A COALITIONS FRAMEWORK FOR SOUTH AFRICA

Coalition management across the Coalition Lifecycle, with special reference to the local sphere

Proposals for taking forward coalitions in South Africa – legislative interventions and encouragement of constructive coalition practice

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Prof Susan Booysen

Mapungubwe Institute for Strategic Reflection (MISTRA)

Prof Jaap de Visser

Dullah Omar Institute for Constitutional Law, Governance and Human Rights, UWC

EXECUTIVE SUMMARY

The purpose of the Coalitions Framework for South Africa is to assist in outlining the options for regulation and the fostering of constructive practice in future coalition government practice in the country. It examines the five phases of the coalition lifecycle from pre-election coalitions to the end of a coalition.

The legal system does not provide specifically for pre-election coalitions, but also does not stand in the way of political parties entering into informal alliances or even submitting joint lists or candidates. Political parties have been reluctant to commit to pre-election formation, barring a few notable exceptions.

In terms of current law, there is no special threshold to achieve representation in national, provincial or local legislatures, other than the "natural" threshold requirement to reach the quota of votes for one seat. A special threshold is likely to make it easier to form, and sustain, a governing coalition. It will eliminate small parties who have become ingrained in coalition praxis. It will reduce the likelihood of multiple kingmakers, and the abuse of that status. What counts against the introduction of a threshold are the need to have a diversity of interests represented in the council/legislature, the need to avoid wastage of votes, and a political culture of recognising small party voices. The Constitution limits how high a threshold may be, because it provides that the electoral system must result in general in proportional representation.

There is a need to address the time allowed for negotiation after a general election, and the negotiation period after the collapse of a coalition. The legal framework, and the challenges that come with it, differ between national, provincial and local government. Consideration could be given to extending the 14-day deadline after general local government elections. Furthermore, a deadline for the election of office-bearers after the collapse of an intervention should be considered. While it is too soon to codify a procedure for coalition negotiations, political actors must respect the outcome of the election, be encouraged to utilise independent mediators and provide feedback to the public.

National, provincial and municipal executives are elected by, and (mostly) from the members of the council/legislatures to which they were elected. In general, there are no special requirements, in terms of representation of their party in the council/legislature or otherwise, for a member to be elected to the executive. The executive committee system in local government is the only exception. The composition of the executive committee is determined by a formula that determines for each party how many executive committee seats it is entitled to (namely proportional to its size in the council). This reduces the scope for coalition negotiations. But it does not mean that, if there is no outright majority, no coalition agreement is necessary. The introduction of qualifications to be represented in the executive could be used to reduce the likelihood of micro-parties occupying the highest political positions. Even without legal change, the political practice should be fostered that the (executive) mayor, Premier or President should represent the largest party in the coalition (not necessarily the largest party in the legislature).

In theory, the municipal manager is well-placed to provide administrative continuity during times of coalition-related uncertainty. However, in reality municipal managers are most vulnerable to the effects of coalition turmoil. Political actors consider the right to appoint (or dismiss) the municipal manager as the key prize to win in the negotiations, so as to exercise control over the municipality. There are areas where legislative change should be considered. Presiding over the election of a speaker and declaring vacancies drag the municipal manager into the political realm. Municipalities

should be encouraged, or perhaps obligated, to ensure delegations to municipal managers that make the municipality more resilient during coalition-related uncertainty. Most importantly, the "distribution" of administrative posts (including senior managers) or administrative units must be a taboo during coalition negotiations. To forge a sound start, there would have to be meticulous management across municipalities of the move from the current politically inspired system of appointments to non-partisanism.

It has become quite common for political parties to conclude national or provincial "umbrella agreements", in which they commit to enter into party politically similar coalitions in the various hung councils where they are represented. They have been among the most stable of coalition governments. There seems little reason to intervene with regulation, but parties may consider introducing clauses in these umbrella agreements that permit their local structures to enter into alternative coalitions in consultation with national party structures, if the local electoral result leaves no other realistic choice.

There are currently no legislative measures aimed at coalition agreements. There is no legal instruction to conclude one when there is no outright majority, let alone an instruction as to what it must contain, or whether it must be made public. In practice, coalition agreements have taken overwhelmingly a post-election format, and have predominantly been informal, inferred from practices that amount to de facto agreements being in place. They focus primarily on offices and portfolios and take a variety of shapes and forms. There are good reasons to insist that coalition agreements should be public, should contain commitments to a common policy programme and should contain dispute resolution mechanisms. Making this legally compulsory raises many complex questions, however. It is better to encourage these three matters as a constructive practice.

The President, Premier and (Executive) Mayors are elected by, and from among the members of the council/legislature. The election must take place by means of a secret vote. Voting on motions of no-confidence is generally done in public but the presiding officer may order a secret vote. The secrecy surrounding these votes has impacted the stability and predictability of coalitions negatively. It is suggested that a clear legal framework be established for the secret or public nature of both motions of no-confidence and the election of office-bearers. This framework must consider that in a coalition setting, secret voting weakens party discipline, and makes coalitions more unpredictable. It may also provide a fertile ground for nefarious practices such a vote-buying. At the same time, there may be circumstances, such as threats to public representatives, under which a secret ballot may be justified.

Motions of no-confidence in office-bearers, and the turmoil that often surrounds them, have become one of the most important manifestations of coalition instability. The law imposes little to no restriction on the frequency, and periods within which they are allowed. It also does not require any substantive reasons for motions of no-confidence. In the context of continuous municipal contests for power, driven especially by bigger parties, there is limited, if any, pressure from political principals on local actors to exercise restraint and use MoNCs judiciously. They are not used to hold the government to account, but to seize power and key positions. It is often difficult to differentiate between motions of substance, and motions based on contrived grounds. Consideration must be given to limiting the period within which motions of no-confidence may be tabled by, for example –

- legislating one or more window periods within which MoNCs are permitted;
- excluding certain time periods, for example the first year, or two years after the elections; or
- limiting the permitted frequency of MoNCs.

Legally disallowing motions of no-confidence based exclusively on the desire to unseat an incumbent is more complex. First, tying motions of no-confidence to substantive grounds would be a far-reaching change to the parliamentary system. Second, linking motions of no-confidence to misconduct blurs the line with existing impeachment provisions. Third, linking motions of no-confidence to underperformance requires the council/legislature to legally establish that underperformance, before it may pass a motion of no-confidence. Motions of no-confidence will become judicialised, and take long to finalise. Instead, it should be considered to only allow the so-called "constructive motion of no-confidence". This is the rule that a motion of no-confidence in an office-bearer may only be passed if it is accompanied by the name of a candidate who immediately assumes office upon the incumbent vacating office.

Without detracting from the above, a different argument can be made with respect to the MoNC in the speaker. It should be considered to require substantive reasons for a MoNC in the speaker.

Provincial governments have a constitutional duty to monitor, support and, if need be, intervene in municipalities. When it comes to municipal governance and administration, the MEC for local government has a specific mandate, while the Provincial Treasury generally focuses on municipal budgeting and finance. In the past, many local governments could count on a sympathetic ear in the provincial government because of matching party-political configurations. However, to influence the behaviour of local politicians in a fraught coalition scenario, the provincial government increasingly relies on persuasion and cooperative governance and, if that does not work, on the limited formal, statutory instruments of provincial oversight. The legal system for oversight is aimed at correcting governance failures, and it does not need an overhaul to be able to address governance failures prompted by coalition turmoil. This is provided that provincial governments exercise their functions objectively. One addition that should be considered is that the municipal managers must be obliged to notify the MEC when there are delays in the election of office-bearers, similar to the duty in the Municipal Finance Management Act to notify the province of impending delays in the adoption of the budget, non-compliance with key financial rules, or of serious financial problems.

The current legislative mechanisms for oversight over coalitions are focused on the (municipal) government and administration that the coalition leads. These oversight mechanisms deal with compliance and performance of that municipality, but they are not directly aimed at overseeing the political praxis of coalitions. Political parties in local government coalitions have operated largely free of coalition oversight in a form that can call them to account for actions that include coalition-crossing, or criticising coalition partners publicly without settling matters internally. The question is whether there is a need to establish mechanisms to oversee the political praxis of coalitions directly. Suggestions have been made to establish a national entity to provide support to coalition negotiations, being the repository of coalition agreements, regulating and/or reviewing the content of coalition agreements, and/or enforcing coalition agreements, i.e. holding political parties accountable for reneging on coalition agreements. It is suggested that the constitutional and practical problems with this approach are endless, and that these suggestions must be considered very reluctantly. Instead of establishing new structures and systems to oversee coalitions as political mechanisms, greater emphasis must be placed on overseeing the compliance and performance of the governments they lead. When an election or the collapse of a coalition produces a hung council, it is an early warning and the municipality should go onto a "watch list". All government entities, tasked with overseeing aspects of its governance, finance and performance must then coalesce, and pay special attention to the vulnerabilities of hung councils.

In addition, civil society should be encouraged – also by coalition governments – to exercise scrutiny of coalition agreements and whether the coalition partners adhere to both acceptable coalition behaviours and to the policies and programmes to which the partners had committed themselves.

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Introduction

The brief for this assignment is to build a framework for the future development of coalition government in South Africa, taking special account of the details that emerged from South Africa's National Coalitions Dialogue of 5-6 August 2023.

This Dialogue reflected overwhelmingly the experiences of the political parties and their leaders with coalition politics at the local government sphere, predominantly in the period since the local government elections of 2016. These experiences have been depicted largely in terms of problematic instability that detracted from constructive, developmental governance. Party-political power pursuits have frequently dominated.

As South Africa approaches its national and provincial elections of 2024, questions have arisen on the extent to which these local government coalition experiences may transfer into the other spheres of government, if and in the cases where outright majorities do not occur.

South Africa has had a range of experiences with local, provincial and national government coalitions since 1994. Political context and prevailing political cultures have to be part of the consideration of the relevance of these histories.

Purpose of the Framework

The purpose of the Coalitions Framework for South Africa is to assist in outlining the options for regulation and the fostering of constructive practice in future coalition government in the country. It was especially the period of heightened local government coalitions since 2016 that brought the realisation that unstable coalition governance was heightening prevailing sub-optimal local governance. With shifting balances of power between South Africa's political parties and provincial and national elections in 2024 that could also necessitate coalition governments there was a further reinforcement of the need to plan to ensure more stable practice.

