

Main regulatory solutions for the elections during an emergency period

Oliver Kask

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The current and ongoing pandemic has given us lessons in holding elections, which have to be taken into account for any future emergencies. As the pandemic has been long, most countries represented in this conference have already organized elections. There have been close contacts between EMBs and we have had great chances to learn from the lessons in organising elections in countries with variable levels of emergencies.

Freedoms of expression and especially of assembly during election campaigns were largely affected. Where elections have not been postponed, the organisation of campaigning and voting procedures have been affected. The question therefore arises as to whether the measures taken have respected the principles of the European electoral heritage, such as the universal suffrage, freedom to campaign, periodicity of elections, stability of electoral law and even legality in general.

In some countries, legislation has been amended before holding elections even though as a general principle electoral legislation should not be amended less than one year before holding elections in its substance. Venice Commission has explained this so called one year rule in the Code of Good Practice in Electoral Matters and its Explanatory Report, Code of Good Practice on Referendums and many opinions. Its aim is to guarantee the equal chances for all candidates and political parties, as they are aware of the processes; and universal vote as the voters can be aware of the voting modalities. In general, late amendments to electoral legislation may decrease the trust in the electoral processes as the transparency of elections would suffer.

Any successful changes to electoral (and referendum) legislation should be built on at least the following three essential elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders;¹ and 3) the political commitment to fully implement such legislation in good faith. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general. These principles have to be taken into account while adjusting regulatory framework for elections during emergencies, as well.

For the future, the Venice Commission has in many occasions suggested to adjust the regulatory framework in order to better take into account the obstacles due to emergencies. Although we do not have a specific document containing guidelines in this regard, the possibilities for adapting regulatory means are mainly well-known already in the past and best practices or international guidelines such as the Code of Good Practice in Electoral Matters by the Venice Commission do not have to go through at least substantial amendments.

Both the time of adjusting regulatory framework and the procedure, including inclusiveness, may suffer if the amendments need to be made unexpectedly. It is wise to provide mechanisms for elections during emergencies beforehand, allowing the EMBs to decide on some modalities depending on the concrete situation during elections. Adaptability and flexibility in adopting regulations are the principles to be taken into account.

¹ Venice Commission, Revised Guidelines on the Holding of Referendums, [CDL-AD\(2020\)031](#), II.3.c.

The legislation may not be too generally-worded nor vague. Even though some discretionary powers may be given to the EMBs, it cannot be too wide. Clarity and foreseeability are needed for all stakeholders, including election staff, candidates and political parties as well as other institutions cooperating election organisers. Foreseeability leads to trust in the processes by the voters and public. Even if some discretionary power is given, the EMBs have to explain their decisions in particular detail to the public and procedural safeguards such as timeliness, inclusiveness and transparency have to be followed. Balance between regulations and amendments to the law has to be found depending on the general trust in the state institutions, level of emergency and other factors. It is especially important, if possible, to have proper discussion between the parliament and EMBs while adapting legislation and deciding on amendments to the electoral law.

Regulations by the EMBs have to be in accordance with the law even if the law could be considered as too strict. The principle of rule of law may not be discarded in emergency situations.

In emergency situations, the key issues have been safety of voters and election staff as well as security of electoral processes in order to guarantee integrity of the electoral processes and trust in the elections. Both of them need specific and separate treatment.

For campaigning, general bans have to be avoided. Even if limitations of public or private gatherings are necessary, other means of campaigning have to be supported. Special norms may address such issues:

- More online campaigning with clear rules could be guaranteed. The Venice Commission has adopted in 2020 the Principles for a fundamental rights compliant use of digital technologies in electoral processes. This study lists out key principles which have to be safeguarded in electoral legislation as the role of online campaigning is in rise, especially due to pandemic.
- More free time-slots in public media may be foreseen to compensate limitations and restrictions for gatherings and door-to-door campaigning or especially contacting most vulnerable groups.
- Longer campaign period can be foreseen in order to allow political parties to contact voters. It means longer electoral period with candidates' nomination earlier.

For the security of EMBs personnel, some special rules may be provided, such as:

- Extended deadlines for setting up local level election commissions and polling boards; replacement of their members or longer list of substitute members who have to be trained well in advance and who may replace in the need those persons who cannot fulfil their tasks. Such lists of substitute members of election commissions may be used in the whole country or in larger regions, not having the substitutes bound to a concrete election commission.
- Ad hoc commissions could be provided ready to step in and take over the work of an election commission in its entirety unavailable to work.
- Flexible rules on the composition of EMBs and the training can be foreseen, while guaranteeing its independence and neutrality, e.g. providing special nomination procedure instead of nominations coming from different political parties with rules to guarantee the political balance.
- Specific rules may be useful to regulate polling stations (in larger buildings with better ventilation; accessibility to vulnerable groups of voters; outdoor, drive-in, mobile and other *ad hoc* polling stations in different places better accessible for vulnerable groups).

