

Statement of the Public Defender of Rights on a study following from the Resolution on Equal Participation in Political and Public Affairs¹

On 20 January 2015, I was approached by the Ambassador and Permanent Representative of the Czech Republic to the Office of the United Nations and Other International Organisations at Geneva, Ing. Kateřina Sequensová, with a request for contribution to a study following from the Resolution on Equal Participation in Political and Public Affairs. The study of the Office of the UN High Commissioner for Human Rights aims at describing the implementation practice of Art. 25 of the International Covenant on Civil and Political Rights (hereinafter the “Covenant”)² and to provide a summary of examples of good practice and implementation experience. The study also wishes to formulate the basic principles of effective participation of citizens in the conduct of public affairs.

Participation in the conduct of public affairs

Taking part in the conduct of public affairs in the sense of Art. 25 of the Covenant is the basic principle of the political system in the Czech Republic which is based on competition of political parties respecting fundamental political principles and rejecting violence as a means of asserting their interests³. The people, who are the source of all power in the State⁴, delegate it to elected representatives or directly participate in the conduct of public affairs⁵. Participation in the conduct of public affairs is linked not only to the voting right but also the constitutionally guaranteed equal access to public offices and other political rights⁶.

Participation in the conduct of public affairs is voluntary and the State does not enforce participation in political the conduct of public affairs. The constitutionally guaranteed principle of equality includes political rights, which are to be guaranteed to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethnic or social origin, membership in a national or ethnic minority, property, birth, or other status⁷. The principle of protection of minorities also follows from the constitutional order⁸. The State does not inspect, or monitor, whether declared equality in participation in the conduct of public affairs is in fact achieved.

¹ Resolution of the Human Rights Council A/HRC/RES/27/24 of 3 October 2014.

² International Covenant on Civil and Political Rights.

³ Art. 5 of the Constitution of the Czech Republic.

⁴ Art. 2 of the Constitution.

⁵ Art. 21 (1) of the Charter of Fundamental Rights and Freedoms.

⁶ Political rights are defined by Art. 17 – 23 of the Charter.

⁷ Art. 3 of the Charter. Protection against discrimination does not preclude the use of preferential votes which change the order of precedence in election lists. Voting with the use of preferential votes is regulated by individual electoral laws.

⁸ Art. 6 of the Constitution.

However, statistical data on the composition of local, regional, national and European political representation shows that some “affected groups” including women, persons with disabilities, members of national, ethnic and sexual minorities, are underrepresented in the Czech political system⁹.

A debate was ongoing in the Czech Republic in the past year concerning introduction of a representation percentage for men and women in election lists in regional and parliamentary elections¹⁰. I commented on, and supported, the draft amendment to the relevant electoral laws in August 2014¹¹. In my opinion, the State should be more active in relation to the representation of women in decision-making processes. While I respect the separation of political parties and movements from the State¹², the State should pay attention to the position of women inside political entities, their membership of top bodies in political parties and access to advancement in the power hierarchy. Women are part of society and should be able to decide freely whether or not they wish to take part in the conduct of public affairs. Where stereotypes pose a hindrance to women’s acting on their free will, the State must step in with either temporary measures or an awareness-raising campaign.

Under the applicable legal regulations, a person with a disability who is unable to mark a voting ballot because of physical impairment may be assisted in the space intended for the marking of voting ballots by some other voter other than a member of the district or special election committee¹³. A voter may also ask for serious reasons, especially health reasons, to be permitted to vote outside the voting site. In that case, the voter may cast his (her) vote into a portable election box which is brought to him/her by two members of the election committee¹⁴.

Pursuant to Section 25 (2) (c) of the Charter of Fundamental Rights and Freedoms, citizens belonging to national and ethnic minorities are guaranteed the right to participate when affairs are addressed that concern national and ethnic minorities. The above right is exercised in advisory bodies – municipal and regional committees for the affairs of that minority and in the Government Council for the Rights of National and Ethnic Minorities. Members of a national minority which lives traditionally and in the long term in the territory of the Czech Republic have the right to information on elections published in the language of that minority¹⁵.

⁹ Data provided by the Czech Statistical Office (www.csu.cz).

