

The Temporary Transfer of Presidential Powers in the Czech Republic

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Abstract

The Presidency plays a central role in the functioning of the Czech political system. Among others, the President convenes the first sitting of the Chamber of Deputies after elections and must appoint the Government before it can seek parliamentary confidence. Therefore, the emergency hospitalization of President Miloš Zeman after the 2021 parliamentary election presented politicians with a hitherto unprecedented dilemma. Although a full-scale constitutional crisis was eventually averted, the incident still demonstrated the ambiguity and limitations of constitutional provisions on presidential inability and the temporary transfer of presidential powers in the Czech Republic. This article discusses the respective constitutional provisions and assesses their expedience in light of recent events. Drawing on historical precedents and political debates from the last 30 years, the article proposes options for reform and argues that constitutional crises will remain a real possibility unless political actors agree on at least a minimum of procedural requirements.

Keywords:

acting president – Czech Republic – Miloš Zeman – presidential succession – temporary transfer of powers

1 Introduction

The institution of the presidency is an integral part of any republican political system. Even in countries where prime ministers are the dominant executive actors and presidents as heads of state – be they directly or indirectly elected – perform primarily ceremonial functions, constitutions always assign at least some tasks to the presidency that make the effective operation of the office essential to the continued functioning of the state as a whole.¹ In order to prevent a paralysis of the state, constitutions must therefore foresee ways to guarantee the functioning of the office of the presidency in times of presidential inability or vacancy of the office.² This issue is often only considered as part of provisions for states of emergency and other major (and unlikely) crises. However, a myriad of examples from across the European continent over the last decade – e.g. the resignation of two German Presidents in short succession³, the failure of the Moldovan Parliament to elect a president for more than two years⁴, the suspension of Romanian President Traian Băsescu during two (eventually unsuccessful) impeachment proceedings⁵, and the death of Polish President Lech Kaczyński in the Smolensk air disaster⁶ – as well as complications brought on by the Covid-19 pandemic have demonstrated the practical relevance of regulating presidential succession.⁷

Constitutional provisions governing the temporary exercise of presidential functions by other political actors in case of presidential inability are often

¹ Philipp Köker, *Presidential Activism and Veto Power in Central and Eastern Europe* (Springer, Cham, 2017), 11-12, 249; see also Elliot Bulmer, *Non-executive Presidents in Parliamentary Democracies*, (International IDEA, Stockholm, 2017).

² Rainer Wahl, *Stellvertretung im Verfassungsrecht* (Duncker & Humblot, Berlin, 1971), 33-38.

³ Heiko Meiertöns and Felix C. Ehrhardt, "Der Präsident des Bundesrates als Vertreter des Bundespräsidenten," 33(3) *JURA* (2011), 166-170.

⁴ Alexander Tanas, "Moldova breaks political deadlock, elects president", *Reuters* (16 March 2012), available at <https://www.reuters.com/article/us-moldova-president-idUSBRE82F19M20120316>. Notably, in other countries such crises were often only narrowly avoided, e.g., in Estonia in 2016, Philipp Köker, "The effects of majority requirements, selectorate composition and uncertainty in indirect presidential elections: the case of Estonia," 35(2) *East European Politics* (2019), 238-258.

⁵ Sergiu Gherghina, "Formal and informal powers in a semi-presidential regime: The case of Romania," in Vít Hloušek (ed.), *Presidents above Parties? Presidents in Central and Eastern Europe, Their Formal Competencies and Informal Power* (Masarykova univerzita, Brno, 2013), 257-270, 266-267.

⁶ Monika Florczak-Wątor, "Konstytucyjne uregulowania problematyki zastępstwa prezydenta w Rzeczypospolitej Polskiej i państwach z nią sąsiadujących," 1(2-3) *Przegląd Prawa Konstytucyjnego* (2010), 185-207.

⁷ Several presidents tested positive for Covid-19 and subsequently had to isolate, necessitating the performance of some of their constitutional tasks by other actors, see e.g., Reuters, "Latvian president tested positive for coronavirus after Sweden trip," *Reuters* (14 October 2021), available at <https://www.reuters.com/world/europe/latvian-president-tested-positive-coronavirus-after-sweden-trip-2021-10-14/>.

characterized by their brevity and ambiguity.⁸ Hence, applying them in practice can pose a major challenge. Most recently, this was highlighted by discussions surrounding the hospitalization of Czech President Miloš Zeman in the immediate aftermath of the October 2021 parliamentary elections. A constitutional crisis was eventually avoided; nevertheless, the case is remarkable as it highlighted (a) the insufficiently defined procedural requirements for establishing presidential inability, (b) the comparatively high hurdles for transferring presidential powers to other actors, and (c) the lack of clear deadlines regarding presidential inability in the Czech Constitution (CCzR). This article explores the constitutional ambiguities and their implications for the temporary transfer of presidential powers in the Czech Republic. First, it introduces the relevant constitutional provisions and their historical genesis, and discusses historical precedents of their application. Second, it summarizes the political events in the aftermath of the 2021 election and highlights the different constitutional problems and discussions at the time. The third part then addresses three major shortcomings of the current provisions, reviews previous reform proposals and discusses options to prevent such impasses in the future. The article concludes by arguing that constitutional crises will remain a real possibility unless political actors agree on at least a minimum of procedural requirements and codify these in organic law.

2 Temporary Presidential Succession in the Czech Republic

2.1 Introduction

The Czech Republic emerged as one of two successor states from the break-up of Czechoslovakia (formally the “Czech and Slovak Federative Republic”) on 31 December 1992. While the Czechoslovak constitutional reform of 1968 had established a federation consisting of two separate Czech and Slovak Republics, each with a parliament and government acting autonomously from federal-

⁸ Philipp Köker and Hiske J. L. Carstens, “Acting Presidents and Temporary Presidential Succession in European Republics,” in Miroslav Đorđević (ed.), *Challenging traditional constitutional ideas in terms of modern state and politics* (Institute of Comparative Law, Belgrade, 2021), 245-258, 247.

level organs⁹, neither possessed their own constitutional document. Work on a new Czech Constitution began in June 1992 after it became clear that a break-up of the Federation was inevitable¹⁰, and the final document was approved by the Czech National Council on 16 December 1992.¹¹

2.2 *The Current Provisions of Article 66 CCzR*

Similar to other Central and East European countries, the Presidency and its powers were a major point of contention in the drafting of the Constitution.¹² The eventual constitutional design of the Presidency – indirectly elected by Parliament, yet equipped with a number of important powers and prerogatives (even if most of them require a counter-signature by the Prime Minister or other Cabinet Members) – emerged as the result of a careful balancing act between competing political forces. While the Government feared that a powerful Presidency could become an alternative center of power, President Václav Havel actively tried to lobby for a stronger presidency.¹³ The comparatively complicated and cumbersome provisions on temporary presidential succession must therefore also be read in this light.

Article 66 CCzR¹⁴, concluding Chapter III A on the presidency, regulates two scenarios and procedures, respectively, under which presidential powers may be exercised by actors other than a duly elected president. In the first scenario, a temporary presidential succession takes place *ipso facto* as soon as a vacancy (*sede vacante*) in the Presidential Office occurs due to resignation¹⁵, impeachment and removal from office based on a decision by the Constitutional

⁹ Petr Kopecký, “The Czech Republic: From the Burden of the Old Federal Constitution to the Constitutional Horse Trading Among Political Parties,” in Jan Zielonka (ed.), *Democratic Consolidation in Eastern Europe. Vol. 1: Institutional Engineering* (Oxford University Press, Oxford, 2001), 319-346, 326.

¹⁰ *Ibid.*, 332-335.

¹¹ Česká národní rada, “Uznesení České národní rady z 10. schůze 16.12.1992 k vládnímu návrhu ústavního zákona České národní rady, Ústava České republiky /sněmovní tisky 152 a 154/”, *Česká národní rada* (16 December 1992), available at <https://www.psp.cz/eknih/1992cnr/usneseni/u0114.htm>.

¹² Kopecký, *op. cit.* note 9, 333.; Köker, *op. cit.* note 1, 258.

¹³ Kopecký, *op. cit.* note 9, 333; Lubomír Kopeček and Josef Mlejnek, “Different Confessions, Same Sins? Václav Havel and Václav Klaus as Czech Presidents,” in Vit Hloušek (ed.), *Presidents above Parties? Presidents in Central and Eastern Europe, Their Formal Competencies and Informal Power* (Masarykova univerzita, Brno, 2013) 31-78, 44f.

¹⁴ Ústava České republiky, ústavní zákon č. 1/1993 (CCzR), last amended by Law no. 98/2013, available at <https://www.psp.cz/docs/laws/constitution.html>. Unless otherwise specified, any references to the CCzR in the present work refer to this version.

¹⁵ Art. 61 CCzR.

Court¹⁶, loss of electoral eligibility¹⁷, or death. Notably, a *sede vacante* persists even in cases where a new office-holder has been elected but has not yet taken the Oath of Office.¹⁸ The second scenario covers instances in which the president is only temporarily unable to perform the functions of the office (*sede plena*) “for serious reasons”.¹⁹ However, a temporary transfer of presidential powers in case of temporary presidential inability requires that the Chamber of Deputies and the Senate pass a resolution to that effect. In both scenarios, enumerated presidential powers are transferred to the Prime Minister and the Speaker of the Chamber of Deputies (or the Speaker of the Senate, in case the Chamber of Deputies is dissolved), respectively.²⁰

Three aspects of the provisions of Article 66 CCzR deserve particular attention in relation to the events in the aftermath of the October 2021 parliamentary elections that motivate this article: (a) the material conditions of “serious reasons”, (b) the procedural requirements of adopting a resolution establishing a *sede plena* by the legislature, and (c) the transfer of enumerated powers and lack of deadlines. The following sub-chapters discuss each of these aspects in detail.

