

Coalition governments: What are the options for law reform at municipal level?

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1 Introduction

In August 2023, the Deputy-President, in partnership with the University of the Western Cape and its Dullah Omar Institute, hosted a National Dialogue on Coalition Governments at the University of the Western Cape. The Dialogue sought to lay a foundation for the development of a National Framework on Coalition Governments in South Africa, and, during its deliberations, many questions and issues emerged. There was broad agreement that radical legal reform is not the key to stable coalitions, but that a careful consideration of the legal framework is called for.

The Dullah Omar Institute will take this discussion forward. In this Policy Brief, we explore two issues, namely (1) what are the options for thresholds at municipal level? and (2) how to ensure that municipal service delivery continues when there is instability? These issues, together with an excursion into Spain's experience with coalition governments at municipal level, will be discussed at a seminar hosted by the Dullah Omar Institute, in partnership with the Hanns Seidel Foundation.

The aim of this Policy Brief and the seminar is to be discursive, i.e. discuss ideas and suggestions that could be useful in the debate about legislative reform in response to instability occasioned by coalition turmoil.

2 Unpacking thresholds

The first section of the Policy Brief examines thresholds in local government. First, it sets out the difference between two types of thresholds, namely electoral thresholds and executive thresholds.

¹ Dullah Omar Institute, 2023.

With respect to electoral thresholds, it will be argued that it is critical to make a distinction between their effect on municipal councils, on the one hand, and their effect on Parliament and provincial legislatures, on the other.

With respect to executive thresholds, it will be argued that there is some manifestation of executive thresholds in certain parts of local government, namely the executive committee system. This offers some solution to coalition instability, but certainly is no silver bullet.

2.1 Distinguishing electoral thresholds and executive thresholds

It is important to distinguish between two different thresholds. The first is a threshold for entry into the legislature: if a party obtains less than a specially determined percentage of the general vote in the general election (for example one, three or five percent), it will not be allocated seats in the legislature.

Currently, there is no such special threshold for entry into the National Assembly, provincial legislature or municipal council. This of course does not mean that every party that competes in the election will be allocated seats. A party must at least obtain the quota of votes for one seat to gain entry into the legislature.²

The second type of threshold is a threshold for participation in the executive: if a party occupies less than the required threshold of seats in the legislature, it is barred from participation in the municipal executive. This will be discussed further below.

Proposals to introduce the first type of threshold, the electoral threshold, attract a lot of debate. Those in favour argue that such a threshold will reduce the fragmentation of politics in the legislature, and that the reduced number of parties in the legislature makes it easier to form a governing coalition. Those who oppose electoral thresholds point at the importance of allowing a diversity of interests and voices to be represented in the legislature.

There is also a constitutional consideration. If a threshold is applied to entry into the legislature, the composition of the legislature will not mirror the outcome of the elections. This prompts the question as to whether the Constitution permits an electoral threshold, given that it insists that the electoral system must result, “in general, in proportional representation”. The higher the threshold, the greater the ‘distortion’ of the distribution of seats compared to the distribution of votes, and therefore the likelihood of the conflict with the Constitution.

The point about this contribution is this: debates about electoral thresholds generally don’t distinguish between national, provincial and local government. Usually, the same arguments are used across all three spheres of government to argue in favour of, or against, electoral

² In general terms the quota is determined by dividing the total number of valid votes cast by the number of available seats, plus 1. The quota thus changes with each election.

thresholds. This Policy Brief argues that there is a critical difference between the role of municipal councils, as compared to the role of national and provincial legislatures, and that this distinction is important in the discussion about electoral thresholds.

2.2 The different roles of municipal councils and national/provincial legislatures

This difference between the role of a municipal council, compared to the role of a national or provincial legislature stems from the Constitution itself. In sections 44 and 104, the Constitution charges the Parliament and the Provincial Legislature with legislative powers (only). In separate provisions, it charges the President and the Premier with executive powers. In other words, Parliament and provincial legislatures make laws, and the President and the premiers implement laws. In local government, it works differently. In section 151(2), the Constitution charges the municipal council with both legislative and executive powers. In other words, the municipal council makes by-laws, and also implements laws.

2.3 What does this have to do with electoral thresholds?

This distinction is critical in the context of debating electoral thresholds. This is because the main argument in favour of electoral thresholds, namely to reduce fragmentation of politics and achieve greater stability in the legislature, arguably carries much greater weight in local government than it does in national and provincial government.