Hence this Coalitions Framework document sets out proposals for the management of coalitions and coalition governments in South Africa. It strives to do so comprehensively, and thus approaches the task from the point of view of the lifecycle of coalitions. For each of the periods in this lifecycle it identifies crucial periods and points at which interventions are advisable. The purpose is to have a detailed roadmap on the possible, appropriate, and credible interventions that will help to foster the desired stability.

The proposals deal primarily with local government because that is what most of the National Coalitions Dialogue's focus was on. However, many of the considerations apply equally to the national and provincial spheres, especially those considerations regarding political culture and practice. Where relevant, the legal frameworks and how they differ between national, provincial and local spheres are explained.

The National Coalitions Dialogue asked a particular set of political parties to help generate rules, or proposals for regulation, that must protect the country and its citizenry against the actions and machinations of political parties whose coalition behaviours are often focused on retaining, regaining, bolstering or protecting their power. The Constitution of the Republic of South Africa does not contain specific provisions regulating the formation and functioning of coalition governments in the national,

provincial and local spheres of government, and ordinary legislation does not contain specific regulatory provisions either.

There are ample cautionary notes in the debates at the Coalitions Dialogue that the law in itself cannot solve all of South Africa's coalition problems. Underlying challenges such as immaturity of political parties, opportunistic power politics, are often beyond the sphere of legislative interventions. Voters are frequently reluctant to punish parties that cause instability, parties that give free rule to financial interests, personal egos, ideological incoherence, and limited attention to service delivery. Such problems cannot be solved by regulation – and these relationships cannot be legislated. Cooperative behaviours and relations would have to be fostered. A culture of cooperative coalition politics and governance would have to be encouraged.

The proposed framework that follows therefore relies equally on regulation (where credible and viable) and identifying the spaces where problems can only be addressed through more informal and political-cultural practice.

Database and methodology

The proposed Coalitions Framework is based primarily on the range of inputs from South Africa's political parties, as received through the platform of the National Coalitions Dialogue (NCD). The Office of the Deputy President of South Africa recorded and collated the party-political submissions, with the assistance of the Parliamentary Monitoring Group. The NCD Discussion Paper, "A draft policy framework towards a stable system of coalition governance", 29 July 2023, also informs key aspects of the Framework. This discussion paper and the party inputs that were shared at the National Coalitions Dialogue of August 2023 form the core of the accompanying synthesis document.

The contents of the following documents are therefore reflected in the Framework:

- The NCD Discussion Paper, "A draft policy framework towards a stable system of coalition governance", 29 July 2023.
- National Dialogue on Coalition Governments Draft Declaration, August 2023.
- Parliamentary Monitoring Group, "National Dialogue on Coalition Governments South Africa".
- National Coalitions Dialogue, Reports from breakaway sessions 1-4.
- Summaries of submissions by political parties, 3 August 2023.

Approach

The approach in this Framework document is to outline and weigh up a selection of the top proposals for the management of coalition praxis in South Africa. This will be either through municipal regulation and national legislation or constitutional amendment, or through the more informal encouragement of best practice and the fostering of conducive coalition culture. The approach in this Framework is to offer these options, contextualised and motivated with reference to general trends manifested in South Africa.

The approach in choosing between regulation and the fostering of coalition culture is: do not over-regulate, limit proposals regarding options for action to areas that are legislatively and constitutionally appropriate, and offer proposals that will articulate as far as possible with credible political cultures

that have evolved. For example, if coalition agreements are negotiated and made public, there may automatically be constraints on coalition-crossing and at least some of the frivolous, unsubstantiated motions of no-confidence. As the expositions in this Framework document will show, however, legislative provisions are complex and many details about courses of action will have to be further consulted.

TABLE 1: MAPPING THE SEQUENTIAL SET OF INTERVENTIONS REQUIRED TO MANAGE MUNICIPAL COALITIONS IN SOUTH AFRICA ACROSS PHASES OF THE COALITION FORMATION, GOVERNANCE AND POSSIBLE DISSOLUTION

PHASE	ACTIONS	STATUS – Requires legislation, encouragement
PERIOD OF PRE-ELECTION PARTY ACTIONS		
Election campaign	Pre-election alliance formation	To be encouraged as practice building transparency
PERIOD FOLLOWING ELECTION RESULTS (OR THE COLLAPSE OF AN EXISTING COALITION) THAT CONFIRM NO OUTRIGHT MAJORITY TO A SINGLE PARTY		
Preparations to constitute government	Threshold to achieve representation in legislative body	Constraints on legislative interventions, even if there are practical advantages
	Negotiation period	Extend the negotiation period, consider deadline for election of office-bearers, encourage several practices
	Threshold qualification to be represented in executive (if not already implied through the executive committee system)	Consider legislative change on choice of municipal system, encourage largest party in coalition to lead
	Municipal manager and administrative continuity	Consider various detailed legislative changes
PERIOD OF FORMALISING COALITION GOVERNMENT		
Constitute government	Announcement of "umbrella" governing coalitions	No need to regulate, encourage party practice of permitting local exceptions
	Form, content and publication of coalition agreements	Encourage constructive practice of agreements being public, content re policy programme, dispute resolution
	Election of office-bearers	Establish clear legal framework especially on secrecy of the ballot
PERIOD OF OPERATION OF COALITION GOVERNMENT		
Mechanisms for governance	Motions of no-confidence frequency / periods in which they are permitted / grounds for motions of no-confidence / recourse to courts	Consider legislative interventions, e.g. on constructive MoNCs with alternatives lined up, periods of allowing the motions, cooperative culture to be encouraged
	Conditions for provincial interventions	Legal framework is in place, consider additions, encourage objectivity in provinces using functions
	Coalitions oversight	Possible legal interventions hold constitutional and practical problems, encourage constructive practice
PERIOD OF THE COALITION GOVERNMENT RUNNING ITS COURSE (NATURALLY OR DUE TO CHANGING BALANCES OF INTER-PARTY POWER)		
Exit practices and culture	Preparations for possible exit from coalition government in preparation for next election, contingency measures for coalition erosion or collapse	Informal, constructive choices encouraged

TABLE 2: FRAMEWORK GRID – numbering correspondents to the sections in the rest of the Framework and the Synthesis of the Dialogue

COALITION LIFECYCLE	COALITION – GOVERNMENT PHASES	(a) Prevailing legal framework	(b) Political context – facilitation, constraints / evolving culture	(c) Manifestations of practice / problems / good practice	Key options	
					(d) For legislative interventions	(e) For encouragement of constructive practice
1: Pre-election	(1) Pre-election alliance formation	1(1)-a	1(1)-b	1(1)-c	1(1)-d	1(1)-e
2: Preparations to constitute government	(2) Threshold to achieve representation in legislative body	2(2)-a	2(2)-b	2(2)-c	2(2)-d	2(2)-e
	(3) Negotiation period	2(3)-a	2(3)-b	2(3)-c	2(3)-d	2(3)-e
	(4) Qualification to be represented in executive, anchored in municipal executive system	2(4)-a	2(4)-b	2(4)-c	2(4)-d	2(4)-e
	(5) Municipal manager and administrative continuity, insulation of administration from politics	2(5)-a	2(5)-b	2(5)-c	2(5)-d	2(5)-e
3: Constitute coalition government	(6) Announcement of coalition	3(6)-a	3(6)-b	3(6)-c	3(6)-d	3(6)-e
	(7) Form and publication of coalition agreements, inclusive of conflict regulation mechanism	3(7)-a	3(7)-b	3(7)-c	3(7)-d	3(7)-e
	(8) Election of office-bearers (incl., nature of the vote)	3(8)-a	3(8)-b	3(8)-c	3(8)-d	3(8)-e
4: Mechanisms, procedures of governance	(9) Motions of no-confidence frequency / periods in which they are permitted / grounds for motions / recourse to courts	4(9)-a	4(9)-b	4(9)-c	4(9)-d	4(9)-e
	(10) Conditions for provincial interventions	4(10)-a	4(10)-b	4(10)-c	4(10)-d	4(10)-e
	(11) Coalitions oversight body	4(11)-a	4(11)-b	4(11)-c	4(11)-d	4(11)-e
5: Run-up to next election or coalitions alternate	(12) Preparations for possible exit from coalition government in preparation for next election. Or for transitions following balance of power change in council	5(12)-a	5(12)-b	5(12)-c	5(12)-d	5(12)-e

Coalition management across the coalition lifecycle, with special reference to the local sphere

The proposed framework is conceptualised via the differentiation of five periods in the lifecycle of a coalition government. In each of these five periods, the framework considers steps or actions that are associated with coalition government practice (see Table 1, "The Framework"). A set of 12 such coalition government decisions are elaborated in the framework. In the further development of the framework, a set of five considerations is elaborated for each of the 12 steps (see Table 2, the "Framework Grid"). In some instances, themes for elaboration (a-e) are not relevant; they will then be omitted.

The five coalition government periods and 12 associated coalition government actions

The five periods (and they are elaborated with the use of 12 coalition government decisions or actions; see the numbers in backets) are:

1: Period of pre-election party actions

(1) Pre-election alliance formation

2: Period following the announcement of the election results (or the collapse of an existing coalition), when no single party gained an outright majority

(2) Threshold to achieve representation in legislative body

(3) Negotiation period

(4) Results-related qualification to be represented in executive, municipal executive system

(5) Municipal manager and administrative continuity

3: Period of formalising coalition government

(6) Announcement of umbrella agreements (impacting multiple councils), or agreements relevant to specific councils

(7) Publication of coalition agreements, inclusive of conflict regulation mechanisms

(8) Election of office-bearers, including public or secret nature of the vote

4: Period of operation of coalition government

(9) Motions of no-confidence – frequency, periods in which they are permitted, grounds of motions of no-confidence (matters of policy substance, sound governance, governance procedure), recourse to courts

(10) Conditions for provincial interventions

(11) Coalitions oversight

5: Period of coalition government running its course to full-term, or losing the outright majority due to changing balances of inter-party seat-holding

(12) Preparations for possible exit from coalition government in preparation for next election, or for transitions following change in the balance of inter-party power in the legislative body or council

Considerations in the completion of the framework

The approach in the development of this framework is that each of the coalition government recommendations will be motivated in terms of five considerations for each of the 12 coalition government steps. For each of these coalition decisions we therefore provide elaboration in terms of the following themes and questions:

(a) Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

(b) Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

(c) Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

(d) Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

(e) Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

The following sections will be developed with a view to contextualising the research problem, understanding the dynamics of coalitions in South Africa, and deciding on the appropriate level and type of action proposed in terms of the Framework.

