

Institut za uporedno pravo
Institute of Comparative Law

**PREISPITIVANJE KLASIČNIH USTAVNOPRAVNIH SHVATANJA
U USLOVIMA SAVREMENE DRŽAVE I POLITIKE**

**CHALLENGING TRADITIONAL CONSTITUTIONAL IDEAS
IN TERMS OF MODERN STATE AND POLITICS**

Urednik/Editor:
Dr Miroslav Đorđević

Beograd, 2021

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Dr. Philipp KÖKER*
Hiske J. L. CARSTENS**

ACTING PRESIDENTS AND TEMPORARY PRESIDENTIAL SUCCESSION IN EUROPEAN REPUBLICS

Summary

Virtually all republican constitutions foresee mechanisms to ensure the continuous functioning of the presidency as the highest-ranking institution. While such rules have been most prominently discussed in the context of constitutional crises, they also apply to other instances, e.g. resignation or temporary unavailability due to illness or international travel. However, the rules governing temporary presidential succession still belong to the lesser researched topics in political science and comparative constitutional law. This paper provides an overview of the constitutional stipulations on acting presidents and their powers in 31 European republics. Thereby, it compares the formal-legal arrangements and defines different models of temporary succession. Furthermore, it discusses the practical applications of the rules by referring to illustrative examples from selected cases.

Keywords: Acting Presidents, Comparative Analysis, Europe, Head of State, Presidential Succession.

1. INTRODUCTION

Democratic constitutions provide the basis for the legitimate exercise of political power.¹ Provisions that ensure the continuous functioning of constitutional bodies in times of crises are therefore an essential element of constitutional law. Whereas many emergency provisions, such as those relating to the redistribution of decision-making powers in times of war or other states of emergency, will only rarely (if ever) be invoked², others possess a much greater practical importance. Principal among these are the stipulations governing the temporary succession of the head of state. Despite the persistence of monarchies in some countries, republics with a (directly or indirectly) elected president at their helm now present the most common form of government across the European continent.³ European presidents are only rarely countries' most dominant political actors and need to share executive power with prime ministers. Nevertheless, all presidents always possess at least some discretionary powers beyond ceremonial duties that allow them to act as a check-and-balance vis-à-vis the executive and

* Postdoctoral Research Fellow/Lecturer, Department of Political Science, Leibniz University Hannover.

** Student Research Assistant, Department of Political Science, Leibniz University Hannover.

¹ M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Edward Elgar, London 2018.

² E. Bulmer, *Emergency Powers*, International IDEA, Stockholm 2018.

³ R. Elgie, "Heads of state in European politics", in: *Routledge Handbook of European Politics* (ed. J. Magone), Routledge, London 2015, 311-327.

legislature.⁴ Furthermore, even the least powerful among them still perform essential tasks, such as signing bills and treaties, appointing ministers, judges and civil servants, or calling legislative elections.⁵ Hence, the importance of a continuous functioning of the presidency should not be underestimated.

In political practice, it is remarkably commonplace that political actors other than the elected president temporarily have to perform presidential duties to ensure the functioning of the state. Temporary succession rules are most often discussed in the context of constitutional crises or other exceptional circumstances, e.g. impeachment or death of the incumbent. While it may be argued that these situations are less exceptional than generally assumed – particularly in comparative perspective (see Chapter IV below) – anecdotal evidence suggests that the respective constitutional stipulations are most frequently applied in other cases. In particular, it is often relatively mundane reasons, such as illness or travel, that lead to presidents' inability to perform their duties and necessitate a temporary assumption of presidential powers by other political actors.⁶ As a consequence, constitutional provisions on temporary presidential succession possess not only an abstract-theoretical, but also a particular practical relevance. Surprisingly, they have only rarely received focused attention from scholars of comparative constitutional law and political science.⁷

The aim of this paper is to fill this gap by combining political science and legal perspectives and provide a large-scale comparative inquiry into the theory and practice of acting presidents in European republics. Based on a review of constitutions and legal commentaries from 31 European democracies, we provide a comprehensive overview and analysis of temporary presidential succession, focussing in particular on the person and powers of acting presidents. We show that while entrusting the speaker of a parliamentary chamber with the role of acting president presents the “standard model” across Europe, there are important exceptions. Furthermore, significant variation exists in the degree to which the exercise of certain prerogatives is limited during the period of *interregnum*. Notably, these differences are neither related to presidents' mode of election nor to the overall scope of their constitutional prerogatives. Our legal analysis is complemented by evidence from several illustrative case studies on the practical application of constitutional rules. We highlight the very different experience and practices of these countries and explicate the legal and practical challenges of ensuring that periods of presidential inability and absence are not exploited by other actors. We conclude by discussing the implications of our findings and formulating an agenda for future research.

2. GENERAL REFLECTIONS ON TEMPORARY PRESIDENTIAL SUCCESSION

Any time the president of the United States delivers their annual State of the Union Address before both houses of Congress, Supreme Court Justices, Diplomatic

⁴ M. Tavits, *Presidents with Prime Ministers. Do direct elections matter?*, Oxford University Press Oxford 2008, 2-6; P. Köker, *Presidential Activism and Veto Power in Central and Eastern Europe*, Palgrave, Cham 2017, 11-12, 249.

⁵ E. Bulmer, *Non-executive Presidents in Parliamentary Democracies*, International IDEA, Stockholm 2017.

⁶ V. Epping, C. Hillgruber (eds.), *BeckOK Grundgesetz*, C.H. Beck, München 2021, Article 57, n. 3.1.

