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CONCEPT DOCUMENT

Regulation of coalition governments in South Africa



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Nkululeko Tselane is an admitted attorney of the High Court of South Africa, and the Legal Counsel for the Institute of Election Management Services in Africa.

He is a vibrant figure, recognized for his legal expertise, passionate activism and organisational skills. He has dedicated his life to fighting for social justice, empowering marginalized communities, and promoting equality and human rights.

Tselane's legal journey began at the University of the Witwatersrand, where he attained his LLB legal qualification. He excelled academically and developed a deep understanding of the legal system. He provides expert opinion on constitutional aspects for IEMSA.

His leadership qualities and unwavering commitment to making a difference led Tselane to the forefront of significant movements such as Fees Must Fall. Beyond his local impact, Tselane's influence extends globally as an ambassador for esteemed international NGOs. Through these platforms, he has engaged with young leaders from diverse backgrounds, working collaboratively to address global challenges and create positive change on a larger scale.

Tselane's ethical principles and strong sense of justice have guided his activism and legal career. His ability to articulate complex issues, coupled with his leadership skills, has made him a trusted voice and commentator.

Introduction

In the evolving landscape of South African politics, coalition governments have emerged as a defining feature of governance. While this is not a completely novel concept, it has become a more pronounced topic of discussion after the 2016 and 2021 local government elections. For the first time since 1994, major municipalities and metros produced election results with no political party emerging with an outright majority. Collaboration, negotiation, and strategic politics were required to form governments. Those two elections served as watershed moments for South African politics and a possible precursor for what may occur at the national level.

This has been equally fascinating and worrying for the residents who have witnessed the instability and unpredictability of these governments formed without an outright winner. We need not look further than the country's economic and financial capital – the City of Johannesburg.

Following the 2021 election, Johannesburg residents have been left bemused as the City of Joburg mayoral seat has been a revolving door with five mayoral changes and numerous motions of no confidence. This has resulted in diminishing public confidence, poorer service delivery, and allegedly millions of Rands squandered.

As early as 2018, IEMSA foresaw the challenges that South Africa is currently facing.¹ IEMSA stated that a government of national unity was a serious possibility because of the gradual decrease in the ANC's share of the vote. Furthermore, there was sufficient evidence to demonstrate that, increasingly, in South Africa and the African continent, the dominance of a singular political party would lose prominence.

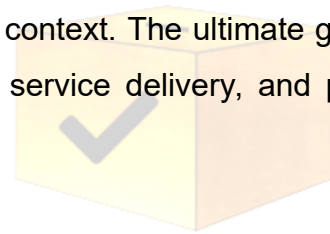
¹ Hlengiwe Nhlabathi [Internet/Newspaper] What SA needs if there's a coalition government next year'. *City Press* [Published 2018 July 2018; cited 2023 May 25]. Available at: <https://www.news24.com/citypress/news/what-sa-needs-do-if-theres-a-coalition-government-next-year-20180711>

We aim to delve into the pressing issue of coalition governments in South Africa and make a case for the urgent need to establish robust regulations governing their formation, functioning, and dispute resolution.

By examining the experiences of South Africa and drawing insights from successful coalition governance models in other countries, we can begin to outline a framework that fosters stability, transparency, and the fulfilment of democratic ideals.

We draw lessons from countries renowned for their effective regulation of coalition governments, such as Germany, the Netherlands, and Kenya. These nations have developed comprehensive mechanisms that promote consensus-building, manage disputes, and ensure accountability. By examining their experiences, we can identify best practices that can be adapted to the South African context. The ultimate goal is to propose a system that would improve governance, service delivery, and public confidence.

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Proportional Representation

It is important to first understand the basic theory behind our electoral system.

South Africa's electoral system is based on proportional representation. Section 46(1)(d) of the Constitution prescribes that the electoral system for the National Assembly must be conducted by way of proportional representation, *in general*. Proportional representation entails that the share of seats a party wins matches the share of votes it receives.² This should be seen in contrast to a majoritarian system, or a first-past-the-post system (FPTP). In a FPTP system, the winner takes all and the unsuccessful candidate receives nothing. The most popular example is the US presidential election. A FPTP system disadvantages smaller parties and tends to result in a two-party system or one dominant party.³

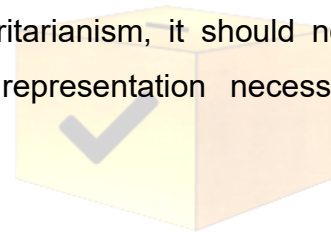
² James Rippon [Internet]. Proportional Representation vs First Past the Post. *North East Bylines*; [Published 2022 November 6; cited 2023 May 25]. Available at: <https://northeastbylines.co.uk/proportional-representation-vs-first-past-the-post/>;

³ Dr K Matlosa [Article]. Electoral Systems and Multiparty Democracy in Southern Africa. *Research and Policy Studies, Southern African Political Economy Series*. (SAPES) at 11.

