demands of new parties and the public in the post-November period.

Therefore, a new Act No. 80/1990 Coll. on elections to the Slovak National Council was adopted immediately in the first phase of the transformation of the legal order. On the basis of this, a documentary proportional electoral system was introduced for the elections to the National Council of the Slovak Republic (since 1993).⁴ A 3 % clause was set to enter parliament, with no increase for potential coalitions. The state territory was

³ Spáč, P., *Priama a zastupiteľská demokracia na Slovensku. (Direct and representative democracy in Slovakia.)* Brno: CDK, 2010, 46.

⁴ The voting system is one of the most common. Among its basic features are:

- a) elections are held in a multi-mandate constituency/multi-mandate constituency;
- b) political parties (or coalitions) draw up mass lists on which candidates are ranked in the order determined by the political party;
- c) voters primarily vote for political parties, not their candidates (this then partially corrects the so-called “priority vote”)
- d) mandates shall be allocated to political parties according to the proportion of votes obtained in the elections;
- e) within political parties, mandates are usually allocated to candidates in the order in which they appear on the list (except for the occupation of mandates on the basis of priority votes).

See for more details Orosz, L. — Molek, P. — Svák, J. — Šimíček, V., *Volebné právo a súdny prieskum volieb v Českej republike a v Slovenskej republike. (Electoral law and judicial review of elections in the Czech Republic and the Slovak Republic.)* Bratislava: C. H. Beck, 2016, 168 et seq.

divided into four constituencies, which were equivalent with the existing regional divisions (Bratislava, West Slovakia, Central Slovakia and East Slovakia). The number of mandates for each district or county was not fixed, but depended on the number of votes cast in the elections.⁵

For the 1992 parliamentary elections, the electoral law made relatively significant adjustments. This is especially true of smaller political parties. Compared to the previous period, the closure clause was increased to 5 % and was also graduated for candidate coalitions. A level of 7 % was set for two- and three- members, up to 10 % for four or more members. In the following period, its form remained essentially preserved, with only slight and rather formal adjustments for the subsequent 1994 elections.⁶

Fundamental changes to the electoral system then took place before the 1998 elections, when the decreasing preferences of the previously governing political parties (the Movement for Democratic Slovakia, the Slovak National Party, the Association of Workers of Slovakia) prompted them “*to use the attribute of parliamentary elections in a purposeful way to maintain its position.*”⁷ The amendment of the Electoral Act, adopted shortly before the elections, amended and re-adapted the main contours of the electoral framework:

- a) The previous division into four electoral regions was abolished and replaced by the introduction of a single constituency in which all 150 members of the National Council of the Slovak Republic were elected.
- b) Although the 5 % closure clause was retained, it was extended to every member of the candidate coalition, which meant their de facto elimination.⁸
- c) The election campaign could only be conducted in public media (with strong government influence, or the Movement for Democratic Slovakia influence), private media were excluded from this process.
- d) The structure of electoral bodies with the superior status of the state administration has been reorganised at the expense of the self-government.⁹

Despite these changes, opposition parties succeeded in the 1998 election, and from them the new government pushed for a change in the rules for coalitions, with a reinstatement of 7 % and 10 % percent depending on the number of their members. On the contrary, one constituency remained until now. Neither the subsequent Electoral Act No. 333/2004 Coll. nor the current Electoral Code 180/2014 Coll. did change the situation.

⁵ Ibid., 47.

⁶ Ibid., 47.

⁷ Ibid., 48.

⁸ This particular modification was an apparent attack on the electoral coalition of opposition parties, which was formed under the name Slovak Democratic Coalition (formed by the Democratic Union, the Christian Democratic Movement, the Democratic Party, the Social Democratic Party of Slovakia and the Green Party). Following this change, these parties were forced to “transform” from a coalition to a political party with the same name and exclusive membership. At that time, only 150 candidates became members of the SDC.

⁹ Ibid.

III. Valid regulation of the exercise of the right to vote in the Slovak Republic¹⁰

The basic line of electoral law in the Slovak Republic can be inferred from the organic link between the provisions of Article 1(1), Article 2(1) and Article 30 of the Slovak Constitution. However, the right to vote is regulated in detail and systematically only at the statutory level, namely Act No. 180/2014 Coll. on conditions for the exercise of the right to vote and Act No. 181/2014 Coll. on Electoral Campaign.

Act No 180/2014 on the conditions for the exercise of the right to vote codified the regulation of individual types of elections and national referendums, previously scattered into several legislations (these are elections to the National Council of the Slovak Republic, elections to the European Parliament, elections of the President of the Slovak Republic, popular vote on the dismissal of the President of the Slovak Republic, elections to local self-government bodies and a referendum promulgated pursuant to Articles 93 to 100 of the Constitution).¹¹

In the conditions of the Slovak Republic, constituencies and their boundaries in elections to the National Council of the Slovak Republic, elections to the European Parliament, the election of the President and the election of the President of the Self-Governing Region and the mayor of the municipality are established *ex lege*. The Act on the Conditions for the Exercise of the Right to Vote provides for one multi-mandate district covering the entire territory of the Slovak Republic for elections to the National Council of the Slovak Republic and for elections to the European Parliament. One single district is provided also for the election of the President (it includes the whole territory of the Slovak Republic), for the election of the president of the self-governing region (it includes the whole territory of the self-governing region) and for the election of the mayor (it includes the territory of the whole municipality).

Multi-mandate constituencies are formed for the election of representatives of self-governing regions assemblies and municipal councils. The power to establish constituencies and to determine their boundaries, as well as the number of mandates within them, is conferred on the local authorities or municipal councils, which must apply it within the time limit specified in the decision to declare elections (see Sections 134 and 166 of Act No 180/2014).

As regards electoral districts, the principles for their formation are established uniformly for all types of elections. The formation of electoral districts and the designation of polling stations are entrusted to the mayors of municipalities within the time limits set by the decision to declare elections. The Act stipulates that the electoral district should be

¹⁰ This part conceptually and content is largely based on the processing of valid electoral rights in the publication Orosz, L. — Molek, P. — Svák, J. — Šimíček, V., *Electoral law and judicial review of elections in the Czech Republic and the Slovak Republic*. Bratislava: C. H. Beck, 2016, 294 et seq.

¹¹ According to the explanatory memorandum to the draft law, the reasons for such unification were the legislator's different approach in the regulation of electoral institutes, terminological inconsistencies, differences in procedures and the need for guarantees of legality and democratic principles in the exercise of the right to vote.

constituted in such a way as to include, as a rule, 1000 voters (see further Section 8 of Act No 180/2014).