⁷ While there is a long tradition of scholarship on the president of the United States that combines legal and political perspectives, it generally lacks a comparative dimension.

Corps and further dignitaries, one member of the cabinet customarily stays behind as “designated survivor” to ensure the continued functioning of the U.S. government even after a decapitating strike.⁸ The United States are not alone in having established a mechanism that would allow the powers and functions of the head of state to be assumed by another actor in case of emergency. However, although all modern constitutions foresee mechanisms to allow for temporary presidential succession, they often stay silent or remain particularly vague on the specific modalities.⁹ In particular, it is often unclear under which circumstances a temporary succession is required. Death, resignation or impeachment of the incumbent present clear-cut instances in which temporary succession must take place regardless of context, cases relating to unavailability due to less serious circumstances such as illness or international travel are much less clear.¹⁰ In these cases the applicability of constitutional stipulations is likely to be highly context-dependent and – given that immediate action may be required – rely more strongly on political convention and informal arrangements between actors.

The importance of the timing of a presidential *interregnum* notwithstanding, the question of *who* assumes *what* presidential prerogatives in the meantime is of central theoretical and practical importance. Except for cases where one or more vice-presidents are elected on the same ticket as the president, there is no equally legitimated constitutional body to fulfil the functions of the presidency in the interim.¹¹ Hence, powers must be vested in representatives of other branches of government, creating the potential to upset the system of checks-and-balances established by the constitution. For this reason, constitutions also need to weigh up whether to transfer all powers of the presidency to an acting president or only those deemed essential to the continued functioning of the state; similarly, powers could be divided among more than one actor. Notably, these considerations apply independently of the cause of presidential inability and whether the incumbent is permanently or only temporarily unable to fulfil the duties of their office (*sede vacante* vs. *sede plena*).

To date, academic discussions of the above have largely been confined to individual countries (sometimes only as part of more general works on the presidency)¹²

⁸ N. Duclos, “The ‘designated survivor’: One person too many in the United States presidential line of succession?”, *French Review of Constitutional Law* 4/2017, 881-898; for further research on the presidential line of succession see e.g. A. M. Schlesinger, “On the Presidential Succession”, *Political Science Quarterly* 3/1974, 475-505; P. Abbott, “Accidental presidents: Death, assassination, resignation, and democratic succession”, *Presidential Studies Quarterly* 4/2005, 627-645; R. Albert, “The Constitutional Politics of Presidential Succession”, *Hofstra Law Review*, 39/2010, 497-576.

⁹ This fact has been noted in a number of constitutional commentaries (see e.g. F. Luchaire, G. Conac, *La constitution de la république française*, Economica, Paris 1987, 360; V. Falzone, F. Palermo, F. Cosentino, *La Costituzione della Repubblica italiana*, Mondadori, Milan 1980) and reports by public institutions (see e.g. Wissenschaftliche Dienste des Deutschen Bundestages, “Vertretungsregelungen für das Amt des Bundeskanzlers und des Bundespräsidenten”, Berlin 2014). The authors are also not aware of any country except the United States that has specified a line of succession through ordinary legislation.

¹⁰ Theoretically, even inadvertent scheduling conflicts as part of a president’s daily agenda may lead to temporary unavailability.

¹¹ J. C. Baumgartner, R. E. Case, “Constitutional Design of the Executive: Vice Presidencies in Comparative Perspective”, *Congress & the Presidency* 2/2009, 148-163.

¹² See e.g. H. Meiertöns, F.C. Ehrhardt, “Der Präsident des Bundesrates als Vertreter des Bundespräsidenten”, *JURA*, 3/2011, 166-170; S. Patyra, “Przesłanki i tryb przejmowania obowiązków Prezydenta Rzeczypospolitej Polskiej w ramach tzw. władzy rezerwowej”, *Studia Iuridica Lublinensia* 20/2013, 33-45; P. Horvath, “Prezident v politickom systéme Slovenskej republiky”, *Slovenská politologická revue* 3/2005, 1-31; L. Cibulka, M. Domin, “Formovanie ústavného postavenia prezidenta slovenskej republiky”, *Acta Universitatis Carolinae – Iuridica* 3/2018, 49-70; K. Janstová, *Prezident Česke republiky*, Univerzita Karlova v Praze, Prague 2007.

or particular instances of presidential replacement.¹³ Comparative legal analyses have often neglected to provide an account of the regulations' practical dimensions beyond their own country¹⁴ or focussed specifically on the role of vice-presidents.¹⁵ Finally, while there is a large body of literature within the field of comparative presidential studies devoted exclusively to the study of presidential powers¹⁶, there is little systematic engagement with the question of who exercises these powers when presidents are unable to do so themselves. In the following, we therefore also seek to extend the literature in this regard.

3. ACTING PRESIDENTS AND THEIR POWERS IN EUROPEAN REPUBLICS

In this chapter, we compare constitutional regulations on the identity and powers of acting presidents across European republics. For our analysis, we selected and reviewed a total of 31 constitutions of countries that fulfilled basic requirements of democratic governance, i.e. cases in which one can reasonably expect that constitutions are respected and political practice is substantially guided by legal norms.¹⁷ To ensure the accuracy of our interpretation, we further reviewed relevant organic law and constitutional commentaries as well as general works on the respective presidencies and political systems. Table 1 summarises our results including relevant constitutional articles and presents the basis for the following discussions.¹⁸ In terms of introduction, it should be noted that although legal scholarship has generally stressed the differentiation between a presidency *sede vacante* and *sede plena*¹⁹, its practical relevance with regard to the European context is limited and will hence not be discussed in detail here.²⁰

¹³ A. Olechno, "Constitutional Aspects of the Government Crisis in Moldova in 2019", *Przegląd Prawa Konstytucyjnego*, 57/2020, 379-387; C. Waldhoff, H. Grefrath, "Eine kopflose Republik? Das erste Interregnum der Bundesrepublik Deutschland", *Journal der Juristischen Zeitgeschichte* 3/2010, 103-107.

