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# EUDO CITIZENSHIP OBSERVATORY

## *ACCESS TO ELECTORAL RIGHTS* *CZECH REPUBLIC*

Pavel Kandalec

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Czech Republic***

**Pavel Kandalec**

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# Access to Electoral Rights

## Czech Republic

Pavel Kandalec

### 1. Introduction

#### 1.1 Legal basis

A **new electoral codex**, the purpose of which is to include all future electoral laws into one single act, is currently under discussion. This new codex, however, has been under discussion for several years but has never been as close to actual adoption as it is at the time of writing. Once the law has been adopted, it may supersede certain provisions noted in this report.

As of late 2013, every type of election and referendum in the Czech Republic is regulated by a separate set of regulations (with the exception of elections to the Chamber of Deputies of the Parliament and to the Senate which are regulated by the same legislation). Although the laws regulating each kind of election or referendum have many similar features, there are often surprising and unjustified discrepancies between them. This report will highlight some of these discrepancies.

This report is based upon the following electoral legislation in the Czech Republic up to June 2013:

- The Local Elections Act (*Zákon o volbách do zastupitelstev obcí*) – Act No. 491/2001 Coll. – hereinafter “ZZO”
- The Regional Elections Act (*Zákon o volbách do zastupitelstev krajů*) – Act No. 130/2000 Coll. – hereinafter “ZZK”
- The Parliamentary Elections Act (*Zákon o volbách do Parlamentu ČR*) – Act No. 247/1995 Coll. – hereinafter “ZVP”. This Act regulates both the elections to the Chamber of Deputies of the Parliament (*Poslanecká sněmovna*) and elections to the Senate (*Senát*)
- The Presidential Election Act (*Zákon o volbě prezidenta republiky*) – Act No. 275/2012 Coll. – hereinafter “ZPR”
- The European Parliament Election Act (*Zákon o volbách do Evropského parlamentu*) – Act No. 62/2003 Coll. – hereinafter “ZEP”
- The Local Referendum Act (*Zákon o místním referendu*) – Act No. 22/2004 Coll. – hereinafter “ZMRef”

- The Regional Referendum Act (*Zákon o krajském referendu*) – Act No. 118/2010 Coll. – hereinafter “ZKRef”

In the case of **presidential elections**, this report is not based on any deeper experience since direct presidential elections took place for the first time in January 2013. Before the release of the constitutional amendment No. 71/2012 Coll., the president was elected indirectly by the Parliament of the Czech Republic (i.e. by the Chamber of Deputies and the Senate through a common meeting of the two chambers).

The reader has also to keep in mind that **regional referendums** have only recently been introduced – with effect from 01 January 2011. Fully in accordance with the expectations of specialists,<sup>1</sup> no regional referendum has yet taken place due to the fact that the fourteen regions that make up the country were created in 2000 without any historical basis and, also, that there are few relevant issues which are decided at the regional level.

The Constitution of the Czech Republic foresees, in Art. 2 Par. 2, a possible **referendum on the execution of state power** (local referendums and regional referendums are only concerned with issues of regional autonomy). Such a referendum, nevertheless, has taken place only once, in 2003, on the issue of joining the EU in accordance with the special constitutional law No. 515/2002 Coll. Given its singularity, this report will not take this referendum into consideration.

Elections of the **city mayor** and the **regional governor** are not discussed at all, as the functionaries in question are elected in indirect elections by the local or regional assemblies.

## 1.2 *Citizenship of the Czech Republic*

Citizenship of the Czech Republic is regulated by law No. 40/1993 Coll. on State Citizenship of the Czech Republic. The Constitution of the Czech Republic, in Art. 12 Par. 1, only refers to a more detailed legal regulation and Art. 12 Par. 2 sets down that no one can be deprived of his/her citizenship against his/her will. In view of the fact that the regulation of citizenship itself is not the subject of this report and that the citizenship of the Czech Republic has already been treated in detail elsewhere,<sup>2</sup> it will not be elaborated on. Nevertheless, three things have to be noted in relation to the subject of this report:

Citizenship of the Czech Republic is **unitary**. There is no other category than the strictly dichotomous state of being either citizen or non-citizen. No denizen categories or other categories of citizens of the state with affinity to the Czech Republic exist. The only exception is regulations for EU citizens that are, as will be explained further, at some points below the standards required by the EU.

Citizenship of the Czech Republic is **equal**. The means of acquiring citizenship is thus unimportant. Naturalised citizens have the same rights as natural born citizens. In the whole of Czech Law (including electoral law), there are no rights that would depend on how long the person in question has been a citizen and on which grounds he/she has become one. With the acquisition of citizenship all rights are acquired immediately. The existing practice does not even allow (unlike, for example, in Germany) the abolition of surreptitiously acquired citizenships – a practice which is subject to criticism and supports dishonest acquisition.<sup>3</sup>

<sup>1</sup> RIGEL, Filip. *Zákon o místním referendu s komentářem a judikaturou*. Praha: Leges, 2011, p. 8.