2.2.1 Material Conditions of Presidential Inability

The first condition for a temporary transfer of presidential powers in case of a *sede vacante* specified in Article 66 CCzR is that “the President of the Republic is for serious reasons incapable of performing their duties”. However, the constitution and other organic law do not specify *expressis verbis* what may constitute “serious reasons”. Commentators generally agree that any such reasons should be objectively verifiable, yet differ on whether these cover primarily illness and loss of legal capacity²¹ or also absences from state territory, e.g. due to travel abroad as part of the President’s role as the country’s highest

¹⁶ Art. 65, Art. 87 para (1) lit g) CCzR.

¹⁷ Art. 57 para (1) CCzR.

¹⁸ Art. 59 CCzR; cf. Vladimír Sládeček, “Čl. 66 [Náhradní výkon funkcí],” in Vladimír Sládeček, Vladimír Mikule, Radovan Suchánek, Jindřiška Syllová (eds.), *Ústava České republiky: Komentář* (C.H. Beck, Prague, 2016, 2nd edition), 659-665.

¹⁹ All translations from Czech into English are by the author of the present work unless otherwise noted.

²⁰ See chapter 2.2.3.

²¹ Václav Pavlíček, *Ústavní právo a státověda, II. díl: Ústavní právo České Republiky část první* (Linde, Prague, 2001), 311; Kateřina Janstová, *Prezident České republiky* (Univerzita Karlova, Právnická fakulta, Prague, 2007), 131. Note that this interpretation is largely based on historical precedent, see also below.

representative, that interfere with the timely performance of presidential duties.²² In practical terms, it could be argued that an exhaustive definition of “serious reasons” for presidential inability is almost impossible to achieve – and could even carry the risk of running counter to the aim of the provisions of Article 66 CCzR, i.e., ensuring the continuous functioning of a central state institution. An exhaustive list of “serious reasons” would prevent the application of the respective constitutional provisions in cases other than those named, even if the President is factually unable to fulfil the duties of the office. While the Czech Constitution is by far not the only one to remain notably vague on this question, the lack of any indication of deadlines or acceptable periods of presidential inability (see also below) further hinders a definite interpretation of the material conditions of presidential inability. Therefore, any decision by the Chamber of Deputies and the Senate to adopt a resolution establishing inability remains context-specific and “subjective” to a certain degree.²³

Despite the subjectivity of a parliamentary resolution, the mere refusal by the President to perform certain acts (presidential inaction) – even if considered *contra legem* – would not qualify as a serious reason in the dominant interpretation of these provisions.²⁴ Irrespective of the above, it must be assumed that the conditions of “serious reasons” are also met when the President declares him- or herself to be temporarily unable to perform their duties for any reason. Nevertheless, such a declaration may be considered unlikely as the temporary transfer of presidential powers by parliamentary resolution (see below) is open-ended and may only be terminated by the Constitutional Court.²⁵

²² Jana Brázdilová, *Jmenovací pravomoce prezidenta republiky podle Ústavy ČR a jejich komparace s ústavní listinou z roku 1920* (Univerzita Karlova, Právnická fakulta, Prague, 2010), 6.; Herc furthermore lists instances in which the president is abducted or acts under threat, Tomáš Herc, *Prezident České republiky* (Univerzita Karlova, Právnická fakulta, Prague, 2011), 64.

²³ Cf. Aleš Gerloch, “K problematice postavení prezidenta republiky v ústavním systému České republiky de constitutione lata a de constitutione ferenda,” in Vojtěch Šimíček (ed.), *Postavení prezidenta v ústavním systému České republiky* (Masarykova univerzita, Mezinárodní politologický ústav, Brno, 2008), 35-41, 35.

²⁴ Herc, *op. cit.* note 22, 64; see also Martin Adamec, “Nečinnost prezidenta republiky ve světle aktuální judikatury,” in Jozef Andraško, Juraj Hamulák and Silvia Senková (eds.), *Constitutional Principles in Decision-making Practice of Administrative Bodies* (Univerzita Komenského, Právnická fakulta, Bratislava, 2018), 8-22.

²⁵ Cf. Sládeček, *op. cit.* note 18; Art. 87 para (1) lit h) CCzR; §§109-116 Zákon o Ústavním soudu, Law no. 182/1993 of 16 June 1993, available at <https://www.psp.cz/sqw/sbirka.sqw?cz=182&r=1993>

2.2.2 Procedural Requirements for Establishing Presidential Inability

A temporary succession and transfer of presidential powers in case of a *sede plena* not only requires that the President is incapable of performing their duties for serious reasons, but also necessitates the adoption of a resolution to that effect by the Chamber of Deputies and the Senate. Nevertheless, the formal procedural requirements of a resolution establishing presidential inability are similarly undefined as the material conditions.

First, it is unclear who would introduce a motion to declare presidential inability. Given that all Deputies, Senators and political groups have the right to propose topics for debate and motions for resolutions²⁶, it must be assumed that this applies *mutatis mutandis* to a resolution on presidential inability. Second, and perhaps more importantly, there is little guidance on how such a resolution would need to be passed. The phrasing of Article 66 CCzR allows for two distinct interpretations: the adoption of two separate resolutions by the Chamber of Deputies and the Senate, or the adoption of a joint resolution at a meeting of both chambers.²⁷ The Standing Orders of the Chamber of Deputies specify that it “resolves jointly with the Senate that the president cannot exercise their office for serious reasons”²⁸, whereas the Standing Orders of the Senate do not discuss the matter. Provisions of Article 37 (2) CCzR specify that the Standing Orders of the Chamber of Deputies apply to any joint meeting and Article 37 (1) CCzR empowers the Speaker of the Chamber of Deputies to convene it, which would support the second of the two possible interpretations.

Overall, several reasons support the first interpretation that separate decisions by both chambers are required. First, Standing Orders only have the status of ordinary law and the Constitution itself does not specifically require a joint meeting of the chambers.²⁹ Second, separate decisions would greatly enhance political accountability and strengthen the constitutional system of Checks and Balances.³⁰ Resolutions in either chamber – be it in separate or joint meetings –

²⁶ §57 para (2) Zákon o jednacím řádu Poslanecké sněmovny, Law no. 90/1995 of 19. April 1995, available at <https://www.psp.cz/sqw/sbirka.sqw?cz=90&r=1995>; § 59 para (2), §60 para (2) Zákon o jednacím řádu Senátu, Law no. 107/1999 of 11 May 1999, available at <https://www.psp.cz/sqw/sbirka.sqw?cz=107&r=1999>

²⁷ Cf. Sládeček, *op. cit.* note 18. Note that Janstová only considers the first interpretation, Janstová, *op. cit.* note 21, 131.

²⁸ § 50 para (1) lit j) Law no. 90/1995, *op. cit.* note 26.

²⁹ Cf. Sládeček, *op. cit.* note 18.

³⁰ This logic is also stressed by the fact that both chambers are differently constituted. The Chamber of Deputies is elected every four years using a system of proportional representation. In contrast, Senate elections

are passed by a simple majority with a quorum of one third of its membership.³¹ As the Chamber of Deputies is more than twice as large as the Senate (200 deputies vs 81 senators), a majority in the Chamber that controls the offices to which presidential powers are transferred in case of a successful resolution (i.e. the Speaker of the Chamber and the Prime Minister) could too easily overrule opposition from the Senate.³² Finally, the phrasing of Article 66 CCzR diverges significantly from other provisions dealing with joint meetings of Chamber and Senate. For instance, the old version of Article 54 (2) and Article 59 (2) CCzR, which regulated the indirect election of the President and subsequent inauguration, explicitly specified that these were to happen “at a joint meeting of both chambers of parliament”.³³

Notably, irrespective of the interpretation of Article 66 CCzR the constitution fails to account for a situation in which the President is unable to exercise their powers but the Chamber of Deputies is dissolved.³⁴ While Article 33 (1) CCzR empowers the Senate “to adopt legislative measures concerning matters which cannot be delayed”, these only concern measures that would otherwise require the adoption of a law. Furthermore, Article 33 (4) CCzR requires the signature of the President for such decisions to be promulgated and can hence be considered inapplicable to cases of presidential inability and the transfer of presidential powers.³⁵ Although periods in which the Chamber of Deputies is dissolved and has not yet been convened for a meeting after elections are generally limited to less than a week and only occur every few years, the events of October 2021 (further discussed below) show that the lack of any constitutional provisions on this matter presents a major omission.

take place every two years via single-member districts, whereby a third of all Senators (serving a term of six years) is replaced. Kopecký, *op. cit.* note 9, 337.

³¹ Art. 39 para (1) and (2) CCzR.

³² Other scholars have likewise criticized that the quorum and majority requirements are too low in relation to the far-reaching consequences of the subject matter. Janstová, *op. cit.* note 21, 131.; Václav Pavlíček and Jiří Hřebejk, *Ústava a ústavní řád České republiky. Svazek I. Ústava České republiky* (Linde, Prague, 1998, 2nd edition), 169.