¹⁴ M. M. Wiszowaty, "Problematyka niemożności pełnienia urzędu przez głowę państwa", in: *Normalność i kryzys – jedność czy różnorodność* (ed. J. Oniszczyk), Warsaw 2010, 401-421; M. Florczak-Wątor, "Konstytucyjne uregulowania problematyki zastępstwa prezydenta w Rzeczypospolitej Polskiej i państwach z nią sąsiadujących", *Przegląd Prawa Konstytucyjnego* 2-3/2010, 185-207.

¹⁵ L. Marsteintredet, "La vicepresidencia y los problemas de la sucesión presidencial en América Latina. Viejos y nuevos retos para el presidencialismo", *Política y gobierno*, 1/2019, 117-137.

¹⁶ See e.g. M. Shugart, J. Carey, *Presidents and Assemblies. Constitutional Design and Political Dynamics*, Cambridge University Press, Cambridge 1992; T. Frye, "A politics of institutional choice: post-communist presidencies", *Comparative Political Studies* 1997/5, 523-552; A. Siaroff, "Comparative presidencies: The inadequacy of the presidential, semi-presidential and parliamentary distinction", *European Journal of Political Research* 3/2003, 287-312; D. Doyle, R. Elgie, "Maximizing the reliability of cross-national measures of presidential power", *British Journal of Political Science* 4/2016, 731-741.

¹⁷ Our selection includes the Republic of Kosovo, whose recognition as an independent state remains disputed. The authors remain neutral on this matter. We exclude Bosnia and Herzegovina due to the fact that the High Representative acts above the three elected presidents (see T. Banning, "The Bonn Powers of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment", *Goettingen Journal of International Law* 6/2014, 259-302).

¹⁸ All constitutional texts were accessed via <http://constituteproject.org>.

¹⁹ See e.g. M. M. Wiszowaty, 3; V. Epping, C. Hillgruber (eds.), Article 57, n. 3.

²⁰ Only the constitutions of Bulgaria and San Marino foresee specific mechanisms in case of permanent incapacity or death of the incumbent, respectively (see also below).

3.1. Models of acting presidents

Overall, three general models of temporary presidential succession emerge across the countries surveyed. By far the most dominant model is to entrust the speaker of one or the only chamber of parliament, respectively, with the role of acting presidents. In more than two-thirds of cases (i.e. 21 of 31) constitutions delegate the role acting president exclusively to a speaker and in a further five cases speakers share the position with additional actors. This model appears natural in so far as the office of speaker usually not only ranks second in terms of protocollary precedence, but also because the role is generally considered to be non-partisan and further removed from day-to-day politics than other offices of state.²¹ Nevertheless, important differences emerge even within this model, in particular with regard to bicameral and federal systems. In these systems, there are at least two options at the disposal of constitution-writers as the speaker of either chamber could be made a substitute for the president at time of unavailability. Following the above reasoning, the speaker of the upper chamber (which traditionally takes a politically less dominant role), may provide the most suitable replacement for the president. This logic applies even more in federal systems, where the upper chamber customarily represents a different set of interests than the federal government and acts as a check on the power of the federation.²² Therefore, delegating the position of acting president to its speaker would arguably present a logical continuation of federal principles.

Among the two federal systems – Austria and Germany – only the president of Germany's *Bundesrat* (technically only a quasi-second chamber representing state governments) acts as president, while the speaker of the eponymous Austrian *Bundesrat* does not play a role in temporary presidential succession. In Germany, this designation appears to have been a conscious choice by the *Parlamentarischer Rat* to strengthen the constitution's federal principles²³. For Austria the reasons are less clear, yet arguably reflect the less influential role of its second chamber when compared to Germany. Similarly, only four out of seven unitary states with bicameral systems delegate the acting presidency either exclusively to the speaker of the upper chamber (France, Italy, Romania) or as part of other arrangements (Ireland; see below). Constitutional provisions in Poland and Slovenia foresee that the speaker of the lower chamber acts as president²⁴; in Czechia they do so together with the Prime Minister (for further discussion see below). At least with regard to Poland, this stipulation seems to have followed out of constitutional precedent as the speaker of the Sejm (lower chamber) had already been the designated acting president in the 1921 constitution.²⁵ In both

²¹ M. Jenny, W. C. Müller, "Presidents of Parliament: Neutral Chairmen or Assets of the Majority?", in: *Parliaments and majority rule in Western Europe* (ed. H. Döring), Mannheimer Zentrum für Europäische Sozialforschung, Mannheim 1995, 326-364.

²² W. H. Riker, "The justification of bicameralism", *International Political Science Review*, 1/1992, 101-116.

²³ F. Siebert, *Von Frankfurt nach Bonn. Hundert Jahre deutsche Verfassungen*, Verlag Moritz Diesterweg, Frankfurt a. Main 1958, 60, fn. 59, 99, fn. 89.