III.1 Active and passive suffrage

It can be inferred from the provisions contained in the special sections of the Act on the conditions for the exercise of the right to vote in conjunction with its general provisions as well as from the relevant provisions of the Slovak Constitution that active suffrage (right to vote) is reserved to:

- citizens of the Slovak Republic who reach the age of 18 at the latest on the day of the elections (Sections 3, 42 and 98 of the Act) to the National Council of the Slovak Republic and at the time of the election of the President;
- citizens of the Slovak Republic who have permanent residence in the territory of the Slovak Republic, as well as citizens of another Member State of the European Union who have permanent residence in the territory of the Slovak Republic and also citizens of the Slovak Republic who do not have permanent residence in the territory of the Slovak Republic or in the territory of another Member State of the European Union if they reside in the Slovak Republic on the day of the elections (Sections 3 and 72 of the Act);
- citizens of the Slovak Republic and foreigners who have permanent residence in a municipality belonging to the territory of the self-governing region or have permanent residence in a military district, which belongs to region for the purposes of elections to the organs of the self-governing region (Sections 3 and 131 of the Act in conjunction with Article 30 (1) and Article 69 (4) and (5) of the Constitution of the Slovak Republic);
- the municipalities residents (citizens and foreigners) who have permanent residence in the municipality (Sections 3 and 163 of the Act in conjunction with Article 30(1) and Article 69(2) and (3) of the Slovak Constitution).

It can be inferred from the provisions contained in specific parts of the Act on the Conditions for the Exercise of the Right to Vote in conjunction with the relevant provisions of Constitution, that passive suffrage (right to stand as a candidate) is reserved to:

- citizens of the Slovak Republic who are 21 years old at the latest and have permanent residence in the territory of the Slovak Republic (Article 74(2) of the Constitution and Section 43 of the Act), with regard to elections to the National Council of the Slovak Republic
- as regards elections of the President of the Slovak Republic, citizens of the Slovak Republic who are eligible to the National Council of the Slovak Republic and have reached the age of 40 on the date of election (Article 103(1) of the Constitution of the Slovak Republic),
- as regards elections of a Member of the European Parliament, citizens of the Slovak Republic who reached the age of 21 at the latest on the date of the elections, as well as citizens of another Member State who reached the age of 21 at the latest on the date of the elections and have not been deprived of the right to vote in a Member State of the European Union of which they are nationals (Section 73 of the Act),

- as regards elections of a member of the council of the self-governing region, residents of the self-governing region (citizens and foreigners) who have permanent residence in the municipality or military district, which belongs to the territory of the constituency in which they stand, and reach the age of 18 at the latest on the day of the elections (Article 30 (1) of the Constitution of the Slovak Republic and Section 132 of the Act),
- as regards elections of the president of the self-governing region, residents of the self-governing region (citizens and foreigners) who are 25 years old at the latest on the day of the elections (Article 30(1) of the Constitution of the Slovak Republic and Section 133 of the Act),
- as regards elections of a member of the municipal council, residents of the municipality (citizens and foreigners) who have permanent residence in the municipality in which they stand and reach 18 years of age at the latest on the day of the elections (Article 30(1) of the Constitution of the Slovak Republic in conjunction with Section 164 of the Act),
- as regards elections of a mayor of the municipality, the inhabitants of the municipality (citizens and foreigners) who have permanent residence in the municipality and reach the age of 25 at the latest on the date of the elections and fulfil “... *the conditions for the performance of the office of mayor in accordance with a special regulation*” (Article 30 (1) of the Constitution of the Slovak Republic in conjunction with Section 165 of the Act).

III.2 Obstacles to the exercise of the right to vote

Pursuant to Section 4 of Act No 180/2014, an obstacle to the right to vote is:

- a) the restriction of personal freedom provided for by law on grounds of public health protection (meaning specifically the quarantine imposed due to COVID-19 pandemics);
- b) execution of a custodial sentence imposed for committing a particularly serious crime;
- c) limitation of legal capacity.

The law also provides for three obstacles to the right to stand as a candidate (Section 6):

- a) execution of a custodial sentence,
- b) a final conviction for an intentional offence if the conviction has not been extinguished;
- c) limitation of legal capacity.

III.3. Proclamation of elections

The promulgation of elections represents the first stage of the electoral process, followed by further steps and procedures in a logical sequence. In accordance with Article 89(2) (d) of the Constitution of the Slovak Republic, the Act on the Conditions for the Exercise of the Right to Vote, law confers the power to declare all types of elections to the President of the National Council of the Slovak Republic.

The Act uniformly lays down the requirement that elections to the National Council of the Slovak Republic, elections to the European Parliament and elections to local self-

government bodies should be declared at least 110 days before the date of their holding. However, such an adjustment does not apply in relation to the election of the President, which the President of the National Council of the Slovak Republic must declare pursuant to Section 106(1) of the Act at the latest 55 days before the day of their holding.

Section 20(2) of the Act on the conditions for the exercise of the right to vote also lays down what the decision to declare the elections must contain (in particular, the date of the election, the time limit for the formation of the precincts and the designation of the rooms, the deadline for the formation and the meeting of the electoral commissions) and the fact that, for all types of elections, it is uniformly determined that the elections are held on Saturday between 7 a.m. and 10 p.m., whereas the mayor of the municipality is entitled, in view of local conditions, to determine the start of the vote differently, at a maximum difference of two hours (Section 20(3)). The decision on the declaration is published in the Collection of Laws of the Slovak Republic (Section 20(1)).

III.4. Registration of voters

For the correct conduct of elections, it is necessary to have a set of specific natural persons (authorised voters) who have (or will have) active electoral rights at the time of the elections. To this end, voter registration is carried out, resulting in a list of voters containing basic data on each eligible voter. Only a natural person on the electoral roll is entitled to vote (subject to the exceptions listed below). A voter can only be enrolled on one voter list to ensure that he is unable to vote several times in the same elections. From that point of view, it can therefore be concluded that the institute of electoral lists is one of the key organisational and legal means by which, on the one hand, universality and, on the other, equality of the right to vote are guaranteed.¹²

The Act on the conditions for the exercise of the right to vote distinguishes *ex officio* registration (*ex officio* are registered those voters who have permanent residence in the Slovak Republic) and voluntary registration, which applies to voters who do not have permanent residence in the territory of the Slovak Republic and, for the purposes of elections to the European Parliament, also to citizens of the Member States of the European Union who have permanent residence in the territory of the Slovak Republic:

- *Ex officio* registration is entrusted to municipalities which, of their own motion, draw up and maintain the so-called permanent electoral register, according to the rules laid down in Section 9 of the Act on the Conditions of Exercise of Electoral Rights.
- As far as voluntary registration is concerned, these voters may, on their own initiative, i.e. voluntarily, register for the purposes of elections to the National Council of the Slovak Republic. Pursuant to Section 45 of the Act, the Ministry of the Interior of the Slovak Republic is tasked with drawing up and maintaining a so-called special electoral register, which includes citizens of the Slovak Republic who do not have a permanent residence in the territory of the Slovak Republic and who have submitted an application for elections by post (such an application can be submitted in paper or electronic form, and