Upon reading the Constitution's drafting and its choice of system, it is evident that the drafters did not envisage or intend the country to be governed by a singular political party; otherwise, they would have opted for an FPTP system. Moreover, the first democratic government was one of "national unity."

Many in South Africa have grown accustomed to one political party dominating the others. This has been a defining characteristic of post-1994 politics at the national, provincial, and municipal levels. It can be seen with the African National Congress at the national level, the Democratic Alliance in the Western Cape, and, for a time, the Inkatha Freedom Party in KwaZulu Natal. Notwithstanding this custom, we would argue that single-party dominance has been an anomaly in a proportional representation system. While nothing precludes majoritarianism, it should not be viewed as the norm in this system. Proportional representation necessitates collaboration.

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Coalition Governments

A coalition government is a form of government where political parties, often from different ideological backgrounds, come together to form a governing collective that forms the government. This is only necessary where no single party has received enough votes to establish a majority and form a government on its own.⁴

Message from voters

It is necessary to understand these distinctions and definitions. Amongst its proposals, the ANC and its members have proposed that the solution to the governance crisis we are currently experiencing is that the party with the highest share of the vote should be given the first bite at the cherry to govern.⁵

⁴ Kara Rogers [Internet]. Coalition Government. *Britannica*; [updated 2023 May 18; cited 2023 May 25]. Available from: <https://www.britannica.com/topic/coalition-government>.

⁵ George Magoma [Article]. Coalitions – A Danger to Constitutional Democracy; Zukile Majova [Internet]. ANC willing to get into bed with all-comers. *Scrolla*; [updated 2023 April 23; cited 2023 May 25]. Available from: <https://scrolla.africa/anc-willing-to-get-into-bed-with-all-comers/>;

This would mean that if a party amassed 49% of the vote, with the other 51% divided into smaller blocks amongst the balance of the parties, the party with 49% would be the governing party. The reasoning behind this is that, notwithstanding the lack of an outright majority, more voters expressed a preference for that party compared to other parties. This argument cannot be sustained.

As explained above, this would fly in the face of a proportional representation system and undermine the democratic principles upon which the Constitution is founded. In our current system, every vote counts. To effectively disregard the remaining votes (51% of votes as used in the example) would be to disenfranchise voters.

We believe that political parties should take the lack of an outright majority as a message from the electorate, not as a mistake or anomaly in South African politics.

The South African electorate is sending a message to political parties that collaboration and cooperation are the desired *status quo*. Put differently, if the electorate wanted a single party to win an outright majority, they would have done so. The electorate has evolved, and therefore the political parties and policymakers must evolve with them.

Legislative Regulation

Coalition governments can bring advantages such as increased stability, broader representation, and the ability to incorporate a range of viewpoints. However, they can also face challenges as has been seen in Johannesburg, Tshwane, Ekurhuleni, Nelson Mandela Bay, and eThekweni. The challenges most commonly come in the form of minority governments, disagreements among coalition partners, policy compromises, and potential instability if the coalition partners withdraw their support.

Ndaedzo Nethonzhe [Internet]. ANC NEC Mulls Introducing Law To Manage Coalition Governments *Eyewitness News* [updated 2023 April 23; cited 2023 May 25]. Available from: <https://ewn.co.za/2023/04/23/anc-nec-mulls-introducing-law-to-manage-coalition-governments>.

Coalition governments must therefore be regulated, through legislation to provide structure and stability.

This is not the first time that IEMSA has called for the regulation of coalition governments. We have been advocating for regulation in light of the foreseen “marriages of convenience” that are largely informal and unstable.⁶ Unfortunately, at the time, the lack of a majority winner was seen as a rarity. It is the norm.

There are several countries that have effective coalition governments, each with its own unique approach to regulating them.