Parliament and provincial legislatures focus on the passing of laws and on exercising oversight over the executive. In other words, they consider, debate and process Bills, and hold members of the executive and the administration accountable for how they run the government. If there is instability in the legislature, these activities are of course affected. However, the national or provincial executive continues with taking executive decisions and ensuring administration. In other words, during coalition turmoil, there is no immediate consequence for the running of the national or provincial government.

Like Parliament and provincial legislatures, municipal councils also pass (the occasional) by-law, and exercise oversight over the municipal executive. However, the vast majority of agenda items of council meetings are executive and administrative matters. Municipal councils take a range of executive and administrative decisions. They approve policies, such as the IDP, a debt collections policy, a zoning scheme, an indigent policy, and a supply chain management policy. They approve programmes and systems, such as the municipality's performance management system or a delegation system. They take decisions to release land for development and, crucially, have the authority to appoint, discipline and dismiss senior managers. The municipal administration is unable to function when those decisions are not made. The local government context is unforgiving: when coalition turmoil results in a council failing to meet, or not prioritising the above service delivery matters, it immediately affects the running of government. As one City Manager once put it: "When my council fails to meet, the next day, the trucks don't leave the depot."

The above examples indicate that, when it comes to the importance of the functioning of legislatures, national and provincial governments are not as unforgiving as local government. Of course, coalition turmoil in Parliament or a provincial legislature will have serious consequences. But the immediate paralysing of the entire national or provincial government is not one of them. Simply put, if a provincial legislature fails to meet, or if its meetings are dominated by coalition politics, the provincial hospitals and schools will still be open the next day.

Therefore, it is argued here that there is a bigger case for an electoral threshold in local government than there is for an electoral threshold in national and provincial government.

2.4 Executive thresholds in local government

As stated above in paragraph 2.1, an executive threshold bars a political party from participating in the municipal executive if it does not have a minimum percentage, or a minimum number of seats in the legislature. This threshold does not affect the composition of the legislature itself, and the diversity of voices and interests represented there, but it limits participation in the executive to those parties that meet the minimum requirement. In the context of coalitions, proponents of the executive threshold argue that it prevents small parties from being disproportionately rewarded for supporting a coalition. Opponents, on the other hand, argue that it unduly limits the ability of political parties to find partners to create a coalition with.

2.5 Are there executive thresholds?

At present, there is no executive threshold in the form of a minimum percentage or a minimum number of seats for participation in a municipal executive, provincial cabinet or national cabinet.

However, a variation of the executive threshold exists in parts of local government, namely in those municipalities that operate an executive committee system. Approximately half of all municipalities have executive committees. Other municipalities operate the executive mayor system. All municipalities in KwaZulu-Natal have executive committees because it is the only system permitted in that province.

2.6 Composition of the executive committee explained

The executive committee may not have more than ten members, or an equivalent of 20 percent of the council, whichever is the least. The executive committee, whose members are elected from among the members of the council, must be elected within 14 days of the general elections. The executive committee then exercises the executive powers delegated to it by the council or assigned to it directly by legislation. In a separate election, the council elects one of the members of the executive committee as the mayor.

The composition of the executive committee is what sets it apart from the executive mayor and his or her mayoral committee.

The executive mayor, once elected, appoints councillors to his or her mayoral committee. The mayoral committee is the executive mayor's committee and the members of the mayoral committee assist the executive mayor. The executive mayor has full discretion as to whom to appoint onto the mayoral committee. In that sense it lends itself well to 'cementing' a coalition, because the mayor's appointments can flow directly from the coalition agreement.

The executive committee works differently. It is a committee of the council. The Constitution provides that committees of the council must be composed in a manner that is "consistent with democracy" and allows parties and interests on the council to be "fairly represented" (s 160(8) Constitution). The first criterion means, simply put, that the majority in the council must also be the majority in the executive committee. The second criterion means that the executive committee is not the preserve of the ruling party or the ruling coalition: it must also include councillors that do not belong to the ruling party or ruling coalition. This distinguishes the executive committee from the executive mayor and his or her mayoral committee where this is not legally required.

The Municipal Structures Act prescribes a formula for the awarding of seats on the executive committee. The formula establishes a system of strict proportionality in terms of which the composition of the executive committee mirrors the composition of the municipal council: the percentage of seats for a party on the council will correspond with the percentage of seats for that party on the executive committee.³

The political party or interest to which executive committee seats are allocated must appoint representatives to occupy such seats. Nothing precludes a political party or political interest from nominating a councillor from another political party or political interest to one or more of its allocated seats. In other words, a political party or political interest may 'donate' one or more of its executive committee seats to another party or interest.