<sup>2</sup> BARŠOVÁ, Andrea. Czech citizenship between past and future. Project CITMODES. University of Edinburgh. <http://www.law.ed.ac.uk/citmodes/files/czechrepublic.pdf>

<sup>3</sup> KANDALEC, Pavel. Zrušení podloudně získaného státního občanství. *Jurisprudence*. 2009, No. 5, p. 28-35.

Citizenship of the Czech Republic is **exclusive**. The principle of exclusivity, which is a common international standard, is based on the attitude of not taking into consideration a citizen's other citizenships in the case when he/she has more citizenships and at least one of them is the citizenship of the state in question. In the area of the electoral law of the Czech Republic, this means no such situation can arise in which a citizen of the Czech Republic would be limited in his/her rights because of his other citizenship(s). His/her other citizenship can only be subject to political critique, as happened in 2008 when Jan Švejnar was running for the President of the Republic and voters (the members of the Parliament) saw his simultaneous American citizenship as a handicap (in the end his rival Václav Klaus became president).

### 1.3 *Franchise of citizen residents, citizens abroad and foreign residents*

Electoral law is deficient where certain categories of **citizen residents** are limited in their electoral rights, namely the mentally disabled and prisoners. In both cases the legal text as such is not obviously unconstitutional, though the practical application of legal provisions play a more important role. In the case of the mentally disabled, the problem has already seen a resolution by the Constitutional Court (see below), whereas the obviously unconstitutional practice concerning the voting rights of prisoners is still only subject to scholarly debate<sup>4</sup>.

The voting rights of Czech **citizens abroad** is not the subject of any important political debate. This is in all probability due to its quite accommodating regulations: citizens residing abroad are not limited in their participation in national elections in any way. They cannot participate only in local and regional elections and local and regional referendums. This can easily be explained by the communal character of these elections or referendums.

However, the status of soldiers doing military service abroad can be problematic. Their active voting rights are not separately regulated, which in practice sometimes leads to them being effectively disenfranchised.

The voting rights of **foreign residents** only concerns EU citizens because no other foreigners have voting rights in the Czech Republic. The Czech Republic has only partially met its obligations ensuing from EU Law. Some of the discrepancies will be discussed later. Suffice it to say for the moment that, up to now, only specialists have engaged in discussing this problem as it has yet to become<sup>5</sup> the subject of political debate and judicial proceedings.

## 2. Citizen residents

### 2.1. Age

There is a uniform lower age limit for active voting rights – eighteen years of age. Yet the legal approach to passive voting rights is different. The age limit for local and regional elections is eighteen years of age; for elections to the Chamber of Deputies and to the European Parliament, 21 years of age; and in the case of the Senate and presidential elections,

<sup>4</sup> E.g. ANTOŠ, Marek., DRÁPAL, Jakub. Volební právo vězňů: zelená je teorie, šedý je strom života. *Trestněprávní revue*. 10/2012, p. 224-230.

<sup>5</sup> ŠIMÍČEK, Vojtěch. Členství cizinců v politických stranách (aneb cizinec není našinec). *Jiné právo*. <http://jinepravo.blogspot.cz/2007/08/lenstv-cizinc-v-politickch-stranch-aneb.html>  
ANTOŠ, Marek. Občané volí v obecních volbách. Ale jen teoreticky. *Jiné právo*. <http://jinepravo.blogspot.cz/2011/10/obcane-eu-voli-v-obecnich-volbach-ale.html>  
ANTOŠ, Marek. Politická participace cizinců v České republice. *Politologický časopis*. 2012/2, p. 113-127.

40 years of age. This has not changed since the formation of the Czech Republic (i.e. since 01/01/1993).

## 2.2. *Mental disabilities*

All electoral rules agree that disenfranchised people who are quarantined or isolated (e.g. § 64 of Act No. 258/2000 Coll. on the **protection of public health** or § 38 Par. 2 of the Act 372/2011 Coll. on health care) have no active voting rights. As Molek and Šimíček mention, ‘this obstruction to carrying out electoral law has to be interpreted in narrow terms, that is, as only concerning contagious diseases’.<sup>6</sup>