¹⁰ Draft law amending Act No. 247/1995 Coll., on elections to the Parliament of the Czech Republic and amending and supplementing some other laws, as amended, Act No. 130/2000 Coll., on elections to municipal assemblies and amending and supplementing some laws, as amended, and Act No. 424/1991 Coll., on association in political parties and political movements, as amended (file No. of the party submitting the draft being MV-75344-4/LG-2014).

¹¹ I am now waiting for settlement of comments, a majority of which are negative standpoints.

¹² Art. 20 (4) of the Charter and Section 5 (1) of Act No. 424/1991 Coll., on association in political parties and political movements, as amended.

¹³ Section 19 (6) of the Act on Elections to the Parliament of the Czech Republic, as amended (hereinafter the “Elections Act”), Section 36 (7) of Act No. 62/2003 Coll., on elections to the European Parliament, as amended (hereinafter the “EP Elections Act”), Section 33 (6) of Act No. 491/2001 Coll., elections to municipal assemblies, as amended (hereinafter the “Municipal Elections Act”), Section 31 (7) of Act No. 130/2000 Coll., on elections to regional assemblies and amending some laws, as amended (hereinafter the “Regional Elections Act”).

¹⁴ Section 19 (7) of the Elections Act, Section 36 (8) of the EP Elections Act, Section 33 (7) of the Municipal Elections Act, Section 31 (8) of the Regional Elections Act.

¹⁵ Section 10 of Act No. 273/2001 Coll., on the rights of members of national minorities and amending some laws, as amended (hereinafter the “Act on Rights of National Minorities”). A municipal assembly shall establish a

I am of the opinion that the State should primarily advise citizens of their rights and defence options. Citizens can participate¹⁶ through political parties and also civic society, which should exist in the space between the public and private sectors¹⁷.

Right to vote and stand as a candidate in elections

In the framework of my activities as the Public Defender of Rights, I dealt with the exercise of the voting right by citizens of other EU member states and became acquainted with the limits to the exercise of the voting right of persons restricted in their freedom; these persons are often held at a place distant from the voting site for the place of their permanent residence.

In my opinion, also confirmed by the case-law¹⁸, nationals of other EU member states with temporary right of residence in the territory of the Czech Republic are granted the voting right in elections to representative bodies in municipalities directly under EU law. I dealt with Section 28 (1) of the Municipal Elections Act which determines a condition for registration in the electoral roll. A voter who is not a national of the Czech Republic is registered in the electoral roll if (s)he applies for registration and provides proof of nationality and registration for permanent residence in the relevant municipality. I found that the condition of permanent residence set out in the Act on Elections to Municipal Assemblies¹⁹ as a prerequisite for the exercise of the voting right in elections to municipal assemblies for both Czech nationals and nationals of other EU member states is discriminatory against citizens of other EU member states and hence at variance with Treaty on the Functioning of the European Union and the relevant provisions of Council Directive 94/80/EC. Permanent residence of Czech nationals means only the “registered” permanent residence under the Act on Population Records²⁰. In relation to citizens of other EU member states, the term “permanent residence” means permanent residence permit in the sense of the Act on Presence of Foreigners²¹, i.e. one of the

committee for the affairs of national minorities if at least 10% of citizens within its jurisdiction claim to be of other than Czech nationality. A regional assembly shall establish a committee for the affairs of national minorities if at least 5% of citizens of the relevant Region claim to be of other than Czech nationality.

¹⁶ Participation of voters in elections decreases for various reasons, e.g. a mounting atmosphere of indifference to public affairs and voting becoming excessively complex in administrative terms. Since voters are not required to actively register for elections in the Czech Republic, the very act of voting is not administratively demanding or time-consuming insofar as the voter does not wish to vote outside the place of his/her permanent residence. A voter wishing to vote outside his/her voting site must take steps to this effect, which may be complicated in some cases. Voting e.g. by electronic means could solve these situations. My predecessor, JUDr. Pavel Varvařovský, provided his comments on the election code in 2012; he stated in this respect that correspondence voting would increase access to elections. File No. 2668/2012/PDCJ. It is currently impossible for me to determine whether the introduction of correspondence or electronic voting would lead to a higher turnout in elections.