¹² Orosz, L. — Molek, P. — Svák, J. — Šimíček, V., *Electoral law and judicial review of elections in the Czech Republic and the Slovak Republic*. Bratislava: C. H. Beck, 2016, 301.

must be delivered to the Ministry of the Interior no later than 50 days before the date of the election and must contain the data provided for by law). Voluntary registration is provided for also in the context of elections to the European Parliament. For the purposes of elections to the European Parliament, citizens of Member States of the European Union who have permanent residence in Slovakia may register voluntarily. Specific rules (Section 75) are laid down in the Act for the establishment of a list of voters for the purposes of elections to the European Parliament, precisely because citizens of other EU Member States who reside in the relevant municipality in the territory of the Slovak Republic have the right to be included in this list. Citizens of other EU Member States must apply for entry on the electoral roll no later than 40 days before the election day (otherwise, their right to enrol on the electoral roll expires). The application for entry on the electoral roll must contain the data laid down by law, which includes a statement that the voter will exercise his right to vote only in the territory of the Slovak Republic and that he has not been deprived of the right to vote in the EU Member State of which he is a national.

III.5. Drafting and registration of lists and candidates

The drafting and registration of lists and candidates is one of the most important stages of the electoral process. It is crucial from a political point of view, as it will definitively outline the circle of candidates who will wage a political struggle for citizens' votes in elections.¹³

1. As regards elections to the National Council of the Slovak Republic, Sections 50 to 54 of the Act on the Conditions of Exercise of Electoral Rights provide that only political parties and political movements may submit candidate lists, no later than 90 days before the election date. Political parties may also form a coalition for election purposes and submit a joint list of candidates. The candidate list must contain:

- the name of the political party or the names of the political parties forming the coalition;
- a list of candidates containing the first name, surname, title, date of birth, job of the candidate at the time of submission of the candidate's list, address of permanent residence of the candidate and ranking on the list expressed in Arabic number for all candidates,
- the first name, surname, function, signature of the person authorised to act on behalf of the political party and the stamp of the political party; in the case of a coalition, the name, surname, office, signature of the person authorised to act on behalf of each political party forming the coalition and the stamp of each political party forming the coalition.

The candidate list must be accompanied by:

- a self-signed declaration by each candidate appearing on the list that he/she agrees to his/her candidacy, does not stand as candidate on another list and has no impediment to the right to stand as a candidate;

¹³ Ibid.

- confirmation of payment of the electoral deposit of EUR 17 000;¹⁴
- notification of the designation of a proxy for a political party or coalition and its alternate, indicating the name, surname and address at which documents may be served; a candidate cannot be a proxy for a political party or coalition or a substitute for him.

No more than 150 candidates may be listed by a political party or coalition on the list. At the same time, a political party may indicate its graphic emblem; the coalition's nominee list may indicate the emblems of the political parties forming the coalition. After submission of the candidate list, it is not possible to supplement it with other candidates or to change their ranking.

The submitted lists shall be reviewed by the National Commission no later than 80 days before the date of the election and it shall decide not later than 70 days before the date of the election, to:

- a) register candidate lists that are in accordance with the law,
- b) register candidate lists that have been modified according to the requirements of the law (e.g. removes from it candidates who do not comply with the statutory conditions of candidacy), or
- c) refuse to register a candidate list.

2. The conditions for drawing up and registering lists of candidates for elections to the European Parliament are essentially the same as in the case of elections to the National Council of the Slovak Republic. Of the differences, it is perhaps worth noting only that on the candidate list, political parties and their coalitions can propose, in addition to Slovak citizens, also citizens of other EU Member States who have permanent residence in the territory of the Slovak Republic, as well as the amount of the electoral deposit, which was set at EUR 700.

3. In relation to the nomination and registration of candidates for the election of the President of the Slovak Republic, the legal regulation and the terminology of the Act are different from those of other types of elections, which may be partly related to the fact that certain questions of nomination for the election of the President are regulated directly in the Constitution of the Slovak Republic.

4. As regards the election of deputies of municipal councils, the Act (Sections 139 to 142) grants the right to propose candidates to political parties, which may also submit a joint list of candidates (in this regard, the law requires that if members of the council are elected in two or more constituencies, the political party must act in the same way in all of them, i.e. either submit a candidate list in constituencies individually or in a coalition

¹⁴ The electoral deposit shall be paid into account set up for this purpose by the Ministry of the Interior; this account number will be published by the Ministry of Interior on its website. The Ministry of Interior shall return the bail paid within one month of the announcement of the outcome of the election to a political party or coalition whose candidate list has not been registered, or to a political party or coalition that received at least two percent of the total number of valid votes cast. Bails that are not returned are revenue of the state budget.

with the same political party or parties as in other constituencies). Independent candidates who must attach a special list signed by 400 voters who support their candidacy and reside in a municipality or military district belonging to the territory of the constituency in which they stand. Candidates for representatives of self-governing regions must have permanent residence in a municipality or military district belonging to the territory of the constituency in which they stand. Candidates' lists shall be submitted no later than 55 days before the date of the election, to the Registrar of the Election Commission of the Self-Governing Region that presents them to the electoral commission of the self-governing region. The Electoral Commission of the Self-Governing Region shall examine the lists of candidates and shall decide not to register or register the candidate no later than 45 days before the date of the election.

The process of proposing and registering candidates for the election of presidents of self-governing regions is in principle regulated by analogy (Sections 144-147), i.e. candidates can be submitted by political parties (which may also submit a joint list) and independent candidates no later than 55 days before the date of the election to the recorder of the electoral commission of the self-governing region. The law lays down the particulars of the lists of candidates, in which the candidate list of each independent candidate must include a special list signed by 1000 voters of the self-governing region who support his candidacy. The candidate for president of the self-governing region must have permanent residence in the municipality or military district belonging to the territorial district of the self-governing region in which he stands. The law does not prevent a candidate for the president of a self-governing region from running for a member of the council. The recorder of the electoral commission of the self-governing region shall submit the candidate lists to the electoral commission of the self-governing region, which shall examine them and decide not to register or to register the candidates no later than 45 days before the date of the election.