2.7 What does it mean for coalitions?

Some argue that the executive committee system is the solution for coalition instability. However, municipalities with executive committee systems have not been immune from coalition instability. The numerous governance crises in hung councils in KwaZulu-Natal bear testimony to this. Therefore, a more nuanced assessment of the executive committee's potential to solve coalition instability is necessary. How should this variation on the electoral

³ The number of executive committee seats for a specific political party or political interest is equal to the number of seats won by that political party or political interest divided by the total number of councillors determined for that municipality, multiplied by the number of seats on the executive committee. If that calculation gives a surplus, that surplus must compete with the other similar surpluses and be awarded to the highest surplus. If there is an equality of surpluses, the result must be determined by lot.

threshold be viewed in light of coalitions and its potential to reduce coalition instability? Five considerations, some of which support the view that executive committees are better for hung councils and some of which oppose it, are discussed below.

The first consideration opposes the view that executive committees are a solution for coalitions. It is not correct to suggest that the executive committee system obviates the need for coalition negotiations and agreements. This argument reduces coalitions to a negotiation about positions, and ignores the need for agreement on policy matters. Decisions in the executive committee and in the municipal council require a majority. Having the composition of the executive 'imposed' by law does not mean that there automatically is agreement on policy matters. The budget, the IDP, tariffs, debt collection etc. must still be negotiated, and disagreements can sink a coalition.

The second consideration, which mildly supports the view that executive committees may facilitate more stability, is that the executive committee system limits the scope for negotiations about positions. Potential coalition partners may negotiate about positions such as the mayor, speaker, whip and committee chairs, but the division of seats to political parties on the executive committee is determined by law. It can be argued that this is an 'instability-reducing' feature of the executive committee.

The third consideration, pointing away from stability, is that the executive committee may not comprise coalition partners only. The opposition will have seats on the executive committee. This is a feature that makes the executive committee more inclusive, and less of a 'winner-takes-it-all' system. However, it may also compromise the ability of hung councils to have stable coalitions. Coalition partners cannot use the meetings of the executive committee to negotiate coalition deals, or solve coalition disputes, because the opposition is present and will be looking for every opportunity to drive wedge between coalition partners.

Fourth, the option to 'donate' executive committee seats brings flexibility for potential coalition partners. It can be used to bring parties onto the executive committee that would otherwise not have seats, due to their limited electoral support. For example, a big party with a number of seats on the executive committee can reward a small party (that has no seats on the executive committee) for supporting the coalition by 'donating' one of its executive committee seats to that smaller party.

Fifth, the Municipal Structures Act does not limit the municipal council's discretion to elect a mayor. The mayor is elected by majority decision and the Municipal Structures Act does not insist in any way that the mayor comes from the largest party in the executive committee. It is thus possible for the council to elect a mayor from a small party, even the smallest party (if it was donated an executive committee seat). This despite the executive committee proportionally reflecting the composition of the council.

In summary, the executive committee system is a variation on the executive threshold but it is by no means a silver bullet in the context of coalition instability. While it reduces the scope for negotiating about positions, the option to 'donate', and the separate election of the mayor still leaves ample scope for negotiation (and thus for disagreement). In any event, the executive committee does not manufacture agreement on policy matters, among its members or among a coalition.

The question is: what do we do with the executive committee system in the debate about options to stabilise coalitions? Provincial governments may, after consultation, change any of their municipalities from executive mayor systems to executive committee systems and *vice versa*. In fact, an attempt was made in the Eastern Cape to 'impose' an executive committee system on Nelson Mandela Bay Metropolitan Municipality in response to ongoing coalition turmoil. It faced opposition from within the council, and it is unclear whether it could have assisted in stabilising governance in the council. Forcibly changing a municipality's governance system is not only politically treacherous, but also brings within many practical problems for the affected municipal governance and administration system.

However, it is argued that, in the debate about legislative efforts to stabilise coalition governance, the concept of the collective executive system, and its advantages and disadvantages, should be included.

The next part of the Policy Brief takes a closer look at the issue of administrative stability during coalition turmoil. It asks the question as to how it can be ensured that the wheels of government keep turning, even when there is a governance crisis.