³³ Herc, *op. cit.* note 22, 67. These provisions were changed when popular presidential elections were introduced in 2012.

³⁴ Herc, *op. cit.* note 22, 67.

³⁵ Herc argues that the resolution of the Senate could be deemed valid and remain in force until a newly elected and convened Chamber of Deputies decides on their ratification at its first sitting according to the provisions of Art. 33 para (4) CCzR, whereby any Senate resolution on Art. 66 would lose force if not ratified; cf. Herc, *op. cit.* note 22, 68.

2.2.3 Transfer of Enumerated Powers and Lack of Deadlines

Irrespective of whether inability occurs due to a *sede vacante* or a parliamentary resolution establishing a *sede plena*, the temporary performance of several enumerated presidential prerogatives and duties devolves on the Speaker of the Chamber of Deputies (or the Speaker of the Senate, see below) while others devolve on the Prime Minister. The division of powers established by this separate transfer of prerogatives generally mirrors the spheres of influence traditionally granted to these two bodies and is perhaps the least problematic of the provisions of Article 66 CCzR.³⁶

The Speaker of the Chamber of Deputies is temporarily vested with the powers of the presidency specified in Article 62 lit a) to e) and k) as well as Article 63 para (1) lit f) CCzR. These are primarily powers of appointment and concern the Presidency's procedural relationship with the legislature. The enumerated powers include appointing, recalling, and accepting the resignation of the Prime Minister and other Members of Government (Article 62 lit a) as well as entrusting the aforementioned office-holders with the temporary exercise of their duties (Article 62 lit d). The Speaker as Acting President also appoints of Justices of the Constitutional Court as well as its President and Vice-Presidents (Article 62 lit e) and members of the Banking Council of the National Bank (Article 62 lit k). Furthermore, the transferred powers include convening the sessions (Article 62 lit b) as well as the dissolution of the Chamber of Deputies (Article 62 lit c) and calling elections for the Senate (Article 63 para (1) lit f) var 2). If the Chamber of Deputies is dissolved, the abovementioned powers are exercised by the Speaker of the Senate (Article 66 sent 2 var 2), who also calls elections for the Chamber of Deputies (Article 63 para (1) lit f) var 1). Notably, the latter power was only introduced comparatively recently by constitutional amendment 319/2009³⁷ whereby its omission is generally seen as the result of an editorial error.³⁸

³⁶ The fact that only selected powers are devolved on each actor was thereby unquestionably influenced by the Slovak constitution that had already been passed in September 1992 and similarly included an enumerated list of prerogatives that would be transferred to the Government and the Prime Minister. Interestingly, the Czech example later served as a template for Slovakia when the Slovak National Council's inability to elect a new president highlighted that extant provisions were insufficient. Cf. Köker and Carstens, *op. cit.* note 8, 251-252.

³⁷ Ústavní zákon ze dne 11. září 2009 kterým se mění ústavní zákon č. 1/1993 Sb., Ústava České republiky, Law no. 319/2009 of 11 September 2009, available at <https://www.psp.cz/sqw/sbirka.sqw?cz=319&r=2009>

³⁸ Herc, *op. cit.* note 22, 72.

The Prime Minister exercises the powers specified in Article 63 para (1) lit a) to e) and h) to k), and Article 63 para (2) CCzR which are primarily related to the role of the President as highest (diplomatic) representative of the State as well as the Presidency's role in the (criminal) justice system. Hence, in case of presidential inability, the Prime Minister takes on the task of representing the State externally and negotiating international treaties (Article 63 para (1) lit a, b), acting as titular Supreme Commander of the Armed Forces (Article 63 para (1) lit c), as well as receiving, accrediting, and recalling heads of diplomatic missions (Article 63 para (1) lit d, e). In addition, the Prime Minister also is temporarily empowered to award of state honors (Article 63 para (1) lit h), appoint judges (Article 63 para (1) lit i), and may halt criminal proceedings and issue amnesties (Article 63 para (1) lit j, k). Finally, any powers delegated to the President by other constitutional provisions are also summarily transferred to the Prime Minister (Article 63 para 2).

Notably, the enumeration of prerogatives does not encompass all presidential powers, yet excludes the power to grant pardons (Article 62 lit g), the right to return adopted legal acts to parliament for reconsideration ('suspensive veto'; Article 62 lit h), and the appointment of the leadership of the Supreme Court (Article 62 lit f) and Supreme Auditing Office (Article 62 lit j). Although the selection of excluded powers may appear eclectic, these are arguably not essential for the continued functioning of the State – even if a *sede plena* or *sede vacante* persists over a longer period of time. The power to grant pardons is generally regarded as the elected presidents' personal prerogative and therefore logically excluded. Similarly, assigning the right to issue a 'suspensive veto' to the Speaker of either Chamber of parliament or the Prime Minister would not make sense given that they are generally supported by the same parliamentary majority that passed the very same legislative acts.³⁹ An argument could be made that appointments of the leadership of the Supreme Court and the Supreme Auditing Office are as relevant for the continued exercise of State Power as those transferred to Speaker and Prime Minister.⁴⁰ Nevertheless, as these institutions remain functional even without a Chairperson or Deputy Chairperson and judges can still be appointed by the Prime Minister under Article 61 (1) lit i) CCzR, the exclusion of their appointment does not present a critical omission. Finally, the selection of excluded powers provides at least an indirect

³⁹ Cf. Köker and Carstens, *op. cit.* note 8, 253-254, 255.

⁴⁰ See Herc, *op. cit.* note 22, 72.

qualification of the material conditions of “serious reasons” discussed above – as long as the President is able to exercise all other powers, yet cannot perform those excluded, it can be assumed that the material conditions of “serious reasons” are not met as a temporary replacement would be prohibited from performing them.

In contrast to the above, the lack of deadlines in the provision presents a much more problematic aspect of Article 66 CCzR. The Czech constitution does not *expressis verbis* place time limits on the exercise of the aforementioned presidential powers by the Prime Minister and the Speaker of the Chamber of Deputies (or, respectively, the Speaker of the Senate). However, some time limits are implied by other provisions with important differences between cases of *sede vacante* and *sede plena*. Before the introduction of popular presidential elections in 2012, Article 56 CCzR stipulated that a presidential election was required to be held within 30 days if the office of the president was vacated. However, the maximum possible duration of a *sede vacante* was in fact longer. As the election of a new president required an absolute majority in both houses of parliament and the third round could be held up to 14 days after the first, the practical limit of a *sede vacante* was closer to 45 days (including one additional day to take the oath of office). The introduction of popular presidential elections extended these deadlines to account for the more extensive preparations required (e.g., collection of nominating signatures, producing ballots, etc.). *De constitutione lata*, the Speaker of the Senate must now call an election no later than ten days after the office has been vacated and no later than 80 days before the date of the election.⁴¹ In case no candidate receives a majority, a run-off between the two candidates who have received the highest number of votes is held after 14 days. Hence, the maximum possible duration of a *sede vacante* currently stands at ca. 95 days (once again allowing for one day to take the oath of office). In stark contrast to these temporal limitations of a *sede vacante*, the maximum duration of a *sede plena* established by parliamentary resolution is only limited by the five-year term of office of the President.⁴²

⁴¹ Art. 56 para (8) CCzR.

⁴² Art. 55 CCzR.

2.3 *Historical Development And Application*

As *Kopecký* notes, “the past was especially powerful in shaping the Czech Constitution [...] and seemed more influential than, for example, constitutional models from democracies abroad”.⁴³ This is also true for provisions on temporary presidential succession which present a continuation and re-activation, respectively, of different principles that were established in the precedent Constitutions of Czechoslovakia. In particular, this relates to the transfer of powers to the Government in case of presidential inability and the cooperative involvement of the Legislature in the process of temporary presidential succession. Given that the provisions of Czechoslovak organic law are frequently used as a means to aid interpretation of the Czech and Slovak Constitutions by identifying historical meaning and important precedents, they possess additional relevance here – especially in highlighting potential options for reform.

The provisional Czechoslovak Constitution of 1918 charged the Government with exercising the functions of the presidency – allowing the cabinet to entrust the Prime Minister with performing particular duties – in case the President was out of country or the office became vacant.⁴⁴ While the 1920 and 1948 Constitutions maintained the transfer of powers to the Government in case of presidential inability as a default option⁴⁵, they also imposed a temporary restriction and deprived the Government of its exclusive role in the process. In case the President was unable to perform their duties for more than six months, the National Assembly – following a decision by the Government – was to elect a Vice-President until such time as the President was once again capable of exercising their duties. Nevertheless, the Constitutions failed to give any indication of the criteria by which the Government should reach a decision.⁴⁶ The only recorded application of these provisions in practice occurred on the initiative of the President, when Tomáš Garrigue Masaryk was unable to attend the independence

⁴³ *Kopecký, op. cit.* note 9, 332.

⁴⁴ §6 Zákon o prozatímní ústavě, Law no. 37/1918 of 13 November 1918, available at https://www.psp.cz/docs/texts/constitution_1918.html. While no vacancy arose until the passage of the 1920 constitution, the fact that the inaugural president Tomáš Garrigue Masaryk only arrived in Prague more than a month after his elections and frequently travelled abroad meant that the paragraph was invoked on a regular basis, Jan Wintr, “Die Regierungsform Tschechiens und der Slowakei im Vergleich,” 65(3) *OER Osteuropa Recht* (2019), 380-397, 382; cf. Milan Syruček, *Prezidenti - Jejich role a odpovědnost* (Brána, Prague, 2018), 37-39.