Germany has a robust framework from which we believe many lessons may be learned. Once their election results are announced, political parties engage in negotiations to form a coalition government. These negotiations result in a detailed coalition agreement, known as the *Koalitionsvertrag*, which outlines the shared policy objectives, the division of ministerial positions, and other key aspects of governance.

This has not been without trial and error. In 2017, the failed attempt at negotiating a coalition between the Free Democratic Party (FDP), the Greens, and the Christian Democratic Union/Christian Social Union (CDU/CSU) was widely held as an example of coalition governments gone wrong.⁷ They therefore attempted not to repeat this after the 2021 election, which brought together three parties with differing ideologies.

After the 2021 election results were announced, the Social Democrats (SPD), the Greens, and the pro-business Free Democrats (FDP) began negotiations to agree on a basic framework and then ultimately form a coalition agreement. Approximately 300

⁶ *Op cit* note 1.

⁷ Economist Intelligence Unit [Internet]. Breaking down the German coalition agreement. The Economist Group; [Last updated 2021 December 1; cited 2023 May 25] Available at: country.eiu.com/article.aspx?articleid=41646587&Country=Germany&topic=Politics&subtopic=Re_5

officials from each of the parties split up into 22 topic-based working groups, covering everything from mobility to democracy to climate issues.⁸

The officials' working groups then presented their recommendations to their top party leaders, who took over the process and ironed out any outstanding issues. The party leaders thereafter presented a final coalition agreement.

The working groups in this case included⁹:

1. Democratic legal order
2. Media
3. Climate and energy
4. Agriculture, nature and nitrogen deposition
5. Housing and spatial planning
6. Infrastructure
7. Security and a strong society
8. Socioeconomic security and equal opportunities
9. Education and development
10. Labour market and income
11. Towards a society in which everyone can be open about who they are
12. Newcomers and social and civic integration
13. An enterprising, innovative and fair economy
14. Culture and creative industries
15. Digitalisation
16. Healthcare
17. Medical ethical issues
18. Foreign policy
19. Migration



⁸ *Ibid.*

⁹ 'Looking out for each other, looking ahead to the future' 2021-2025 coalition agreement between the People's Party for Freedom and Democracy (VVD), Christian Democratic Alliance (CDA), Democrats '66 (D66) and Christian Union (CU). Published 15 December 2021. [Published 2022 January 10; Cited 2023 May 25]. Available at: <https://www.government.nl/government/documents/publications/2022/01/10/2021-2025-coalition-agreement>

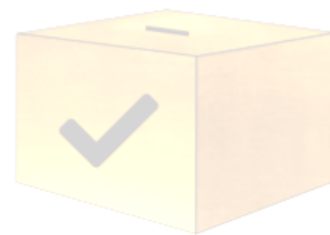
20. Finance

It is important to note that the Germans place an emphasis on substance over form. This means that the parties first negotiate the substance of each ministry and their objectives, and only thereafter negotiate the division of ministries. This is critical.

Many South Africans have bemoaned the instability of coalition governments due to position-jostling by politicians. By first agreeing on the substance, this concern is lessened. This also reduces disagreement between coalition partners and fosters mutual compromise and cooperation. This process can and should be legislated in South Africa.

Upon analysis of the challenges that South Africa is grappling with today, we would propose the following working groups as key strategic areas for a potential coalition government to focus on at the national level:

1. Poverty and inequality
2. Energy security
3. Mineral resources and climate change
4. Agriculture, forestry, fishery, and environment
5. Land reform
6. Healthcare
7. Basic education
8. Higher education
9. Human settlements and spatial planning
10. Social development (with an emphasis on societal causes of crimes and gender-based violence)
11. Transportation
12. Water and sanitation
13. Home affairs and security
14. Migration
15. Business and labour
16. Trade and industry
17. Public works and infrastructure



- 18. International relations
- 19. Public finance and revenue collection
- 20. Justice and order
- 21. Cooperative Governance
- 22. Traditional affairs

These working groups would work under a timeline of 45 – 60 days, keeping in line with Section 49 of the Constitution and the timelines required to form Parliament.

With a clear framework to work under, we believe that coalition partners would much more easily be able to set clear policy and strategic objectives.

Coalition governments in South Africa and Germany are like two different recipes for political collaboration.

In South Africa, it's like throwing all the ingredients into a pot without a clear recipe. The flavours clash, the heat is inconsistent, and it's hard to achieve a harmonious blend. With numerous parties coming together, compromises are frequent, but maintaining stability can be a challenge.

