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# QUO VADIS, ART. 62?

## THE CHALLENGE OF A DOUBLE EXECUTIVE VACANCY FOR THE LEBANESE CONSTITUTION

*"Should there be a vacancy in the  
Presidency for any reason whatsoever, the  
Council of Ministers shall exercise the  
authorities of the President by delegation."*

*- Article 62 of the Lebanese constitution*



## Quo Vadis, Art. 62?

– The challenge of a double executive vacancy for the Lebanese  
Constitution –

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## Abstract

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*Lebanon is currently facing a situation that had not been anticipated when the Lebanese Constitution was drafted in 1926 or in any of its subsequent revisions: for months now, and for the first time in its history, the country has neither had a president, nor a sitting government.*

*The cabinet of Prime Minister Najib Mikati is acting in a caretaker function. Until the deadlock is solved, the question presents itself as to what powers the caretaker government has during a presidential vacancy, according to the Lebanese Constitution. Can it pass laws, issue decrees or sign international treaties? Can it schedule governmental meetings at all? What does the Constitution say and how are the relevant articles to be interpreted?*

*This paper seeks to provide an overview of the decisive provisions of the Constitution and their respective interpretations.<sup>1</sup>*

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<sup>1</sup> This report is the result of research done before and after a panel discussion organized by the KAS Rule of Law Programme Middle East & North Africa on Art. 62 of the Lebanese Constitution on December 6th, 2022, in Beirut. The panelists were Me. Rina Constantine and Me. Edgard Abawatt, both constitutional experts in their own right. The report was written by Claudia Hainthaler, Valeska Heldt, Patrick Saad and Marilyn Saliba.

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## Introduction

Lebanon is facing its third presidential vacancy since the end of the civil war in 1990. It seems as though the country is no longer capable of ensuring a smooth change of presidential powers: Each of the last three presidential terms were followed by a vacancy of at least several months. At the end of former President Sleiman's term in 2014, Lebanon even experienced a vacancy of about two and a half years before President Michel Aoun was elected in October 2016. This was the longest presidential vacancy in the country's history, so far.

During this vacancy, the sitting government under Prime Minister Tammam Salam assumed the responsibilities of the president. Michel Aoun's term ended on the 1st of November 2022, and since then, the parliament has not been able to elect a successor. As a result, at the time of the writing of this paper, the country is experiencing another month-long presidential vacancy.<sup>2</sup>

The peculiarity this time lies in the fact that Lebanon is also facing a governmental vacancy. Ever since the elections of May 15th, 2022, the country has been without a sitting government. Both parliament and former President Aoun failed to form a government in time before the term of the presidency ended. Since the appointment of the Cabinet requires a presidential decree under Art. 53 Nr. 4 of the Constitution<sup>3</sup>, Najib Mikati, as Prime Minister designate from the previous government, can only govern the country with his caretaker government, i.e. those ministers that were also holding office before the elections. Consequently, for the first time in the country's history, Lebanon is facing a double vacancy in the Executive.

In view of the occurring power vacuum, the question arises: how is the country to be governed in this time? In the following remarks, the impact of the presidential vacancy on the government (I.) will be discussed, followed by the impact on the parliament (II.).

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<sup>2</sup> By the end of February 2023, after eleven attempts of presidential elections, no President had been elected. [Lebanese parliament fails to elect president for 11th time](#), Middle East Monitor, 20/01/2023.

<sup>3</sup> The Lebanese Constitution, promulgated on May 23, 1926, last amended 1990, hereinafter: "the Constitution".

## The presidential vacancy and the government

The role of the government in the absence of the president is partly regulated in the Constitution. In the following, a closer look at the basic regulation of Art. 62 of the Constitution will be taken (1.). The exercise of specific powers by the government will then be discussed (2.). Finally, it will be clarified whether and which peculiarities apply in the case of a transitional government (3.).

### 1. The fundamental provision of Art. 62 of the Constitution

The official translation of Art. 62 of the Constitution reads as follows: “Should there be a vacancy in the Presidency for any reason whatsoever, the Council of Ministers shall exercise the authorities of the President by delegation.”<sup>4</sup> However, since no active delegation of powers is required, and they are rather automatically transferred to the government, translating the transfer of powers as an interim exercise of authority appears to be a more fitting translation than “by delegation”.<sup>5</sup>

In order to answer the question of which presidential powers the government may exercise during a presidential vacancy, it is necessary to first clarify what the president’s general powers are.