⁴⁵ §60 Ústavní listina Československé republiky (CCzSR 1920), Law no. 121/1920 of 29 February 1920, available at https://www.psp.cz/docs/texts/constitution_1920.html; §60 Ústava Československé republiky (CCzSR 1948), Law no. 150/1948 of 9 May 1948, available at https://www.psp.cz/docs/texts/constitution_1948.html

⁴⁶ František Weyr, *Československé právo ústavní* (Melantrich, Prague, 1937), 209.

day celebrations in November 1930 due to illness and therefore instructed the Government to represent him.⁴⁷

The Socialist Constitution of 1960 and the 1968 Constitutional Law on the Czechoslovak Federation removed any involvement of the legislature as well as any temporary restrictions and once again vested the Government and Prime Minister with exercising presidential duties (the latter also became Commander-in-Chief).⁴⁸ Nevertheless, the 1960 and 1968 Constitutions remain significant precursors to the current provisions. First, they established the wording defining presidential inability as cases in which the office is “vacant, a new president has not been elected and taken the oath, or if the President is unable to exercise his office for serious reasons” which is still used today. Second, as a consequence of the prolonged illness of President Ludvík Svoboda, Article 64 of the Law on the Federation was supplemented by a second paragraph in 1975 to allow for the election of a new Head of State if the President had been unable to fulfil their duties for more than a year.⁴⁹ Notably, the government’s justification for the draft law explicitly referred to the six-month deadline of the 1948 constitution as an important precedent, but rejected the proposal to re-introduce the election of a Vice-President as it failed to provide a “comprehensively satisfactory solution” for situations in which the office of the President was not “vacated in a way foreseen by the constitution”.⁵⁰ The subsequent election of Gustáv Husák as Svoboda’s replacement in May 1975 – one year after the latter had been hospitalized with a pulmonary embolism and suffered several strokes – also remains the only instance in which a president was removed from office due to incapacity. The only other case where the provisions of Article 64 Constitutional Law of the Federation were applied in practice occurred in July 1992 when President Václav Havel resigned in anticipation of the imminent dissolution of Czechoslovakia.⁵¹ During the last five months of the Federation’s

⁴⁷ The Government in turn authorized Prime Minister František Udržal to fulfil the role of acting president on their behalf; Brázdilová, *op. cit.* note 22, 9.

⁴⁸ Art. 64 Ústava Československé socialistické republiky (CCzSR 1960), Law no. 100/1960 of 11 July 1960, available at https://psp.cz/docs/texts/constitution_1960.html; Art. 64 Ústavní zákon o československé federaci (CCzSF 1968), Law no. 143/168 of 27 October 1968, available at https://psp.cz/docs/texts/constitution_1968.html.

⁴⁹ Ústavní zákon kterým se doplňuje čl. 64 ústavního zákona č. 143/1968 Sb., o československé federaci, Law no. 50/1975 of 28 May 1975, available at <https://www.psp.cz/sqw/sbirka.sqw?cz=50&r=1975>

⁵⁰ Vláda Československé socialistické republiky, “Vládní návrh Ústavního zákona kterým se doplňuje čl. 64 ústavního zákona č. 143/1968 Sb., o československé federaci”, *Parlamentná tlač Federálního shromáždění Československé socialistické republiky* č. 91, 1975, available at https://www.psp.cz/e-knih/1971fs/tisky/t0091_00.htm

⁵¹ Janstová, *op. cit.* note 21, 129.

existence the function of Head of State was then exercised by the Czechoslovak government which entrusted the performance of all presidential duties to Prime Minister Jan Stráský.⁵²

Notably, the current provisions of Article 66 CCzR were also only applied twice in practice, yet in neither instance was presidential power transferred by parliamentary resolution.⁵³ Rather, the Speaker of the Chamber of Deputies and the Prime Minister assumed presidential powers due to a *sede vacante*. After the Czech Republic gained independence on 1 January 1993, presidential elections were only held on 26 January and Václav Havel was sworn in as the country's inaugural President on 2 February. Similarly, when Havel's second term expired on 2 February 2003, a successor had not yet been elected. Following two unsuccessful rounds of voting in January 2003, the final round was held on 28 February and Václav Klaus was sworn in on 3 March as Havel's successor. Despite Havel's persistent health problems and frequent hospitalizations, including a string of emergency operations in April 1998, a temporary transfer of powers was apparently never seriously considered.⁵⁴ However, none of Havel's spells of incapacity coincided with events that would have required the exercise of presidential powers to guarantee the continued functioning of the state (e.g., calling elections, appointing members of government, judges, etc.).

2.4 Summary

Constitutional provisions on the exercise of presidential powers in case of temporary inability of the incumbent or vacancy in the office of the president of the Czech Republic developed from and build on several previous constitutional documents. However, provisions *de constitutione lata* have failed to fill gaps that were highlighted by complications with their – albeit limited – practical application to date. In particular, this concerns cases in which the office of the president remains occupied, but incumbents are unable to perform their duties in the shorter or longer term (*sede plena*). As the next chapter shows, these

⁵² Vláda České Republiky, “Jan Stráský – Rejstřík předsedů vlád,” *Vláda České Republiky* (n.d.), available at <https://www.vlada.cz/cz/clenove-vlady/historie-minulych-vlad/rejstrik-predsedu-vlad/jan-strasky-24449/>.

⁵³ Janstová, *op. cit.* note 21, 129-130.

⁵⁴ Havel suffered from numerous health problems throughout his presidency and was hospitalized a total of 17 times during his 13-year tenure as Czechoslovak and Czech president, spending a total of 230 days in hospital. Česká tisková kancelář (ČTK), “Výkon Václava Havla ve funkci hlavy státu komplikovaly nemoci,” *České noviny* (6 January 2003), available at <https://www.ceskenoviny.cz/zpravy/vykon-vaclava-havla-ve-funkci-hlavy-statu-komplikovaly-nemoci/20741>.

problems were prominently brought to the fore when President Miloš Zeman was hospitalized in the immediate aftermath of the October 2021 parliamentary election and subsequently unable to fulfil his duties.

3 The 2021 Czech Legislative Elections And Their Aftermath

On 8-9 October 2021, the Czech Republic held elections for the Chamber of Deputies. The populist ANO party (Action of Dissatisfied Citizens) of Prime Minister Andrej Babiš was able to win a narrow plurality of seats; however, its previous coalition partners failed to enter parliament. Hence, a coalition led by the center-right three-party coalition SPOLU (“Together”) with the liberal electoral coalition “Pirates and Mayors” (STAN) became the most likely outcome. An agreement between SPOLU and STAN to form a government notwithstanding, the appointment of SPOLU leader Petr Fiala as Prime Minister and other SPOLU and STAN politicians as Cabinet Ministers was not entirely certain. The Constitution stipulates that the President must appoint the Prime Minister and Cabinet Ministers before the government can seek a Vote of Confidence in the Chamber of Deputies⁵⁵ and provides Presidents with wide discretion in their decisions. Incumbent President Miloš Zeman in particular had leveraged the ambiguity of these provisions – notably, no criteria or deadlines for appointment are specified – to suit his political agenda on previous occasions, e.g. by conducting personal interviews with each ministerial candidate to draw out the process of appointment and even appointing a cabinet that clearly lacked any parliamentary backing to force snap elections.⁵⁶ Furthermore, he had previously openly declared his support for Babiš.⁵⁷ Even as the final election results were announced, the nature and outcome of the process hinged on the President.

In line with established tradition, Zeman met with Prime Minister Babiš the following day to discuss the election results (albeit without plans for tasking any party leader to form a government). However, only shortly afterwards he was

⁵⁵ Art. 68 para (3) CCzR.

⁵⁶ Lubomír Kopeček and Miloš Brunclík, “How Strong Is the President in Government Formation? A New Classification and the Czech Case”, 33(1) *East European Politics and Societies And Cultures* (2019), 109-134, 127; Köker, *op. cit.* note 1, 263.