On the other hand, in Germany, coalition governments are more like a meticulously crafted dish. The recipe is followed with precision, ingredients are carefully selected, and there's a focus on balancing flavours. Parties often have clear policy agreements and work towards common goals, resulting in relatively stable and effective governance.

While both countries engage in coalition governments, Germany seems to have perfected the recipe, creating a smoother and more efficient outcome. South Africa, on the other hand, still grapples with finding the right mix of ingredients, often leading to a more tumultuous and unpredictable political landscape.

It is important to once again emphasize that these negotiations are not a simple trade-off between ministries. This is exactly what the electorate does not want to see. It is a process whereby the parties find elements of their respective manifestos that they agree on, incorporate these elements, and find a mutually acceptable compromise on the balance of issues.

Once this process is finalised, the coalition agreements can be made publicly accessible, as they are in Germany, and then they can be deposited at the proposed entity that will be formed to regulate coalition governments. This is discussed further below.

Similarly, at the provincial and municipal levels this same process should be followed.

Municipalities receive their functions and powers from Sections 156 and 229 of the Constitution, read with Chapter 5 of the Local Government: Municipal Structures Act. This provides a much narrower and more defined set of working committees that would be formed, and it further depends on the category of municipality. However, as a broad guideline, we propose the following working groups in the event of a coalition government having to be formed at the municipal level:

1. Municipal finance and revenue collection
2. Social development
3. Economic development
4. Water and sanitation
5. Electricity supply
6. Transport and road infrastructure
7. Health
8. Emergency services
9. Small business and fresh produce markets
10. Local Tourism
11. Cemetery, crematorium and burial practices
12. Public Works

Germany is not the only country with a stable coalition government. There are several other countries that have effective coalition governments, each with its own unique approach to regulating them.

In the Netherlands, most governments are formed through negotiations between multiple parties. The Dutch approach emphasizes consensus-building and compromise, with parties agreeing to a coalition agreement that outlines their policy priorities and the division of cabinet posts.

Belgium has a federal system of government that requires coalition building at both the national and regional levels. The country has a complex political landscape with multiple linguistic and regional divides, which has resulted in a tradition of consensus-building and compromise between parties. South Africa shares these social parallels.

Switzerland has a unique form of coalition government known as a "concordance democracy." In this system, Switzerland is governed by the Federal Council, a seven-member collegial body whose decisions are made by consensus. The Swiss system emphasizes direct democracy and decentralized decision-making.

Austria has a tradition of coalition building and compromise, with a strong emphasis on social partnership and dialogue between labour and business interests.

Kenya also has a system of coalition governments, as it has a history of election results that do not result in an outright winner. After the 2007 election, a coalition government was formed between the two main parties, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM), to help resolve the post-election violence and political crisis. In order to regulate and mitigate conflict, Kenya created an office

referred to as the Registrar of Political Parties.¹⁰ After finalizing a coalition agreement, the coalition partners deposit their agreement with the Registrar. The Kenyan model provides a clear method of dispute resolution that would easily be applied in the South African context.

Dispute Resolution

There are multiple steps to forming a stable coalition government. Forming a coalition government and publishing the coalition agreement is in an initial step. However, maintaining the peace and stability is important to avoid the government collapsing once formed. This is exasperated when parties have ideological differences and are, by definition, still competing for a larger share of the electorate in by-elections and subsequent elections.

In Germany, for example, disputes between coalition partners are typically resolved through negotiations and compromise. The coalition agreement serves as a framework for decision-making, and disputes are often referred to an arbitration panel or resolved through mediation.

In the Netherlands, disputes between coalition partners are typically resolved through negotiation and compromise as well. If a dispute cannot be resolved through negotiation, the coalition partners may agree to dissolve the government and call for new elections.

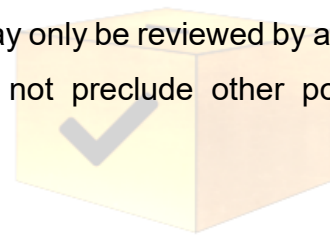
In Belgium, disputes between coalition partners are typically resolved through a process of consultation and negotiation, with a mediator appointed if necessary. If a dispute cannot be resolved, the government may be dissolved and new elections called.