²⁴ Slovenia's second chamber is not directly involved in the legislative process, yet the jurisprudence of the Slovenian Constitutional Court still considers the system to be a form of "incomplete bicameralism"; Constitutional Court of the Republic of Slovenia, Decision from 22.10.2008, U-I-295/07-8, *Uradni list Republike Slovenije, Št. 105*, 13980, n. 10.

²⁵ The reasons for this decision at the time can unfortunately no longer be discerned with certainty; K. Walczuk, "Konstytucyjne aspekty tymczasowego wykonywania obowiązków Prezydenta RP przez Marszałka Sejmu", *Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach*, 104/2015, 200.

Czechia and Poland, the speakers of the Senate act as presidents while the speaker of the Sejm and Chamber of deputies, respectively, are unavailable.²⁶

The second model of temporary succession is best described as “individual executive succession”. Under the former fall regulations in Finland and Malta, where presidential powers are assumed by prime ministers²⁷, and Bulgaria and Switzerland, where vice-presidents take on the role of acting president. Notably, Bulgaria is the only country where a vice-president is elected on the same ticket as the president²⁸ and completes the term in case of resignation or permanent incapacity of the president.²⁹ In Switzerland all members of the collegiate *Bundesrat* are elected separately by parliament and collectively act as head of state; the president and vice-president (which change every year) are technically only chairperson and deputy chairperson of the presidency.³⁰ Hence, the vice-presidencies in both countries are not exactly comparable. Also in the group of individual executive succession is San Marino, where two “Captains Regent” are elected parliament every six months and any period during one or both members of the dual presidency is naturally limited. Here, a 2005 organic law allows for electing a replacement in case of death of one of the Captains Regent³¹, yet in case of mere temporary unavailability each of the Captains Regent can also act alone.³² Finally, while it may appear odd that the Cypriot constitution includes provisions for a vice-presidency but does not foresee any role for its incumbent in terms of temporary succession, this is perfectly logical within its general structure. President and vice-president are meant to represent different ethnic groups (Greek Cypriot and Turkish Cypriot) and be elected on their own individual tickets; a similar logic applies to the positions of speaker and deputy speaker of parliament who become acting president and vice-president, respectively, in case of unavailability. Nevertheless, there has been no vice-president since 1974.³³

The third model is the “collegiate or shared succession” in which there is no single acting president but powers are exercised by several individuals assembled in a committee or divided between several actors. A three-member committee acts as president in Iceland (speaker of parliament, prime minister and Supreme Court chairman) and Ireland (speakers of both chambers and Chief Justice, also called “Presidential Commission”). Whereas powers are exercised jointly in these countries, the constitutions of Czechia and Slovakia divide powers between the speaker on the one hand, and the prime minister (Czechia) or cabinet as a whole (Slovakia). Austria presents a mixed model here, as the Federal Chancellor as head of government acts as head of state during short periods of unavailability (up to 20 days) after which a collegiate organ consisting of the speaker of parliament and their two deputy speakers succeeds them. Although these technically represent the same institution, they usually represent different political parties and decisions are taken by majority vote.³⁴

²⁶ Constitution of the Republic of Poland, 1997 (rev. 2009), Article 131 (4); K. Janstová, 132.

²⁷ See also the discussion on Austria below.

²⁸ R. Elgie, 323.

²⁹ Constitution of the Republic of Bulgaria, 1991 (rev. 2015), Article 97 (3).

³⁰ G. Biaggini, *Bundesverfassung der Schweizerischen Eidgenossenschaft*, Orell Füssli, Zürich 2007, Art. 176, n. 7.

³¹ Legge qualificata sui Capitani Reggenti, Bollettino Ufficiale della Repubblica di San Marino, 186/2005, Article 5 (1).

³² Reggenza della Repubblica di San Marino, <http://www.reggenzadellarepubblica.sm/on-line/home/la-reggenza/funzioni.html>, last visited 1. October 2021.

³³ J. Ker-Lindsay, “Presidential Power and Authority in the Republic of Cyprus”, *Mediterranean Politics* 1/2006, 23.

³⁴ L. Adamovich, B. Funk, *Österreichisches Verfassungsrecht: Verfassungsrechtslehre unter Berücksichtigung von Staatslehre und Politikwissenschaft*, Springer, Wien 1985, 262.

3.2 Powers of acting presidents

The provisions on the powers of acting presidents can generally be divided into two different models. The dominant “unrestricted” model – found in 22 out of 31 constitutions – does not place particular limitations on the exercise of presidential powers by acting presidents beyond those already in force (most commonly the need for countersignature by the prime minister or relevant cabinet minister for certain acts). Nevertheless, even countries where constitutions foresee no explicit restrictions, constitutional scholars and practitioners disagree strongly on whether and when acting presidents may exercise particular powers. This was particularly prominently brought to the fore in Latvia during the illness and hospitalisation of president Raimonds Vējonis in 2016. In considerations that would appear similarly applicable to other countries, representatives of the presidential office almost categorically denied that the speaker of parliament would be endowed with all the powers of the presidency, excluding inter alia the nomination of cabinet ministers, the dissolution of parliament, and the power to grant pardons as examples of powers usually exercised at the president’s personal discretion.³⁵ Legal scholars argued for a more nuanced interpretation based on the doctrine of urgency in which only those powers would be exercised that would be required for the functioning of the state at the time.³⁶ Overall, the example serves to highlight the vagueness of many constitutions in regulating temporary presidential succession.