THE FRAMEWORK

1: Period of pre-election party actions

To date, coalition practice in South Africa has only been informed minimally by formal coalition agreement, and even less so by pre-election coalition agreements.

1(1) Pre-election alliance formation

Some of the factors that need to be considered are whether pre-election coalition agreements should be encouraged, and if there are reasonable expectations that this practice could foster more durable and transparent, accountable coalition governance.

> 1(1)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

There are no measures in electoral law that cater specifically for pre-election alliance formation. However, there is also nothing in the electoral law that either stops such agreements, or prevents two or more political parties from submitting one, combined party list, as long as the list is submitted on behalf of one registered political party, which will then also be responsible for submitting names to the IEC to fill any council vacancies that may occur during the term of office. Two or more parties could also informally support the same ward candidate, as long as the candidate is officially nominated to the IEC by one political party and will appear on the ballot under that party's name.

> 1(1)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

South Africa is in a period of party-political flux. There is little certainty in pre-election periods as to the final party results; alternatively, parties fear that tying themselves into coalitions pre-election, may be an admission to followers of poor election prospects, which may reinforce voter reluctance to support the particular party. South Africa's political parties hence hesitate committing themselves to coalitions prior to elections. This trend has changed in the 2023 formation of the Multiparty Charter; several other minor party alliances have also emerged among micro-parties. These include the alliance between Rise Mzansi and Move South Africa, and the voting bloc SARA, comprising Cope, the NFP, ICM and some churches.

> 1(1)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

South Africa's political parties have been reluctant to commit themselves to coalition government (and pre-election alliance formation) until they have certainty about the party hierarchies that emerge from the election results. South Africa does not yet have an established culture of governing by coalition, even if there have been a range of national (GNU 1994) and provincial (KwaZulu-Natal and Western Cape, for example) coalition governments, as well as a wide range of local experiences. Hence, coalition formation is largely a post-election phenomenon. In local government it has also become a numbers game: parties construct new governing majorities, and undermine, deconstruct and replace existing ones.

1(1)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

There are no obvious legislative interventions that present themselves as solutions.

1(1)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

It would be unrealistic to legislate, or more informally require political parties to enter into pre-election alliances (with a view to constituting a coalition post-election) while party politics is in flux. With a view to fostering transparency, nevertheless, it would be considerate to voters should parties declare pre-election which partners they may, or may not, consider should a coalition government become necessary.

2: Period following the announcement of the election results in which no single party gains an outright majority – or the collapse of an existing coalition

Several actions that are crucial to the life of coalition governments unfold in the period from the announcement of election results that bring in a hung legislature or council. If appropriate legislative frameworks are in place, or constructive practice is ingrained, orderly and stable coalition practice will stand a chance.

2(2) Threshold to achieve representation in legislative body

This section considers the introduction of a threshold for representation in South Africa's legislative bodies. Should a political party have secured a special minimum percentage of the general vote to be awarded a seat in the legislature? Such a threshold would contrast with the practice to date, namely thresholds that equate with the minimum number of votes required to win a seat.

2(2)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

In terms of current law, there is no special threshold in national, provincial or local government, other than the "natural" threshold requirement to reach the quota of votes for one seat. (In general, the quota is determined by dividing the total number of valid votes cast, by the number of available seats, plus 1, disregarding fractions; the quota thus changes with each election.) In the case of the National Assembly with its membership of 400, 0.25 percent can be used as a general indication of South Africa's national "natural threshold".

2(2)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

The proportional representation electoral system has helped spawn small parties, and South African voters have spread their votes across a wide range of them. Small parties have gained legitimacy and are vehicles for participation in a time when bigger parties have shed voter support or have failed to gain additional traction. The South African practice of minimal (or "natural") thresholds has already fostered a coalition culture. Small and micro-parties have become ingrained in coalition praxis. They often form part of stable local government coalitions – especially in those cases where one major

party only requires “top-up” to reach the level of an outright majority. A part of the landscape has also been the multiplicity of minor parties that jointly determine the balance of power, for example in South Africa’s metropolitan councils. Party-political culture has come to include that all voices and votes count, there is respect for minorities, and disapproval of “wasted votes”.

> 2(2)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

There have been a range of practices, varying between approximate pre-election alliances (hardly ever formalised) and post-election scrambles to manufacture majorities. The latter were evident especially in metropolitan municipalities, but also in several of the other bigger councils where one or more of the bigger parties relied on the enlistment in a coalition of several small and micro-parties. These small parties were attracted by gaining kingmaking powers, or powerful positions – in the process they gained both personal power and in multiple cases also effective empowerment of or delivery of community interests. Some of these small parties would have been eliminated had thresholds been applied, especially in the metro councils. In illustration of the fleeting presences of these parties: several of the current micro-party partners in governing coalitions run the risk of not achieving representation in a next election.

> 2(2)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

The introduction of a threshold could be considered. What counts in favour of a threshold is that it will reduce the fragmentation of politics in the council/legislature, and the reduced number of parties in the legislature should make it easier to form, and sustain, a governing coalition. What counts against the introduction of a threshold is the need to have a diversity of interests and voices represented in the council/legislature and the need to avoid a wastage of votes. Generally, in countries that have thresholds, they vary from 1 to 3 or sometimes even 5 per cent. The Constitution limits the options: with a threshold in place, political parties will not be represented strictly in proportion to their electoral support. The Constitution provides, for all three spheres of government, that the electoral system must result, “in general, in proportional representation”. It therefore insists on proportionality, with some room for deviation from proportionality. The higher the threshold, the greater the “distortion” of the distribution of seats compared to the distribution of votes, and therefore the likelihood of conflict with the Constitution.

In considering a threshold, a distinction must be made between municipal councils on the one hand, and the National Assembly and provincial legislatures on the other. The National Assembly and provincial legislatures exercise legislative authority only, because the President and the Premier exercise the executive authority of the Republic and of a province, respectively. The Municipal Council, on the other hand, exercises both legislative and executive authority. It delegates executive authority to the Executive Mayor or the Executive Committee, and it exercises executive and administrative authority itself. In practical terms, instability in the Council (as an assembly) has a more immediate effect on governance and administration than instability in the National Assembly or Provincial Legislature.

2(3) Negotiation period

When the general election does not produce an outright winner, or when a coalition terminates prematurely mid-term (usually by office-bearers leaving or being removed from office), it is followed

by a period within which a coalition must be negotiated. There are two key questions. First, what are the timeframes that apply and are they adequate? Second, is there guidance in law and/or policy on the process of negotiation, i.e. on questions such as how negotiations commence, who leads, who facilitates, feedback to the public, etc.?

> 2(3)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

The timeframes that apply depend on (1) which sphere of government and (2) whether it concerns the period after a general election or the period after a collapse of a coalition.

Local government – negotiation period after a general election

The law instructs municipalities to convene their first meeting within 14 days after the council has been declared elected.[i] At this meeting, the council must elect a speaker. The law similarly instructs the municipality to constitute its executive within those first 14 days, i.e. determine the members of the executive committee and elect a mayor, or elect an executive mayor.[ii] There is no statutory deadline for the appointment of the mayoral committee by the executive mayor.

Local government – negotiation period after a coalition collapses

In the event of a coalition collapsing (usually manifested by the removal from office of one or more office-bearers), the law does not prescribe a specific time period within which the council must meet. In theory, therefore, potential coalition partners could take more than the 14 days that apply after a general election. However, the council would have a schedule of regular council meetings that applies. Furthermore, a majority of councillors may demand that a meeting be held.

National and provincial government – time period after general election

The Constitution provides that the National Assembly elects a President, and the Provincial Legislature elects a Premier, "at its first sitting" after its election.[iii] There is thus no hard deadline in the Constitution itself. The National Assembly and provincial legislatures determine their schedule of meetings.

National and provincial government – time period after a coalition collapses

The collapse of a national or provincial coalition would typically manifest in the removal from office of the President or the Premier. In that case, the Constitution provides that an election to fill the vacancy must be held within 30 days.[iv]

It is also possible (although less likely) that the collapse of a national or provincial coalition manifests in the National Assembly or a provincial legislature passing a motion of no-confidence in the Cabinet or in the Provincial Executive Council.[v] The President or the Premier remains in office, but must reconstitute the Cabinet or the Provincial Executive Council. A third possible manifestation is where the President or the Premier, as the case may be, dismisses one or more members of the Cabinet or the Provincial Executive Council. The President or the Premier remains in office and must appoint new members of the Cabinet or the Provincial Executive Council. For the last two scenarios, there is no constitutional deadline.

With regard to the process of negotiation, the law is silent on questions such as who initiates negotiations, who leads or facilitates the conversations, how they ought to be structured, protocols surrounding feedback to the public, etc. Political actors have full discretion to determine the process of coalition negotiations.

> 2(3)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

With regard to local government, in several cases, there was seemingly no need for negotiations at all. Stable or relatively stable de facto coalitions took shape – in these stable councils there is often one party that does not enjoy an outright majority yet is unambiguously stronger than the biggest opposition party. The biggest opposition recognises it stands no chance, given the balance of parties, to form an alternative majority. In such cases, they let the party or set of parties that constitute a de facto coalition get on with the job. In other cases, negotiations have manifested piecemeal as coalitions collapse and then get reconstituted based on party-political bartering for positions and patronage. These coalition agreements of this opportunistic type have been marking the coalition landscape.

The negotiation processes that undergird these coalitions are generally opaque; their existence may be deduced purely by inference. These arrangements often arise out of strategic interpretation of the balance of power in the council, without any formal or perhaps even informal negotiations having taken place. In other cases, the negotiations occur in the form of interparty agreement on splitting of portfolios to enlist potential partners in a coalition and thus jointly gain power. Some of these agreements will be driven by a regional, provincial or national concord of cooperation between two or more parties, but often on more localised variations. On occasion local party structures also deviate from the broader umbrella organisations and form local coalition variants that are at odds with the umbrella agreement.

The negotiations towards the Multiparty Charter were different in that the negotiations were publicly announced, facilitated by an independent mediator, concluded with feedback to the public, and followed up by an engagement with civil society. It was perhaps an example of a degree of professionalisation or regularisation of coalition negotiations. However, they were pre-election negotiations and were thus not conducted on the basis of an electoral outcome, or under the pressure of the need to constitute a government.