¹⁷ I have observed that the non-governmental sector organises training programmes aimed at strengthening the involvement of Roma women in politics. I appreciate and support this activity because the participation of women from ethnic minorities in public affairs is very low. More information at: <http://www.slovo21.cz/index.php/extensions/vsechny-romske-projekty/375-politicky-vycvik-pro-romske-zeny-2014>.

¹⁸ Resolution of the Regional Court in Brno of 19 September 2014, File No 64A 6/2014-20.

¹⁹ Section 28 (1) and (2) of the Act on Elections to Municipal Assemblies.

²⁰ Act No. 133/2000 Coll., on registration of the population and birth identification numbers and on amendment to some laws (Act on Registration of the Population), as amended. The following is stipulated in the first sentence of Section 10 (1) of the Act: “Place of permanent residence means the residence address of a citizen in the Czech Republic which is kept in the Register of Inhabitants in the form of a link (address code) to the address reference point in the basic register of territorial identification, addresses and real estate chosen by the citizen usually at the place where he has his family, parents, flat or employment are present.”

²¹ Section 87g *et seq.* of Act No. 326/1999 Coll., on the presence of foreigners in the territory of the Czech republic and on amendment to some laws, as amended.

types of permits for a foreigner's presence in the territory and can only be obtained after several years of residence in the territory of the Czech Republic²². In this context, the national legislation stipulates different conditions for the citizens of the Czech Republic and nationals from other EU member states, which is not consistent with EU law.

I therefore welcomed the decision of the State Election Committee in the municipal elections in autumn 2014, based on which EU citizens holding a certificate of temporary residence in the Czech Republic who simultaneously met other statutory conditions for the right to vote to municipal assemblies, were registered in addenda to electoral rolls²³.

Furthermore, in connection with the voting right of foreign nationals, I follow on the findings and activities of my predecessor, JUDr. Pavel Varvařovský, who commented on the draft election code twice and disagreed with the opinion that the right of foreigners from third countries to vote and stand as a candidate in elections to municipal and regional assemblies should be limited only to those persons who are granted this right by an international treaty²⁴.

I have long promoted granting the voting right in elections to municipal and regional assemblies to foreigners from third countries with a permit for permanent residence in the territory of the Czech Republic, believing that granting them the voting right would be an effective means of supporting integration of foreigners in public and political life. I addressed the same topic in my comments²⁵ on the draft Implementation Process for the Updated Strategy of Integration of Foreigners – Living Together in 2015²⁶, which the Government partly reflected in approving the implementation process for the updated *Strategy*²⁷.

At the end of the past year, the Government submitted to the Parliament of the Czech Republic the Convention of the Council of Europe on the participation of foreigners in public life at local level²⁸ (hereinafter the "Convention") for granting its consent to ratification, where the Czech Republic reserved, pursuant to Art. 1 (1) of the Convention, the right not to apply the provisions of Chapter B and Chapter C. It follows from the Explanatory Memorandum for the Parliament that the Government does not plan to change (and generally extend) the voting right of foreigners with a permit for permanent residence in the Czech Republic and continues to make the voting right conditional on reciprocity²⁹. My position on this issue is different and, within my statutory powers, I intend to further deal with the granting of the voting right to foreigners from third countries with a permit for permanent residence and acquaint the legislators with my arguments. In addition, if foreign nationals with a permit for

²² As a rule, five years of uninterrupted temporary residence in the territory.

²³ Information on the decision of the State Election Committee is available at <http://www.mvcr.cz/clanek/volit-ve-volbach-do-zastupitelstev-obci-mohou-i-obcane-eu-s-prechodnym-pobytem.aspx>.

²⁴ File No. 2668/2012/PDCJ and File No. 1494/2013/PDCJ.

²⁵ File No. 3324/2014/PDCJ.

²⁶ File No. MV-141012-7/OAM-2014 of the submitting party.

²⁷ Resolution of the Government No. 20 of 14 January 2015.

²⁸ Convention of the Council of Europe on the participation of foreigners in public life at local level of 5 February 1992, signed for the Czech Republic on 7 June 2000.

²⁹ The Explanatory Memorandum for the Parliament is available at: <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=375&CT1=0>.

permanent residence are to be involved in the conduct of public affairs, they must also have the right to be members of political parties and stand for them in elections³⁰.