The second model of restricted powers is found in ten countries, primarily in those following the “speaker”-model of acting presidents but also in the “shared succession”-model of Czechia and Slovakia. Here, constitutions and organic law explicitly prevent acting presidents from using particular powers without the consent or countersignature of other actors (Croatia, Estonia, and Lithuania), or particular powers are exempted from being exercised by any actor except for a duly elected president. Most commonly, the latter refers to the dissolution of parliament, calling a referendum or exercising executive clemency. While such restrictions may help to prevent misuse of powers during presidential *interregna*, they also bear the risk of political deadlock. This is best illustrated by the Slovak constitutional crisis in February 1998, which significantly shaped the current stipulations. *De constitutione lata*, some presidential prerogatives were assumed by the government (the prime minister became commander-in-chief) when political parties failed to elect a new president in parliament. Nevertheless, regulations excluded the right to dissolve parliament, accept the resignation of an outgoing government and nominate a new government (as well as other the heads of other constitutional organs).³⁷ With legislative elections scheduled for September 1998 and the very real possibility that the presidency would remain vacant until this time, constitutional amendments became necessary to avoid a constitutional paralysis. Following the Czech example, appointment and dismissal powers would be exercised by the speaker of parliament, while others would be assumed by the government

³⁵ K. Jaunzeme, “Par Valsts prezidenta vietas izpildīšanu”, *Jurista Vārds* 26. 01.2016, 6.

³⁶ A. Kārklīņa, “Par Valsts Prezidenta pien kumu izpildi vīna slimības laikā”, *Jurista Vārds* 26.01.2016, 8-9. E. Levits, “Valsts prezidenta aizvietošanu”, *Jurista Vārds* 02.02.2016, 12-13.

³⁷ L. Cibulka, M. Domin, 67.

(which was however free to delegate them to the prime minister).³⁸ Nevertheless, later amendments then also introduced further exceptions with regard to the power to grant pardons and amnesties after these had been used by prime minister Vladimír Mečiar to shield several political allies from prosecution just days after becoming acting president.³⁹

3.3. Temporary presidential succession and the separation of powers

Transferring presidential powers to political actors which are themselves representatives of other constitutional bodies, especially if there are no explicit restrictions, always risks blurring the separation of powers. A final important consideration in discussing models of acting presidencies is therefore to what extent acting continue in their original offices. By logic of omission of any relevant regulations, the vast majority acting presidents in Europe are not restricted in fulfilling a dual institutional role. The Finnish constitution is the only constitution to include specific restrictions, i.e. according to Art. 48 the deputy prime minister is barred from attending and participating in debates in plenary sessions of parliament while substituting for the prime minister as acting president.⁴⁰ While the Estonian constitution also remains silent on the subject, it is the general consensus that the speaker of parliament can no longer fulfil that role while acting as president. Rather, they would have to vacate their seat in parliament and be replaced by an alternate (similar to members of government), suspend any membership in a political party, and take the presidential oath. Given the complicated nature, these have never been applied in practice – even for short-term unavailability.⁴¹ Apart from this example, constitutional commentaries usually take it as a given that the ban on holding other offices of state that applies to regular incumbents of the presidential office cannot be applied *mutatis mutandi* to acting presidents. Instead of discussing it as a potential violation of the separation of powers, it is seen as equivalent to other non-applicable norms, such as minimum age requirements.⁴² In this context, it is also interesting to note that neither the choice of person of acting president, nor the presence of restrictions appears to covary with the regime type. Among parliamentary and premier-presidential regimes – the most common regime types in our sample – each model can be found with approximately similar frequency.

³⁸ Ústavný zákon zo 14. júla 1998, ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. Zbierka zákonov Slovenskej republiky, č. 244/1998.

³⁹ G. Dobrovičová, “Decision of president to grant amnesties – Theoretical and practical issues in Slovak Republic”, *Zeszyte Naukowe Uniwersytetu Rzeszowskiego* 108/2019, 31-38. Interestingly, in a similar case the Constitutional Court of Kosovo declared amendments aimed at restricting the pardon power of the acting president as unconstitutional, arguing that it violated the right of freedom of individuals seeking to be pardoned; see Hasani, E. “Constitutional Protection of the Head of State”, *International Constitutional Law Journal* 2/2013, 139.

⁴⁰ Constitution of the Republic of Finland, 1999 (rev. 2011), Article 48.

⁴¹ Ü. Madise, M. Gramberg, “§ 83”, *Eesti Vabariigi põhiseadus - kommenteeritud väljaanne*, n. 2-3, https://pohiseadus.ee/sisu/3557/paragrahv_83, last visited 30 September 2021.

⁴² See e.g. T. Maunz, G. Dürig (eds.), *Grundgesetz-Kommentar*, C.H. Beck, München 2021, Article 57, n. 27b; Curtea Constituțională a Republicii Moldova (ed.), *Comentariul la Constituția Republicii Moldova*, Editura ARC, Chisinau 2012, 332.

