

## Expanding the Prerogatives of Caretaker Governments in Times of Crisis

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### About the author

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### Executive Summary

Caretaker governments became much more frequent and prolonged in recent years. While the average period to form a government was six days between 1989 and 2005, it increased to 100 days between 2005 and 2016,<sup>1</sup> reaching up to a full year in two recent cases: Tammam Salam's (2014) cabinet took 315 days to be formed, while Hassan Diab presided over a caretaker government for more than a year (from August 2020 to September 2021).

The prerogatives of caretaker governments are, however, subject to different interpretations, and a point of controversy among Lebanon's politicians. Given that Lebanon's pressing economic and financial crisis often required critical decisions from Prime Minister Hassan Diab's caretaker government, this brief seeks to clarify the prerogatives that the constitution, legal jurisprudence, doctrine, and academics assign to caretaker governments, as well as what citizens can expect from them.

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Mounir Mahmalat and Declan Curran, 'Fractionalization and Reform: A Framework of Political Collaboration on Reform with Application to Lebanon,' *Economics of Governance* 21, no. 2 (2020): 187–214.

According to Paragraph 2 of Article 64 of the Lebanese Constitution, *'the Government shall not exercise its powers before it gains [a vote of] confidence, nor after it has resigned or is considered resigned, except in the narrow sense of a care-taker government.'* The understanding of the term 'narrow sense' is the main reason behind opposing opinions, because the constitution does not provide further details as to its exact meaning. The concept comes from French doctrine and jurisprudence, where the 'Third Republic' Constitution refers to *'expédier les affaires courantes'* ('expedite regular affairs' or *'tasrif al a3mal'* in Arabic). In the 1990 constitutional amendments following the Taef Agreement, the term 'narrow sense' of 'regular affairs' was introduced into the Lebanese Constitution (Article 64, Paragraph 2), without further clarifying its definition, boundaries, or scope. Even before 1990, and despite the absence of the term in the constitution, the prerogatives of a caretaker government were already problematic (see *Rashed vs. Lebanese State, 1969*, below).

This brief provides an analysis of the Diab government's caretaker period, in order to identify reforms necessary for future caretaker governments. It seeks to clarify the powers of a caretaker government by delineating the legal boundaries that prevent it from undertaking decisions that are either urgent or necessary for maintaining security, sustaining public services, or meeting constitutional or other legal deadlines.

### **The legal framework of 'regular affairs' undertaken by a caretaker government**

The necessity of the continuation of all government administrations and facilities is an important principle in constitutional jurisprudence. The resignation of a particular government should not paralyze political, institutional, economic, and social life. To that end, any government that resigned, or is considered as having resigned, should remain in power in order to run the 'regular affairs' of the state (*'expédition des affaires courantes'*) until a new government is formed.

According to a French State's Council ruling from 1966 (*'Conseil D'Etat Francais - 22 Avril 1966 - Federation Nationale Des Syndicats De Police'*), 'regular affairs' are those actions that do not expose the government in its entirety or the relevant minister alone to any political liability. Because a government derives its legitimacy from the people by way of a vote of confidence from parliament, a caretaker government does not have such a mandate and therefore has no constitutional authority to make political decisions. While 'political decisions' commit the state to, for example, lasting regulatory changes or international engagements, 'regular affairs'—in its general constitutional meaning—refers to those matters that cannot be postponed or remain pending until a new government is formed.

Lebanese courts have based their decisions on French administrative jurisprudence to determine the literal definition of ‘regular affairs,’ identifying the following three categories:

- Regular affairs by nature: Routine daily decisions that the ministerial offices prepare and the relevant minister merely signs after review.
- Important affairs: Decisions that can only be taken by a caretaker government in a state of emergency. Such decisions remain subject to judicial review by the Council of the State.<sup>2</sup> This body determines what can be considered ‘important affairs,’ in addition to the power of appealing any caretaker government decision that the council views as exceeding the limits of the ‘narrow sense,’ even in the case of emergency.
- Major statutory regulations: Regulations amending legal provisions and rights recognized by law, which never fall within the competence of a caretaker government.

‘Regular affairs’ tend to be interpreted as those decisions that are required for the continuation of public services. An emergency may justify that a caretaker government go beyond the narrow sense of regular affairs, if deadlines have to be met, or if immediate action is required to ensure the security and the safety of the state. The exercise of some powers by a caretaker government, while limited after its resignation, therefore remains necessary. It is unreasonable to accept the absolute vacuum in power until a new government is formed, especially in a phase of socio-economic and political instability. This interpretation has also been highlighted by the French Administrative Court in 1952: *‘Considérant qu’en raison de son objet même, et à défaut d’urgence, cet acte réglementaire (...) ne peut être regardé comme une affaire courante, si extensive que puisse être cette notion dans l’intérêt de la continuité nécessaire des services publics.’* (CE, Ass. 4 avril 1952 Syndicat régional des quotidiens d’Algérie.)