3 How to ensure that municipal service delivery continues when there is instability?

3.1 Introduction

When a council fails to meet or take decisions consistently this ought to be classified as a unique governance disaster requiring urgent attention. It cannot be business as usual when the council or councillors do not want to do what is required of them. In this part of the Policy Brief, we discuss the impact of a governance vacuum, created when a council regularly fails to convene or take decisions, on service delivery and development in communities. We then explore a potential way of filling this vacuum to ensure that service delivery continues even in cases of instability, which increasingly is often coalition related.

3.2 What should local government be about?

The debate on coalitions in local government is often about the conduct of councillors and political parties, which leads to unstable councils. It may seem as if local government exists to serve councillors and political parties. Yet, the Constitution imposes a clear service delivery and development mandate on municipalities. Local government must -

- a) provide democratic and accountable governance for communities;
- b) ensure that services are provided in a sustainable manner;
- c) promote the socio-economic development of their communities;
- d) ensure a safe and healthy local environment; and
- e) promote citizen participation in local government.

This vision for local government was further developed in the White Paper on Local Government (1998) and given effect in various pieces of legislation and policies. Thus, local politicians and administrators must always strive to realise this vision.

3.3 The reality

Sadly, politics in many municipalities is no longer only about service delivery and the development of local communities. It is about political parties and councillors (re)gaining control of councils. The challenge is acute in municipalities where there is no single party with a majority to govern, therefore, necessitating the formation of a coalition government. It is common knowledge that many of the coalition governments have been unstable. Mayors and speakers in these municipalities have been elected and fired regularly. Many council meetings have failed to take place, and when they do take place it is not uncommon for some of them to degenerate into chaos. There are certain interests, whether political or otherwise, that benefit from this chaos, and have no incentives to make things work. Why is it that no one is being held accountable for the chaos when the consequences are there for everyone to see? Should we have to wait until elections to hold political parties and local politicians accountable?

The conduct of political parties and councillors in some of the municipalities leaves a lot to be desired. However, unlike the municipal manager (MM) who can be personally held liable for certain service delivery failures, there is no similar provision when it comes to councillors. Even in cases where it was clear that councillors have no intention or will to do what is required of them, they continued to receive their remuneration. They will also continue to occupy office unless the Code of Conduct for Councillors is invoked, which rarely happens even in cases where circumstances justify so. This instability and chaos is occurring at the expense of service delivery and development.

3.4 The impact of the absence of separation of powers at the local level

As discussed above, unlike at the national and provincial level, where there is separation of powers between the executive and legislature, which enables the executive to function and ensure the provision of services even when there are political fights in the legislature, there is no separation of powers at the local level. The council exercises both the executive and legislative powers. It has a two sided responsibility of making and implementing its own laws

and policies. The council may delegate executive powers to political office-bearers and structures such as the mayor, and to officials such as the MM, for example. But it remains ultimately accountable. Thus, a council is indispensable to how a municipality functions even when it delegates its powers. What this means is that when a council fails to meet or take decisions, service delivery stops or takes place at a snail's pace.

This governance disaster caused by the inability or unwillingness of councillors to meet or take decisions, affects the delivery of services. The public debate on stabilising coalitions has largely been about restricting the behaviour of political parties or councillors in council. A number of legislative proposals have been put forward towards this end, such as limiting the number of times a motion of no confidence can be issued and when such a motion can be issued after a general election. Other legislative proposals, discussed in the Local Government Bulletin article, "[Coalitions in local government: ideas for law reform Introduction of electoral thresholds](#)", are the removal of the secrecy surrounding election of office-bearers and extending the period within which a newly elected council must elects its main office-bearers within 14 days. Not much attention has been given to how we can keep service delivery going even in times of coalition turmoil in council.

3.5 The absence of an effective corrective instrument

There are intergovernmental instruments to address governance and other problems in municipalities. These include interventions in terms of section 139 of the Constitution, investigations in terms of section 106 of the Municipal Systems Act, and the enforcement of the codes of conduct for municipal staff and councillors. These mechanisms have proved inappropriate or ineffective in addressing governance problems for a number of reasons. When there is a governance disaster, caused by unwillingness or inability on the part of councillors to meet and/or take decisions, there is a decision making vacuum which these instruments cannot speedily resolve to ensure that service delivery continues. Are there no better ways to manage this vacuum?