⁵⁷ Vlastimil Havlík and Jakub Wondreys, “The 2021 Czech parliamentary elections: the surprising victory of the anti-populist coalition,” *WhoGoverns.EU* (11 October 2021), available at <https://whogoverns.eu/the-2021-parliamentary-elections-in-czechia-the-surprising-victory-of-the-anti-populist-coalition/>.

taken to intensive care for treatment of complications with an undisclosed chronic disease.⁵⁸ In the following days, the hospital and the Presidential Office refused to release more information apart from the fact that Zeman's condition had stabilized, leading to intense speculation about his ability to perform his presidential duties in the shorter and longer term. Concerns about the President's inability to fulfil the functions of the office increased when media reports revealed that he likely suffered from hepatic encephalopathy, a condition brought on by liver cirrhosis that is associated with neurological and mental impairments.⁵⁹ These concerns also failed to subside after the Speaker of the Chamber of Deputies, Radek Vondráček, visited the President. It soon emerged that the meeting had taken place without the approval of the attending physician and the hospital distanced itself from Vondráček's statements on the President's health.⁶⁰ Furthermore, media and politicians alike questioned the validity of the presidential decree convening the first session of the newly elected parliament⁶¹ due to various inconsistencies.⁶²

The first public information on the President's health condition was released on 18 October, when the Speaker of the Senate, Miloš Vystrčil, declared that he had received a letter from the Central Military Hospital (at which Zeman was hospitalized) stating that Zeman was unable to perform any of his duties and

⁵⁸ Jan Menšík, "Zemana převezli do nemocnice. Záběry ukazují, že je v bezvládném stavu," *Novinky.cz* (10 October 2021), available at <https://www.novinky.cz/domaci/clanek/z-lan-odjela-sanitka-v-doprovodu-limuzin-40374464>; Jaroslav Gavenda "Prezidenta Zemana stabilizovali. Co se dělo před odjezdem do nemocnice," *Seznam Zprávy* (10 October 2021), available at <https://www.seznamzpravy.cz/clanek/z-lan-miri-sanitka-do-nemocnice-177390>. Notably, Zeman had already been hospitalized for two weeks in September to treat dehydration and exhaustion; Rémy Vlachos, "Zeman se v nemocnici zdrží, doporučili mu nepřetržitou lékařskou péči," *iDNES.cz* (14 September 2021), available at https://www.idnes.cz/zpravy/domaci/zeman-nemocnice-hospitalizace-stav-lecba.A210914_134935_domaci_remy.

⁵⁹ Lukáš Prchal and Prokop Vodrážka, "Prezident je dezorientovaný, obtížně komunikuje. Jeho stav je vážnější, než Hrad přiznává," *Deník N* (13 October 2021), available at <https://denikn.cz/726227/prezident-je-dezorientovany-obtizne-komunikuje-jeho-stav-je-vaznejsi-nez-hrad-priznava/>.

⁶⁰ Česká televize, "Vondráček přišel za Zemanem neoprávněně, tvrdí nemocnice a hodlá věc vyšetřit," *Česká televize* (14 October 2021), available at <https://ct24.ceskatelevize.cz/domaci/3385948-sledujte-brifink-ke-zdravotnimu-stavu-prezidenta-republiky>.

⁶¹ Miloš Zeman, "Rozhodnutí Prezidenta republiky ze 14. října 2021 o svolání zasedání Poslanecké sněmovny Parlamentu ČR", Collection of Laws 386/2021, section 171/2021 (14 October 2021), available at https://www.epravo.cz/_dataPublic/sbirky/2021/sb0171-2021.pdf.

⁶² Among others, it was alleged that the document had not been signed by Zeman and himself and observers that the date had only been added afterwards. Criminal investigations were, however, later discontinued. Ondřej Kořínek and Jakub Bartosz, "Žalobci řeší hned několik podání kvůli pravosti podpisu Zemana, zkoumat se bude i video z nemocnice," *Novinky.cz* (26 October 2021), available at <https://www.novinky.cz/krimi/clanek/zalobci-resi-hned-nekolik-podani-kvuli-pravosti-podpisu-zemana-zkoumat-bude-i-video-z-nemocnice-40376134>.

was unlikely to return to work in the coming weeks.⁶³ Based on this information the Standing Senate Commission on the Constitution of the Czech Republic and Parliamentary Procedure (*Stálá komise Senátu pro Ústavu České republiky a parlamentní procedury*) noted the following day that the conditions for invoking Article 66 had been met and instructed the Senate's Organization Committee (*Organizační výbor*) to prepare a timetable for a respective resolution.⁶⁴ Zeman was moved out of intensive care in early November but was still judged to be unable to fully devote himself to work. Vystrčil nevertheless argued that a resolution pursuant to Article 66 was not necessary as long as the president was able to accept the resignation of the government after the first meeting of the Chamber of Deputies.⁶⁵ This position was also mirrored in a resolution by the Senate Commission from 9 November 2021 which recommended that the Speaker should only seek further information on the president's medical condition and potentially initiate further steps if the President was no longer "able to exercise at least the most important powers and prerogatives of his office (e.g. appointment of a government, ministers, judges, generals and professors, etc.)."⁶⁶

Although still in hospital, Zeman subsequently tasked SPOLU leader Petr Fiala with the formation of a new government⁶⁷ and accepted the resignation of the Babiš Government according to Article 73 (2) and (3) CCzR⁶⁸, thus fulfilling the conditions set forth by the aforementioned Senate Committee resolution.

⁶³ Sue Nguyen, "Dalšími kroky se budeme zabývat, říká předseda Senátu Miloš Vystrčil v reakci na ÚVN, podle níž není prezident republiky schopen vykonávat pracovní povinnosti (18.10.2021)," *Senát Parlamentu České republiky* (18 October 2021), available at https://senat.cz/zpravodajstvi/zprava.php?ke_dni=28.12.2021&O=13&id=3265.

⁶⁴ Stálá komise Senátu pro Ústavu ČR a parlamentní procedury, "k důvodnosti zahájení řízení podle čl. 66 Ústavy České republiky," *Senát Parlamentu České republiky* (19 October 2021), available at <https://senat.cz/xqw/webdav/pssenat/original/101269/84978>.

⁶⁵ iROZHLAS, "Vystrčil o článku 66: Připadá mi nejlogičtější počkat, jestli bude prezident schopný přijmout demisi vlády," *iROZHLAS* (4 November 2021), available at https://www.irozhlas.cz/zpravy-domov/milos-zeman-vystrcil-clanek-66_2111041416_pj.

⁶⁶ Stálá komise Senátu pro Ústavu ČR a parlamentní procedury, "k možnostem aplikace čl. 66 Ústavy České republiky," *Senát Parlamentu České republiky* (9 November 2021), available at <https://senat.cz/xqw/webdav/pssenat/original/101562/85228>. See also: Josef Kopecký, "Senátoři odložili zbavení Zemana pravomocí, vyčkají zprávy konzilia," *iDNES.cz* (9 November 2021), available at https://www.idnes.cz/zpravy/domaci/senatni-komise-pro-ustavu-stav-prezidenta-milose-zemana-aktivace-clanku-66.A211109_052522_domaci_kop.

⁶⁷ Jiří Ovcáček, "Prezident republiky pověřil Petra Fialu jednáním o sestavení nové vlády," *Pražský hrad / Prezident ČR* (9 November 2021), available at <https://www.hrad.cz/cs/pro-media/tiskove-zpravy/aktualni-tiskove-zpravy/prezident-republiky-poveril-petra-fialu-jednanim-o-sestaveni-nove-vlady-16154>.

⁶⁸ Jiří Ovcáček, "Prezident republiky přijal demisi vlády," *Pražský hrad / Prezident ČR* (11 November 2021), available at <https://www.hrad.cz/cs/pro-media/tiskove-zpravy/aktualni-tiskove-zpravy/prezident-republiky-prijal-demisi-vlady-16160>.

Despite Zeman's scheduled release from hospital on 25 November, the appointment of a new government was further delayed as he was re-hospitalized just hours later due to a Covid-19 infection.⁶⁹ Consequently, Zeman only designated Petr Fiala as Prime Minister on 28 November and began meeting with prospective government ministers in the following week. Holding no more than two meetings a day while being separated in a specially constructed glass cubicle, he eventually appointed Fiala and his cabinet ministers on 17 December 2021.⁷⁰ Hence, the process lasted almost four weeks – in contrast, when Zeman last appointed governments after legislative elections in 2014 and 2017, it had taken only twelve and seven days, respectively. The Chamber of Deputies passed a vote of confidence in the new coalition with a majority of 106:87 on 13 January 2022 and discussions over Zeman's ability to perform his duties as President subsequently subsided.⁷¹ Nevertheless, the above incident highlights very clearly that the current provisions of Article 66 are insufficient to prevent constitutional crises and a (temporary) paralysis of the State in case of short- or long-term presidential inability. In the next section, I focus on three major shortcomings of the current provisions, review previous reform proposals, and discuss options to prevent such impasses in the future.

4. Analysis And Suggestions For Reform

4.1 *Shortcomings of Article 66 CCzR Meriting Further Consideration*

The above discussion of constitutional provisions and the events of the autumn of 2021 have highlighted a number of problems in relation to the interpretation

⁶⁹ Lukáš Prchal and Barbora Janáková, "Zeman se nakazil koronavirem od ošetřovatelky, Fialu jmenuje premiérem v neděli v Lánech," *Deník N* (26 November 2021), available at <https://denikn.cz/756293/zemana-nakazila-koronavirem-v-tydnu-jeho-osetrovatelka-kterou-najal-mynar/>.

⁷⁰ Jiří Ovčáček, "Prezident republiky jmenoval členy nové vlády," *Pražský hrad / Prezident ČR* (17 December 2021), available at <https://www.hrad.cz/cs/pro-media/tiskove-zpravy/aktualni-tiskove-zpravy/prezident-republiky-jmenoval-cleny-nove-vlady-16218>; Except the minister of the environment Zdeněk Nekula who had been quarantined at the time and was only appointed on 3 January, Česká televize, "Nekula se stal ministrem zemědělství. Chce vrátit dotace 'do rovnovážné polohy'," *Česká televize* (3 January 2022), available at <https://ct24.ceskatelevize.cz/domaci/3422782-zive-prezident-jmenuje-zdenka-nekulu-ministrem-zemedelstvi>.