On election day, many different solutions can be foreseen. These options include:

- longer election time, not comprising voting during one day, but instead during a week, many election days or some special days for voting in mobile polling stations. This option is used in many Nordic countries. It requires special arrangements, sometimes regulatory ones to keep the electoral material (ballot papers, ballot box, voters' lists) safe for an extended time when neither the polling station staff nor observers can be present. Special procedures for filling protocols on sealing the polling station rooms could be required.
- Internet voting is a possible option for voting in a distance without requirement for voters to leave their domicile during emergency period. Arranging internet voting takes time and is costly to keep the security of vote and fight against cyberattacks.
- Postal voting may be foreseen, especially for voters living in areas with higher level of emergency or for most vulnerable groups of voters. When providing for this solution, the trust in the postal service provider has to be high in the society and arrangements made for the validation of ballot papers depending on the time they have been sent or received in order to avoid endless collection of ballot papers and their counting. The longer the period for sending postal votes the more doubts might raise about the honesty of the procedure. "Postal voting, as the only method of voting independent of time and place, is the most convenient form of voting (Armbruster and Pautsch 2019). However, in granting the voter this flexibility, the risks of voter identification and physical transport of the vote are more acute. To guarantee postal voting, it is essential that voter identification and authentication is carried out in a reliable way, that secrecy of the vote is maintained throughout the process and the ballot transfer and count are safe and efficient in a timely fashion. EMBs must be able to control that each voter only exercises her/his right to vote once. Secrecy of the ballot is usually maintained by requiring that a posted ballot and other materials such as voter authentication statements are enclosed separately in a postal package. Many countries provide return envelopes to voters, thus making the postal voting free of costs for voters. The country's postal service must also be reliable to ensure that votes are received by the voter with sufficient time to complete and return the ballot."²
- In emergency situations, special rules may be suitable for observing and counting, in order to avoid crowding of the polling stations during election day and counting time. It is possible to set up web cameras for observing the counting or for security of ballot box, require polling stations to be located in large rooms with availabilities for observers to keep distance etc. Some rules can be foreseen for the selection of observers who are allowed to enter polling stations in case there are requests in a high level to do it, in order to limit the number of persons inside the polling station. Counting of votes may be organized in large halls, not in local premises often with small rooms. At the same time, the observers have to have the right to observe counting in a distance which does not prevent the meaningful observation.

The solutions to be used are not only up to the parliament to decide. Election management bodies on all levels have their availabilities to adapt elections to emergency situations. Addressing public with calls to take part in elections during election day in some specific manner can provide for appropriate behaviour of the voters, observers or candidates and good conduct of elections. Especially in larger countries with emergencies coming up only in parts of the country or being especially worrying in such areas, the lower level election management bodies may use the same kind of options to address the issues not with formal rules but with recommendations. These recommendations have to be communicated in a clear manner in the media, social media, webpages of the election management bodies etc.

² A. E. Heinmaa: Special Voting Arrangements (SVAs) in Europe. Available <https://www.idea.int/news-media/news/special-voting-arrangements-svas-europe-country-postal-early-mobile-and-proxy>.

Some options to be considered in this level is requesting voters within their possibilities:

- to vote at different time slots (e.g. vulnerable groups like elderly people in early voting hours and others in the afternoon; in case the elections take place in more than one day allocating one day to the voters in vulnerable groups;
- in case the polling stations become overcrowded, to go to the polling station at a later stage and queuing outside of the building where the polling station is located;
- to call to wear masks inside the polling stations and use hand sanitizer before and after voting. This issue is especially relevant in many countries due to the strong disagreements in societies on the impacts of the vaccines and the attitude towards the COVID-19 in general. Recommendations as a soft means without disenfranchising those voters opposing masks may add to constructiveness of the voting processes, especially if special time slots for voting for different societal groups are used;
- to use options to vote at home, by mail or by proxy in case the voter is ill or has been in close contact with ill persons;
- to avoid voting in some time slots to make necessary pauses for sanitizing and ventilating the premises;

In addition, some recommendations may be plausible for choosing the members of election management bodies, especially at lower level, from among vaccinated persons, having more persons in the commissions or having a longer list of substitute members of those commissions.

Postponement of elections has been one of the main solutions in managing elections during the early stages of the pandemic in 2020. I would not consider it unsuitable for the time being. As the Venice Commission has suggested in its considerations, such decision should be made only in case the main principles of elections cannot be protected.

One of the last possibilities to keep the elections safe is by providing some solutions in the electoral system. Holding only one round of elections instead of two can avoid difficulties with regard to the personal contacts. For parliamentary elections, it means that proportional representation could be favoured. Single transferable vote might be an option for the elections of president or mayor. Of course, this requires political will and issues related to emergencies may only be a secondary argument.

In addition, during emergency situations referendums may not only be postponed but avoided at all, except if a referendum can afford securing political stability in the society. In case a referendum is part of a compromise to guarantee the cooperation and stability in political debates, a postponement or renouncement of a referendum should not be considered and instead some possibilities discussed above should be used.