5. The rules governing the nomination and registration of candidates for elections to municipal bodies, that is to say, for the election of municipal councillors and mayors, are comparable to those applicable to elections to the bodies of self-governing regions (Sections 171 to 179), i.e. nominations of candidates for municipal and mayor elections may be submitted by the political parties and their coalitions, as well as independent candidates no later than 55 days before the date of the election to the Registrar of the Local Electoral Commission. Independent candidates are obliged to attach to the candidate list a special document signed by voters who support their candidacy and have permanent residence in the municipality in which the independent candidate stands. The number of necessary signatures, depending on the size of the municipality, is specified in Annex 1 to the Act. Candidates must be permanent residents in the municipality or village. The candidate for mayor may also stand as a candidate for a member of the council. The recorder of the local electoral commission shall submit the candidate lists to the local electoral commission for examination and registration. No later than 45 days before the date of the election, the Local Electoral Commission shall decide whether or not to register candidates.

III.6. The Electoral Authorities

In the context of the organisation and management of elections, electoral commissions shall fulfil an irreplaceable task. The Law on the conditions for the exercise of the right to vote presupposes, for all types of elections, the establishment of district electoral commissions, and for the purposes of the elections of the authorities of the self-governing region, the establishment of electoral commissions of self-governing regions and district electoral commissions and, for the purposes of the elections of municipal self-government bodies, the establishment of local or city commissions (hereinafter referred to as 'lower-level election commissions'). The supreme authority for all types of elections is the State Commission for Elections and Control of Political Party Financing. In addition to the electoral commissions, the Act also designates as electoral bodies a) the Ministry of the Interior of the Slovak Republic, b) the Statistical Office of the Slovak Republic, c) district offices, d) self-governing regions and e) municipalities.

Among these bodies, the State Commission for Elections and Control of Political Party Financing plays a key role. It is an independent body for controlling the financing of political parties and political movements, managing elections and determining the results of elections. The State Commission has 14 members, of whom 10 delegates are appointed by political parties that received representation in the National Council of the Slovak Republic in the last elections, in proportion to the number of parliamentary mandates obtained. The number of members of the State Commission delegated by the political parties that formed the government must be equal to the number of members of the State Commission delegated by other political parties represented in the National Council of the Slovak Republic. This equality (5+ 5) must be maintained throughout the term of office of the State Commission. One member of the State Commission is delegated by the President of the Constitutional Court, the President of the Supreme Court of the Slovak Republic, the Prosecutor General and the President of the Supreme Audit Office of the Slovak Republic.

A member of the State Commission can only be a citizen of the Slovak Republic who has permanent residence in the territory of the Slovak Republic, has not been convicted of a criminal offence, has full legal capacity, has a university degree of second degree and has reached the age of at least 35 years. The same person may become a member of the State Commission for a maximum of two consecutive terms. Section 14 of the Act on the conditions for exercising the right to vote also provides for the incompatibility of the function of a member of the State Commission with other public functions.

Under Paragraph 16(1) of the Act on the conditions for the exercise of the right to vote, the State Commission is entrusted with a broad remit, which is specified in other provisions of that law, as well as in the Electoral Campaign Act and the Act on Political Parties. The State Commission

- a) examines and registers candidate lists for elections to the National Council of the Slovak Republic and for elections to the European Parliament,
- b) supervises the readiness of lower-level election commissions to carry out tasks under this Act,
- c) manages the technical unit in the performance of tasks under this Act,

- d) controls the financing of political parties;
- e) controls the financing and conduct of the election campaign;
- f) is an appeal body against decisions of the Ministry of the Interior issued under special regulations in matters of political party financing and electoral campaign matters;
- g) discusses the allocation of broadcasting times in television and radio broadcasting during an election campaign on the basis of a proposal from the broadcaster;
- h) determines the results of the elections by post by persons entitled to vote who do not have a permanent residence in the territory of the Slovak Republic, and draws up the minutes of the result of the vote by post by persons entitled to vote who do not have a permanent residence in the territory of the Slovak Republic,
- i) identifies and publishes the interim and overall results of the elections;
- j) draws up minutes of the outcome of the elections;
- k) issues certificates of election to candidates elected as Members of the National Council of the Slovak Republic and Members of the European Parliament,
- l) declares the appointment of an alternate member of the European Parliament;
- m) notifies the President of the National Council of the Slovak Republic on the appointment of an alternate or the non-execution of the mandate in the case provided for by the Act in special sections;
- n) directs the processing of voting results;
- o) forwards the electoral documents to the Ministry of the Interior for keeping in custody;
- p) performs other tasks according to specific parts of this Act and special regulations.

The lower-level election commissions are formed on the so-called “delegation principle”, which is based on the fact that political parties registered for election purposes (in the election of the President also the petition committee that proposed the candidate for the office of president) delegate the same number of representatives or alternates to the different levels of the election commissions. A member of the Electoral Commission may be one who has reached the age of 18, is eligible for legal acts and has permanent residence in the territory of the Slovak Republic; however, he or she cannot be a candidate for an elected office. Lower-level election commissions are therefore “lay” commissions, since the law does not lay down any professional or educational preconditions for membership.

Lower-level election commissions must have at least five members. If the minimum number is not reached, the mayor of the municipality shall appoint the missing members of the commissions. The mayor, the head of the district office and the chairman of the self-governing region are not constrained in complementing the members of the commissions (it could be the case, for example, that the mayor of the municipality will complement the commission with his closest relatives, which is certainly not desirable).

The tasks of the lower-level election commissions are registration, maintaining order, control and summary of results. The lower-level election commissions and, above all, the district election commissions play a particularly important role in ensuring the voting process and in the counting of votes, i.e. in determining the results of the elections. At the preparatory stage of the elections, decisions of the election commission of the self-governing region and of the local election commission on the registration of candidates (candidate lists) subject to judicial review are of fundamental importance in the elections of the local self-governing authorities.

III.7. The Electoral Campaign

The rules governing the conduct and financing of the electoral campaign under the Act on Conditions for the Exercise of the Right to Vote are further regulated by Special Act No. 181/2014 Coll. on Electoral Campaign.

1. For the purposes of this Act, an electoral campaign shall mean ‘any activity of a political party, a political movement, a coalition of political parties and political movements, candidates and third parties under Section 8, for which payment is normally payable, aimed at promoting their activities, objectives and programmes in order to obtain an office elected under a special regulation’ (Section 2(1)). The activity in question may be to the benefit or to the detriment of the elected entities. The activities of entities other than those mentioned above shall be prohibited at the time provided for the electoral campaign.

2. The Act defines the duration of the campaign, which begins on the date of publication of the decision on the declaration of elections in the Collection of Laws of the Slovak Republic and ends 48 hours before the date of the election (Section 2(2)). In this way, a so-called electoral moratorium is established uniformly for all types of elections. The law also knows the so-called moratorium on the publication of the results of electoral surveys, which is established for the period of 14 days before the date of the election until the end of the vote (Section 17).