However, more important is the fact that all electoral laws agree that **incapacitation** obstructs the carrying out of both active and passive voting rights. This has become a serious problem, mainly in relation to the practice of civil courts in the decision-making process about incapacitation. In fact, in Czech law there are two ways through which the civil courts can limit the legal eligibility of mentally disabled people: the ‘limitation of legal eligibility’ (§ 10 Par. 2 of the Civil Code) and ‘incapacitation’ (§ 10 Par. 1 of the Civil Code). It is the latter measure that limits legal eligibility most strongly and it is only this measure which obstructs both passive and active voting rights in all types of elections and referendums. The Constitutional Court of the Czech Republic in its finding of 12/07/2012 ref. no. IV. ÚS 3102/08 found this practice unconstitutional. The legal measure on incapacitation is a legal measure of civil law that allows courts to deprive a natural person of legal eligibility if this person becomes unable to make legal acts due to a mental disorder that is not completely transient. Ordinary courts, such as the Constitutional Court learned from official records, possibly because of the primarily civilian nature of incapacitation, do not take the public law consequences (i.e. the *ex lege* loss of voting rights) of their decisions into consideration. Concerning this matter, the Constitutional Court pointed out the alarming statistics which showed that by 30 July 2007 3,893 people had been ‘limited in their legal eligibility’ and 23,283 people had been classed as ‘incapacitated’. Based on these numbers, the Constitutional Court concluded that ordinary courts decide too often on the constitutionally problematic incapacitation ruling.

When deciding about the limitation of legal eligibility or incapacitation of a natural person, ordinary courts are, according to the Constitutional Court, obliged to judge separately whether the concrete person is able to understand the meaning, the purpose and the consequences of the elections.

The Constitutional Court, nevertheless, did not derogate any of the electoral laws. The sole fact that incapacitated people have neither active nor passive voting rights was not evaluated as unconstitutional. It criticised only the existing practice of civil courts.<sup>7</sup>

The practical impact of the findings mentioned above have so far been negligible, as the vast majority of people who have been incapacitated do not struggle for the redefinition of their legal limitations that the Constitutional Court has evaluated.

<sup>6</sup> MOLEK, Pavel. ŠIMÍČEK, Vojtěch. *Soudní přezkum voleb*. Praha : Linde Praha, a.s. 2006, p. 123.

<sup>7</sup> For more about the topic see: VYHNÁNEK, Ladislav. Mental Disability and the Right to Vote in Europe: A Few Notes on the Recent Development. In *VIIIth World Congress of the International Association of Constitutional Law* 2010.

### 2.3. *Persons convicted of criminal offences (“prisoners”)*

In the case of prisoners, it is necessary to realise that in the area of voting rights, there is an essential difference between convicted prisoners and people in pre-trial detention. Otherwise, the Czech legal regulation does not make any distinctions between prisoners (e.g. according to the gravity of crime committed). After being released from prison or after pre-trial detention, these people immediately regain their voting rights in full.

#### *Prisoners’ active voting rights*

Officially in the elections for the Chamber of Deputies (the lower chamber of the Parliament), the Senate (the upper chamber of the Parliament), the European Parliament or the presidential elections, prisoners are not limited in their active voting rights in any way. On the other hand, convicted prisoners are disenfranchised in regional and local elections (§ 4 Par. 2 (a) ZZO; § 4 Par. 2 (a) ZZK). In local and regional referendums, both convicted prisoners and prisoners in pre-trial detention are disenfranchised (§ 4 (a) ZMRef; § 4 (a) ZKRef).

These are the legal regulations concerning prisoner’s active voting rights. What appears to be unjustified is the discrepancy in the voting rights of people in pre-trial detention who, according to the law, can participate in local and regional elections but cannot vote in referendums on the same local or regional level. Notwithstanding this observation, the practical problem lies elsewhere.

The prisoners can vote for the president, the European Parliament and the Chamber of Deputies without limitations. However, in reality they cannot fully vote for the Senate. The Senate elections take place every two years, but only individuals in one-third of 81 Senate districts are allowed to vote at any given time (the senators’ mandate then continues for six years). Thus, on a rotating basis, every two years around 33 percent of all eligible voters in 27 Senate districts can vote.

Legal regulations nevertheless specify that in order for the prisoner to be allowed to vote in Senate elections, these elections have to be announced in both the Senate district where he/she has permanent residence and the Senate district in which he/she is imprisoned. Taking into account that Senate districts are relatively small and that there are more of them than there are prisons (there are 36 prisons), it is clear that in this ‘lottery’ only some prisoners have actual voting rights. As can be seen from the statistics of the Prison Service of the Czech Republic, every two years only 2 per cent of all prisoners (not the expected 33 per cent) can vote.<sup>8</sup>

Local and regional elections give rise to an even more extreme situation. Although prisoners in pre-trial detention are not disenfranchised in local and regional elections, it is in fact necessary for them to have served their pre-trial detention in the prison that is located in the same district as their permanent residence. The word district now refers to the voting district – “*okrsek*” in the sense of § 26 ZZO. These districts are stipulated by the local mayors so that they contain around 1,000 voters. This is just an administrative arrangement (the results of local elections do not depend on the districts). Such a voting district usually only contains a few streets; in practice, elections for several districts together take place in the nearest public building (e.g. a school). The probability that the prisoner will reside in a prison in the same voting district in which he/she has his permanent residence is thus close to zero

<sup>8</sup> ANTOŠ, Marek., DRÁPAL, Jakub. Volební právo vězňů: zelená je teorie, šedý je strom života. *Trestněprávní revue*. 10/2012, p. 224-230.

and in these local and regional elections, prisoners in pre-trial detention become *de facto* disenfranchised.