4. THE PRESIDENTIAL *INTERREGNUM* IN PRACTICE

The above discussion has already highlighted selected practical aspects of temporary presidential succession; yet, for a comprehensive it is necessary to also provide a comparative overview of the application of respective constitutional stipulations in practice. As a first step in fathoming the frequency of temporary presidential succession in Europe we have collated all cases in which acting presidents had to step in due to delayed elections or resignation, suspension, impeachment or death of the incumbent. Table 2 shows that even these arguably more “serious” instances are comparatively frequent and the majority of countries in our sample (19 out of 31) have experienced at least one such time period. Thereby, resignations have been the most common serious reason (19 separate instances), yet a total of eleven presidents also died in office (usually by natural causes; only North Macedonian president Boris Trajkovski and Polish president Lech Kaczyński tragically died in plane crashes, respectively). Furthermore, delayed elections – either due to low turnout (Serbia) and irregularities (Austria) or because of parties’ failure to elect a candidate in parliament (Malta, Moldova, Slovakia) – required presidential succession that often exceeded a time period of over a year.

Unfortunately, systematic information on when acting presidents take over during illness, travel, holiday or other (planned) short-term unavailability is generally unavailable.⁴³ Nevertheless, some data is available through a case in which the German Higher Administrative Court in 2007 confirmed the validity of laws signed and promulgated by the vice-president of the *Bundesrat* (i.e. the deputy of the acting president foreseen by the German Basic Law) on behalf of the president. Citing written evidence from the *Bundesrat* administration and presidential office, the court ruling noted that the president of the *Bundesrat* had acted as president on 40 occasions between June 1996 and August 2006 (i.e. about four times *per annum*).⁴⁴ As we can reasonably assume a similar application of regulations in other countries, this underscores the practical relevance of temporary presidential succession rules in practice. The fact that regulations are regularly employed in everyday political practice, does not mean that there are no cases or practices with regard to temporary presidential succession that raise concern from a comparative perspective. Below we present some, albeit anecdotal evidence that highlights the legal and practical challenges of ensuring that periods of presidential inability and absence are not exploited by other actors.

Above, we have already mentioned the controversy relating to the use of amnesties by Slovak prime minister Mečiar while he was acting president.⁴⁵ Interestingly, this did not prevent the subsequent government of Mikulas Dzurinda to exploit another constitutional loophole only two years later. In July 2000, president Rudolf Schuster was hospitalised and temporarily succeeded by co-partisans Dzurinda and National Council Speaker Josef Migas.⁴⁶ After Schuster had already come into conflict with the government on

⁴³ A promising approach would be to analyse countries’ legal gazettes to identify cases in which acting presidents promulgated legislation on behalf of the president, yet would need greater resources.

⁴⁴ OVG Magdeburg, Decision from 25.04.2007, 1 L 453/05, BeckRS 2008; see also V. Epping, C. Hillgruber, Article 57, n 1.

⁴⁵ In fact, amnesties were later repealed; see G. Dobrovičová, 31.

⁴⁶ Sme.sk, “Chronológia pôsobenia Rudolfa Schustera vo funkcii prezidenta”, 13.06.2004, <https://domov.sme.sk/c/1638272/chronologia-posobenia-rudolfa-schustera-vo-funkcii-prezidenta.html>, last visited 1. October 2021.

several occasions during his first year in office, Dzurinda now seized the opportunity and returned three bills to parliament for reconsideration which had just been passed by his own governing majority.⁴⁷ Two bills were subsequently re-adopted without any substantial changes and the third amended in accordance with the government's wishes; hence, it was clear that Dzurinda's merely served to ensure that they could not be vetoed by Schuster himself who had previously criticised the governments' plans.

The fact that acting presidents often remained unrestricted in performing their principal office of state, has been controversially discussed with regard to presidential elections in Poland 2010. The tragic death of Lech Kaczyński in April 2010 occurred while he was running for re-election, just two weeks before candidates for the presidential elections had to be registered with the State Electoral Commission. Kaczyński's main contender was the speaker of the Sejm Bronisław Komorowski, who subsequently became acting president. Although constitutional scholars have generally argued that the speaker should limit their (party) political activities which serving as acting president,⁴⁸ Komorowski now had to combine the roles of speaker, acting president and presidential candidate. Thereby, commentators particularly questioned whether he had acted correctly in using his powers to appoint a new head of the presidential office and Bureau of National Security as well as proposing a candidate for the Polish National Bank. Opposition politicians thereby also feared that Komorowski would be able to gain an "incumbency advantage" through his role as acting president.⁴⁹

Finally, the Irish practice of temporary presidential succession differs remarkably from that of other countries. As outlined above, Ireland presents one of the few cases where not a single actor but by a "Presidential Commission" performs the role of acting president. Since the inauguration of the first Irish president Douglas Hyde in 1938, the commission has had to act three times for longer periods to bridge the time between the death (Erskine H. Childers, 1974) or resignation of incumbents (Cearbhall Ó Dálaigh, 1976; Mary Robinson, 1997) and the inauguration of a new head of state.⁵⁰ However, political practice has been characterised by a much more frequent assumption of presidential duties by the Commission. At least since the 1990s, the Commission has acted in any case of presidential inability – arguably regardless of urgency. As such, the Commission not only regularly signs bills into law, but has also granted the dissolution of the Dáil in November 1992. In the context of the above discussions, this is notable for several reasons. First, the right to refuse the dissolution of parliament on advice of the Taoiseach is often highlighted as one of the most important avenues of (informal) influence of the Irish president. Presidents have also used this power on several occasions to force the formation of new governments.⁵¹ Second, although president Mary Robinson was unavailable at the time, she was on her last day of a state visit to Australia and due to return the next day.⁵²

⁴⁷ P. Köker, 285.

⁴⁸ M. M. Wiszowaty, 18.