> 2(3)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

In local government, the problem is twofold. On the one hand, the 14-day deadline after general elections forces municipal councils with an outright majority to meet and elect office-bearers, regardless of whether or not a coalition agreement was reached. At times, this led to the tail wagging the dog: office-bearers were elected into office, and their political parties had to forge a coalition agreement *ex post facto*. These agreements were seldom sustainable. On the other hand, the absence of any deadline after the collapse of a coalition is also a problem because it has resulted in prolonged periods of councils being leaderless.

The absence of a generally agreed or preferred process of coalition negotiations has rendered many coalition processes unpredictable, unclear to the public, and arguably resulted in many stillborn coalition agreements. First, precious time was lost waiting for a(ny) political actor to make the first

move. Second, opportunities to benefit from the wealth of experience, skill and knowledge in political mediation that exists in South Africa, were lost as political actors went (or were forced to go) it alone. Last, the existence of a coalition often only manifested to the public once the votes in a council meeting were counted, compounding the sense of alienation of the voters and the general public.

> 2(3)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

Consideration could be given to extending the 14-day deadline after general local government elections to a 21-day or 30-day deadline for all councils. In that scenario, councils with an outright majority can, and should be encouraged to, meet and elect office-bearers sooner. An alternative is to introduce the possibility for councils without an outright majority to apply to the MEC for local government, for an exemption from the 14-day deadline. This exemption must then be relatively easy to access for councils without an absolute majority. Both options can only work if accompanied by arrangements to ensure that key executive and administrative decision making continues while coalition negotiations take place.

Furthermore, consideration should be given to introducing a deadline for the election of office-bearers after the collapse of an intervention.

The options for legislative intervention into the process of coalition negotiations are limited. Political practices and conventions to negotiate post-election governing coalitions have not had sufficient time to develop. Countries with well-established (and sometimes even codified) processes for coalition negotiations have developed these over decades. At this stage of South Africa's democracy, legal measures that force political actors to engage one another according to a predetermined, rigid protocol would be unwise. It would undermine the need for the organic growth of political practices and conventions that make for responsible coalition-building relevant to the South African context. For example, in the hybrid presidential-parliamentary system at national level there is no head of state that exists separate from the outcome of the coalition (and who could insert an independent decision to start a coalition process or appoint a mediator). Neither is there such an entity at provincial or local level. The MEC for local government could approximate that role (see below at 4(10)). However, the reality is that the MEC is a political actor with a direct political interest in the outcome of any local negotiation. In that constellation, bias, or the perception of bias, is almost impossible to escape from.

> 2(3)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

The problem of the short negotiation period goes hand in hand with that of arriving at coalition agreements. Both formalised and *de facto* coalition agreements have been changed at will. Thus, in this coalition culture that has taken shape, an extended negotiation period, even if advisable, on its own will not guarantee stability.

It is too soon to legislate a process of coalition negotiations. However, the need for more predictable, transparent and ultimately more promising coalition negotiations is urgent because the consequences of failed coalitions are dire. It is suggested that three considerations should inform alternative, constructive practice of coalition negotiations.

The first is respect for the outcome of the elections and the will of the voter. This means that all political actors must respect that there is a special responsibility on the largest parties, and in particular the party with the most votes, to try and form a coalition. It is not a dogma that no coalition without the largest party is ever possible. It is, however, a recognition of the fact that the electoral outcome, and the will of the voters, matter. Also, when parties record large wins or large losses, such change is a message from the electorate that negotiators must consider.

The second consideration is the notion that coalition negotiations need not be haphazard but can be professionalised. Political actors should reach into the reservoir of independent expertise in mediation, facilitation and dispute resolution that exists in South Africa, to assist in coalition negotiations. In fact, the first item for negotiations between political actors aiming to form a coalition ought to be: who do we all agree could assist us?

The third consideration is that the public is entitled to a degree of transparency. Coalition negotiations cannot be conducted via the media and will generally take place behind closed doors. However, the legitimacy and sustainability of any coalition is enhanced if there is structured feedback, even if it is minimal, on the state of the negotiations, and then transparency on the outcome.

2(4) Qualification to be represented in the executive

National, provincial and municipal executives are elected by, and (mostly) from the members of the council/legislatures to which they were elected. Are there any requirements, in terms of the representation of their party in the council/legislature or otherwise, for a member to be elected to the executive? If there are not, should there be?

Some of the answers to these questions may already be indicated by the choice of municipal executive system – the determination is done in terms of existing legislation and by the provincial MEC for local government well before the coalition negotiations and agreements enter, and establishment of the particular municipal executive happens.

> 2(4)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

Local government

In local government, the executive mayor is elected frequently by a majority vote in the council.[vi] The executive mayor then appoints councillors to the mayoral committee.[vii] The executive mayor can appoint councillors that are part of the coalition. In this system there are no qualifications to be represented in the executive.

However, there are also municipalities that have an executive committee system. In these municipalities, the political composition of the executive committee is determined by a formula that determines for each party how many executive committee seats it is entitled to (namely proportional to its size in the council).[viii] Not every party will gain representation in the executive committee through the formula. The executive committee system limits the scope for negotiations because the political composition of the executive is largely predetermined by law. The coalition negotiations will thus focus on other office-bearers (speaker, mayor, chief whip, committee chair, etc.). It also reduces

the likelihood of instability (somewhat) because removing the mayor from office does not automatically lead to the rest of the executive committee being removed from office. However, there are at least three reasons why a coalition agreement remains necessary, also in a municipality with an executive committee system –

- coalition partners must still agree on the budget, policies and decisions – so there is still a need for negotiations;
- the mayor is elected by majority vote – so the coalition partners must still find agreement on who becomes mayor; and
- parties with seats on the executive committee may "donate" seats to other parties[ix] – so smaller parties may still be brought into the executive committee despite not making it through the formula.

The provincial government decides for each municipality which of the two systems applies.[x] Before changing a municipality from one system to the other, the provincial government must consult the municipality. Doing this during the term of office is not advisable because it has serious consequences for the entire system of municipal governance and administration.

National and provincial government

In national and provincial government, the President and the premiers decide the composition of their respective cabinets. They may appoint any member of the National Assembly or provincial legislature, as the case may be.[xi] The President may also appoint a maximum of two cabinet members from outside the National Assembly.[xii] There are thus no qualifications to be represented in the executive at national or provincial level.

> 2(4)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

One of the problems experienced is that of proportionality in representation in the executive. The question arises as to whether micro-parties, thus at municipal level likely with one or two seats, ought to be permitted to occupy the highest municipal position, namely that of the (executive) mayor or to become members of the municipal executive. A similar argument applies (albeit less strongly) to the position of speaker. Given the casting vote that the speaker holds in some conditions, this elevation of minor parties has impacted the functionality of councils.

The culture that has taken shape in local government is that micro-parties (or, at least, a fairly predictable set of micro-parties and on occasion small community parties in small councils) have vacillated between the bigger parties and have been included in various executives (despite having minor electoral bases), acting as kingmaker to whichever of the bigger parties extends the best offer to the small or micro-party. This has been enabled particularly where bigger parties are determined to be elevated to the highest office, and hope to use the council as evidence of the party's ability to govern.

> 2(4)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

The bulk of South Africa's municipalities use the mayoral executive system, and mayors widely use the associated powers of appointment to help sustain local sphere coalitions. In particular, they have

tended to use these appointments as a lure to help bring in coalition partners. The proportional committee system, the main alternative, is used mainly in KwaZulu-Natal (this system can also be undermined due to the power of co-optation that can disrupt the expected proportionality).

On several occasions, political parties have engaged in the "trading of positions" across jurisdictions. In other words: "we will support your mayoral candidate in Municipality X, if you support our mayoral candidate in Municipality Y". These arrangements could assist in building coalitions. However, they risk alienating local voters and residents, and run contrary to principles of proportional representation and accountability. A councillor with minimal traction in the municipality could be elected as mayor, only because his or her party supported an arrangement in another municipality.

> 2(4)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

Consideration should be given to –

- introducing executive committee systems in those municipalities where the general election does not produce an outright winner – this is possible in terms of existing national and provincial legislation, and should only be done at the beginning of the term of office;
- prescribing the executive committee system for all municipalities – this would return the style of municipal executive governance to the situation as it generally was before 2000, namely based on an inclusive executive system. It would, however, result in the loss of the advantages of the executive mayoral system, namely *the potential for* visible, accountable and efficient executive leadership;
- introducing a percentage threshold for participation in the municipal executive. This could provide, for example, that a party must have won a minimum percentage of wards and a minimum percentage of the PR vote to be eligible for membership of the mayoral committee.

Prevailing debates on the merits of the municipal executive systems tend towards a switch to the proportional system. However, there are pressures *not to* introduce this mid-stream between elections, and especially not when selected political parties may be under pressure of losing majorities.

> 2(4)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

The municipal executive system in South Africa by law is determined at the provincial sphere of governance. Hence there is no direct space for alternative, informal practice to be encouraged. The widespread use of the mayoral executive committee system for purposes of patronage and mayoral party power, however, indicates that party-political constraint in the use and abuse of municipal portfolio allocations would help serve the objective of more stable, accountable and less partisan municipal governance.

The political practice should be fostered that, in principle, the (executive) mayor, Premier or President should represent the largest party *in the coalition*. This respects the will of the electorate, avoids the practice of disproportionally compensating smaller parties for joining a coalition, and ensures that the executive head of government has the legitimacy required to lead the coalition. Insisting on the largest party in the coalition, *not necessarily the largest party in the legislature*, delivering the head of the

national, provincial or municipal government avoids the insistence that a coalition government must always include the largest party in the legislature.

The practice of "trading in positions across jurisdictions" must be discouraged because it reduces coalitions to being elite pacts with no legitimacy in the local electoral result.

2(5) Municipal manager, administrative continuity and insulation of the administration from political interference

In the time that a coalition is being formed (i.e. after a general election or after the collapse of a coalition), the key executive positions are either vacant, or filled by incumbents that no longer enjoy the support of the majority of the council/legislature. However, the government must continue to function. In local government, the municipal manager must ensure governance and administrative continuity until the dust has settled and new office-bearers have been elected. How is this regulated?