Lebanon’s political system is based on the trio of president, prime minister and parliamentary speaker. The president is the head of state, as well as the second executive body alongside the government. His powers, enumerated in the Constitution, include the sole power to issue the decree designating the Prime Minister (Art. 53 Nr. 3<sup>6</sup>), the power to issue the decree appointing the Cabinet in agreement with the Prime Minister, and the sole power to issue the decrees accepting the resignation of Ministers or their dismissal (Art. 53 Nr. 4, Nr. 5). He also has the power to accredit ambassadors (Art. 53 Nr. 7) and to issue laws which have been adopted and to demand their publication (Art. 56, para. 2), the power to transmit laws proposed by the Council of Ministers to the Chamber of Deputies (Art. 53 Nr. 6) and the power

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<sup>4</sup> All English citations of the Lebanese Constitution are taken from the translation of the official website of the Lebanese Presidency, available [here](#).

<sup>5</sup> This corresponds with the French translation, which reads: “*En cas de vacance de la présidence de la République pour quelque raison que ce soit, les pouvoirs du Président de la République sont exercés à titre intérimaire par le Conseil des ministres.*” (emphasis added); the French version is available [here](#).

<sup>6</sup> All norms without further designation are such of the Lebanese Constitution.

to call for an extraordinary meeting of the Council of Ministers in agreement with the Prime Minister (Art. 53 Nr.12).

But can the government exercise all these powers in case of a vacancy, per Art. 62? There is, in fact, a strong case for a restrictive interpretation of the Constitution, allowing only specific powers to be temporarily exercised by the government.<sup>7</sup> An interpretation of the Constitution allowing the entirety of the president's power to be transferred to the government would, in essence, undermine the Constitution's choice of a dual executive that guarantees democratic checks and balances. Furthermore, a long-term presidential vacancy would jeopardize the sectarian power distribution, as the president – according to the National Pact of 1943 – is to be a Maronite Catholic.

Furthermore, a long-term presidential vacancy would jeopardize the sectarian power distribution, as the president – according to the National Pact of 1943 – is to be a Maronite Catholic.<sup>8</sup> Consequently, based on the intent and purpose of the Constitution, the government should only exercise those presidential powers that ensure the continuity of executive power during a presidential vacancy. Constitutional expert Rina Constantine argues that those would (only) be administrative functions, critical to avoid a paralysis of public service<sup>9</sup>, and necessary to maintain the country's basic public responsibilities.

In light of the said interpretation, Art. 62 of the Constitution presupposes the government's ability to act in order to avoid a paralysis. It can reasonably be assumed that it also allows for the Council of Ministers to be able to convene. As a result, procedural requirements relating to the president shall be considered obsolete. This concerns, e.g., the Prime Minister's duty to notify the president of the agenda prior to the parliamentary sessions (as per Art. 64 Nr. 6 of the Constitution).

But more specifically, if certain presidential powers are given to "the government", what does this mean in terms of decision making? Does every Minister need to agree, can the Prime Minister decide for the government, is a simple majority sufficient?

According to Art. 65 Nr. 5, the government generally decides by consensus. If this is not possible, decisions shall be taken by vote of the majority of attending members. A two-thirds majority is necessary when it comes to one of the explicitly listed basic decisions, e.g. the declaration of a state of emergency and its termination, war and peace, electoral law,

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<sup>7</sup> See also Constantine, *The functioning of the constitutional institutions amid a presidential vacancy in Lebanon*, Al-Adl (Volume 2/2022), 533 (536).

<sup>8</sup> The Prime Minister is to be a Sunni Muslim, and the Parliament Speaker is to be a Shia Muslim. Constantine, *The functioning of the constitutional institutions amid a presidential vacancy in Lebanon*, Al-Adl (Volume 2/2022), 533 (536).

<sup>9</sup> Constantine, *The functioning of the constitutional institutions amid a presidential vacancy in Lebanon*, Al-Adl (Volume 2/2022), 533 (538).

nationality law, personal status laws, and the dismissal of Ministers. The legal quorum for a Council meeting is two-thirds of its members.

