COALITION POLITICS IN LESOTHO

A Multi-disciplinary
Study of Coalitions and
their Implications for
Governance

Editors

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LIST OF ACRONYMS

ABC	All Basotho Convention
ACP	Alliance of Congress Parties
AD	Alliance of Democrats
AG	Attorney General
AJA	Administration of the Judiciary Act
AMHC	All Mauritian Hindu Congress
ANC	African National Congress
BAC	Basutoland African Congress
BAP	Basotho Action Party
BBDP	Basotho Batho Democratic Party
BCP	Basutoland Congress Party
BDNP	Basotho Democratic National Party
BNP	Basotho National Party
CAM	The Comité d'Action Musulman
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CID	Criminal Investigation Division
CMW	Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
CORD	Coalition for Reforms and Democracy
COVID-19	Coronavirus Disease of 2019
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil Society Organisations
DC	Democratic Congress
DCEO	Directorate on Corruption and Economic Offences
DPL	Democratic Party of Lesotho
DPP	Director of Public Prosecutions
ECF	Extended Credit Facility

ECK	Electoral Commission of Kenya
EMB	Election Management Body
FIU	Financial Intelligence Unit
FORD	Forum for Restoration of Democracy
FPTP	First-Past-The-Post
GDP	Gross Domestic Product
GNU	Government of National Unity
HRC	Human Rights Committee/Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IFP	Inkatha Freedom Party
IMF	International Monetary Fund
IPA	Interim Political Authority
JIMC	Monitoring and Implementation Committee
JSC	Judicial Service Commission
KANU	Kenya African National Union
KSC	Kenya Social Congress
LCD	Lesotho Congress for Democracy
LCN	Lesotho Council of Non-Governmental Organisations
LCS	Lesotho Correctional Services
LDF	Lesotho Defence Force
LHWC	Lesotho Highlands Water Commission
LLA	Lesotho Liberation Army
LMPS	Lesotho Mouted Police Service
LP	Labour Party
LPC	Lesotho People's Congress
LPF	Lesotho Para-Military Force
LWP	Lesotho Workers Party
MCA	Millennium Challenge Account

MEC	Movement for Economic Change
MFP	Marematlou Freedom Party
MMM	Mouvement Militant Mauricien
MMP	Mixed Member Proportional
MPs	Members of Parliament
MSM	Mkenya Solidarity Movement
NARC	National Rainbow Coalition
NASA	National Super Alliance
NDPC	National Dialogue Planning Committee
NEC	National Executive Committee
NIP	National Independence Party
NLF	National Leaders' Forum
NRA	National Reforms Authority
NSS	National Security Services
NUL	National University of Lesotho
NYS	National Youth Service
ODM	Orange Democratic Movement
PAC	Public Accounts Committee
PDP	Peoples Democratic Party
PEFA	Public Expenditure and Financial Accountability
PFD	Popular Front for Democracy
PM	Prime Minister
PMSD	Parti Mauricien Socialiste Democrate
PMU	Police Mobile Unit
PNU	Party of National Unity
PR	Proportional Representation
PSIC	Public Sector Investment Committee
PSIP	Public Sector Investment Programme
RCL	Reformed Congress of Lesotho
RLDF	Royal Lesotho Defence Force

SACU	Southern African Customs Union
SADC	Southern Africa Development Community
SGR	Standard Gauge Railway
SMM	Single Member Majoritarian
SMMEs	Small, Micro and Medium Enterprises
SMP	Single Member Plurality
SOMILES	SADC Observer Mission to the Kingdom of Lesotho
SOU	Special Operations Unit
TNA	The National Alliance
TRC	Transformation Resource Centre
TRC	Truth and Reconciliation Commission
UDF	United Democratic Forum Party
UPR	Universal Periodic Review
URP	United Republican Party
WDM	Wiper Democratic Movement

THE POWERS OF A COALITIONAL PRIME MINISTER UNDER THE CONSTITUTION OF LESOTHO

4

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1. Introduction

The Constitution of Lesotho (1993) places executive authority in the King (sec 86). However, the scheme of the Constitution vests the effective powers of government in the Prime Minister, regardless of whether the government is based on a single-party majority or coalitional. The Prime Minister's office is integral to the entire constitutional design as the government forms and falls through this office (Rose, 1990; Bogdanor, 2008). As a Westminster design, the confidence of the National Assembly is a condition precedent to the formation of a government in Lesotho. The person to be appointed Prime Minister must, at all material times, enjoy the confidence of the House (Heasman, 1962; Rasmussen, 1987). If the National Assembly withdraws its confidence from the government and the Prime Minister, it effectively marks the end of such a government (sec 87).