> 2(5)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

The municipal manager is appointed by the council. The recruitment, appointment and disciplining of municipal managers are tightly regulated by law. Municipal managers must be appointed on the basis of their professional knowledge, skills and experience, and through a competitive procedure.[xiii] Decisions to suspend and/or dismiss a municipal manager must follow carefully laid-out procedures. (Only) in theory, therefore, the municipal manager ought to be professional, i.e. someone who implements political directives and resolutions, manages the administration, provides technical advice to the politicians, acts as the bridge between the administration and the politicians and is sufficiently insulated from the daily ebb and flow of politics. The expectation of professionalism and objectivity is then also the basis for the municipal manager performing key governance functions in the context of coalition politics, including the following four roles –

- The municipal manager convenes the first meeting after the general election and presides over every election of the speaker, often the first act of an incoming coalition.[xiv]
- In general, coalition partners will turn to the municipal manager for technical assistance and advice on council matters.
- The municipality's delegations will (or should) stipulate what the municipal manager's powers are when there is a temporary power vacuum in the municipality's leadership (such as a recess).
- The municipal manager is responsible for declaring vacancies on the council.[xv] Vacancies arise when a councillor is removed from office, dies, resigns, or loses party membership. A vacancy may be a turning point in the lifespan of a coalition and declaring is then a loaded decision.

Legally, the municipal manager's tenure is also not affected by coalition formation, collapse or turmoil. If a coalition collapses prematurely, the accounting officer's contract is not affected legally. It is only after a general election that there is a direct legal constraint: a municipal manager's employment contract may not extend longer than a year after the election. Again, practice shows a fundamentally different situation whereby the municipal manager's tenure is very much affected by coalition turmoil.

2(5)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

Despite all the legal assurances, municipal managers are most vulnerable to the effects of coalition turmoil. The fact that they are appointed on a fixed term, and by the council essentially renders them political appointments. Allegedly, the advantage is "synergy" between the politics of the council and the accounting officer. However, this construction is the Achilles Heel of the governance framework for coalitions. Political actors consider the right to appoint (or dismiss) the municipal manager as the key prize to win in the negotiations so as to exercise control over the municipality. After a turnover in the council, the municipal manager often has a target on his or her back, depending on which way he or she is (perceived) to lean.

Because this is also a broader political prize, the provincial and national governments, with their oversight over the local, have been tolerant of the disruptions. Several of these cases have also become subject to litigation (see also section 4(11) on oversight).

2(5)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

Disciplinary proceedings based on trumped-up charges, unfilled vacancies, the appointment of "duplicate" municipal managers, rushed appointments of unsuitable candidates, and an explosion of litigation have been in evidence. For the affected municipalities and their residents, the results have been severe. To compound this, the belief that the right to appoint and dismiss staff is up for grabs in coalitions, even extends to the right to appoint (or dismiss) senior managers and, in the worst cases, even to the entire municipal administration.

The replacement of competent but party-aligned municipal managers and associated administrative disruption have been one of the major problems of coalition alternation. On the other hand, such replacement in some cases also amounted to constructive practice. However, the municipal manager has in effect become a political pawn. The appointment processes have also been problematic where incumbents have been suspended, and the suspensions contested, while acting or new municipal managers are appointed. On occasion this has resulted in parallel municipal operations. In the worst cases, municipal administrations have been placed in limbo.

Charging the municipal manager with the duty to preside over the election of the speaker has proved problematic. Securing the office of the speaker is the first act of the coalition. Not only could it bring the coalition a much-needed casting vote, it also represents direct influence over council agendas and proceedings. Despite the legal assurances, the reality is that the fate of the municipal manager then hangs in the balance during the election of the speaker. Yet, he or she must preside over precisely that decision. Even if the municipal manager acts impartially (which most will) their actions are easily perceived to be biased.

The intersection between vacancies on the council and political instability is often intense and problematic. A single council vacancy may change the balance of forces on the council and trigger the collapse of a coalition. The reverse may also happen: coalition-related turmoil within a party may trigger a vacancy. Either way, vacancies are significant events on the council's political calendar, particularly if there is no outright majority. The municipal manager's decision to declare a vacancy (or not) is politically charged. This is particularly so when the council vacancy arises because of a political party expelling a councillor (for example for going against party dictates surrounding coalitions). In

that scenario, the municipal manager is forced to "adjudicate" the validity of an internal party decision. The accounting officer, who ought to steer clear of the local politics and focus on stability and continuity in the administration, is thus dragged into the epicentre of coalition politics. In a charged scenario, whatever decision the municipal manager takes will be perceived to be biased and evoke further tension.

> 2(5)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

It must be considered to avoid having the municipal manager preside over the election of a speaker in a coalition scenario. Another, independent institution can be called in to preside, such as the IEC, a representative of the judiciary, or an independent / private elections agency. To avoid overburdening other institutions, this could be limited to councils where there is no outright majority. An amendment to the Municipal Structures Act to that effect could be considered.

It must also be considered to amend the Municipal Structures Act to make the IEC, and not the municipal manager, responsible for deciding whether or not a vacancy has arisen on the municipal council. The IEC may receive the requisite documentation from the municipal manager, but the IEC ought to have the final say. It is independent, sufficiently removed from local politics, has the expertise, and has access to all the party constitutions.

Municipalities must be encouraged (or forced through a minimum standard in the Municipal Systems Act), to include delegations to the municipal manager that ensure that the key governance and administrative decision making continues when key executive offices are vacant.

> 2(5)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

For as long as political actors consider the right to appoint and dismiss the municipal manager (or any staff) as a prize for winning in coalition negotiations, coalition turmoil will continue to sabotage municipalities. A convention must be encouraged whereby the "distribution" of administrative posts or administrative units is an absolute taboo during coalition negotiations. No such expectations must be entertained in negotiations, and the raising of any such expectations by a potential coalition partner must be collectively condemned by all the other potential partners.

3: Period of formalising coalition government

The period of formalising coalition government, ranging from the announcement of a coalition with the status to govern, to the publication of agreements, build on the outcomes of the previous period and then also constitute the platform for the subsequent life of the coalition. What are the formal (legislative) and political-cultural interventions and encouragement of good practices that can help build sound coalition practice?

3(6) Announcement of umbrella agreements, likely to impact multiple councils

It has become common practice for multiple political parties to conclude national or provincial "umbrella agreements", in which they commit to enter into coalitions in the various hung councils where they are represented. These umbrella agreements cover multiple councils, for which agreements are then imposed. Section 3(7) deals with council-specific coalition agreements.

> 3(6)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

There is no specific legal framework applicable to umbrella agreements. They are concluded in the political realm, between leaders of political parties. While there is no legal precedent, it is hard to imagine an umbrella coalition agreement being enforceable in court. They derive their purchase from the political fallout that comes with non-compliance, rather than the law.

> 3(6)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

A range of umbrella agreements between South Africa's political parties have been shaping local coalitions, across multiple municipalities. For example, in the 2016 to 2021 term of local government, there was the umbrella agreement between the DA, IFP, FF+, Cope and UDM. In the 2021-2023 period, this practice was manifested, for example, in the realignment of the EFF with the ANC (away from the IFP, mainly in KwaZulu-Natal), and in the NFP aligning with the ANC (some NFP representatives nevertheless refused to follow the official party directives). In the run-up to the 2024 national and provincial elections, further umbrella formations were arising, both major (such as the Multiparty Charter, which includes the DA, IFP, FF+, ActionSA, ACDP), and minor formations, involving parties that would run the risk individually of not reaching levels of electoral support required for representation (even by prevailing "natural threshold" standards).

> 3(6)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

Announcements of the umbrella coalitions, in their own right, have been unproblematic although the specific constitution of the alliance of parties has often resulted in change in the coalition government. This has also been the case when a minor party or parties have done coalition-crossing and realigned with another major party to gain high office, control over a favoured municipal portfolio, or some other unannounced benefits. On the other end of the spectrum, where parties have public and predictable alliances, the announcements have been better received and well tolerated, except by the losing parties.

The downside of umbrella coalitions in the local government sphere is that it limits local political actors in negotiating local coalition agreements tailored to the local context. When the configuration of the council leads towards a coalition that contradicts the umbrella agreement, and the relevant parties can find each other (informed by local familiarity and/or urgency), such a coalition would be "disallowed" in terms of the umbrella arrangement. That could be a missed opportunity for promoting tolerance and cooperation.

> 3(6)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

There are no legislative or regulatory interventions that present themselves. Umbrella coalitions are a political practice with which the law should be reluctant to interfere.

> 3(6)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

Umbrella political coalitions have been among the most stable of coalition governments in recent South African coalition government history. Where instability has occurred, it was caused largely by a fallout between the partners at national or provincial government levels, which then affected multiple municipalities. Until South African party politics generally stabilises beyond the coalition zone (where alternate majorities can be composed) it is unlikely that more constructive practices can be fostered.

Nevertheless, political parties that participate in umbrella coalitions may be encouraged to avoid overly rigid centralisation. They may consider introducing clauses that permit their local structures to enter into alternative coalitions in consultation with national party structures, if the local electoral result leaves no other realistic choice.

3(7) Form and publication of coalition agreements, inclusive of conflict regulation mechanism

When two or more political parties (or independent representatives) decide to combine their votes to support a coalition, there is a coalition agreement. Should these agreements be formalised? Should all forms of agreements be recognised and be published?

> 3(7)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

There are currently no legislative measures aimed at coalition agreements. There is no instruction in the law to conclude one when there is no outright majority in a council or legislature, let alone an instruction as to what it must contain, or whether it must be made public.

> 3(7)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

Again, the fact that there are rising prospects for coalition governance at the provincial and national spheres, has had an impact on local practice. Parties have been rehearsing coalition relations locally with a view to testing options for possible future national and provincial coalitions. These are “agreements” of a party-political type, but not “coalition agreements”. In addition, the absence of formalised agreements has helped parties keep their options open: this has been important because bigger parties have been entering into agreements with either flexible minor parties (willing to go with the best offer from any of the bigger parties), or community parties and independents that have been willing to go with any of the bigger parties that can offer a good deal to the community or interest that is being represented by the minor partner. Parties have tended to regard coalition agreements as restraining them in conditions where they want to “play the party-political field”.

The trends discussed under “umbrella agreements” (section 3(6)) also have relevance. Many of the local government coalitions have been formed at a national or subnational (more inclusive than single-municipality) level. In a few cases, local and municipal leadership pursued their own preferred local alliances in defiance of their national leadership thereby giving shape to “rebel agreements”. In a few cases the political parties have also been tolerant of their local structures acting contrary to the national or regional umbrella agreements, especially if community parties are part of the arrangement.