In 2014, the government of Tammam Salam<sup>10</sup> assumed interim presidential powers in accordance with Art. 62. It imposed even higher standards: it required a unanimous decision for the taking or signing of any act. However, an analysis of the decrees issued at the time show that the government did not, in fact, always manage to meet this self-imposed standard. However, since there is no explicit constitutional necessity for unanimity, this did not, per se, constitute an unconstitutional course of action.

## 2. Specific presidential powers

Having tackled the general legal considerations regarding Art. 62 of the Constitution, specific powers will now be highlighted, as well as the question - at a later stage - whether or not these can be exercised by the caretaker government during the vacancy.

In this respect, the ratification of international treaties and the amendment of the constitution are of particular interest, as they have a far-reaching impact.

### a) The ratification of international treaties

Art. 52 of the Constitution provides that the President of the Republic has a major role in the context of the adoption of international treaties. He negotiates and ratifies the treaties in agreement with the Prime Minister. Since international treaties, typically regulating foreign affairs, are usually not necessary to ensure the continuity of national public service, there is generally no need for the delegation of this power to the government. In addition, international treaties generally bind the state authorities for the future and might even impact the state's finances.

This encroachment on the different state powers can only be justified if the proper process, stipulated in the Constitution, is being followed. In conclusion, international treaties cannot be negotiated and ratified in the absence of the President of the Republic, irrespective of their subject-matter.

### b) The amendment of the Constitution

Per Art. 76 of the Constitution, in the event that the president proposes an amendment of the Constitution, the Cabinet shall translate such a proposal into a draft law to be submitted to the Chamber of Deputies. Similarly to the negotiation and ratification of international treaties, the exercise of such a power is typically not imperative for the continuity of public services. Furthermore, it has been argued that discussing " an amendment to the Constitution

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<sup>10</sup> Salah Hijazi, [What room for maneuver does the Mikati government have?](#), L'Orient Today, 4/11/2022.



is unacceptable” “when the post of its protector is vacant.”<sup>11</sup> Since a constitutional amendment, as per Art. 76, is to be initiated by the President, the power to do so is inherent to the officeholder of the presidency. The power therefore cannot be exercised by the government.

### c) Powers subjected to ‘delegation.’

Applying the criteria outlined above, only few powers ultimately remain that can be exercised by the sitting government in lieu of the president. These include the power to promulgate and request the publication of decrees (Art. 56, para. 2), the power to issue the decree accepting the resignation of Ministers in agreement with the Prime Minister (Art. 53 Nr. 4), the power to forward laws proposed by the Council of Ministers to the Chamber of Deputies (Art. 53 Nr. 6) and the power to call for an extraordinary meeting of the Council of Ministers in agreement with the Prime Minister (Art. 53 Nr.12).<sup>12</sup>

## 3. The particularities of a caretaker government amidst a presidential vacancy

With the current government having been in caretaker status since May’s parliamentary elections, the question arises if a caretaker government – as opposed to a sitting government – may exercise those presidential powers.

First, it should be noted that Art. 62 of the Constitution makes no such distinction. The wording of the Article does not limit the transfer of powers to sitting governments. However, a restrictive interpretation could seem necessary, as the caretaker government only has a debatable democratic legitimacy (given that the Cabinet has not been approved of by the current parliament). Considering the objective of Art. 62, which is to guarantee a minimum level of executive continuity under exceptional circumstances, topped by a restrictive interpretation of the provision, as seen above, these concerns can arguably be set aside. Art. 62 provides for a continuity of the executive, which ultimately acts to preserve and provide for the interests of the Lebanese people. Further limiting the application of Art. 62 based on the form of the Cabinet would inherently affect the country’s public interests.

Consequently, the form of the cabinet does not impact the question of takeover of presidential powers.

This is in line with the current official constitutional interpretation of Art. 62. On 17 February 2021, the Legislation and Consultations Committee of the Ministry of Justice rendered a legal opinion<sup>13</sup> in which it stated that the Council of Ministers shall meet as a

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<sup>11</sup> Constantine, *The functioning of the constitutional institutions amid a presidential vacancy in Lebanon*, Al-Adl (Volume 2/2022), 533 (550).

<sup>12</sup> Constantine, *The functioning of the constitutional institutions amid a presidential vacancy in Lebanon*, Al-Adl (Volume 2/2022), 533 (540 et. seq.).