Legal regulations are not the sole problem for elections in prisons. It follows from recent research<sup>9</sup> that around a quarter of all prisoners do not have an identity card. This is not surprising – criminals pay less attention to administrative duties than the rest of the population. Although they could arrange for an ID card to be issued in the prison with the help of the prison service, since they need their ID even less in prison than when they were free they often neglect this. However, prisoners cannot participate in elections without an ID card. This issue is the same with elections for the Chamber of Deputies, for the Senate, for the EP and presidential elections. All electoral laws, in fact, agree in that the voter is obliged to prove his/her identity with his/her ID card or his/her passport. This normally legitimate requirement loses meaning in prison. The identity of a prisoner cannot be doubted at all (if it was, the right of the state to imprison them would have to be doubted, too). The regulation is being discussed by scholars, which stipulates that in the presence of two wardens who would confirm his/her identity, the prisoner could vote without a valid identity card.<sup>10</sup>

### ***Prisoners' passive voting rights***

As regards passive voting rights, imprisonment (either the serving out of the sentence or the pre-trial detention) is not a legal barrier *ex lege* for any national elections. Convicted prisoners cannot stand as candidates in local regional elections. In the event that a member of a local or regional assembly is sentenced to unconditional imprisonment (eventually when the original non-prison sentence is changed to imprisonment), the assembly in question has to end the mandate of its convicted member (§ 5 ZZO; § 5 ZZK). Should the assembly fail to do so, the Ministry of Interior would end the mandate *ex offio*.

In case a member of the Chamber of Deputies or a senator is convicted, their mandate is not terminated by the conviction itself. Currently, this is a very popular topic in the Czech Republic. Two members of the Chamber of Deputies have recently been sentenced to unconditional imprisonment (Jaroslav Škárka by the first instance court for 3 years and Roman Pekárek finally for 5 years). They have not been in pre-trial detention and they are not in prison yet so they are still fulfilling their mandate.

In the case of Škárka, the first instance court decided to prohibit him from all activities connected to his mandate. This court sentence was, however, criticised by specialists as the majority of existing interpretations of the Constitution do not allow a criminal court decision to limit the passive voting rights in such a way.<sup>11</sup> Nevertheless, contrary opinions have also appeared.<sup>12</sup> The answer to this question remains still open, since Jaroslav Škárka has been finally fully acquitted by the court of appeal.

The current pre-trial detention of another MP, David Rath, is a separate topic. This is because Mr Rath, contrary to the two aforementioned MPs, is actually not carrying out his mandate, as he has been in pre-trial detention since May 2012. Since then, he has participated in the meetings of the Chamber of Deputies twice and he has given a speech on both

<sup>9</sup> ANTOŠ, Marek., DRÁPAL, Jakub. Volební právo vězňů: zelená je teorie, šedý je strom života. *Trestněprávní revue*. 10/2012, p. 224-230.

<sup>10</sup> ANTOŠ, M., DRÁPAL, J. Volební právo vězňů: zelená je teorie, šedý je strom života. *Trestněprávní revue*. 10/2012, p. 224-230.

<sup>11</sup> E. g. KOUDELKA, Z. Zákaz činnosti a pasivní volební právo. *Trestní právo*. 6/2012.

<sup>12</sup> ANTOŠ, Marek. Může soud zbavit poslance mandátu? Myslím, že ano. *blog aktualne.cz*. <http://blog.aktualne.centrum.cz/blogy/marek-antos.php?itemid=16165>

occasions. His appearance, however, was always connected only to the discussion of the proposal to pronounce the Chamber's agreement with his criminal prosecution (which is a manifestation of the MPs' and senators' trial immunity given by Art. 27 Par. 4 of the Constitution<sup>13</sup>). There has again been an animated debate between the specialists on whether the MP in detention has the right to participate in regular meetings of the Chamber, that is, to vote for laws, etc. In reality, MP Rath is currently unable to carry out his mandate. At the time of writing, this question is still awaiting discussion at the Constitutional Court.

Regarding the carrying out of passive voting rights, a special situation can theoretically arise with the President of the Republic. He benefits, in his position, according to the Art. 65 of the Constitution, from substantial immunity (indemnity), and yet a special proceeding can be conducted against him by the Constitutional Court for high treason (from 08 March 2013 this is also possible for 'a serious breach of the Constitution or another part of the constitutional order'). The punishment *sui generis* in this proceeding can be his removal from office and the annulment of his eligibility for presidential office. Up to now, however, in the whole history of the Czech Republic, this happened only once – in March 2013 against the president Václav Klaus. The Constitutional Court, however, finally stopped the proceedings since the electoral period of Václav Klaus expired..