⁷¹ Josef Kopecký, "Vláda získala důvěru. Fiala má priority: Dukovany, důchodová reforma, dálnice," *iDNES.cz* (13 January 2022), available at https://www.idnes.cz/zpravy/domaci/hlasovani-o-duvere-vlade-petra-fialy-snemovna-den-druhy.A220113_135702_domaci_kop.

and application of Article 66 in practice. In particular, there are three shortcomings that merit further consideration:

- a) The procedural requirements for a resolution by the Chamber of Deputies and the Senate establishing presidential inability remain insufficiently defined. Most importantly, the Constitution and Parliamentary Standing Orders do not specify whether any decision on such a resolution is to be taken jointly or separately, and how to proceed during a period in which the Chamber of Deputies is dissolved (or elected, but not yet convened for its first meeting).
- b) Any parliamentary resolution establishing presidential inability for serious reasons is open-ended and can only be terminated by the Constitutional Court. This means that the Constitution does not account for cases in which the president is foreseeably unavailable for a limited period of time, e.g., because of a planned medical procedure or long-distance travel. Although the Presidential Office can make arrangements in coordination with other Organs of State to ensure that the president is not required to perform any planned duties in this time, this still makes the Czech Republic a major exception – at least in comparison with other European countries where such temporarily limited solutions are commonplace.⁷²
- c) Given the open-endedness of a parliamentary resolution establishing presidential inability and lack of short-term solutions (that would also allow for a more nuanced approach to the material conditions of “serious reasons”; see also chapter 2.2.1), the absence of deadlines for passing a resolution on inability or for the maximum duration of a *sede plena* assumes particular importance. On the one hand, this means that there may be a constitutional vacuum of undefined length during which the President is unable to exercise the functions of the office but no other officer of the state has been authorized to exercise them instead. On the other hand, the fact that both the Prime Minister and the Speaker of the Chamber of Deputies or the Senate, respectively, continue to exercise their original constitutional offices and habitually hail from the same political party or governing coalition, could lead to a situation where an important part of the constitutional system of Checks and Balances is disabled for the duration an entire legislative term.

⁷² Cf. Köker and Carstens, *op. cit.* note 8, 253.

The remainder of this section reviews previous reform proposals that either changed or sought to change the provisions of Article 66 before discussing other options for reform. It should be noted that other aspects – such as the separate devolvement of selected presidential powers otherwise only found in Slovakia⁷³ – likewise merit academic discussion. Yet, as this article is primarily motivated by the real-life example of the aftermath of the 2021 parliamentary elections, such considerations are left for discussion in subsequent publications.

4.2 *Previous reform efforts*

The shortcomings of Article 66 CCzR have not escaped the attention of legislators and politicians. Over the last 30 years, a total of 15 draft laws were submitted to amend its provisions.⁷⁴ However, only three were eventually passed and thereby largely failed to address the issues identified above. The first successful amendment, Constitutional Law 319/2009⁷⁵, introduced the ability of the Speaker of the Senate to announce elections to the Chamber of Deputies while the latter is dissolved (an omission widely regarded as an editorial error in the original document). The two subsequent constitutional amendments, relating to the EU accession referendum⁷⁶ and the introduction of popular presidential elections⁷⁷, only introduced minor changes to the powers devolved on the Prime Minister and Speakers of the Chamber of Deputies and Senate, respectively. Of the remaining 12 draft laws, four addressed at least part of the problems discussed in this section (Table 1) yet were part of larger initiatives that failed to receive sufficient political backing.

The first attempt to address some of the problems of Article 66 CCzR was introduced in 1999. A group of deputies produced a far-reaching draft law aimed at improving various aspects of the constitution based on the experiences of the first six years as an independent country. In particular, it proposed

⁷³ Cf. Köker and Carstens, *op. cit.* note 8, 250.

⁷⁴ In addition, a last-minute proposal to re-activate the “vice-presidential solution” from the 1920 constitution was submitted during final debate on the constitution on 16 December 1992, but rejected by deputies; Národní rada České republiky, “Stenografický zápis 10. schůze, 16. prosince 1992”, *Stenoprotokoly* (16 December 1992), available at <https://www.psp.cz/eknih/1992cnr/stenprot/010schuz/10-1.html>

⁷⁵ *Op. cit.* note 37.

⁷⁶ Ústavní zákon o referendu o přistoupení České republiky k Evropské unii a o změně ústavního zákona č. 1/1993 Sb., Ústava České republiky, Law no. 515/2002 of 13 December 2002, available at <https://www.psp.cz/sqw/sbirka.sqw?cz=515&r=2002>.

⁷⁷ Ústavní zákon, kterým se mění ústavní zákon č. 1/1993 Sb., Ústava České republiky, Law no. 71/2012 of 12 March 2012, available at <https://psp.cz/sqw/sbirka.sqw?cz=71&r=2012>.

changes to the Chamber of Deputies (including a possibility of self-dissolution by vote of an absolute 3/5 majority of deputies), immunity of office-holders, limited the President's discretion in using their appointment powers, and clarified the procedure for appointing a government.⁷⁸ The draft also acknowledged that Article 66 CCzR was problematic and suggested a simplified division of all presidential powers (not only a subset) between the Prime Minister and the Speaker of the Chamber of Deputies (or the Senate, respectively). Furthermore, the authors of the draft argued that the Constitution only insufficiently provided for cases in which the president was unable to exercise their office for a longer period of time. As a remedy, they suggested to add an additional paragraph allowing the Chamber of Deputies and the Senate to pass a resolution to establish a vacancy in the Presidential Office if the period of presidential inability – as established by a previous resolution – exceeded six months. While the draft was passed by the Chamber of Deputies with the required 3/5 majority, the Senate subsequently rejected the proposal on 29 March 2001.⁷⁹ With regard to the proposed changes of Article 66, the Senate Commission for the Constitution welcomed the simplified division of powers, yet argued that “it is preferable to transfer all the powers of the President of the Republic to a single person, i.e. in line with many foreign models and the concept of the Senate as a continuous body, to the Speaker of the Senate”.⁸⁰ Furthermore, it questioned whether the addition of a new Article 66 (2) CCzR was necessary and would not rather be open to abuse as the president would be unable to appeal against such a resolution.⁸¹ Instead, the Senate recommended that the phrasing of its own competing draft should be used which devolved the exercise of all presidential powers on the Speaker of the Senate.⁸² The Senate draft was passed on to the

⁷⁸ Ivan Langer, Petra Buzková, Eva Dundáčková, Zdeněk Jičínský, Jitka Kupčová and Jan Zahradil, “Návrh na vydání ústavního zákona, kterým se mění ústavní zákon České národní rady č. 1/1993 Sb., Ústava České republiky”, *Sněmovní tisk* 359/0, 1999, available at <https://www.psp.cz/sqw/text/ti-skt.sqw?o=3&ct=359&ct1=0>

⁷⁹ Senát Parlamentu České republiky, “6. schůze, 33. hlasování (návrh ústavního zákona, kterým se mění zákon č. 1/1993 Sb., Ústava ČR)”, *Hlasování Senátu* (29 March 2001), available at <https://www.senat.cz/xqw/xervlet/pssenat/hlasy?G=1654&O=3>

⁸⁰ Komise Senátu pro Ústavu České republiky, “Usnesení komise Senátu pro Ústavu České republiky z 24. schůze dne 31. května 2000”, *Senátní tisk* 172/3, 2000, p. 6, available at <https://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=15998>.

⁸¹ Senát Parlamentu České republiky, *op. cit.* note 80.

⁸² Komise Senátu pro Ústavu České republiky, “Návrh senátního návrhu ústavního zákona, kterým se mění a doplňuje ústavní zákon č. 1/1993 Sb., Ústava České republiky, ve znění ústavního zákona č. 347/1997 Sb.”, *Senátní tisk* 84/0, 1999, page 30, available at: <https://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=2696>

Chamber of Deputies in January 2002 but was subsequently rejected in the first reading.⁸³

The two other proposals that sought to tackle the shortcomings of Article 66 were part of draft laws that were intended to introduce more significant changes to the role of the president in the political system. A proposal by the parliamentary group of the Czech Social Democratic Party (Česká strana sociálně demokratická – ČSSD) to introduce a semi-presidential system in which the President was directly elected, yet the Prime Minister would continue to be responsible to the legislature, was widely discussed at the time and enjoyed support in other parties. Once again, this draft proposed a second paragraph to Article 66 CCzR that would allow parliament to declare a vacancy in the Presidential Office if the incumbent's inability lasted longer than six months. While the government strongly opposed this restructuring of the political system⁸⁴, the draft bill still went to a third reading in the Chamber Deputies where it even received support from a number of government deputies. Nevertheless, the bill failed to reach the required 3/5 constitutional majority.⁸⁵ Another draft constitutional law, proposed by an individual deputy shortly before the first direct election of the President was to take place, suggested the introduction of a presidential system in which the president was both the head of state and head of government. The Prime Minister would no longer be responsible to parliament and effectively function as the President's deputy. Hence, the draft proposed – in rather ambiguous phrasing – that the “the Prime Ministers assumes the office of the president” in case of a vacancy or a parliamentary resolution establishing presidential inability.⁸⁶ Although it was recommended for discussion by the relevant committees, the bill never even made it to the first reading during the 2010-2013 legislative term and was subsequently abandoned.