¹⁰ Terry Tselane [Internet]. The 'vat en sit' coalition arrangement has become unsustainable. IOL; [Published 2021 October 30; cited 2023 May 25]. Available at: <https://www.iol.co.za/news/politics/opinion/the-vat-en-sit-coalition-arrangement-has-become-unsustainable-df9abc98-0dc6-4f65-b8c6-c3b31431ce86>.

In Switzerland, disputes between coalition partners are typically resolved through negotiation and compromise, with a focus on consensus-building and direct democracy. If a dispute cannot be resolved, it may be referred to the Swiss Federal Council, which serves as the executive branch of government.

We propose that an independent body, with similar functions and powers to the Commission for Conciliation, Mediation and Arbitration (CCMA) be established.¹¹ Labour dispute resolution often relies on communication between employer and employee, with the first objective of maintaining the working relationship through the conciliation or mediation process. If this is unsuccessful, the dispute may then be referred to arbitration. In this instance, arbitration would be a further avenue to enforce the provisions of a coalition agreement. The benefit of arbitration awards is that they are legally enforceable, and cannot be appealed; they may only be reviewed by a court of law. This promotes finality. Of course, this would not preclude other political solutions.

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In order to further empower this entity, we propose that in the long-term Chapter 9 of the Constitution be amended to include this intergovernmental entity of mediation and arbitration, affording it similar status as other Chapter 9 Institutions like the Commission for Human Rights and the Independent Electoral Commission.

Motion of No Confidence

The South African Parliament has in the past brought multiple motions of no confidence in the President and his executive. To date, none have been successful. It should be emphasized that the Motion of No Confidence in the executive is an important tool in protecting democracy and holding the executive to account. This is solidified by Sections 102 and 141 of the Constitution. This tool should remain in place,

¹¹Jason Felix and Bradley Maasdorp [Internet]. Coalition govts can work if there is agency regulating it, says ex-deputy IEC chairperson. News24; [Published 2021 October 21; Cited 2023 May 25] Available at: <https://www.news24.com/news24/southafrica/news/coalition-govts-can-work-if-there-is-agency-regulating-it-says-ex-deputy-iec-chairperson-20211025>

however, with the proviso that coalition partners are obliged to bring their partners to a formal conciliation or mediation process before tabling such a motion in Parliament.

We do not wish to suggest that a coalition government relationship is sacrosanct and permanent. We also do not advocate for stability only for stability's sake. Stability without growth is tantamount to regression. If the coalition government collapses or dissolves, so be it. The Constitution makes provision for this. That is a potential outcome of a vibrant political environment. However, effective governance requires a clear framework.

Conclusion

While coalition governments offer potential advantages such as increased representation and legitimate compromise, they also pose significant challenges in terms of stability, decision-making, and managing diverse political agendas.

Coalitions will become a more pronounced feature of South Africa's political landscape over the coming years. This will require political parties to accept that there will be compromises made. This will require political maturity and voter education.

The above interventions may be implemented in the short, medium, and long term to assist the governance of the ever more prevalent coalition governments.

In the short-term, it may be implemented in municipal by-elections almost immediately. Municipal by-elections are conducted around the country on a regular basis due to various factors. An immediate implementation would be possible to allow residents and political parties to begin acclimatising themselves to the system. As this is not yet compulsory or legislated, it would need to be done by invitation or agreement of the municipal council hoping to form a coalition government and with the support of the Department of Cooperative Governance.

In the medium term, interventions may be implemented ahead of the national elections in 2024. This would include meeting with the various political parties, and members of parliament to acclimatize them to the processes.

In the long term, legislation specifically tailored to coalition governance can provide a solid foundation for transparent coalition formation, defined decision-making processes, and mechanisms for resolving disputes.

This regulation system will allow the public to judge the effectiveness of office-bearers once a coalition agreement is concluded. It is easier to judge a coalition partner's performance once one knows which portfolios they were responsible for and which compromises were necessary in order to form a government.

Moreover, the creation of an independent entity dedicated to the resolution of coalition disputes could further enhance the functioning of coalition governments in South Africa. This entity would act as a neutral arbiter, facilitating dialogue, negotiation, and compromise among coalition partners, thereby minimizing the political conflicts that may arise during the coalition's term.

It is essential for policymakers, political parties, and citizens alike to recognize the significance of regulating coalition governments as a means to ensure responsible and efficient governance. By embracing comprehensive regulation, South Africa can harness the potential of coalition governments while mitigating the risks, fostering a more inclusive, representative, and stable democracy.

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