### 3. Citizens abroad

Since 2000, citizens abroad have been, in principle, eligible to vote in all elections except for local and regional elections and local and regional referendums. This holds for elections for the Chamber of Deputies, the Senate and presidential elections and for both passive and active voting rights. Citizens abroad do not have passive voting rights at EP elections but they have the right to vote. In all these elections they can vote in the relevant Czech authority abroad except for the elections for Senate where citizens abroad can vote only if they appear in the Czech Republic on the day of elections. It is interesting that citizens abroad can vote for the Senate at every Senate election, that is, every two years in the Senate district of their choice and therefore have a vote three times stronger than a resident citizen who votes for the Senate only once every six years. However, in fact, citizens abroad usually don't travel to the Czech Republic just to exercise this right.

The votes of citizens abroad are, in the case of elections for the Chamber of Deputies, added to a voting region which is determined in advance by lottery (§ 27 ZVP). In 2006, when elections to the 200-member Chamber of Deputies ended in political stalemate (100 left wing, 100 right wing deputies), something as minor as the lottery ticket placing the votes from abroad almost determined the course of the whole Czech political scene for the next four-year electoral term.<sup>14</sup>

#### 3.1. Registration of citizens abroad

Concerning active voting rights, the registration of citizens living abroad is slightly more complicated than that of resident citizens. While lists of voting resident citizens are created automatically in the district of their permanent residence in the Czech Republic, citizens

<sup>13</sup> Art. 27 Par. 4 of the Constitution of the Czech Republic: „*Deputies and Senators may not be criminally prosecuted except with the consent of the chamber of which they are a member. If that chamber withholds its consent, such criminal prosecution shall be forever foreclosed.*“ In the case of David Rath, the consent has been given by Chamber of Deputies.

<sup>14</sup> ANTOŠ, Marek. Rozhodly letošní volby do Poslanecké sněmovny hlasy ze zahraničí? *Právní rozhledy*. 17/2006, p. 642–646.

abroad have to register at a relevant Czech authority abroad, in whose district they have their residence outside of the Czech Republic (§ 6 Par. 5(a) ZVP). Their application for registration into the so-called ‘special list of the representative authority’ has to be delivered to this authority at least 40 days before the elections.

It is only possible to vote at a Czech representative authority. Neither electronic voting nor postal voting is possible.

When citizens abroad return to the Czech Republic on election day, they are not allowed to vote unless they have de-registered themselves from the special list of the representative authority and unless they have registered their permanent residence on the territory of the Czech Republic. Citizens abroad can also benefit from the possibility of having a ‘voter ID’ issued.

### **3.2. Voter ID**

The voter ID should be discussed here in more detail, although its *raison d’être* is not solely to accommodate citizens abroad. Via their voter IDs, citizens abroad can also vote in the Czech Republic (or at any other representative Czech authority) and, in the same way, citizen residents residing temporarily abroad (e.g. on vacation) can vote at a representative authority abroad.

The voter ID is issued on request to the voter who is planning to vote at a different place than in the district of his/her permanent residence. In that case, he/she has to apply for a voter ID at least seven days (fifteen in the case of elections to the EP) prior to the elections (§ 6(a) ZVP, § 33 ZPR or § 30 ZEP). The application has to be submitted in person, eventually by correspondence supported with a certified signature of the applicant. Subsequently, the voter is issued with a voter ID which enables him/her to vote:

- for the Chamber of Deputies and in presidential elections in any of the voter districts in the Czech Republic or at any of the representative authorities abroad
- for the Senate in any voting Senate district in which he/she has his/her permanent residence and where elections are held; in the case of a citizen abroad, he/she can vote in any district in which elections are held (on the territory of the Czech Republic)
- for the European Parliament in any voting district on Czech territory (i.e. not at a representative authority abroad – only those who have permanent residence in the district of this representative authority abroad can vote for the EP there)

It follows from the above that resident citizens can also benefit from the institute of the voter ID if they know that they will be temporarily residing at a place other than their place of residence.

To complete the picture, it is necessary to add that the voter IDs can also be issued according to ZZO (local elections) and ZZK (regional elections) in the case when a voter would want to vote in a different voting district than at the place of his/her residence. It has been already noted above that the voting district is just a small administrative division (around 1,000 voters). In practice, the voter ID could be practical for voters who would, for example, want to vote in local elections at the other side of the city than where he/she has his permanent residence. From the point of view of citizens living abroad this is not relevant because, as has already been mentioned, they have no voting rights for either local or regional elections.