While voting right is a political right belonging to citizens, there are cases where this criterion is broken³¹. Granting the voting right to citizens with a permit for permanent residence in the territory of the Czech Republic is a political decision – the Czech Republic already grants it to some foreigners on the basis of international treaties. It is also reasonable to ask whether the citizenship category represented by the relationship between a citizen and a State becomes meaningless in globalised society (similar to the State itself) and should be replaced.

In his work to date, the Defender has pointed out that citizens present in facilities such as psychiatric clinics, facilities for elderly people, etc. were not allowed to vote³². A residential facility has the duty to inform its clients of the possibility to take part in elections and ascertain their interest in exercising their voting right. Most of the clients stay in the facility outside the place of their permanent residence, i.e. outside their voting site and they can vote either using a special identity card issued for voting purposes or on the basis of registration in a special electoral roll. Facilities have the duty to prepare an electoral roll and deliver it to the municipality in whose jurisdiction the facility is located. The client casts his/her vote into a portable ballot box or a voting site can be established directly in the premises of the facility. Another option is to apply for a special identity card for voting purposes which is delivered to the client to the facility. The identity card is issued on the basis of a written application with an authenticated signature or application made in person at the municipal authority in the place of the applicant's permanent residence. If the client is immobile, e.g. because (s)he cannot take leaves, it is impossible for him/her to obtain the identity card for voting purposes without the co-operation of the residential facility.

When commenting on the legislative draft of the election code, my predecessor JUDr. Varvařovský disagreed with the opinion that persons held in police cells and persons in the above facilities should be classified as incapable of voting. First, he advanced the concept that persons in such facilities should have the voting right, considering it wrong that a whole category of people should be excluded from the voting right. Second, he insisted that staying in these facilities does not prevent some clients from appearing at their voting site. For the same reasons he found it inappropriate to record the incapacity to vote in the permanent electoral rolls.

Electoral laws lay down absolute incapacity to exercise the voting right in connection with limitation of legal capacity under the Civil Code effective from 1 January 2014.^{33, 34} The Constitutional Court considers it a violation of the Constitution

³⁰ Section 2 (4) relates membership of political parties and movements exclusively to Czech citizens. Act No. 424/1991 Coll., on association in political parties and in political movements, as amended.

³¹ A foreign national has the right to vote in municipal elections insofar as he is granted the same right by an international treaty and is registered for permanent residence in the relevant municipality on the election date. Section 4 (1) of the Municipal Elections Act. The right to vote to a municipal assembly includes the right to vote in a local referendum. Section 2 of Act No. 22/2004 Coll., on local referendum and amending some laws, as amended. As already mentioned, foreign nationals from other EU member states with a permit for permanent and temporary residence in the territory of the Czech Republic also have the right to vote in municipal elections.

³² <http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2013/i-v-domove-pro-senior-y-ci-lecebne-maji-lide-pravo-ucastnit-se-voleb/>.

³³ Act No. 89/2012 Coll., the Civil Code.

if common courts deprive a person of legal capacity without simultaneously ruling on the capacity to vote. Certain problems with electoral rolls have also been observed. Electoral rolls are made with the use of data from the information system for records of the population where only an entry on limitation of legal capacity is made without specifying the scope of the limitation, i.e. whether the voting right is also limited. Effective from 1 January 2012, limitation of legal capacity is no longer recorded in citizen's identity cards. In this situation, the election committee may prevent a voter from voting because of the entry on limitation of legal capacity in the electoral roll despite the fact that the court ruling has not included the voting right in the limitation of legal capacity. In that case, the voter can seek judicial review pursuant to Section 90 of the Code of Administrative Justice³⁵ or submit to the election committee the court ruling on limitation of legal capacity and demonstrate that the limitation does not include the exercise of the voting right. In my opinion, recording the scope of limitation of legal capacity, i.e. whether the limitation of legal capacity includes the exercise of the voting right, and recording the number of the relevant court ruling, would solve this situation.

Voters are not required to actively register for elections. Voters are registered in permanent electoral rolls, or in special electoral rolls for those voters who cannot vote at the voting site where they are registered in the permanent list due to being restricted in their freedom, as well as for voters registered for permanent residence in a different jurisdiction.