3. The Electoral Campaign Act lays down maximum limits on the funds that may be spent by entities authorised to conduct an electoral campaign for each type of election, as follows:

- a) in elections to the National Council of the Slovak Republic and elections to the European Parliament, political parties, political movements and their coalitions may spend no more than EUR 3 million (including VAT) on the electoral campaign and so-called third parties up to a maximum of EUR 100 000,
- b) in the election of the President of the Slovak Republic, individual candidates may spend up to EUR 500 000 (including VAT) on the electoral campaign together for both rounds of elections and so-called third parties EUR 100 000 (political parties and political movements also have third party status for the election of the President),

- c) in municipal elections, political parties and political movements may spend up to EUR 500 000 for the electoral campaign, so-called third parties EUR 25 000 and independent candidates:
- for the post of President of the Self-Governing Region, up to a maximum of EUR 250 000 for both rounds of elections,
 - no more than EUR 250 000 for the post of Mayor of Bratislava and Mayor of Košice,
 - for the post of mayor, mayor of a municipality or mayor of a district with a population:
 1. between 60 001 and 120 000 inhabitants, up to a maximum of EUR 100 000,
 2. between 30 001 and 60 000 inhabitants, up to a maximum of EUR 70 000,
 3. between 16 001 and 30 000 inhabitants, up to a maximum of EUR 50 000,
 4. between 10 001 and 16 000 inhabitants, up to a maximum of EUR 20 000,
 5. between 5 001 and 10 000 inhabitants, up to a maximum of EUR 10 000,
 6. between 2 001 and 5 000 inhabitants, up to a maximum of EUR 5 000,
 7. up to 2 000 inhabitants up to a maximum of EUR 2 000.

4. Act No. 181/2014 Coll. lays down rules for keeping and registering funds earmarked for the campaign. Electoral campaign funds must be led by political parties, political movements and their coalitions, presidential candidates, independent candidates for elected positions in local authorities and so-called third parties in a special payment account, which is free of charge, remotely and continuously accessible to third parties, and funds can only be deposited into this account by transfer from another account. Entities authorised to conduct an electoral campaign must keep a special record of the use of electoral campaign funds in the statutory breakdown, with an overview of the costs required to be published on their website. On the use of funds for the electoral campaign, candidates prepare a final report (in the case of elections to the National Council of the Slovak Republic and elections to the European Parliament) or report (for the other types of elections) and are obliged to deliver it to the Ministry of the Interior, which will publish these documents on its website and keep them open to the public for five years.

5. The Electoral Campaign Act lays down rules for the broadcasting of political advertising and discussion programmes during the electoral campaign in the public television (RTVS), as well as for licensed broadcasters, which are based on equality and on the principle that RTVS must, and other licensed broadcasters may set aside time for the broadcasting of political advertising and discussion programmes (Section 10). In the same way, the rules for the placement of election posters are also laid down in the law on the principle of equality (Section 16).

6. A control mechanism has been established to comply with the obligations and limitations laid down by the Electoral Campaign Act. State control of the electoral

campaign is entrusted to the Ministry of the Interior and, on its behalf, the district office, and it is carried out in accordance with the rules laid down by law (Section 7). State control is complemented by public control, which is primarily based on public access to information on the financing of electoral campaigns and the obligation for candidates to keep records of the financing of the electoral campaign and the obligation to publish or make available to the public the required documents.

7. The Electoral Campaign Act contains a relatively strict sanctioning mechanism by which infringements of the electoral campaign rules are sanctioned. Administrative offences may be committed by entities authorised to conduct an electoral campaign, and sanctions in the form of financial penalties for their commission are imposed in the first instance either by the State Commission (for the administrative offence of violating the electoral moratorium) or by the Ministry of the Interior of the Slovak Republic (for other administrative offences) and also by the Ministry of Culture of the Slovak Republic (in relation to administrative offences committed by publishers of periodic or non-periodical publications or press agencies). Offences may be committed by natural persons and legal persons, and penalties in the form of financial penalties for their commission are imposed by the competent district office.

III.8. Voting

From the standpoint of the electorate, voting is the most fundamental moment in the entire process. The Act on conditions for the exercise of the right to vote distinguishes:

1. voting at the polling station; and
2. voting by post in elections to the National Council of the Slovak Republic (for other types of elections this method of voting is not allowed).

Ad 1. The voting method at polling stations is based on the basic rule that the voter fundamentally votes at the polling station according to his/her permanent residence, i.e. in his electoral district. In elections to the National Council of the Slovak Republic, elections to the European Parliament and elections of the President, the voter may also vote in another polling station in the territory of the Slovak Republic (i.e. outside his electoral district) on the basis of a voting card. The card serves to ensure the voting of those voters who will not be in their electoral district on election day; these voters may apply to the municipality in which they are resident for a voting card (in writing and electronically no later than 15 days before the date of the election or in person no later than the last working day before the election). At the same time as issuing the voting card, the municipality shall remove the voter from the electoral roll. The ballot card entitles entry of the voter to any electoral roll in any electoral district.

In addition to the traditional voting method, the Act on the conditions for exercise of the right to vote also includes so-called voting outside the polling station, which takes place through a portable ballot box. Within the meaning of Section 24(7) of the Act, such a form of voting may be requested by the voter alone or through another person only for serious, in particular medical reasons. In such a case, the district electoral commission sends to the voter two of its members with a portable ballot box, ballot papers, an envelope and a list of those voters who have asked to vote outside the polling station.

Precisely this model served to solve also the potential problem of quarantined voters in the Autumn 2022 elections.

The law emphasises the principle of personal voting (i.e. that the representation of the voter is not permissible), but at the same time allows for an exception where Section 24(6) states: 'A voter who is unable to modify a disability ballot paper himself or because he or she is unable to read or write and notifies the district electoral commission prior to the vote shall have the right to take with him/her another person who is able to modify the ballot paper in accordance with his instructions and law and put it in the envelope; such a person may not be a member of the district electoral commission.'

Under the law, each district electoral commission is to allow voting only to voters who are registered on the electoral roll. Upon arrival at the polling station, the voter proves his/her identity by means of an identity card or passport. The district electoral commission circles the voter's sequential number in the voter list and hands him over a ballot paper and an envelope. However, the district electoral commission may, in the cases provided for by law, also allow voters who are not included in the electoral roll to vote by adding them to the electoral roll and allowing them to vote. These are the voters who arrived on the day of the election:

- a) to the polling station with a ballot card,
- b) at the appropriate polling station according to their place of residence and are not registered on the electoral roll;
- c) to the appropriate polling station according to their place of residence with a court decision pursuant to Section 10(2) (decision to make corrections or to supplement a permanent voter list issued in the court proceedings),
- d) in the case of the election of the President and the elections to the European Parliament, the citizens of the Slovak Republic who reach the age of 18 at the latest on the day of the elections, who do not have permanent residence in the territory of the Slovak Republic or in the territory of another EU Member State; these voters must submit a Slovak passport and a solemn declaration of permanent residence abroad (the entry into the electoral register will be recorded by the district election commission in the Slovak passport of that voter).