To avoid double voting, the voter has to return his/her voter ID to the election commission once their vote has been cast.

### 3.3. *Soldiers at missions abroad*

This report does not individually discuss the voting rights of soldiers, as mandatory military service was abolished in the Czech Republic in December 2004. In spite of this, it is relevant to consider here the professional soldiers (and policemen) who are serving in missions abroad (presently for example in Kosovo or Afghanistan). They are explicitly deprived of **active voting rights** in local elections (§ 4 Par. 2(d) ZZO). Regarding other elections, their active voting rights are not regulated in any other special way.

Some participants in missions abroad, however, cannot in reality execute their active voting rights. Soldiers and policemen on missions abroad still have their permanent residence in their voting district in the Czech Republic. Therefore, they have to present themselves at their voting district in the Czech Republic. With the voter ID they could also vote at the relevant Czech authority abroad which, although possible in Kosovo, is certainly not in Afghanistan due to security reasons. This situation is problematic and, if a high enough number of electoral complaints was submitted, the elections could be cancelled. However, no such official complaints have so far been made. The need for the introduction of correspondence seems to be quite relevant.

Concerning **passive voting rights**, soldiers and policemen are not limited at any elections, but it generally holds for both of them that they cannot become members of a political party which, in practice, leads to the policemen and soldiers usually not executing their passive voting rights.

## 4. Foreign residents – EU citizens

The only foreign residents with electoral rights in the Czech Republic are EU citizens. All other foreigners and apatrids are fully disenfranchised in all elections. Even citizens from the Slovak Republic, which has strong historical ties to the Czech Republic, are not privileged in any manner. Indeed, before the entry of both countries to the EU (1. 5. 2004), Slovak citizens had even been treated as third country citizens in the Czech Republic.

Theoretically, EU citizens can vote in local elections and also in elections to the EP. They can also participate in local referendums, but they are excluded from all other types of elections (even regional elections).

However, voting rights in regional elections in Prague should be noted. Although elections there conform to the law on elections into local assemblies (ZZO), Prague is considered to be on the same level as the other thirteen Czech regions. A paradoxical situation can therefore arise, as an EU citizen with permanent residence in Prague has the possibility to vote at this higher, regional level.

### 4.1. *Local elections*

According to § 4 Par. 1 ZZO, a citizen of a different country, who has registered his/her permanent residence in the municipality, can vote in local elections if he/she is granted these rights by an international treaty. The only such international treaty allowing this is the Treaty on the Functioning of the European Union.

This quite negative approach of the legislator to the voting rights of foreigners is, according to some scholars, a remnant of the unified conception of a past representative system when all representative assemblies were part of a single system of state power and administration bodies.<sup>15</sup>

### ***Local elections – active voting rights of EU citizens***

The active right of EU citizens to vote for local assemblies sometimes collides with its principal condition: the voter has to have his/her permanent residence registered in the municipality in question. As Marek Antoš<sup>16</sup> has pointed out, this condition is regulated in the same way for all voters (citizen residents and EU citizens). In reality, however, it is strongly discriminatory and represents a considerable obstacle for EU citizens.

The concept of “**permanent residence**” in fact does not have the same content throughout the legal code. In the case of citizens of the Czech Republic, permanent residence is regulated by law No. 133/2000 Coll. on the record of residents and is inherently defined for record keeping purposes. Czech citizens can change his/her permanent residence very easily – just by mere declaration at the local authority. The only condition he/she has to fulfil is to prove that he/she has the right to stay in some house in the municipality (e.g. as tenant or owner of the house).

On the other hand, in the case of foreigners (EU citizens included), the concept of permanent residence is regulated by law No. 326/1999 Coll. on the residence of foreigners on Czech territory and represents a significantly different institute. In principle, an EU citizen is eligible to obtain ‘permission for permanent residence’ (from the foreign police authority) after five years of uninterrupted sojourn on the territory of the Czech Republic, if he/she fulfils additional conditions (§ 87(g) of the law on the residence of foreigners). A foreigner who is intending to live in the Czech Republic obtains, at first, permission for a short-term stay and in most cases can apply for a higher level stay – ‘Permanent Residence’ – after five years of sojourn.

It is thus clear that, in local elections, EU citizens’ chances of carrying out their active voting rights cannot be compared to the citizen residents’ chances of carrying out their active voting rights. Recent research shows that only two-fifths of EU citizens have ‘permanent residence’. The others only have what is called sojourn and cannot participate in local elections. The actual resulting participation of EU citizens in local elections is then a mere 1 per cent of all EU citizens living in the Czech Republic.<sup>17</sup>

### ***Local elections – Registration of EU citizens***

Marek Antoš<sup>18</sup> further calls attention to another discriminatory circumstance: citizen residents do not have to register before the elections because their names appear on the list of voters based on the fact that they have their permanent residence in the municipality concerned. If a citizen resident presents himself/herself at the polling place on the day of the elections and by chance does not appear on the list (e.g. because he/she moved to the municipality a few days preceding the elections), the election committee is liable, according to § 33 Par. 3 ZZO, to add him/her to the list.