⁴⁹ P. Winczorek, "Wszystkie decyzje marszałka", *Rzeczpospolita*, 09.06.2010. It should be noted that a similar situation existed in Austria in 2016. When the second round of the presidential elections had to be repeated due to numerous irregularities, one of the two candidates – Norbert Hofer – was deputy speaker and hence also fulfilled the role of acting president. Nevertheless, his conduct in this office did not give rise to the same type of public criticism.

⁵⁰ J.M. Kelly, *The Irish Constitution*, Tottel Publishing, Haywards Heath 2003, 228.

⁵¹ See e.g. J. Coakley, "The Politics of the Presidency", in: *The Oxford Handbook of Irish Politics* (ed. D. M. Farrell, N. Hardiman), Oxford University Press, Oxford 2021, 372.

⁵² *Sidney Morning Herald*, "Vice Regal", 5 Nov 1992, 10.

Even if Robinson communicated with the members of the Commission, dissolution could have reasonably been granted by herself one day later. Third, exempting the dissolution of parliament from the powers of acting presidents presents the most common restriction (see above). While the Irish constitution explicitly foresees the involvement of the president as an actor without a personal stake in the dissolution of parliament, the Dáil and Senedd speakers may – given that the Commission is able to act by any two of its three members – circumvent this external check and trigger an election when it benefits them.

5. CONCLUSION

Temporary presidential succession is an important instrument to guarantee the continued functioning of the state – not only in times of crisis but also as part of everyday political decision-making. In this paper, we have provided a comprehensive overview and analysis of relevant constitutional provisions across 31 European republics. Overall, temporary succession by the speaker of one of the chambers of parliament emerged as the dominant model, yet with some significant exceptions. Furthermore, most constitutions do not formally restrict the powers of acting presidents. Nevertheless, where formal restrictions exist, they are usually very similar and forbid acting presidents to dissolve parliament, appoint and dismiss governments, or call referenda. In addition, almost all acting presidents fulfil a dual constitutional role as they continue in their original offices. Surprisingly, these patterns do not covary with countries' regime type and only often have the potential to violate the established separation of power between branches of government.

Naturally, this contribution has not been able to cover all legally or practically relevant aspects of temporary presidential succession. In particular, the distinction between *sede plena* and *sede vacante* does not affect who acts as president during this time (and which powers are exercised by that person). However, the question of how instances of each are determined has not been covered by comparative research yet. Furthermore, a cursory examination reveals that only few constitutions explicitly regulate the question of how long periods of temporary succession may last – and even where they do, they foresee vastly different maximum periods before new presidential elections must be held.⁵³

Going forward, we believe that two avenues show particular promise for comparative research that combines legal and political science perspectives. First, comparative analyses – including our own – have generally only focussed on the European continent. Expanding the analysis to a global sample would increase variation and allow for identifying potential regional models of temporary presidential succession. Furthermore, it would allow for a better comparison between parliamentary and premier-presidential systems on the one hand (representing 28 of 31 cases in our sample) and president-parliamentary and presidential regimes on the other. Second, scholarship could be enhanced by gathering systematic data on the frequency of temporary presidential succession – not only during moments of crises but also as part of the “normal” functioning of the state. Thereby, data on the volume of activities undertaken by acting presidents (e.g. number of laws signed, officials appointed, diplomats received) would likewise allow to arrive at a fuller picture of the contemporary relevance of temporary presidential succession.

⁵³ See also M.M. Wiszowaty, 12.

Table 1: Constitutional regulations on temporary presidential succession and the powers of acting presidents in European republics

Country	Regime type ^a	Acting President ^b	Powers ^c	Legal Basis ^d	Notes / Restrictions
Albania	parl	Speaker _{unicameral}	=	Art. 91 I / –	
Austria	pres-parl	PM / Speaker _{lower}	=	Art. 64 I / –	PM acts only for first 20 days; after that speaker and two deputy speakers act as president.
Bulgaria	prem-pres	Vice-president	=	Art. 97 II / –	
Croatia	prem-pres	Speaker _{unicameral}	≠	Art. 97 I, II / Art. 97 IV	Countersignature of PM required for promulgation of laws.
Cyprus	pres	Speaker _{unicameral}	=	Art. 44 II / –	
Czechia	prem-pres	Speaker _{lower} & PM	≠	Art. 66 / Art. 66	Powers divided between actors; I.A. cannot dissolve parliament or veto bills.
Estonia	parl	Speaker _{unicameral}	≠	Art. 83 I / §27 PSJKS	Approval of Supreme Court required to call snap elections and refuse to proclaim a law.
Finland	prem-pres	PM	=	Art. 59 / –	
France	prem-pres	Speaker _{upper}	≠	Art. 7 IV / Art. 7 IV	Cannot dissolve parliament or call a referendum.
Germany	parl	Speaker _{upper}	=	Art. 57 / –	
Greece	parl	Speaker _{unicameral}	≠	Art. 34 I / Art. 34 I	Cannot dissolve parliament, dismiss the cabinet or call a referendum.
Hungary	parl	Speaker _{unicameral}	=	Art. 14 I / –	
Iceland	pres-parl	Committee	=	Art. 8 / –	Members: Speaker (acts as chair), PM, and Supreme Court Chairman.
Ireland	prem-pres	Committee	=	Art. 14 I / –	Members: Speakers of Dáil and Seanad, and Chief Justice; any two members may act.
Italy	parl	Speaker _{upper}	=	Art. 86 I / –	
Kosovo	parl	Speaker _{unicameral}	=	Art. 90 I / –	
Latvia	parl	Speaker _{unicameral}	=	Art. 52 / –	
Lithuania	prem-pres	Speaker _{unicameral}	≠	Art. 89 / Art. 89	Consent of the Seimas required to dissolve parliament and to appoint or dismiss ministers.
Malta	parl	PM	=	Art. 49 / –	PM acting in consultation with the leader of the opposition.
Moldova	prem-pres	Speaker _{unicameral}	=	Art. 91 / –	
Montenegro	prem-pres	Speaker _{unicameral}	=	Art. 99 / –	
N. Macedonia	prem-pres	Speaker _{unicameral}	=	Art. 82 / –	
Poland	prem-pres	Speaker _{lower}	=	Art. 131 II / –	
Portugal	prem-pres	Speaker _{unicameral}	=	Art. 132 I / –	
Romania	prem-pres	Speaker _{upper}	≠	Art. 98 I / Art. 98 II	No power to dissolve parliament, address parliament or call a referendum.
San Marino	parl	–	=	Art. 5 (2) no. 186/2005	Powers exercised by remaining Captain Regent; replacement election in case of death.
Serbia	prem-pres	Speaker _{unicameral}	=	Art. 120 I / –	
Slovakia	prem-pres	Speaker _{unicameral} & Cabinet/PM	≠	Art. 105 I / Art. 105 I	Powers divided between actors; I.A. cannot dissolve parliament or grant pardon/amnesties.
Slovenia	prem-pres	Speaker _{lower}	=	Art. 106 I / –	
Switzerland	parl	Vice-president	=	Art. 176 II / –	
Ukraine	prem-pres	Speaker _{unicameral}	≠	Art. 112 / Art. 112	Cannot dissolve parliament or call a referendum; limited appointment/dismissal powers.