> 3(7)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

To date, coalition agreements have taken overwhelmingly a post-election format, predominantly informal. In some cases, parties have preferred the designation of “voting partner” over that of “coalition partner”. The following broad categories of “coalition agreements” can be differentiated in describing the practices of the period 2021-2023 –

> Formal, informal agreements – or partial and conditional:
> - formal, multiparty agreements, deliberated, announced – national, provincial or local;
> - confidence-and-supply arrangements;
> - de facto power to the predominant party that does not hold an outright majority;
>
> By voting for office and portfolios:
> - coalition by voting for offices of mayor, deputy mayor, speaker, chief whip;
> - coalition by announcement of municipal portfolio allocation;
>
> By voting practice and inferred voting patterns :
> - bloc or pattern voting as evidence of a coalition;
> - coalition by stealth – strategic abstention from voting, absenteeism, abscond from or disrupt council sittings (ensuring thereby that a certain voting outcome will prevail).

Municipal coalition agreements therefore have tended to be announced, in the cases of the most unstable of the coalition governments locally, via the announcement of the municipal executive. Many of these cases involved brinkmanship and cutting-edge negotiations for potentially lucrative portfolios. Granting them to prospective coalition partners secured the coalition.

> 3(7)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

Among the ideas to regulate coalitions (as distinct from amending general governance arrangements to avoid instability), the regulation of coalition agreements seems the least complex. For example, it has been suggested to –

- make the publication of coalition agreements compulsory;
- regulate certain minimum standards for coalition agreements, such as –
    - commitments to a common policy programme; and
    - dispute resolution mechanisms.

There are good reasons to insist that coalition agreements are made public. A coalition agreement is the founding document of the incoming government, and the public is entitled to have access to it. Second, it will be harder for a coalition partner to renege on a coalition agreement if that agreement is in the public domain, and party members and voters can hold the party accountable for its decision to leave the coalition. However, to make publication legally compulsory, a number of questions must be addressed, such as –

- Who will be legally instructed to publish it? For example, must it be published by, or on behalf of, the incoming leader of the government, i.e. the (executive) mayor, Premier or President? Or should it be published on behalf of the legislature, to which the coalition accounts? Must it be gazetted or is publication on an official website sufficient?
- Are all types of coalitions obliged to formalise their agreements equally? In other words, what circumstances would give rise to the legal duty to publish a coalition agreement? Does the absence of an outright majority automatically trigger that duty? Or does the commitment of two or three parties to support each other's executive candidate trigger the duty? Is a minority coalition also duty bound to publish its coalition agreement? If so, would a coalition of opposition parties then also have to publish its agreement? Are confidence and supply agreements, for example, allowed to be just that – occasional and situation-specific cooperation – or should it also follow the formal agreement route?
- What, if any, are the consequences of not publishing an agreement? Is publication of the agreement a precondition for the validity of the constitution of the government? In other words, is the executive barred from assuming office before the agreement is published? Can a "technical" publication requirement override a vote taken in the legislature? Or would there not be any sanction if the publication requirement is not complied with?
- If the coalition agreement contains the policy priorities agreed to by the coalition, and it is officially published as the incoming government's plan, how does that intersect with the existing policy programme of that specific government, for example the municipality's Integrated Development Plan?

  3(7)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

When parties agree to jointly constitute a government they should be obligated to formalise this through the negotiation, adoption and publication of an agreement that is founded in substantive matters of policies and programmes of action. Confidence and supply agreements should also be formalised, since the votes in which the parties agree to cooperate to ensure majorities are crucial too to the stabilisation of coalition government.

There is broad agreement among political actors, academics and local government stakeholders that coalition agreements must –

- address substantive policy commitments, and not just power-sharing arrangements;
- contain dispute resolution mechanisms; and
- be made public.

These three practices should be encouraged as a constructive practice, even if making it legally compulsory proves too complex at this stage of South Africa's democracy.

3(8) Election of office-bearers, including public or secret nature of the vote

The President, Premier and (Executive) Mayors are elected by, and from among the members of the council/legislature. Does that election take place in public or by means of a secret vote? What are the consequences of the public or secret nature of the vote for coalitions?

> 3(8)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

The legislative measures pertaining to the secret or public nature of the vote vary, depending on (1) whether it concerns the national/provincial government or local government and (2) whether it concerns the motion of no-confidence or the election of the office-bearers.

In the National Assembly and in provincial legislatures, motions of no-confidence are generally debated, and voted on in public. However, the presiding officer may decide that the vote be conducted in secret. Since the Constitutional Court determined, in 2017, that the presiding officer has that power, the trend has been to vote on them in secret. When it comes to the election of the President and the Premier, the Constitution is clear: the vote is conducted by secret ballot.[xvi]

In local government, motions of no-confidence are generally debated, and voted on in public council meetings. Based on the same Constitutional Court ruling, it could be argued that presiding officers in municipal councils have the same authority, namely to order that the vote be conducted in secret. However, this is a grey area and also depends on the municipality's rules and orders. When it comes to the election of office-bearers, the Municipal Structures Act is again clear: it must always be done by secret ballot.[xvii]

> 3(8)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

The evolving coalition culture is one of a free-for-all in terms of the manoeuvres that may be executed, often under the veil of secret ballots in MoNCs. The secret ballot has become the surreptitious vehicle for deception and possibly unannounced coalition realignments. One of the alternatives, also witnessed across several councils, has been the announced realignment of a ward councillor, followed by resignation and by-election. Some municipal coalition governments have been changed in this way.

> 3(8)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

In prevailing municipal practice in South Africa, the use of secret ballots in voting for office-bearers is one of the vehicles for elected municipal representatives to realign with alternative party coalitions. Two variations have stood out, namely either jumping the coalition ship in the course of the vote (and perhaps not owning up to it publicly, and acting against the party's instruction), or to go against the party caucus alignment and in effect voting for the opposing candidate. In the process these representatives have then probably also acted in contravention of the mandate given to the party and its leadership.

> 3(8)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

The law's blanket insistence on a secret ballot for the election of office-bearers (across all three spheres) has contributed to instability in coalitions. Changing this for national and provincial governments would need a constitutional amendment. In local government, changes can be made by amending ordinary legislation. It is suggested that a clear legal framework must be established for the secret or public nature of both motions of no-confidence and the election of office-bearers. This framework must consider that in a coalition setting, secret voting weakens party discipline, and makes coalitions more unpredictable. It may also provide a fertile ground for "vote-buying". At the same time, there may be circumstances, such as threats to public representatives, under which a secret ballot may be justified.

> 3(8)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

The secret or public nature of motions of no-confidence and/or election of office-bearers is primarily a legal issue with only limited little room for alternative political practice. If the law, or an order of the presiding officer determines that a vote is held in secret, political parties may still attempt to institute internal systems within the party to "force" transparency for the sake of internal party discipline (such as a "monitoring" system among councillors; even conducting lie detector tests). However, these arrangements are susceptible to legal challenge as they would go against the essence of the secret vote. One of the few steps that political parties may take to limit or preclude surreptitious coalition-crossing and destabilisation of coalition governments is clearly to enhance and enforce party discipline. This has been difficult to achieve in the case of some of the parties where leadership contests prevail.

4: Period of operation of coalition government

This crucial period in the lifecycle of coalition governments brings forward many situations that seem to justify intervention and regulation. This section considers possibilities of possible interventions, especially in managing motions of no-confidence, and forms of coalition oversight.

4(9) Motions of no-confidence frequency / periods in which they are permitted / grounds on which they are introduced and accepted

The President, Premiers and (Executive) Mayors remain in office for as long as they enjoy the support of the majority of the council/legislature. If the council/legislature passes a motion of no-confidence in the executive, it indicates that the support is no longer there. The incumbent President, Premier or (Executive) Mayor must then vacate office. What are the rules and practices surrounding motions of no-confidence and how does it impact coalitions? Furthermore, are the specific reasons for tabling a motion of no-confidence in a specific office-bearer legally relevant? Should a motion of no-confidence only be permissible when it can be proven that the incumbent underperformed or misbehaved?

> 4(9)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

The law distinguishes between "impeachment" and motions of no-confidence. Impeachment procedures deal with legal infringements, misconduct or incapacity on the part of the office-bearer.

Therefore, they are subject to stringent procedures that must meet the standards of fairness, including the *audi alteram partem* rule. The infringement, misconduct or incapacity must be proven. As stated above, impeachment procedures are generally not an adequate instrument to terminate a coalition.

For motions of no-confidence, no substantive reason is required. The law requires no more than a basic procedure of prior notice, aimed not to create a "trial", but to create an opportunity for the legislature or the council to debate the motion and the affected office-bearer to defend him- or herself in that political debate. There is no legal requirement for the majority to make, let alone prove, any misconduct or failure. The tally of the votes decides. This is a key feature of the parliamentary system that finds application (albeit in varying degrees) at all three spheres of government. In the parliamentary system, the executive stays in power for as long as it is supported by the majority of the legislature.

In local government, the council may remove a political office-bearer, such as the (executive) mayor, speaker, chief whip, member of the executive committee etc., from office by passing a motion of no-confidence.[xviii] The law does not require any reason or substantive motivation. All it requires is prior notice to enable a debate in the council, and that the motion be passed by a majority of councillors present in the meeting. The law also does not place any restriction on when, or how often, MoNCs may be tabled. The only current restriction exists in municipal rules and orders which often may stipulate that, once any motion failed to pass, the same motion may not be tabled again for a certain time (e.g. three months).

If the council removes an executive mayor, the members of the mayoral committee are also removed.[xix] If the council removes a mayor (in the executive committee system), the members of the executive committee remain in office.

In local government, there is no special procedure to "impeach" an office-bearer on account of misconduct or incapacity. However, any allegation of misconduct on the part of an office-bearer must be dealt with in terms of the Code of Conduct for Councillors.[xx] This may ultimately result in that councillor being removed from office as a councillor, by the MEC for local government, on recommendation by the council. A fair procedure must be followed, and the violation of the Code of Conduct must be established. Impeachment is not an adequate instrument to terminate a coalition because it involves a lengthy procedure and a decision by the MEC.

The National Assembly may remove the President, and the Provincial Legislature may remove the Premier, by passing a motion of no-confidence.[xxi] If the motion passes, the entire national or provincial cabinet must resign. Alternatively, the National Assembly (or the Provincial Legislature) may pass a motion of no-confidence in the cabinet only. In that case, the cabinet members must resign, and the President (or the Premier) must reconstitute her or his cabinet. Similar to local government, the law does not require any reason or substantive motivation. The rules of the legislature determine the procedure that must be followed.