<sup>15</sup> FILIP, J. Analýza pro potřeby Úřadu vlády ČR. 2004.

<sup>16</sup> ANTOŠ, Marek. Politická participace cizinců v České republice. *Politologický časopis*. 2012/2, p. 113-127.

<sup>17</sup> ANTOŠ, Marek. Politická participace cizinců v České republice. *Politologický časopis*. 2012/2, p. 119-120.

<sup>18</sup> ANTOŠ, Marek. Politická participace cizinců v České republice. *Politologický časopis*. 2012/2, p. 113-127.

An EU citizen who is intending to participate in local elections must have obtained permission for permanent residence (see above) and also must have registered, before 4 p.m., at least two days prior to the elections (§ 28 ZZO).

### ***Local elections – passive voting rights of EU citizen***

Another practical problem arises with EU citizens' passive right to vote in local elections. Apart from the fact that the candidate for the local assembly has to fulfil the active voting right conditions mentioned above (i.e. permanent residence in the municipality concerned), carrying out the passive right to vote collides in practice with all EU citizens' noneligibility for membership to a political party. The prevailing opinion and practice are such that legal regulation does not allow for the membership of foreigners to political parties. This is because, at the constitutional level, the right to become a member of a political party is only granted to citizens (Art. 20 Par. 2 Czech Charter of Fundamental Rights and Basic Freedoms) while the executive law (No. 424/1991 Coll. on the grouping of people into political parties) sets down in § 2 Par. 3 that only a citizen of more than eighteen years of age can become a member.

At first glance, it may seem that the problem is not at all serious, as unaffiliated people can also stand as candidates in local elections, on the ballots of a political party. In practice, however, carrying out passive voting rights of unaffiliated people is almost impossible as hardly any political party will include a non-member on its ballot.

Nevertheless, Czech citizens who are in fact unaffiliated very often stand as candidates in local elections. They usually form a new political party shortly before the elections just for the sake of the local elections (the so-called 'town hall parties' – this is, however, just a political term, as from the point of view of law this is a standard political party). In order to form a political party, it is necessary to produce a petition containing 1,000 signatures from voters who have Czech citizenship (but of any location).

It is nevertheless possible to stand as a candidate in an 'association of independent candidates'. If, however, the association wanted to participate in local elections, it would have to gather signatures from seven per cent of all people living in the municipality. Only voters, i.e. people of more than eighteen years of age who have their permanent residence in the municipality can sign such a petition. This is, mainly in bigger cities, a much stronger condition than the 1,000 signatures from voters with permanent residence anywhere in the Czech Republic mentioned above as necessary for the founding of a political party.

To sum up, Czech citizens who might want to stand as candidates in local elections and who have no affiliation to any of the present political parties can simply form a political party in order to enter local elections. EU citizens do not have such a possibility and can only benefit from candidacy through an 'association of independent candidates'. The number of signatures necessary however is, in practice, almost completely impossible to gather in bigger cities.

Vojtěch Šimíček pointed out this problem as early as 2007 when he stated: 'I dare say that after the granting of active and passive voting rights to EU foreigners with permanent residence on Czech territory (or in the municipality concerned), membership in political parties has to be allowed imperatively for this group too in communal elections and in elections to the EP. If the legislator has granted voting rights to EU foreigners with permanent residence, although only in local elections, I consider the regulation to be constitutional only if these rights are granted fully to them. Because this is currently not the case, I am afraid that the limitation I have mentioned cannot be considered constitutional. In

other words: if the state made me eligible to stand as a candidate in elections, it must not, at the same time, prevent me from benefiting from the same means of carrying out of this right that my potential political rivals have. If it does, it is unacceptable discrimination.<sup>19</sup>

To complete the picture, it should be mentioned that only a Czech citizen can become the mayor or the vice mayor of a municipality (§ 103 Par. 2 of the Law No. 128/2000 on municipalities). In the capital city of Prague, the condition of Czech citizenship does not concern only the mayor, but also all the members of the 11-member City Council (§ 69 of 131/2000 on the Capital City of Prague).<sup>20</sup>

#### 4.2. *Elections to the EP*

EU citizens' **active** rights to vote in EP elections has a wider scope than their active rights to vote in local elections. To reiterate, in local elections, an EU citizen has to have "permanent residence" in the municipality in question, which is a condition that only about two-thirds of all EU citizens living in the Czech Republic fulfil (the remaining third being mostly only 'sojourners'). By contrast with that, both those EU citizens who have their permanent residence in a municipality in the Czech Republic and those who only sojourn can vote for the EP. They have to have had permanent residence or sojourn for at least 45 days before the second day of the elections (§ 5 Par. 1 ZEP).