In order to ensure the secrecy of the vote, each voter shall, upon receipt of the ballot paper and the envelope, enter a special area for the modification of the ballot paper in which he adjusts the ballot paper in the manner provided for by law. A voter who does not enter a special area for editing ballot papers shall not be allowed to vote by the district electoral commission. Vote takes place by sliding an envelope in front of the precinct electoral commission into the ballot box after leaving the special area for editing the ballot papers.

The method of adjusting the ballot for each type of election differs. The simplest way is to adjust the ballot for those elections in which the majority voting system is applied in the single electoral constituencies (elections of the President, the election of self-governing regions and the election of mayors), where all candidates are placed on a single

ballot paper and ranked in alphabetical order, the voter voting by indicating on the ballot paper by circling the sequential number the candidate for whom he/she is voting (if several candidates were circled, the ballot paper would be invalid).

In principle, the method of adjusting the ballot paper for elections in which the majority electoral system is applied in multi-mandate constituencies (elections to the municipal council and municipal elections) is almost identical. All candidates are also placed on a single ballot paper in alphabetical order and the voter votes by circling the sequential numbers to indicate the candidates for whom he votes. However, no more than the number of candidates to be elected in the constituency concerned may be marked (otherwise, the ballot paper is invalid).

In the case of elections to the National Council of the Slovak Republic and elections to the European Parliament, a system of proportional representation is in force, whereby for each political party and coalition whose list of candidates has been registered, a separate ballot paper is drawn up indicating the candidates of the relevant political party or coalition in the order in which they were listed on the list (i.e. in the order proposed by the political party or coalition). The electoral commission will hand over to the voter ballot papers of all political parties or coalitions, and the voter votes by placing in the envelope only one ballot paper (political party or coalition for which he/she votes), while on the ballot paper he puts in the envelope he can indicate by circling the serial number of up to four candidates (in respect of elections to the National Council of the Slovak Republic) or two candidates (in respect of elections to the European Parliament) on a single ballot paper to indicate which of the candidates he prefers, i.e. he can use the so-called “priority vote”.

Ad 2. Voting by post applies only to elections to the National Council of the Slovak Republic. By post can vote:

- a) voters who do not have permanent residence in the territory of the Slovak Republic and who have been entered on a special list on the basis of an application;
- b) voters who have permanent residence in the territory of the Slovak Republic, are staying outside its territory at the time of the elections and have requested the choice by post from the municipality in which they have permanent residence.

Voters who do not have a permanent residence in the territory of the Slovak Republic and who have been enrolled in a special electoral register on the basis of an application will be sent at least 35 days before the date of the election (i) an envelope bearing the official stamp of the Ministry of the Interior, (ii) ballot papers, (iii) a return envelope and also (iv) an instruction on the voting method. Similarly to a voter voting in a polling station, voter voting per post puts in the envelope only one ballot paper of a political party or coalition for which he or she is voting, on which he can indicate, by circling the serial number of up to four candidates listed on a single ballot paper, which of the candidates he prefers. The voter puts the ballot paper into the envelope and puts the sealed envelope into the return envelope he sends. The result of the vote shall include the votes on the ballot

papers received by the Ministry of the Interior no later than the last working day preceding the day of the elections. Return envelopes will be handed over by the Ministry of Interior to the State Commission on the day of the election. The vote by post of voters who do not have a permanent residence in the territory of the Slovak Republic is reviewed and its results are examined by the State Commission.

III.9. Survey of voting results, allocation of mandates and announcement of election results

At the end of the vote, the decisive stage of the electoral process takes place, which consists of the identification of votes, the allocation of mandates and the proclamation of the official election results. Voting results are collected for all types of elections at the level of the local election commissions. In addition, in case of the elections to the National Council of the Slovak Republic, the results of the vote of voters who were enrolled in a special electoral roll and who voted by post are also determined by the State Commission. The survey of the results of the vote, which is laid down in detail in both the general provisions (Section 29) and the special sections of the Act on the conditions for the exercise of the right to vote, consists of an evaluation of the validity of the ballot papers and the subsequent counting of votes cast in favour of individual candidates or political parties and their coalitions in elections to the National Council of the Slovak Republic and elections to the European Parliament.

Each district elections commission shall draw up a report containing the data laid down by law, in particular the results of the vote. The minutes shall be signed by the President and the other members of the local election commission. If one of the members of the election commission does not sign the minutes of the proceedings and the result of the vote in the electoral district, it may state in the minutes the reasons for the non-signature. The failure by some members of the Electoral Commission to sign the minutes of the proceedings does not affect its validity (but this may be relevant in the judicial review of elections).

After the results of the vote at the level of the local election commissions have been ascertained and the minutes were handed over to the higher-level election commissions, the results of the vote are summarised first at the level of the local election commissions (in the case of the elections of self-governing regions at the level of the district commissions and in the municipal elections at the level of the local election commission only) and then in the elections to the National Council of the Slovak Republic, and in the elections to the European Parliament, at the national level within the State Commission, and in the elections to self-governing regions at the level of the election commission of the self-governing region.

The rules for determining the results of the elections or determining to whom mandates will be allocated on the basis of the results of the vote depend on the electoral system applicable to the different types of elections. Perhaps the easiest way is to determine the winner of the election in cases where a majority voting system with a relative majority is applied, i.e. mayor elections, and municipal council elections. In the election of the mayor, the candidate who obtained the most valid votes (regardless of the number of

votes) is elected mayor of the municipality (one valid vote is theoretically sufficient), with new elections being held in the event of equal votes (Section 189(4)). Candidates who have obtained the most valid votes in the constituency shall be elected as members of the municipal council. If candidates of the same political party or coalition receive the same number of votes in the constituency, the candidate shall be elected as a Member in the order indicated on the candidate list of the political party or coalition concerned. If in a constituency more than one candidate of several political parties, coalitions or independent candidates receives the same number of valid votes, the local election commission shall appoint a member of the municipal council by lot (Section 189(1) to (3)). Similar are the rules for determining the election winners in the election of representatives of self-governing regions, i.e. candidates who have obtained the most valid votes in the constituency are elected as members of the council. If in a constituency more than one candidate of the same political party or coalition receives the same number of valid votes, the candidate shall be elected depending on the order indicated on the candidate list of the political party or coalition concerned. If in a constituency more than one candidate of several political parties, coalitions or independent candidates obtains the same number of valid votes, the election commission of the self-governing region shall appoint a member of the council by lot (Section 157(1) to (3)). If, during the parliamentary term, the term of office of a member of the body ceases, the candidate who obtained the closest number of valid votes in the constituency in which the mandate ceased to exist shall take the vacant place (Section 160(2)).