<sup>13</sup> Legal Opinion no. 87/2021, Legislation and Consultations Committee, 17 February 2021.

caretaker body, in accordance with Art. 62 of the Constitution, in order to decide upon the necessity to take action in an urgent matter; and if the necessity is confirmed, the Council of Ministers may act collectively. A meeting may only be convened to decide on the necessity of taking an important act or decision.

Based on this assessment, Prime Minister Mikati's caretaker cabinet met on several occasions. For example, on December 5th 2022<sup>14</sup>, the government agreed to request the Banque du Liban (Central bank of Lebanon) to release 35 million USD to buy medicine and milk for children. It also approved social assistance for military personnel and pensioners. Although these decisions should be deemed necessary, especially with regards to the extensive and severe economic crisis Lebanon is grappling with, several ministers from the former President's party boycotted the session under the argument of the unconstitutionality of the meeting.

## The presidential vacancy and the parliament

After having analysed the repercussions of the presidential vacancy on the government, the question arises whether and if so, how such a vacancy influences the work of the legislature. In general, the Chamber of Deputies is the sole holder of legislative power, see Art. 16 of the Constitution. The wording of the provision does not imply that any circumstances, including an executive vacancy, would have any consequence on the legislative power. Therefore, the Chamber of Deputies should be able to pass legislation under these exceptional circumstances. The counterargument is based on Arts. 74 and 75 of the Constitution. Art. 73 et seq. relate to the election of the president; Art. 74 regulates the procedure to follow amid a presidential vacancy, i.e. the election of a successor by the Chamber without delay. In particular, Art. 75 stipulates: "The Chamber meeting to elect the President of the Republic shall be considered an electoral body and not a legislative assembly. It must proceed immediately, without discussion of any other act, to elect the Head of the State." The provision can be interpreted as an exception to Art. 16, suggesting that the parliament may not pass laws in the event of a presidential vacancy ("not a legislative body"), but rather that it may only convene to elect a president.<sup>15</sup> This interpretation is in line with the current practice and is not surprising, considering the intention for presidential elections to be held quickly and swiftly – different to today's practice, in which elections are commonly postponed and blocked.

However, from a purely legal standpoint, this restrictive interpretation is not compelling. When interpreting the provision textually and systematically, it is consistent to say that the

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<sup>14</sup> [Mikati's caretaker cabinet met despite several ministers' decision to boycott the session](#), L'Orient Today, 5/12/2022.

<sup>15</sup> A number of MPs choose to boycott legislative sessions based on this argument: [46 MPs to boycott legislative sessions as presidential vacuum stalls](#), L'Orient Today, 11/02/2023.

Chamber only acts as an electoral body when “meeting to elect the President”.<sup>16</sup> This would not exclude the possibility to meet for legislative purposes in matters that do not relate to the process of electing a president.

It should be mentioned that even the restrictive school of thought, that sees in Art. 75 a prohibition of legislative proceedings during a presidential vacancy, admits one exception to this rule:<sup>17</sup> namely the possibility to adopt legislation that is necessary, commonly referred to as the “legislation of necessity”. According to the Legislative and Consultative Committee at the Ministry of Justice, this allows the adoption of laws if doing so is necessary to prevent the State and its institutions from being exposed to danger or to vindicate and protect constitutional rights.<sup>18</sup> These arguably are, in essence, the same criteria of preserving the continuity of public services as with regards to the government, as seen above.

The assumption that the parliament is generally competent to pass laws during a presidential vacancy poses the question how checks and balances can be ensured during this period. The Constitution provides the president with the right to request the reconsideration of a law by the Chamber during the legislative process (Art. 57) and with the power to challenge laws (Art. 19). Notwithstanding, the absence of the president as one person entitled to file an action under Art. 19 is without detriment to the checks and balances between the executive and legislative powers: Art. 19 also allows for the Speaker of Parliament and the Prime Minister along with any ten Members of Parliament to file actions with the Constitutional Council. The ex-post legislative control is therefore, in principle, ensured. Regarding the constitutional oversight during the legislative procedure, it is worth noting that generally, irrespectively of a vacancy, the president cannot prevent a law of being passed. Per Art. 57, he has the power to oblige parliament to reconsider the law. If subsequently, the law is approved by an absolute majority of all members legally composing the Chamber of Deputies, the law passes despite the president’s reservations. The legal mechanism for an ex-ante control is therefore relatively weak. Consequently, a contrario, its omission cannot and must not lead to the parliament being restricted in its decision-making power.