3.6 Delegation of powers

One of the most important governance instruments for a municipal council is its delegation policy. In this policy, it delegates powers to the political structures and office-bearers, such as the (executive) mayor, speaker, chief whip, members of the executive etc. But it also delegates powers to the MM and other senior managers in the municipal administration.

In terms of section 160(2) of the Constitution, it is only the powers to pass by-laws, adopt a budget, impose revenue-raising measures, and to raise loans that may not be delegated. Section 59(1)(a) of the Municipal Systems Act adds the power to adopt or adjust the IDP and enter into a service delivery agreement. In terms of various pieces of legislation (Municipal Finance Management Act, Municipal Property Rates Act etc), a council may not delegate the

power to appoint senior managers, appoint a property valuer, and to dispose of municipal capital assets, among others. This leaves room for the council to delegate everything else to the MM and/or other offices in the interests of effective local government or when the circumstances require. All municipalities have adopted delegation policies to guide the exercise of delegated authority in the day-to-day functioning of a municipality, with the council as the main decision making body.

3.7 The delegation of power when there is a disaster

There will be other times when the council will not be able to convene or convene swiftly enough to attend to municipal business. For example, when a disaster has been declared in terms of the Disaster Management Act, councils often assign extraordinary powers to the MM to deal with the disaster promptly. The assignment takes place within a municipality's systems of delegation. Decisions that would normally require the approval of the council, a committee of the council, or the mayor (whether executive or not), and that cannot wait until after the disaster is contained or until the next council meeting, are taken by the MM. These powers enable the MM, not only to respond to the disaster, but also to take decisions so that service provision in critical areas continues uninterrupted or with minimal disruption. We saw this happening during the COVID-19 pandemic, for instance. However, there are safeguards put in place to limit the abuse of these extraordinary powers. The MM may be required to take decisions in consultation with, or on the recommendation of another senior manager and/or with the approval of the executive committee or executive mayor. Further, any decisions taken by the MM during this period are reported and ratified in the first meeting of the council or the relevant committee.

3.8 The delegation of power when the council is on recess

Similarly, when a council goes on recess, whether during the December-January period, just before a general election or any other time, delegated authority is often given to the MM to take decisions on behalf of the council until the next sitting of the council. Such decisions often relate to operational matters which if not taken would undermine service delivery or the smooth running of the municipality. This delegation of authority is also undertaken in terms of a municipality's system of delegations. Thus, the door is open for the MM to take "full charge" when the council is unable to convene and/or take decisions when there is a state of disaster or when the council is in recess. Why not adopt the same approach when a council is unable to convene and/or take decisions due to a governance crisis, as described above?

3.9 An extraordinary role for the MM?

In order to ensure that there is no decision making vacuum, the MM could be assigned extraordinary powers to act on behalf of the council, mayor, executive committee, or mayoral

committee whenever any of these institutions are available or unwilling to make decisions due to instability in the council. These powers will enable the MM to make decisions relating to the day-to-day running of a municipality and ensure the continuing delivery of services.

Should it be left to individual municipalities to decide in their delegation policies whether the MM should assume this extraordinary role? Political realities of the day caution us not to leave this to the discretion of the council. A minimum requirement should thus be set in national legislation to force councils to make provisions for the MM's role when there is a power vacuum.

Giving the MM extraordinary powers comes with risks given the potential for these powers to be abused. When the MM is unprofessional and/or partisan, for example, the powers may be exercised to promote the realisation of certain political ends. Thus, the difficult question is how to minimise the abuse of this power. There are a number of measures which if used in combination could be effective. For instance, the duration within which these extraordinary powers can be exercised can be limited to two weeks, for instance, but renewable by the council. All decisions taken by the MM during the relevant time can be reported at the next council meeting for condonation or review, as is the norm in recess scenarios.

3.10 Conclusion

While local politics adjusts to the reality of coalitions, and legislative ways are explored to stabilise coalition governments, we need to find ways of ensuring that a municipality continues to serve its residents. Why must citizens not receive the services they are entitled to because councillors have refused to attend a council meeting or take decisions? Are we not allowing councillors to hold communities at ransom? Evidence across the country, particularly in municipalities run by coalition governments, suggests so. Hence, there is a need to explore ways of filling the governance vacuum whenever it arises. In this Policy Brief, we asked whether assigning extraordinary powers to the MM could be the answer. Such powers may enable the MM, just like in cases of a natural disaster, to take decisions whenever there is a governance disaster.