⁸³ In particular, deputies objected to the strengthened role of the Senate; Poslanecká sněmovna Parlamentu České republiky, “Stenografický zápis 46. schůze”, *Stenoprotokoly* (12 February 2002), available at <https://www.psp.cz/eknih/1998ps/stenprot/046schuz/46-9.html#q1132>

⁸⁴ Vláda České republiky, “Stanovisko vlády k tisku 332/0”, *Sněmovní tisk* 332/1, 2007, available at <https://www.psp.cz/sqw/text/tiskt.sqw?o=5&ct=332&ct1=1>

⁸⁵ Poslanecká sněmovna Parlamentu České republiky, “79. schůze, 52. hlasování (Novela z. Ústava České republiky)”, *Hlasování* (27 May 2010), available at <https://www.psp.cz/sqw/hlasy.sqw?g=52360&l=cz>.

⁸⁶ David Rath, “Návrh poslance Davida Ratha na vydání zákona, kterým se mění ústavní zákon č. 1/1993 Sb., Ústava České republiky, ve znění pozdějších předpisů”, *Sněmovní tisk* 907/0, 2013, available at <https://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=907&CT1=0>.

TABLE 1 Unsuccessful constitutional reform proposals including substantive changes to Article 66 CCzR

Amendment	Contents of proposal
<i>Sněmovní tisk</i> 359/0, 1999 Introduced by a group of deputies Rejected by the Senate, 29 March 2001	<p><i>General aims</i></p> <ul style="list-style-type: none"> – Improve consistency and clarity of provisions relating to the functioning of the Legislature, appointment and dismissal of the Government, and the powers of the Presidency <p><i>Proposed changes to Article 66</i></p> <ul style="list-style-type: none"> – New division of powers in case of vacancy or resolution establishing presidential inability; presidential powers enumerated in Art. 63 pass to the Prime Minister, powers in Art. 62 pass to the Speaker of the Chamber of Deputies (or to the Speaker of the Senate while the latter is dissolved) – Introduction of Article 66 para (2): <i>“If the President of the Republic is unable to exercise his office for serious reasons for more than six months from the date on which the Chamber of Deputies and the Senate have decided in accordance with paragraph (1), the office of President shall be deemed to have become vacant.”</i>
<i>Senátní tisk</i> 84/0, 1999 Introduced by the Senate Commission for the Constitution Rejected by the Chamber of Deputies in 1 st reading, 12 January 2002	<p><i>General aims</i></p> <ul style="list-style-type: none"> – Address practical concerns and academic criticism; improve clarity of provisions on the relationship between Legislature, Government, President, Constitutional Court and Supreme Court – Strengthen the role of the Senate in the legislative process and the appointment of judges and other offices <p><i>Proposed changes to Article 66</i></p> <ul style="list-style-type: none"> – Removal of division of separate devolvement of enumerated powers on Prime Minister and Speaker of the Chamber of Deputies or Senate – In case of vacancy or resolution establishing presidential inability the exercise of all presidential functions devolves on the Speaker of the Senate

TABLE 1 Unsuccessful constitutional reform proposals including substantive changes to Article 66 CCzR (cont.)

Amendment	Contents of proposal
<i>Sněmovní tisk</i> 332/0, 2007 Introduced by ČSSD party group Failed 3 rd reading in the Chamber of Deputies, 27 June 2010	<p><i>General aims</i></p> <ul style="list-style-type: none"> – Introduction of a semi-presidential system with a directly elected president, yet no changes to the role and powers of the Prime Minister <p><i>Proposed changes to Article 66</i></p> <ul style="list-style-type: none"> – New division of powers in case of vacancy or resolution establishing presidential inability; presidential powers enumerated in Art. 63 pass to the Prime Minister, powers in Art. 62 a) to g) and j) pass to the Speaker of the Chamber of Deputies (or the Speaker of the Senate while the former is dissolved) – Introduction of Article 66 para (2) [identical wording to <i>Sněmovní tisk</i> 359/0, 1999]
<i>Sněmovní tisk</i> 907/0, 2013 Introduced by an individual deputy Did not proceed to 1 st reading; abandoned after end of legisla- tive term	<p><i>General aim</i></p> <ul style="list-style-type: none"> – Introduction of a presidential system and transfer of appointment powers to the Chamber of Deputies and Senate to establish a stricter separation of powers <p><i>Changes to Article 66</i></p> <ul style="list-style-type: none"> – Removal of division of separate devolvement of enumerated powers on Prime Minister and Speaker of the Chamber of Deputies or Senate – In case of vacancy or resolution establishing presidential inability “<i>the Prime Ministers assumes the office of the president</i>”

SOURCE: OWN ELABORATION.

In sum, reform proposals to date have failed to fully address the shortcomings of Article 66 identified above. Supplementing Article 66 CCzR with a second paragraph that provides parliament with the ability to declare a vacancy in the office of the president – as suggested by draft laws in 1999 and 2007 (see Table 1) – would indeed be suitable to prevent that a *sede plena* persists until the end of a president's term of office. However, as long as there is no further

specification of the exact procedure through which Parliament shall pass such a resolution – either in the constitution or through ordinary law – this only addresses part of the problem. This similarly applies to devolving the exercise of presidential powers on either the Speaker of the Senate or the Prime Minister alone, as envisaged by other proposals (albeit together with other changes), which only simplifies instances in which presidential inability has already been established. In the next section, I propose constitutional amendments to address these problems, taking into account the concerns outlined above as well as the feasibility of finding support among Czech lawmakers.

4.3 *Options For Reforming Article 66*

The aim of this section is to present a number of realistic options for reforming the provisions of Article 66 and address the shortcoming identified above. Hence, while other solutions may be possible (and perhaps even desirable), the proposals formulated here are those that – based on previous discussions and (failed) reform attempts – would appear most likely to find support among a majority of lawmakers. The proposals are not meant to present definite or necessarily flawless solutions, but rather to serve as points of discussion highlighting hitherto underexplored avenues. Therefore, they are also presented as potential additions to Article 66 CCzR and not as a rephrasing of the current constitutional text.

4.3.1 Procedural Requirements

The requirement for an explicit authorization of acting presidents through parliamentary resolution is unique to the Czech case and not found in other European democracies, where the designated acting president (or committee acting as president) take over presidential duties *ipso facto* whenever inability occurs.⁸⁷ Such a solution safeguards against a paralysis of the state more efficiently than the provisions of the Czech Constitution; yet, given the ambiguity of the respective provisions, their application has not been without controversy.⁸⁸ Especially because the short-term transfer of powers often remains hidden from the public eye, the Czech solution can also be regarded as positive as it creates transparency and increases the legitimacy of the actions by the actors performing

⁸⁷ Cf. Köker and Carstens, *op. cit.* note 8, 251.

⁸⁸ Cf. Köker and Carstens, *op. cit.* note 8, 253.

presidential duties in lieu of the duly elected president. Previous discussions about the reform of Article 66 CCzR and the fact that all reform proposals so far have kept the requirement for a parliamentary resolution have shown that the Czech political system has not established the norms of trust that would allow for a transfer of power without explicit authorization.⁸⁹ Hence, a more feasible strategy would be to clarify extant provisions rather than replace them.

In line with the dominating opinion in the literature, I propose that a resolution on presidential inability should be passed separately by both chambers of the legislature. As argued above, this enhances political accountability and strengthens the constitutional system of checks and balances by ensuring that neither chamber can overrule the other. Nevertheless, as the aftermath of the October 2021 election showed, it is also important to provide for cases in which only one chamber – i.e., the Senate – is constituted. It has previously been argued that a failure to pass a resolution by the Chamber of Deputies after the Senate has already resolved on the matter during the Chamber's dissolution could invalidate the Senate resolution or end the temporary transfer of powers.⁹⁰ This is in line with Article 33 CCzR which empowers the Senate “to adopt legislative measures concerning matters which cannot be delayed” when the Chamber of Deputies is dissolved – although only on proposal of the government and requiring the subsequent countersignature of the Prime Minister and the President – and which lose their validity if the Chamber of Deputies does not confirm them at their first meeting. While this clearly strengthens the system of Checks and Balances, it would arguably not provide an ideal solution for the purpose of ensuring the continued functioning of the State. Not only could it unnecessarily prolong the period during which the president is unable to exercise the functions of the office but no other officer of the State has been authorized to exercise them instead, but it may also lead to a (renewed) constitutional crisis, e.g., when the President is unable to appoint a new Government. Therefore, I propose that the Senate resolves alone on resolutions establishing presidential inability when the Chamber of Deputies is dissolved and that this resolution cannot subsequently be invalidated. Nevertheless, to maintain a modicum of political accountability, it is advisable that – analogously to Article 33 (3) CCzR – the resolution requires the countersignature of the Prime

⁸⁹ The introduction of popular presidential elections that provide presidents with their own democratic mandate has arguably further complicated this.

⁹⁰ Cf. Herc, *op. cit.* note 22, 68.

Minister to be valid. Consequently, Article 66 could be supplemented by a paragraph reading as follows:

Proposal for Article 66 para (2) CCzR

The chambers decide on the resolution under paragraph 1 in separate sessions. During a period in which the Chamber of Deputies is dissolved, only the Senate takes a decision on the resolution which shall be signed by the Prime Minister.