Their registration for EP elections is more complicated than that of Czech citizens. While Czech citizens do not have to register at all, EU citizens have to be registered at least 40 days prior to the elections (§ 29 Par. 1 ZEP).

Concerning **passive voting rights**, any Czech citizen and every EU citizen who has permanent residence or who is sojourning on Czech territory can become a member of the EP. If an EU citizen stands as a candidate, it is required that he/she has had permanent residence or has sojourned in the Czech Republic for at least 45 days before the second day of the elections (§ 6 ZEP).

Furthermore, an EU citizen must not be deprived of the right to be elected to the EP by the legal code of his/her country of origin (§ 6 ZEP). A citizen resident candidate, on the other hand, only has to have permanent residence in the Czech Republic (the minimum 45-day stay is not required in this case).

A more serious obstacle to the carrying out of EU citizens' passive rights to vote for the EP is the fact that one can only stand as a candidate on the ballot of a political party (§ 21 Par. 1 ZEP). Here, the same problem applies as was noted above in relation to the passive voting rights of EU citizens in local elections: only a 'citizen' can be a member of a political party, which is, in current practice, understood as a 'citizen of the Czech Republic'.

#### 4.3. *A possible solution: An EU-conform interpretation of the concept of the word 'citizen'*

The solution to the whole, evidently unconstitutional situation that is in disagreement with EU Law, seems to lie in the so-called EU-conform interpretation of the concept of 'citizen'. According to this interpretation EU citizens should, in the sense of the aforementioned laws, also be considered as 'citizens'. In any case, most of the laws mentioned do not use the

<sup>19</sup> ŠIMÍČEK, V. Členství cizinců v politických stranách (aneb cizinec není našinec). *Jiné právo*. <http://jinepravo.blogspot.cz/2007/08/lenstv-cizinc-v-politickch-stranch-aneb.html>

<sup>20</sup> MOLEK, Pavel. ŠIMÍČEK, Vojtěch. *Soudní přezkum voleb*. Praha : Linde Praha, a.s. 2006, p. 111.

explicit term “citizen of the Czech Republic” - only the expression ‘citizen’ is used. Although at the time these laws were created there was no doubt that the meaning of the word ‘citizen’ referred precisely to a ‘citizen of the Czech Republic’, with the accession of the Czech Republic to the EU an EU-conform interpretation of this concept has become possible.

The **EU-conform interpretation** of the concept of ‘citizen’ has already been used by the Constitutional Court of the Czech Republic, although in a different context. According to § 21 of the law No. 128/2000 Coll. on municipalities, the establishment of a new municipality by splitting from an existing one is possible, among other things, in the case when the new municipality (along with the original one) has ‘at least 1000 citizens’. The Constitutional Court of the Czech Republic has deduced, in its finding file no. IV. ÚS 1403/09 from 19 April 2010, that the regulation in question has to be interpreted in such a way that EU citizens who have their permanent residence in the new municipality are considered as ‘citizens’. The purpose of the 1,000 people condition for the establishment of a new municipality is to prevent the creation of very small municipalities. In consideration of the fact that EU citizens can participate, under other legally given conditions, in local government, there is no reason why they should not be counted in the minimum number of residents of a municipality.

The extent to which the EU-conform interpretation will be used in future in the case of the above mentioned discriminatory situation of EU citizens remains unresolved.

## 5. Conclusion

This report concludes that electoral laws in the Czech Republic show a number of deficiencies. They affect citizen residents by the too widely practised legal measure of incapacitation that leads to some of these people being disenfranchised. Another group of citizen residents who become disenfranchised in many aspects at the national level are prisoners. Although the legal regulation does not specify this, their chances of taking part in certain types of elections are almost non-existent.

Czech Law is fairly considerate towards citizens abroad, as it enables them all to take part in national elections regardless whether they have ever resided in the Czech Republic and no matter how long they have been abroad. Nevertheless, it does not provide for the possibility of voting by correspondence. Notably, in the case of soldiers on missions abroad, this can be problematic.

Most serious, however, is the fact that EU citizens do not have the same rights as citizens of the Czech Republic in what concerns their active and passive voting rights in local elections. This is due to the fact that, in practice, a five year stay in the Czech Republic is required. The passive voting rights of EU citizens (at both local elections and elections to the EP) are complicated further by the fact that they cannot be members of a Czech political party. The present state of affairs is discriminatory and in disagreement with EU law. Nevertheless, the solution does not necessarily have to lie in a law text amendment; it is also possible to use the so-called EU-conform interpretation of legal concepts. The above outlined problems are still awaiting a judicial resolution.