The National Assembly/Provincial Legislature may remove the President/Premier from office for violation of the law or the Constitution, serious misconduct, or inability to perform the functions of office.[xxii] A two-thirds majority is required, and the rules of the legislature determine the procedure that must be followed. A fair procedure must be followed, and the violation, misconduct or inability must be established. In principle, impeachment proceedings and the voting take place in public. Impeachment is not an adequate instrument to terminate a coalition because impeachment involves a lengthy procedure and requires a two-thirds majority.

4(9)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

In the context of continuous municipal contests for power, driven especially by bigger parties, there is limited, if any, pressure from political principals on local actors to exercise restraint and use MoNCs judiciously. In the National Assembly there have been several initiatives, both in the time of the Zuma and Ramaphosa administrations, to execute motions of no-confidence and possible impeachment proceedings against the two presidents. The governing party's majority vote was maintained sufficiently to block these motions.

When the provincial MEC for local government is politically aligned to the office-bearers in a particular municipality, evidence has emerged of guaranteed supportive decisions, especially in cases that concern the scheduling of motions by speakers. This has meant that municipalities align their changing of the local order to provincial political office. Several of these cases have subsequently gone to court.

South Africa's general political culture is one in which parties and government agencies make wide use of recourse to the courts to help resolve political and administrative matters. The context also includes predominant or governing parties that indirectly encourage contentious coalition behaviour, for the sake of regaining or retaining power, and then hope that the judiciary may rule favourably.

4(9)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

MoNCs in South Africa's coalition municipalities are used commonly as a political tool, and they are frequently introduced on spurious grounds. They have become used largely, not to hold the government to account, but to seize power and key positions. The clearest manifestation of this is the common practice to table a MoNC when there is a vacancy on the council that weakens the ruling coalition, thus purely pursuing power rather than extracting accountability. In these processes MoNCs have lost some of their credibility to help leverage accountability. Furthermore, the timing of MoNCs in the local government budgeting and planning cycle can have severe effects. For example, removing an (executive) mayor in the run-up to the annual adoption/review of the integrated development plan and the budget (i.e. between January and June) is especially damaging, considering that the (executive) mayor must lead those processes. Another consideration is that there is often an insistence that MoNCs are tabled in special council meetings. Especially in metropolitan municipalities, convening a special council meeting comes at very considerable costs, which is arguably fruitless expenditure.

Grounds for the introduction of MoNCs in political practice

Motions of no-confidence have been used, and often abused. The MoNCs have become a notable "weapon" to institute new municipal governments when the parties had managed to muster an alternatively constituted multiparty majority, hence a substitute coalition. It is often difficult to differentiate between motions of substance, and motions based on contrived grounds. The poor state generally of municipal governance means that it is often impossible *not to find* grounds to institute motions against for example a mayor, for not fulfilling municipal mandates. There are cases nevertheless where MoNCs have been used to expel office-bearers on whom evidence of misgovernance or ill repute had emerged.

In several cases parties in the local councils have turned to the courts to find recourse against actions by for example speakers that obstruct motions procedurally, and in particular for refusing to enter them onto council agendas, or for scheduling them in inappropriate ways.

> 4(9)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

Consideration must be given to limiting the period within which motions of no-confidence may be tabled by, for example –

- legislating one or more window periods within which MoNCs are permitted;
- excluding certain time periods, for example the first year, or two years after the elections; or
- limiting the permitted frequency of MoNCs.

Furthermore, consideration must be given to limiting the scope for the convening of special council meetings, purely for the purpose of voting on MoNCs.

Motions of no-confidence must be based on a substantial political disagreement. But can this be regulated? Should the law only allow motions of no-confidence based on substance, and disallow those based exclusively on the desire to unseat an incumbent? There are reasons why this is difficult to realise in law.

First, tying motions of no-confidence to substantive grounds would be a far-reaching change to the parliamentary system. Justice Jaftha, in his dissenting opinion in Premier, Gauteng and Others v Democratic Alliance and Others put it as follows: “The golden thread that runs through removal from office in all spheres is simply that the relevant legislative body has lost confidence in its executive. No other reason is required for this political decision. All that is required to implement the decision is that there should be a motion of no-confidence, supported by a simple majority. Of course, members of the relevant body are allowed to hold a debate over the motion before it is put to a vote.”

Second, linking motions of no-confidence to misconduct blurs the line with the existing impeachment provisions, and makes the latter redundant. Third, linking motions of no-confidence to underperformance means the council/legislature must establish that underperformance *as a jurisdictional fact,* before it may pass a motion of no-confidence. This will require the regulation of undisputable, objective standards, and will require the council/legislature to conduct a rigorous, objective assessment against those standards before it may pass a motion of no-confidence. It will change the motion of no-confidence from a political instrument into an administrative (performance management) instrument. Fourth, motions of no-confidence could take weeks, if not months to be finalised, and could thus prolong institutional instability. Fifth, the resolution to adopt the motion must comply with substantive and procedural grounds, many of which will be challenged in court by those removed from office. The current, very basic, procedures are already litigated extensively. Adding more substantive and procedural rigour will cause litigation to rise exponentially.

Instead of legally requiring reasons for motions of no-confidence, it should be considered to provide for a so-called “constructive motion of no-confidence”. This is the rule that a motion of no-confidence in an office-bearer may only be passed if it is accompanied by the name of a candidate who immediately assumes office upon the incumbent vacating office. In other words, if passed, the motion votes the incumbent out, and immediately votes an alternative in. This eliminates the practice of voting an incumbent out, and causing a leadership vacuum that may take weeks or sometimes even

months to fill. At the same time, it does not unduly constrain the space for the political dynamics in the council to run their course or overregulate a political instrument. Rather, it encourages the formation of coalitions surrounding motions of no-confidence.

Without detracting from the above, a different argument can be made with respect to the MoNC in the speaker. It should be considered to require substantive reasons for a MoNC in the speaker. The speaker is not part of the executive. The election and removal of the speaker is thus not a manifestation of the parliamentary features of the system of governance. Second, the speaker has a strictly delineated set of functions, for which she or he can be held accountable. Third, the speaker must be objective and impartial. These considerations ought to make MoNCs in the speaker different from MoNCs in the executive.

The fact that the speaker exercises a casting vote in the event of an equality of votes on a (regular) matter before the council, should not detract from this. The casting vote is a mechanism to break a deadlock and it ought not to be counted as a coalition vote. To solidify the objective and impartial role of the speaker, consideration must be given to excluding from the casting vote those matters that are a direct manifestation of coalition politics such as MoNCs and the voting in of office-bearers.

> 4(9)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

Regardless of the possibility for legislative interventions to limit MoNCs, a political practice must emerge whereby MoNCs are considered, and are used as, instruments of accountability, not purely as instruments to obtain power.

Legislative intervention to insist on reasons for MoNCs would be inappropriate and counter-productive. However, it must be strongly encouraged, as a principle, that motions of no-confidence must be based on substantial political disagreements, not merely a desire for power. Inasmuch as entering a coalition must be based on an agreement to implement a joint programme, the decision to terminate a coalition must be based on the corollary, namely the identification of irreconcilable policy or political differences. The public, and the voters in particular, are entitled to know what those differences are.

The practice of terminating coalitions without any explanation to the public must be strongly discouraged. It excludes the public and significantly undermines trust in coalition politics. Instead, "accounting" to the public with substantive reasons for why the coalition failed must be standard practice.

4(10) Conditions for provincial interventions

Provincial governments have a constitutional duty to monitor, support and, if need be, intervene in municipalities.[xxiii] When it comes to municipal governance and administration, the MEC for local government has a specific mandate, while the Provincial Treasury generally focuses on municipal budgeting and finance.

4(10)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

The MEC for local government is responsible for –

- convening the first council meeting after the general elections, if there is no municipal manager; [xxiv]
- calling by-elections, if the municipal manager does not do so;[xxv]
- deciding the municipality's executive type;
- granting exemptions from provisions of the Municipal Structures Act;[xxvi]
- receiving reports of new senior management appointments;[xxvii]
- challenging irregular appointments of senior managers;[xxviii] and
- approving the extension of acting municipal managers beyond three months.[xxix]

Depending on the circumstances, the MEC may be called upon to exercise these powers to help avoid a governance crisis caused by coalition turmoil.

There are three further provincial oversight powers that intersect with coalition issues, namely –

- The refusal of the speaker to convene a meeting in a coalition council is often a sign of coalition turmoil. The speaker's refusal could be to frustrate an imminent election or an imminent MoNC, or the resistance against a "happy" opposition. If the speaker refuses, the municipal manager must convene the meeting (often seen as choosing sides). If both the speaker and the municipal manager refuse, the provincial MEC for local government may convene the meeting.[xxx]
- The provincial government must monitor municipalities. Generally, this is done by means of systematic monitoring (regular reporting), but there are specific instruments that may be used in response to a(n impending) coalition crisis. For example, delays in the processing of the budget must be reported to the province. Also, the MEC for local government may request information or institute a commission of inquiry into alleged fraud, corruption of maladministration (which coalition turmoil may result into). The national Minister may leapfrog over the MEC if the MEC refuses.
- If coalition turmoil persists and causes a governance crisis, the provincial government may, and in some cases must, invoke section 139 of the Constitution. Section 139 of the Constitution provides for an array of possible interventions, including sending a directive, assuming responsibility, dissolving the council, imposing a budget and/or imposing a financial recovery plan.

4(10)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

Changing party-political balances notwithstanding, South Africa remains characterised by the dominance of one major party, at least up to the elections of 2021 (local) and 2024 (provincial and national). This meant that local governments – comprising matching party-political configurations – could often count on a sympathetic ear in the provincial government.

This dynamic changed further in 2021 when all provincial governments had to adjust to overseeing coalition councils. It was no longer sufficient to rely on party-political channels to "correct" the

behaviour of municipal councils. Furthermore, factionalism within parties also compromised the leverage of provincial politicians over municipal councils.

Therefore, to influence the behaviour of local politicians in a fraught coalition scenario, the provincial government increasingly relies on (1) persuasion and cooperative governance and, if that does not work (2) the limited formal, statutory instruments of provincial oversight.

> 4(10)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

In several cases in local coalition practice from 2021-2023, coalition government challengers turned to their provincial counterparts to appeal actions such as speakers' scheduling or non-scheduling of MoNCs. The provincial interventions occasionally became subject to litigation. In some instances, the provincial actions were upheld, in others reversed. Some of these rulings were also taken on appeal to higher courts.

> 4(10)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

Municipal managers must be obliged to notify the MEC when there are delays in the election of office-bearers, similar to the duty in the MFMA to notify the province of impending delays in the adoption of the budget, non-compliance with key financial rules, or of serious financial problems. This will enable the MEC to support the municipality and intervene where necessary.