In the election of the President of the Slovak Republic and the presidents of self-governing regions, a *majority voting system* is applied with an absolute majority, with the rule that if one of the candidates does not obtain an absolute majority of the votes in the first round (in the case of the election of the President, within the meaning of Article 101 (4) of the Constitution, the “*above half majority*” of all eligible voters, and in the election of presidents of self-governing regions within the meaning of Section 162(1) of the Act, “*above half of the valid votes*”, i.e. only those of the eligible voters who took part in the elections), the second round of elections shall take place within 14 days, to which the two candidates with the highest number of valid votes shall pass in the second round of elections. If one of the candidates who has advanced to the second round of elections ceases to be eligible as president or president of the self-governing region, or if the right to stand is waived, the candidate who obtained the next highest number of valid votes shall proceed to the second ballot. If there are no two candidates for the second round of elections, the second round shall not take place and new elections shall be declared. If only one candidate applies for the post of President or President of the Self-Governing Region, the elections shall be held by voting on him/her.

In the second round, one of the candidates who receives more votes is elected as president or president of the self-governing region. If in the second round of elections of the self-governing region the candidates receive the same number of votes, the President of the National Council of the Slovak Republic shall declare new elections (Section 149(3)). The same would seem to be the case for the election of the President, although neither the Constitution nor the law expressly provides for this.

In elections to the National Council of the Slovak Republic and to the European Parliament, the system of proportional representation applies, in both cases the territory of the Slovak Republic consists of one multi-mandate constituency (in the elections to the National Council of the Slovak Republic it is a 150-mandate constituency, the last election to the European Parliament was a 13-mandate constituency). In connection with the identification of the winners of the elections, or the allocation of mandates in the elections to the National Council of the Slovak Republic and the elections to the European Parliament, it is necessary to take into account:

- a) the Electoral Threshold Institute,
- b) the electoral formula,
- c) the system of priority voting,
- d) appointing of substitutes.

The electoral threshold is adjusted differently for the purposes of elections to the National Council of the Slovak Republic and elections to the European Parliament. It is fixed at 5 % of the total number of valid votes for elections. It means that valid votes cast to political parties, which received less than five per cent of valid votes, are not taken into account in the further examination of the election results (Section 93(2)). In elections to the National Council of the Slovak Republic, the so-called additive model of the electoral threshold continues to be applied, which differentiates between the amount of the closing clause for an individual candidate political party and for electoral coalitions. In order to overcome the electoral threshold in elections to the National Council of the Slovak Republic, it is necessary that:

- a) the individual candidate political party received at least five per cent of the total number of valid votes cast;
- b) a coalition of two or three political parties received at least seven per cent of the total number of valid votes cast.
- c) a coalition of at least four political parties won at least 10 percent of the total number of valid votes cast.

Valid votes cast to political parties and coalitions with fewer votes are not taken into account in the election results (Section 66).

As regards the electoral formula, the modified Hagenbach-Bischoff method applies, the application of which is based on the following procedure (see Sections 68 and 94):

- The sum of the valid votes cast for passing political parties or coalitions shall be divided by 151 (150 + 1) in elections to the National Council of the Slovak Republic, and in the case of elections to the European Parliament by the number of Members of the European Parliament to vote for the Slovak Republic increased by one (in the last election 13 + 1), the number resulting from this division being referred to as the Republic electoral number.
- The total number of valid votes obtained by a political party or coalition shall be divided by the Republic electoral number, and the political party or coalition shall be assigned as many mandates as the Republic electoral number contained in the sum of the valid votes obtained by that political party or coalition.

- If one mandate more is allocated than should have been allocated, the excess mandate of the political party or coalition that reported the smallest balance of the division shall be deducted. With the same balance of divisions, the mandate is deducted from a political party or coalition that received fewer votes. If the number of valid votes is equal, the lot shall be decisive.
- If not all mandates have been allocated in this way, or if a political party or coalition has run with fewer candidates than is to be assigned, those mandates shall be allocated successively to those political parties or coalitions with the largest balance of divisions. In the event of equal balances of votes, a mandate shall be given to a political party or coalition that received a larger number of votes. If the number of votes is equal, the lot shall be decisive.
- Mandates that have been allocated to a political party or coalition shall in principle be allocated to candidates in accordance with the order indicated on the list, except where a candidate(s) obtained a given amount of priority votes.

It follows from the above that both the elections to the National Council of the Slovak Republic and the elections to the European Parliament are based on the model of the tied list, i.e. the voter can cast the vote only to one political party or coalition, which also determines the ranking of candidates on its list. However, the voter may make changes in the order of candidates. According to the legislation laid down in the Act on the conditions for the exercise of the right to vote for elections to the National Council of the Slovak Republic as well as for elections to the European Parliament, analogous rules apply, according to which *“within individual political parties or coalitions candidates shall receive the mandates assigned to the party in the order in which they are placed on the ballot paper.”* However, *if voters who cast a valid vote for that political party or coalition have exercised the right of priority, the candidate who has obtained at least three per cent of the preferential votes of the total valid votes cast for a political party or coalition shall first have a mandate. If a political party or coalition is assigned more than one mandate and more candidates have fulfilled the condition set out in the previous sentence, the mandates will be gradually given to the candidates in the order of the highest number of priority votes obtained. If there is equality of priority votes, the ranking on the ballot paper is decisive’* (Paragraphs 68(5) and 93(5)). Candidates who do not receive a mandate on the basis of the above rules shall become alternates.

As regards the promulgation of the election results, the Act on the conditions for the exercise of the right to vote provides in Section 16(1)(i) and (j) that the State Commission shall establish and publish the interim and overall results of the elections and draw up a report on the outcome of the elections. However, those provisions contained in the section of the Act referred to as ‘General Provisions’ must be read in conjunction with those in specific parts of the Act. Thus, the competence of the State Commission under Section 16(1)(i) and (j) of the Act can apply only to elections to the National Council of the Slovak Republic, to the election of the President and to elections to the European Parliament. It is apparent from the relevant parts of the Act relating to those elections that the State Commission draws up minutes on the outcome of the elections to the National Council of the Slovak Republic, on the outcome of the elections to the European Parliament and on the outcome of the election of the President, which contain the

statutory requirements, and at the same time issues electoral certificates to elected candidates to the National Council of the Slovak Republic and the European Parliament (see Sections 69 and 70, 95 and 96 respectively, Sections 113 and 114 of the Act).