While stressing on the definition given by the French courts, and in the absence of a clear understanding of the Lebanese Constitution in this regard, the Lebanese State’s Council (hereinafter referred to as ‘the Court’) approved the above-mentioned principle in its ruling in Case No. 613 of 1969 (*Rashed vs. Lebanese State, 1969*):

*Considering that a government liability ends in the cases described above, including its resignation, and that the lapse of responsibility determines the scope of ‘regular affairs’ a resigned cabinet is entrusted with, exceeding the limits of the ‘regular affairs’ in question leads to an irresponsible government carrying out actions that are subject to responsibility, which gives rise to a transgression that violates the Constitution’s provisions and regulations.*

<sup>2</sup> Council of the State or State’s Council (*Majlis Shura Al Dawla*) is currently the only administrative jurisdiction in Lebanon. Established in 1924, it was reorganized in 1975, and plays an advisory role to the government, as well as a judicial role as a court.

*Considering that the resulting effects of resignation or dismissal lead to a power vacuum in the period preceding the formation of a new cabinet, resulting in disrupting the work of the executive power and in paralyzing public administrative services entrusted to ministers... In order to avoid the risks and caveats arising from a power vacuum, the President of the Republic shall, in line with constitutional jurisprudence, request the resigned cabinet whose scope of work is limited to 'expedite regular affairs,' to remain in power until a new government is formed.*

The Court also gave its own definition of the term 'narrow sense' when it ruled that it includes emergencies, as well as situations where legal deadlines have to be met. Furthermore, the Court has distinguished regular affairs—which may be carried out by a caretaker government—from 'right of disposition' ('*haq al tasrif*' or '*al a3mal al tasrifiya*' in Arabic), which are not within its scope of work. The Court defines 'regular affairs' as the day-to-day administrative work conducted by the government, while 'right of disposition' issues are categorized as matters that aim to create new financial commitments, the disbursing of significant funds, or the introduction of substantive change to the functioning of public services.

The Court, however, has made an exceptional consideration concerning the 'right of disposition.' It ruled that a caretaker government can make decisions in cases that are justified by exceptional and urgent circumstances related to public order, state security, or any other situation where a timeline has been determined by law. They are also subject to the administrative courts' oversight, in the absence of parliamentary monitoring (*Rashed vs. Lebanese State*, 1969):

*A caretaker government may take necessary measures beyond 'regular affairs' in exceptional circumstances related to public order or internal and external state security. In these cases, the measures taken by a resigned ministry, and the assessment of the circumstances in which they were taken, are subject to the oversight of the administrative courts, in the absence of parliamentary monitoring or ministerial responsibility.*

In addition, another ruling (*Case No. 700 of the Court: Hnoud vs. Lebanese State*, 1995) has confirmed that '*a resigned government can conduct affairs unrelated to matters of supreme state policy, provided that such decisions do not interfere with the upcoming or succeeding cabinet's ability to adopt policies that it deems appropriate.*'

This would imply that a caretaker cabinet:

- Cannot engage in long-term policies that would be binding to the next government (both in terms of regulatory change or international agreements);
- Cannot take high-level/critical political decisions and engage, for instance, in sensitive negotiations with the IMF, or adopt a detailed economic plan for years to come.

The Commission for Legislation and Consultations at the Ministry of Justice issued a similar position. In an April 2005 consultation (No. 265/2005), the commission defined the concept of ‘regular affairs’ for a caretaker government in accordance with the decision issued by the French State’s Council on 4 April 1952, as well as the distinction the ruling has made between the three categories of affairs.

To sum up what has been stated so far, French legal doctrine considers that ‘regular affairs’ are decisions for which there is no real possibility of choice.<sup>3</sup> The concept of ‘regular affairs’ is, by definition, restrictive. It aims at keeping public services/affairs running at a minimum pace. The ‘narrow sense’ reflects and reinforces the idea of temporary arrangement, bearing in mind that a new cabinet is normally supposed to take over in a reasonable period of time. However, as the time span between the resignation of a cabinet and the formation of another increases, the narrowness of the concept of ‘regular affairs’ becomes problematic. Obviously, the challenges, deadlines, and unexpected events that a caretaker cabinet may come across in a few days or weeks are far less than those it is likely to face in several months, or even a year. This should not legally imply that ‘regular affairs’ could simply be interpreted in a ‘broader’ sense, but the risk a caretaker having to widen the scope of its interventions and push the margins of its prerogatives becomes more likely, higher, and more frequent.

### Salam’s 2016 circular: Limiting the ‘regular affairs’ of caretaker governments

In 2016, then-Prime Minister Tammam Salam issued Circular No. 20/2016 (hereinafter referred to as ‘the Circular’) following his resignation.<sup>4</sup> The Circular simply reiterates the Rashed vs. Lebanese State ruling defining ‘normal business,’ and admits that such acts cannot be undertaken by a resigned government during routine circumstances, unless there is an exceptional situation justifying it.