Notes: ^a pres – presidential, pres-parl – president-parliamentary, prem-pres – premier-presidential, parl – parliamentary; ^b PM – Prime Minister/head of government, Speaker – speaker of parliament (subscript indicates respective chamber), Committee – multi-member collegiate body acting as president; ^c = no restriction of powers of acting president, ≠ powers of acting president restricted by constitution/organic law; ^d Stipulations on Acting President / Limitation of Power Presentation, articles refer to constitutional provisions in force at the time of writing – constitutional texts were accessed via <http://constituteproject.org>.

Table 2: Major episodes of temporary presidential succession in Europe

Country	Time period	Delay of election	Resignation	Impeachment	Death
Albania	1991 –		1992, 1997		
Austria	1945 –	2016			1950, 1957, 1965, 1974, 2004
Bulgaria	1991 –				
Croatia	1990 –				
Cyprus	1974 –				1977
Czechia	1993 –				
Estonia	1992 –		1969		
Finland	1919 –		2010, 2012		1974
France	1958 –		1985		
Germany	1949 –		2012		
Greece	1974 –				
Hungary	1990 –		1976, 1997		1952
Iceland	1944 –				1974
Ireland	1937 –				
Italy	1948 –		1964, 1978, 1985, 1992, 1999, 2015		
Kosovo	2008 –		2010, 2011, 2020		
Latvia	1993 –			2004-2005	
Lithuania	1992 –				
Malta	1976 –	1981-1982, 1987-1989			
Moldova	1996 –	2009-2012			
Montenegro	1990 –	2002-2003			
N. Macedonia	1991 –				
Poland	1990 –				2004
Portugal	1976 –			2007*, 2012*	2010
Romania	1990 –				
San Marino	1945 –				
Serbia	1991 –	1997; 2002-2004	2012		
Slovakia	1993 –	1998-1999			
Slovenia	1990 –				
Switzerland	1945 –				
Ukraine	1991 –			2014**	

Notes: Table excludes periods before the election of an inaugural president; * President Basescu was only suspended during impeachment proceedings yet not removed from office; ** While a vote was held to remove president Yanukovich (who at that point had already fled the country), the procedure did not follow the process for impeachment laid out by the constitution.

Dr. Philipp KÖKER⁵⁴

Hiske J. L. CARSTENS⁵⁵

VRŠILAC DUŽNOSTI PREDSEDNIKA I PRIVREMENA PREDSEDNIČKA SUKCESIJA U EVROPSKIM REPUBLIKAMA

Sažetak

Praktično svi republički ustavi predviđaju mehanizme za osiguranje kontinuiranog funkcionisanja predsedništva kao institucije najvišeg ranga. Iako su takva pravila najistaknutije razmatrana u kontekstu ustavnih kriza, ona se primenjuju i na druge slučajeve, npr. ostavku ili privremenu nedostupnost zbog bolesti ili putovanja u inostranstvo. Međutim, pravila koja uređuju privremenu sukcesiju predsednika i dalje spadaju u manje istražene teme u politikologiji i uporednom ustavnom pravu. Ovaj rad daje pregled ustavnih odredbi o vršiocima dužnosti predsednika i njihovim ovlašćenjima u 31 evropskoj republici. Autori upoređuju formalno-pravne regulative i definišu različite modele privremene sukcesije. Konačno, razmatra se praktična primena pravila uz pozivanje na ilustrativne primere iz odabranih slučajeva.

Ključne reči: vršilac dužnosti predsednika, uporedna analiza, Evropa, šef države, predsednička sukcesija.

⁵⁴ Postdoktorski naučni saradnik/predavač, Leibniz University Hannover.

⁵⁵ Istraživač saradnik, Leibniz University Hannover.