> 4(10)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

Provincial intervention in the matters of the municipalities is largely in the domain of regulation and formal powers. At best, all political parties in government or in coalition government in particular ought to be encouraged publicly not to abuse public office for political gain, for example by prioritising the interests of their own parties in these intergovernmental decisions.

4(11) Coalitions oversight

The current legislative mechanisms for oversight over coalitions are focused on the (municipal) government and administration that the coalition leads. These oversight mechanisms deal with compliance and performance of that municipality, but they are not directly aimed at overseeing the political praxis of coalitions. Is there a need to establish mechanisms to oversee the political praxis of coalitions directly?

> 4(11)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

There are no legislative measures specifically aimed at oversight over the praxis of coalitions in municipalities. The oversight is subsumed under the general monitoring, support and intervention that national and provincial governments carry out vis-à-vis local government. This includes oversight over municipalities by –

- provincial departments, responsible for local government – exercising oversight over municipal governance and performance;
- provincial treasuries – exercising oversight over municipal local government revenue and financial management;
- national department of cooperative governance and traditional affairs – exercising oversight over municipal governance and performance;
- National Treasury – exercising oversight over local government revenue and financial management;
- Auditor-General – auditing municipal financial management; and
- national and provincial line departments – exercising oversight over specific local government functions (water, sanitation, electricity, roads, environmental affairs, etc.).

When coalition turmoil leads to a governance crisis, these areas will be affected and the intergovernmental oversight mechanisms ought to detect problems when they occur. Sometimes, the problems surface immediately (for example when the council fails to meet, failure to pass a budget, key vacancies unfilled, erratic and illegal decision making, etc.). But sometimes they manifest over a medium to longer term (deteriorating revenue, service delivery failures, or failure to meet financial commitments).

> 4(11)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

The fact that national and provincial politics in South Africa are also potentially on the verge of coalition status has constrained oversight over local practice. The oversight spheres or government have instead looked on the local as wind tunnels to test emerging practice: local government coalition actions have shown an "experimental" nature: political parties feel free to explore new party-political partnerships when existing ones fail.

This entails that there is little accepted form of oversight and parties being called to account for coalition practice, except by legislation and court action (in selected cases where laws do cover coalition actions).

> 4(11)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

Political parties in local government coalitions have operated largely free of coalition oversight in a form that can call them to account for actions that include coalition crossing, or criticising coalition partners publicly without settling matters internally. It has been notable that it has often been national party-political matters that have impacted local coalitions adversely. For example, problems with national leadership tendencies of coalition partners have caused the breakup of multiple local coalitions.

> 4(11)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

There are no straightforward legislative or regulatory interventions for direct oversight over coalitions. Suggestions have been made to adopt legislation that establishes a national entity to perform functions such as –

- providing support to coalition negotiations (e.g. mediation and dispute resolution services);
- being the repository of coalition agreements;
- regulating and/or reviewing the content of coalition agreements; and
- enforcing coalition agreements, i.e. holding political parties accountable for reneging on coalition agreements.

The constitutional, legislative and practical problems with this approach are endless. Support for coalition negotiations is useful only if it is agreed to by all coalition partners. This is regardless of whether the service is offered by a national entity or organised separately. The added value of a separate national entity "recording" coalition agreements for the sake of it, is doubtful. Coalition agreements must be published by, or on behalf of, the incoming coalition government or the legislature to which it accounts.

If a national entity would be empowered to make decisions that constrain what parties may agree upon, by "rejecting" or enforcing coalition agreements, it would be tantamount to establishing an entity to which all (coalition) governments must account, on the basis of very uncertain rules. It would restrict the freedom of political parties to make the political choices that the Constitution allows them to make.

It has also been suggested to broaden the existing mandate of the IEC in this direction. However, the IEC's focus must at all times be on ensuring free and fair elections, and not on dealing with the outcome of elections.

In summary, suggestions to establish national structures and/or systems that exercise oversight over coalitions (as distinct from the compliance and performance of the governments they lead) must be considered reluctantly. Against the backdrop of the Framework's overall approach to tread carefully with legislative intervention, this option should not be considered at this stage.

> 4(11)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

It is suggested that, instead of establishing new structures and systems to oversee coalitions as political mechanisms, greater emphasis is placed on overseeing the compliance and performance of the governments they lead. For this, existing systems of oversight can be used and tailored. When an election or the collapse of a coalition produces a hung council, it is an early warning and the municipality should go onto a "watch list". All government entities, tasked with overseeing aspects of its governance, finance and performance must then coalesce, and pay special attention to the vulnerabilities of hung councils.

Coalition turmoil is a fertile ground for a predictable set of problems such as council governance failures, prolonged vacancies, irregular staff appointments, irregular procurement decisions, etc. The existing systems of oversight must be strengthened and tailored to detect and avoid these problems. For example, could the Auditor-General exercise live-auditing during coalition turmoil, the MECs for finance and local government have a special presence, and sector departments keep a special watch on hung councils?

In addition, and in terms of public accountability and transparency, civil society and their organisations should be encouraged – also by coalition governments – to exercise scrutiny of coalition agreements

and whether the coalition partners adhere to both acceptable coalition behaviours and to the policies and programmes to which the partners had committed themselves. All coalition councils should be encouraged to prove their commitment to constructive and developmental governance, for example through –

- a publicly accessible "public coalitions office" where the coalition agreement is available, and the individual and local party contact details of all coalition members are given out;
- there must be a virtual, online edition of this public coalition office as well;
- coalition members must report at this office for public engagement (including on feedback regarding the type of governance that was delivered to constituencies) at hours that are advertised well in advance.

The locus of coalition attention should thus be shifted from coalitions as elite engagements among political parties to coalitions as relatively inclusive, multi-constituency cooperative agreements that will serve communities.

5: Period of coalition government running its course to full-term, or losing the outright majority due to changing balances of inter-party seat-holding

The period towards the end of the coalition lifecycle has hitherto received little attention in reflections on the stabilisation of coalition governments. However, it is at this time that political parties start contemplating life after the coalition. They start planning for the next coalition cycle, which will come after a next election that may yet again not deliver outright majorities. It may be in their interest to end existing coalition arrangements. Should there be any control or oversight as the coalitions start unwinding naturally?

5(12) Preparations for possible exit from coalition government in preparation for next election, or for transitions following change in the balance of inter-party power in the legislative body or council

> 5(12)-a Prevailing legal framework – what are the legislative measures (both nationally and in local government) that are already in place?

Current legislation and municipal regulations in South Africa do not cater specifically for a period, just prior to pending general elections, for parties to withdraw from governing coalitions should they so wish. This is comparable to the international situation – where unstable coalitions in the runup to the next election is a recognised problem.

> 5(12)-b Political context – to what extent does the prevailing political context facilitate or constrain coalition government practice, and what is the political culture that has evolved?

In local government in South Africa political parties have been mindful of possible party-political changes in provincial and national government come 2024, and the possible spread of coalition governments into these spheres. Consequently, they have been using local government coalitions to test cooperative relations with other parties. There may be a rise in the practice of exiting from municipal coalitions that are seen to be tainting prospects in the 2024 national and provincial elections.

5(12)-c Manifestations of practice – what are the problems that have been experienced, along with reference to instances of good practice?

On the one hand, South Africa has not yet experienced the full effect of pre-emptive coalition-exiting by parties that experience their existing coalitions as limiting (a phenomenon that is experienced internationally). On the other hand, this type of strategic calculation of future prospects has characterised much of the party fluctuations in coalition alignment in the period of 2021-2023.

5(12)-d Key options for legislative interventions – what are the foremost legislative or regulatory interventions that present themselves?

It is possibly premature to introduce formal prescriptions for a part of South Africa's coalition experience that has not unfolded fully yet, with particular reference to municipal coalitions.

5(12)-e Encouragement or fostering of alternative, constructive practice – what are the governance and political practices that should be fostered, in those cases where legislative interventions would be inappropriate, or counter-productive?

Coalition government practitioners should be encouraged to be prepared for a possible increase in the floundering of coalition governments as South Africa approaches future elections. When parties and coalition governments prepare for this eventuality, the same cautions follow as in the case of unravelling of coalition governments generally. In particular, there would have to be facilitation of transitional government in which the municipal administration must be empowered to ensure continuity.

NOTES – Prevailing legislative and constitutional provisions for coalitions in South Africa

[i] S 29(2) Local Government: Municipal Structures Act 117 of 1998 (Structures Act); S 36(2) Structures Act;
[ii] S 45 Structures Act; S 48(2) Structures Act; S 55 Structures Act.
[iii] S 86(1) Constitution of the Republic of South Africa, 1996 (Constitution); S 128(1) Constitution.
[iv] S 86(3) Constitution; S 128(3) Constitution.
[v] S 102(1) Constitution; S 141(1) Constitution.
[vi] S 55(3) read with Schedule 3 Structures Act.
[vii] S 60 Structures Act.
[viii] S 43(2) Structures Act.
[ix] S 43(2)(f) Structures Act.
[x] S 16(1)(a) Structures Act.
[xi] S 91(2) Constitution; s 132(2) Constitution.
[xii] S 91(3) Constitution.
[xiii] Chapter 7, Part 2 Local Government: Municipal Systems Act 32 of 2000 (Systems Act).
[xiv] S 29(2) Structures Act.
[xv] S 25(2A) Structures Act; Item 18 Schedule 1 Structures Act. Item 11 Schedule 2 Structures Act.
[xvi] Item 6(a) Schedule 3 Constitution.
[xvii] Item 6(a) Schedule 3 Structures Act.
[xviii] S 40 Structures Act; S 41E Structures Act; S 53 Structures Act; s 58 Structures Act.
[xix] S 40 Structures Act; S 41E Structures Act; S 53 Structures Act; s 58 Structures Act.
[xx] Schedule 7 Structures Act.
[xxi] S 102 Constitution; S 141 Constitution.

[xxii] S 89(1) Constitution; S 130(3) Constitution.
[xxiii] S 155(6) Constitution; S 139 Constitution.
[xxiv] S 29(2) Structures Act.
[xxv] S 25(4) Structures Act.
[xxvi] S 91 Structures Act.
[xxvii] S 54A(7)(a) Systems Act; S 56(4)(a) Systems Act.
[xxviii] S 56(8) Systems Act; S 56(5) Systems Act.
[xxix] S 54A(2)(b) Systems Act.
[xxx] S 29(2) Structures Act.