Much of the debate regarding caretaker prerogatives revolves around the second paragraph of the Circular, which adopts a very limited and brief definition of ‘normal business.’ The Circular interprets the Constitution by narrowing down the scope of ‘normal business,’ so that only decisions on ‘regular affairs’ can be taken. The Circular, therefore, infringes on the purview of the Court (Council of the State), which is the only competent authority to determine such matters. The Court, moreover, had already determined a wider scope for a caretaker government, allowing it ‘to decide on matters that are not of fundamental, crucial, or delicate character, including international conventions, and even long-term and general development plans, for instance’ (see *Al Zoghbi vs. the Lebanese State*, 2013).

<sup>3</sup> René Chapus, *Droit du contentieux administrative*, 13<sup>th</sup> Edition, LGDJ, 2008.

<sup>4</sup> It is worth noting that the Circular is a mere repetition of Circular No.10/2013 issued by former Prime Minister Najib Mikati.

In addition, the Circular introduces a new decision-making mechanism, requiring all ministers, *‘in the event that an administrative decision falls within the scope of normal business that needs to be urgently addressed during the course of caretaking, to submit the draft resolution to the Presidency of the Council of Ministers for exceptional approval by the President of the Republic and the Prime Minister.’* Such ‘exceptional approval’ does not appear anywhere in the Lebanese Constitution.

Requiring ministers to obtain ‘exceptional approval’ from the president and the prime minister regarding ‘normal business’ effectively means transferring powers from the government (which according to the constitution—post-Taef—is the operative ‘Executive Power’) to the president and the prime minister. Doing this by way of a circular is simply unconstitutional. Nevertheless, this unusual approach has been widely adopted in the last few years to deal with any impasse within caretaker governments. The Official Gazette—the government-issued newspaper of record—has frequently published decrees based on ‘exceptional approvals.’

In light of the above, the Circular should not have adopted an interpretation that contradicts the rulings of the State’s Council, given that in a caretaker government all ministerial decisions are subject to this judicial body’s oversight.

### Final remarks and precedents

- In the absence of a clear definition of the ‘narrow sense’ of regular affairs for a caretaker government in the Constitution, one has to refer to court rulings regarding the matter. As has been shown above, the boundaries within which a caretaker cabinet can manoeuvre are plainly set. Any other interpretation is political, and not legal.
- Clearly, each case should be considered separately, according to the criteria, principles, and benchmarks drawn by legal jurisprudence and the courts. The reluctance of Prime Minister Diab’s caretaker government to convene, despite the onset of major developments requiring government attention, reflects a rigid understanding of the law. In a brief communique issued by his media office (13 August 2021) regarding the matter, Diab reiterated his position that a caretaker government cannot convene to take major decisions, because such a step would be a violation of the Constitution. One could conceivably understand Diab’s position in politics, inasmuch as the caretaker prime minister was unwilling to ‘conduct business as usual’ or prolong the term of his caretaker government. However, his position remains debatable due to the fact that the constitution does not prohibit a caretaker government from convening, and Lebanon has known precedents in this regard:

- a. In 1969, Rashid Karame's caretaker government approved a draft budget. It is worth noting that, according to Articles 32 and 83 of the constitution, deadlines are set therein for both the government and the parliament to submit, discuss, and approve the yearly budget. Subsequently, one could argue that Diab's caretaker cabinet failed to meet a constitutional deadline when it refrained from meeting in order to approve the draft budget prepared by the ministry of finance for parliament's approval.
  - b. In 1979, Salim Hoss' caretaker government convened to approve a set of urgent bills (draft laws), and passed them on to parliament.
  - c. And recently, in 2013, Najib Mikati's caretaker government held a Council of Ministers meeting to appoint the president and members of the Electoral Supervisory Commission, a necessary step for the parliamentary elections to take place on time.
- If a caretaker government fails to act, there are regrettably no control mechanisms in the constitution. When a cabinet resigns, the extent of parliamentary oversight on governmental activity becomes negligible. A caretaker government, however, cannot justify inaction with a restrictive interpretation of 'narrow sense'—a position that could lead to the paralysis of public affairs, especially that judiciary control a posteriori remains a guarantee against any decision that oversteps a caretaker's decision-making power. Notably, this interpretation does not imply that a caretaker cabinet should meet regularly, nor does it mean that the cabinet should conduct 'business as usual' as if it had not resigned, and therefore make decisions that widen the scope of 'regular affairs.' It simply means that between choosing to do nothing and handling the exact urgent and necessary matters that the Court has previously decided on, the caretaker should sometimes exceptionally meet with one single item on its agenda when the need arises. As the above cited precedents illustrate, nothing in the constitution prevents a caretaker from meeting.
  - Considering that the Constitutional Council<sup>5</sup> was not given the right to interpret the constitution, the boundaries set by the Council of State should be considered as the primary reference for caretaker cabinets.

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The Constitutional Council was established in the 1990 constitutional amendments post-Taef Accord (New Article 19 of the Constitution) and authorized to supervise the constitutionality of laws and arbitrate conflicts that arise from parliamentary and presidential elections.

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