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<sup>16</sup> Constantine, *The functioning of the constitutional institutions amid a presidential vacancy in Lebanon*, Al-Adl (Volume 2/2022), 533 (553 et seq.), with further references.

<sup>17</sup> Constantine, *The functioning of the constitutional institutions amid a presidential vacancy in Lebanon*, Al-Adl (Volume 2/2022), 533 (555).

<sup>18</sup> Legal Opinion no. 581/2013, Legislative and Consultative Committee, 26 June 2013.

## The way out: The rules for electing a new President of the Republic

Having examined the complex consequences of a presidential vacancy, the question remains, how this deadlock is to be lifted, that is, how to elect the President of the Republic?

Pursuant to Art. 49 of the Constitution, the president is elected by a two-thirds majority in the first ballot, i.e. 86 of the 128 deputies, and, in case the first ballot fails, by an absolute majority in subsequent ballots (50%, i.e. 64 deputies, + 1). Irrespectively of this, current House Speaker Nabih Berri considers every new session to be a first round, making the votes of two-thirds – 86 deputies – necessary during every ballot.

This interpretation has made it easy for political groups opposed to the presidential candidates to prevent an election, by simply leaving the plenary hall, leading to the loss of the quorum each time a second round is initiated.<sup>19</sup> It has provided them with a de facto veto-power. In the first round of the first election attempt, 63 of the votes were blank, presidential candidate Michel Moawad received 36 votes, while his contestant Eddé received 11.<sup>20</sup> After this first unsuccessful round, the parliamentarians of the Shiite Hezbollah-Amal tandem withdrew from the Chamber. They were followed by members of three other parties, making it impossible for the Chamber to attain even an absolute majority.

It is therefore not surprising that it took until the 46th electoral session<sup>21</sup> and endless negotiations to achieve the two-thirds quorum needed to hold the vote and for President Michel Aoun to be elected on October 31, 2016. Given these demanding requirements, the broad fragmentation of political groups in Lebanon, the faint political willingness to compromise and to follow constitutional provisions, an “immediate” election “without discussion” (as required by Art. 74 and Art. 75) shifts further into an unknown future.

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<sup>19</sup> [Parliament holds 10th election for new president](#), L'Orient Today, 15/12/2022.

<sup>20</sup> Yara Abi Akl and Salah Hijazi, [Présidentielle libanaise : qui a voté pour qui?](#), L'Orient-Le Jour, 29/09/2022.

<sup>21</sup> Marc Daou, [Présidentielle au Liban : le Parlement entame une \(très\) longue bataille politique](#), France24, 9/10/2022.

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## Conclusion

The absence of both a sitting government and a president raises many constitutional questions, the answers to which are far from clear, as they are not explicitly stipulated in the Constitution. It lies in the nature of our human experience that every linguistic utterance, every text or expression of will, require a certain amount of interpretation by the recipient or reader. In the case of the constitutional interpretation (a task that should generally fall into the competence of constitutional courts) one would assume that the bodies deriving their power from the Constitution apply common legal interpretation methods – which include looking at the purpose and intent of the Constitution – and refrain from misusing the Constitutional text by applying their very own interpretation.

In the words of Wissam Lahham from the organisation Legal Agenda, “the 'legal constitution' that represents legality is supplanted by a new 'political constitution' whose superiority over the former is justified by the supremacy of the agreement between confessional leaders in the name of national unity and the requirements of 'living together'”.<sup>22</sup> The constitutional crisis of Lebanon may not be solved in the foreseeable future, so long as individual political “interpretations” prevail.

For further reading on the subject, please refer to Me. Rina Constantine's (Attorney-at-law LL.M, Harvard Law School) paper titled THE FUNCTIONING OF THE CONSTITUTIONAL INSTITUTIONS AMID A PRESIDENTIAL VACANCY IN LEBANON published in Al-Adl (Volume 2/2022), the Beirut Bar Law Review and Dr. Wissam Lahham's, CARETAKER GOVERNMENT FROM CONSTITUTIONAL OBLIGATION TO POLITICAL ARBITRARINESS (only in Arabic) [published here](#).

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<sup>22</sup> Wissam Lahham, [Violer la Constitution Inviolable!](#), L'Orient Littéraire, 05/01/2023.

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