Several findings were made in the course of the Defender's work, revealing certain shortcomings in connection with the exercise of the right to vote. First, already ombudsman JUDr. Otakar Motejl notified the parties submitting draft legislation on elections of the deterring effect of the duty to indicate the birth identification number in a petition supporting an independent candidate for the Senate. He welcomed it when the submitter took account of his comment and replaced the birth identification number with the date of birth.

Another practical obstacle is related to the staffing of district election committees in a situation where Senate and municipal elections are held in parallel. The staffing of election committees in concurrent Senate and municipal elections is governed by the Municipal Elections Act which establishes the right of every political entity (political party, political movement or coalition) to delegate a representative for the committee. Independent candidates are allowed to stand in Senate elections; these candidates, however, were not allowed to delegate representatives to the election committee in concurrent Senate and municipal elections³⁶. I am at one with the Ministry of the Interior of the Czech Republic that nothing prevents mayors to delegate also representatives of independent candidates to district election committees, to seats not filled by representatives of election parties standing for the

³⁴ The term "depriving of legal capacity" was used before the new Civil Code came into effect.

³⁵ Act No. 150/2002 Coll., the Code of Administrative Justice, as amended.

³⁶ Section 17 and Section 70 of the Municipal Elections Act.

municipal assembly³⁷. The Supreme Administrative Court too supported this interpretation³⁸.

In the Czech Republic, voters do not actively register for elections; instead they are registered in permanent electoral rolls for municipal, regional, parliamentary and European elections. Every voter may be registered only once to avoid double voting. Election committees are allowed to add unregistered voters to the list insofar as they can demonstrate before the election committee that they have the right to vote. Pursuant to Section 88 of the Code of Administrative Justice³⁹, a person affected by an error or shortcoming in a permanent electoral roll may bring the case to the courts, seeking correction or supplementation of the electoral roll or an addendum thereto. Such defence is only meaningful if the person concerned learns about the error before elections, or more precisely, before (s)he proceeds to voting.

Court review of validity of elections and voting is governed by Section 90 of the Code of Administrative Justice, where the court takes into account in the proceedings whether the claimed irregularity was indeed capable of influencing the results of the elections or voting, which is very problematic in terms of adducing evidence⁴⁰.

Equal access to public offices

Public office is an office which exists in the context of the conduct of public affairs. The right of citizens to equal access to public offices encompasses the prohibition of discrimination in access to such offices, as well as the right to discharge them without interference and according to previously set rules. The Czech Republic lacked a comprehensive legal regulation which would define conditions for the exercise of public service and requirements on public servants. Act No. 234/2014 Coll., on public service, came into effect on 1 January 2015, stipulating that the basic prerequisite for entry into service consists in observance of the democratic principles of the constitutional order of the Czech Republic and due performance of service, which I consider to be legitimate and in accordance with the case-law of European courts⁴¹.

Mgr. Anna Š a b a t o v á, Ph.D., signed
Public Defender of Rights
(the document bears an electronic signature)

³⁷ File No. 4533/2014/VOP.

³⁸ Resolution of the Supreme Administrative Court of 20 November 2014, file No. Vol 23/2014-110, www.nssoud.cz.

³⁹ Act No. 150/2002 Coll., the Code of Administrative Justice, as amended.

⁴⁰ Municipal elections were repeated twice in the Krupka municipality in 2010 because the court had declared the results of the elections invalid due to interference in the electoral process (for example, bringing voters to the electoral site, falsification of voting ballots). In 2014, the elections were held under surveillance by the Police, monitoring potential vote trading in the streets. Detailed information in Czech is available at: <http://www.novinky.cz/domaci/361929-volby-na-brne-severu-i-pres-udajne-kupceni-s-hlasy-plati.html>; <http://www.rozhlas.cz/zpravy/regiony/zprava/na-komunalni-volby-v-krupce-dohledne-policie-chce-zabranit-kupceni-s-hlasy-volicu--1401297>. There are also cases of “formal citizens”, i.e. people whose registration for permanent residence in a municipality is purpose-driven, in order to vote for an arranged candidate for the municipal assembly. Judgment of the Constitutional Court of 4 May 2011, file No. Pl. ÚS 6/11 (N 85/61 SbNU 315). Available at <http://nalus.usoud.cz>.

⁴¹ Judgment of the European Court of Human Rights of 21 October 2014, *Naidin v Romania*, No. 38162/07.