In relation to elections to the bodies of the self-governing region, the electoral commission of the self-governing region draws up a report of the result of the elections containing the statutory requirements, and shall immediately send it electronically to the State Commission and then within three days ensure the delivery of one copy of the minutes by post (Section 156). At the same time, the electoral commission of the self-governing region is expressly entrusted with the publication of the results of the elections of the deputies of the council and of the president of the self-governing region “in a manner usual in the place” and “results of the elections shall be published on the website of the self-governing region” (Section 158). In principle, the regulation concerning municipal elections is analogous: The drawing up of the minutes of the results of the elections in the municipality containing the statutory requirements is entrusted by the Act to the local electoral commission (Section 189), which at the same time publishes “the results of the municipal elections and the results of the election of the mayor of the municipality” (Section 190) and issues a certificate of election to the elected candidates (Section 191).

IV. COVID-19 and Electoral Rules in Slovakia

Although no general elections were anticipated and held in Slovakia during the 2020 and 2021 pandemics, the risk of COVID-19 in the exercise of the right to vote entailed numerous challenges.

It was not until 2021, specifically until December 2, 2021, that a law was adopted amending Act no. 180/2014 Coll. on the conditions for the exercise of the right to vote and on the amendment of certain laws. This law introduced a statutory restriction of personal liberty for the protection of public health as an obstacle to the right to vote. In order to indicate the obstacle to the right to vote, the public health authorities became obliged to notify the relevant municipality of the details of the voter who was required by law to have their personal liberty restricted for reasons of public health protection. The public health authority was required to notify the municipality on the last working day before the election day. However, a special law also allowed explicitly to regulate a special exercise of the right to vote by persons in quarantine. This goal is pursued by the legislation of May 2022, which introduced special rules for the exercise of electoral right by persons in quarantine. Otherwise, these voters would have been deprived of their right to vote.

On May 10, 2022, a government bill was namely adopted on a special method of voting in elections to municipal self-government bodies and elections to self-governing regional bodies, which takes place in 2022 on the same day and at the same time and which amends certain laws. Hence, special regulation was to apply to the local elections taking

place in Autumn of 2022.¹⁵ No general rule applicable for other types of elections (presidential, parliamentary) was introduced by this Act, though.

In addition, the procedure under this Act was to apply only if, as of September 30, 2022, the Public Health Office of the Slovak Republic decided to isolate in quarantine the COVID-19-positive persons, or persons who have come into close contact with COVID-19, for the sake of the protection of public health. This happened to be the case and the special rules indeed applied.

Special constituencies were designated to ensure that eligible voters who have requested a special method of voting in joint elections had the possibility to vote. To ensure a special voting method, a special electoral commission was set up for each special constituency. Special constituencies had a shape different from the traditional constituencies, depending on the number of COVID-19 positive persons requesting the special electoral procedure.

At the first meeting of the special electoral commission, the mayor of the designated municipality was to determine by lot from among all members of the special electoral commission the order in which the members of the special electoral commission were to be sent on the day of the elections with a special portable ballot box to serve those who had requested a special method of voting under this Act. Voting in the special box was namely to be ensured by two seconded members of the special election commission. If, on the day of the elections, due to a substantial increase in the number of eligible voters who had requested a special voting method or for other serious reasons, it would be necessary to ensure the deployment of additional members of the special electoral commission with a special box, the mayor was to determine the additional members of the special electoral commission in the order determined by a lot, to collect the votes with another portable ballot box. In case of a large number of eligible voters who would request a special voting method, the head of the district office was to appoint additional members of the special election commission in the required number.

For the purpose of performing a special method of voting in elections pursuant to this Act, a special list of eligible voters for elections to local government bodies and a special list of eligible voters for municipal elections (hereinafter referred to as “special voter lists”) was prepared for each of the relevant special constituency, according to the place of permanent residence of the eligible voters who had requested a special method of voting. Special voter lists were prepared by the local electoral commission registrar (hereinafter referred to as the “registrar”) at the request of an eligible voter. The eligible voter was to submit a request for a special method of voting to the registrar of the municipality of his / her permanent residence alone or through another person, by telephone during the office hours of the municipality of his / her permanent residence; at latest on the last working day before the day of the joint elections. They were to submit the application no later than at noon on that day.

¹⁵ Available at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=511131>

For the purpose of submitting the application, the municipality was to publish a telephone contact for the registrar no later than five working days before the day of the joint elections, being published on the official notice board of the municipality and on its website, if it has one. On the last working day before the day of the joint elections, the registrar was to notify the mayor of the designated municipality by 2 p.m. of the number of eligible voters who had requested a special method of voting in individual constituencies. The registrar was to ensure the deletion of the eligible voter who had requested a special method of voting from the general list of voters in the municipality of permanent residence of the eligible voter, stating that (s)he had requested a special method of voting.

The special electoral commission was to send two of its members to the voter in the order determined by lot. Upon arrival to the site of the special voting method, the seconded members of the special electoral commission was to invite the voter to vote and remained in place for ten minutes. If the voter did not appear to vote within this period despite repeated invitations, it meant the voter had declined to vote.

Details on the use of protective equipment for members of the special election commission and the driver providing transport of members of the special election commission were determined by the Public Health Office of the Slovak Republic.

Thus, with regard to the elections in 2022, the parliament of the Slovak Republic adopted a special legal regulation that allowed persons in quarantine to vote, either from home or quarantine site, by means of a portable ballot box carried by members of a special electoral commission. However, this adjustment was only to apply if the COVID-19 pandemic persists in September 2022 and the quarantine obligation is still in force. No other future elections, including those to the National Council of the Slovak Republic taking place on September 30, 2023, were concerned by this special regulation.

This minimalistic amendment hence copied the rules applicable previously to those who could not vote due to health reasons. The major differences consisted in the fact of special constituencies and special electoral committees being established for the purpose to serve those voters who were confined to isolation in quarantine. The potential problem thereby arised with regard to potential increase in number of such voters, which might have made the regulation ineffective, requiring to rise the number of members of special electoral committees as well as their drivers in order to serve all the interested voters in quarantine. This threat has not materialised in the end, luckily.

Additionally, upon passing this regulation, concerns were voiced also with regard to simple announcing of the wish to vote into the portable ballot box by a simple phone call to the registrar, without any additional authentication or verification procedure. This might have been the space for misuse, especially in case of elections in smaller municipalities where every vote counts. However, in such a case, the problem of being deleted from the list of voters upon the phone call could have been reversed in such a way that the voter who was maliciously reported as being in quarantine would certainly come

to the ballot box in person and would then be additionally returned back to the list of voters in the ballot room itself.

Still, the procedure seems rather complicated and its efficiency was in the very end made dependent on the actual numbers of quarantined persons during the Autumn 2022 elections. Beyond these elections, however, the legislator in Slovakia, was apparently not willing to introduce any lasting measures or modifications to the electoral system and basically relied on the fact that the pandemic is more or less over. Therefore, no special measures with regard to pandemics were introduced with regard to the parliamentary elections of September 2023 at all.