4.3.2 Short-Term Substitution

In contrast to other constitutions, the Constitution of the Czech Republic does not foresee any mechanism by which Presidents themselves could temporarily devolve their power on other actors. Instead, any temporary transfer of powers can only be terminated by decision of the Constitutional Court. Constitutions of other countries remain silent on the subject and tend to assume that any short-term delegation is subject to mutual agreement between presidents and relevant actors without imposing explicit deadlines. However, commentators agree that powers cannot be delegated individually but must be transferred in full, and that presidents may not work “side-by-side” with a designated acting president.⁹¹ In the Czech case, support for a temporally unlimited delegation of powers by the President to other actors is unlikely to find majority support. Rather, specifying a limited period of time for which powers may be delegated and then return to the President without recourse to the Constitutional Court would appear more feasible.

The Czech Constitution commonly specifies 30 days as an acceptable deadline, e.g., the Chamber of Deputies convenes on the thirtieth day after its election (unless the President convenes is earlier)⁹² and the government seeks a vote of confidence no later than thirty days after its appointment.⁹³ Hence, providing the President with the option to delegate their powers to the Prime Minister and Speaker of the Chambers of Deputies (or Senate, respectively) for a period not exceeding 30 days if they are for serious reasons unable to perform the functions of their office also appears reasonable. Notably, if it becomes clear that the

⁹¹ See e.g. Michael Nierhaus, “Art. 57 [Vertretung],” in Michael Sachs (ed.), *Grundgesetz: Kommentar* (C.H. Beck, München, 2018), 1361.

⁹² Art. 34 para (1) CCzR.

⁹³ Art. 68 para (3) CCzR; other examples include Art. 44 para (2) CCzR which gives the government thirty days to express views on a bill after which its opinion is presumed to be positive.

President will not be able to return to their duties after 30 days, the Chamber of Deputies and the Senate would still be able to pass a resolution establishing presidential inability before the period of delegation has expired. Hence, a further addition to Article 66 would read:

Proposal for Article 66 para (3) CCzR

If the President of the Republic is for serious reasons incapable of performing his duties, he may for a period not exceeding thirty days entrust the performance of his duties pursuant to paragraph 1 to the Prime Minister and the Speaker of the Chamber of Deputies, or the Prime Minister and the Speaker of the Senate during a period in which the Chamber of Deputies is dissolved.

4.3.3 Restrictions on Duration

Only few constitutions foresee any explicit restrictions on the duration of a *sede plena* apart from the term of office of the president.⁹⁴ Yet, where such restrictions exist they tend to be very short (30 days in Greece, 60 days in Albania, and 90 days in Hungary), particularly in comparison to examples of such restrictions in previous Czechoslovak Constitutions – six months until the election of a Vice-President⁹⁵ (1920 and 1948 constitutions) or removal of the President after one year (1975 amendment to the 1968 constitution).⁹⁶

Two previous reform proposals included a deadline of six months from the day on which the Chamber of Deputies and the Senate passed a resolution establishing presidential inability. After the expiration of this deadline, the office was considered vacated. This rightly drew criticism at the time because it did not allow the President to contest such a decision. Hence, while a deadline to settle the issue of presidential inability is desirable, it would be problematic to merely default to presidential inability without a thorough examination or turn the matter into a political decision by putting it in the hands of Parliament.

⁹⁴ Marcin Michał Wiszowaty, “Problematyka niemożności pełnienia urzędu przez głowę państwa – *sede plena*, *sede vacante* i kwestia zastępstwa, jako przykłady regulacji kryzysowych na gruncie polskiej i europejskich regulacji konstytucyjnych,” in Jerzy Oniszczyk (ed.), *Normalność i kryzys – jedność czy różnorodność. Refleksje filozoficzno-prawne i ekonomiczno-społeczne w ujęciu aksjologicznym* (Oficyna Wydawnicza Szkoły Głównej Handlowej, Warsaw, 2010), 401-421, 406-407.

⁹⁵ §60 CCzSR 1920; §60 CCzSR 1948.

⁹⁶ Law no. 50/1975, *op. cit.* note 49.

Therefore, I propose to adapt the model of the Albanian⁹⁷ and Polish⁹⁸ constitutions here, and place the decision on presidential inability into the hands of the Constitutional Court – albeit while maintaining the six-month deadline established in previous reform proposals and historical practice.⁹⁹ A final addition to Article 66 would thus read:

Proposal for Article 66 para (4) CCzR

If the President of the Republic is incapable of exercising his office for serious reasons for more than six months from the date on which a resolution pursuant to paragraph 1 or paragraph 2 has been adopted, the Constitutional Court shall establish whether the Office of the President has been vacated.

4.4 *Summary*

In this section I have presented three proposals to supplement the provisions of Article 66 CCzR and remedy its most pressing shortcomings. Thereby, considerations were based not only on an interpretation of the constitutional text, but also on an analysis of previous reform proposals in order to arrive at solutions that would be most likely to find sufficient support among politicians. While a substantive reform of Article 66 has so far failed to receive sufficient political backing, the events of October 2021 have once again highlighted the need to agree on at least a minimum of procedural requirements. Hence, it is very likely that the question of the temporary transfer of presidential powers will be back on the agenda, and it is hoped that the proposals above will help to inform these debates.

⁹⁷ Art. 91 para (2) Constitution of the Republic of Albania of 22 November 1998 (last amended by Law no. 115/2020 of 30 July 2020), available at <https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf>.

⁹⁸ Art. 131 para (1) Constitution of the Republic of Poland of 2 April 1997 (last amended by Law no. nr 114/946 of 21 October 2009), available at <https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>.

⁹⁹ This addition would require a small addition to Article 87 (1) CCzR to include the right of the court to rule on whether the office of the president has been vacated (or an alternative phrasing of Article 87 (1) h) CCzR which allows the president to challenge a parliamentary resolution on inability) and the Law on the Constitutional Court. However, the procedures laid down in the latter could arguably be applied *mutatis mutandis*.

5 Conclusion

The Czech Republic, like other democratic republics, is faced with the difficulty of providing solutions to instances in which the president is temporarily unable to exercise their powers. However, current provisions are characterized by a number of ambiguities in the temporary transfer of presidential powers in the Czech Republic which – in the extreme – could lead to a paralysis of the state. These have been highlighted on several occasions since the adoption of the Constitution almost 30 years ago, yet came particularly prominently to the fore in the aftermath of the 2021 parliamentary elections. The aim of this paper was to explore these ambiguities and their implications through a thorough analysis of extant provisions, their historical genesis, and previous application.

The first part of the paper explained the provisions of Article 66 CCzR on the temporary transfer of presidential powers and considered problems related to the insufficiently defined material and procedural conditions of its application, the practical difficulties posed by the transfer of enumerated powers and lack of deadlines, and the historical evolution and application of provisions. Following a discussion of the events surrounding the hospitalization of President Miloš Zeman, the paper then identified three major shortcomings in current provisions and – based on a review of previous reform proposals – formulated additions to Article 66 addressing these. In particular, it was suggested (1) to clarify the procedure for passing a parliamentary resolution establishing presidential inability, (2) to allow the president to delegate powers for a limited period of time, and (3) to authorize the Constitutional Court to rule on whether the Office of the President had been vacated following six months of inability. While it should be acknowledged that these solutions are not necessarily flawless, the preceding discussion of previous reform efforts showed that they are well within the range of feasible outcomes should lawmakers seek to tackle the shortcomings of Article 66 CCzR in the future.

Miloš Zeman eventually continued to serve as President until the end of his term on 7 March 2023. While discussions about his health problems and fitness to fully exercise the tasks of his office subsided, the general problem of providing for the eventuality of a temporary inability or permanent incapacity of the Head of State persists. The preparations by the Standing Senate Commission on the Constitution of the Czech Republic and Parliamentary Procedure and the

Speaker of the Senate¹⁰⁰ in the wake of President Zeman's hospitalization have already contributed greatly to establishing some more general guidelines and further specified the material conditions of "serious reasons" requiring a temporary presidential succession. Nevertheless, given inevitable changes in political circumstances and the composition of either chamber of parliament, such resolutions cannot necessarily be relied upon. Hence, major constitutional crises will remain a real possibility unless political actors agree in advance on at least a minimum of procedural requirements and codify these through constitutional amendments (or the adoption of a separate organic law).

The Czech Republic is not alone in only providing limited guidance on the material conditions of presidential inability and the procedural requirements of the temporary transfer of the office's powers to other actors. Thereby, issues relating to temporary presidential succession must not only be considered because inability and vacancy in the office are recurrent and comparatively frequent phenomena, but also because they raise more fundamental questions related to the separation of powers and systems of constitutional Checks and Balances.¹⁰¹ Although it is beyond the scope of this article to address these in full (even in relation to the case of the Czech Republic), the above analysis has nonetheless highlighted that national constitutional traditions significantly shape debates and potentially narrow feasible reform options. Nevertheless, this does not mean that such questions should be discussed without reference to provisions in other countries. Rather, systematic analysis of constitutional provisions elsewhere holds significant practical and scholarly promise. As lawmakers themselves often refer to provisions in other countries in crafting or amending constitutions¹⁰², academic engagement can also only benefit from further comparative analysis.

¹⁰⁰ Stálá komise Senátu, *op. cit.* note 66.

¹⁰¹ Cf. Köker and Carstens, *op. cit.* note 8, 247.

¹⁰² See discussion above on entrusting the Speaker of the Czech Senate with the exclusive role of acting president; Komise Senátu pro Ústavu České republiky, *op. cit.* note 80.

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