While the Constitution expressly creates the Prime Minister's office, it is a matter of intense controversy whether the powers stipulated in the Constitution as powers of the Prime Minister are exhaustive. In principle, the "executive authority" effectively exercised by the Prime Minister is a fairly broad notion that defies both definitional and legal circumscription. Therefore, the term "executive" is primarily associated with the implementation of the law (Baxter, 1982). However, limiting the executive function to the implementation of the law might obscure the nature of executive authority in modern constitutional theory. The modern-day conception of executive authority has outgrown its classical trappings. As Phillips and Jackson contend: "the scope of this function has become extremely wide. It now involves the provision and administration or regulation of a vast system of social services,

as well as supervision of defence, order and justice and the finance, required, therefore” (Phillips & Jackson, 1987:12). Thus, the executive is best defined in generic terms as: “the whole corpus of authority to govern” (Bradley & Ewing, 1997:88).

Be that as it may, the Constitution of Lesotho provides for certain basic executive functions of the Prime Minister. The most prominent ones are the appointment and dismissal of ministers and senior government officials, the parliamentary prerogatives such as dissolution and prorogation of Parliament, appointment and dismissal of heads of the superior courts. These are classical prerogative powers of the King that have effectively drifted to the Prime Minister (Obioha, 2020; 'Nyane, 2020).

In a situation where the government is based on a single political party, the exercise of these functions is pretty straightforward. The problems of decision-making are minimal; the Prime Minister is normally regarded as the head of government, assisted by the Cabinet. The situation is a bit complicated in a hung parliament situation – where the government is based on a coalitional majority in the National Assembly. The Prime Minister's ordinary executive powers get curtailed both politically and legally (Green-Pedersen, et al., 2018). He is not as strong as the Prime Minister who won the outright majority in the House at the political level. At the legal level, the situation is a bit dicey because the Constitution of Lesotho spells out the powers of the Prime Minister regardless of whether it is coalitional or single-party-based. Yet, the coalition agreements, which form the basis for coalition governments, often attenuate the Prime Minister's powers in fundamental respects (Bennister & Heffernan, 2012). They spell out how the cabinet will be constituted.

The cabinet positions are shared amongst the coalescing partners, and the appointment and dismissal of cabinet members from other political parties is only a formality for the Prime Minister. The coalescing partners wield powers to recommend the appointment and dismissal of ministers from their own political parties. For instance, under the 2017 coalition, the agreement was that: “[c]abinet portfolios will be allocated by the Prime Minister in consultation with the Coalition Partners” (ABC, et al., 2017:art 5.5). It provided further that: “[w]here the need to reshuffle Cabinet, or dismiss a minister arises for whatever reason, there shall be prior consultations between the Prime Minister and the relevant Coalition Partner” (ABC, et al., 2017:art 5.7).

The coalition agreements also limit the executive prerogative of the Prime Minister to exercise his government discretion. He is often bound to consult the partners on matters of government. To that end, the 2017 Coalition Agreement provided that: “[c]onsultation is presumed to precede every important decision by the Prime Minister” (ABC, et al., 2017:art 5.11). When relations deteriorate between coalition partners, which is a common phenomenon in Lesotho, the contestation between the Prime Minister and the coalition partners often arises (Booyesen, 2015; Weisfelder, 2015). When disagreements occur, the Prime Minister often resorts to his original executive powers enshrined in the Constitution.

In contrast, the coalition partners often resort to coalition agreements and the threat to withdraw their support to the Prime Minister in the National Assembly. During the maiden 2012-2015 coalition between All Basotho Convention, Lesotho Congress for Democracy (LCD), and Basotho National Party, the disagreement over the non-consultative nature of Prime Minister Thomas Thabane was very common (Banerjee & Rich, 2017). The disagreement became so acute that it even became the basis for the premature collapse of that coalition. The tension recurred under the ABC-led 2017-2020 coalition government when the Prime Minister sought to unilaterally prorogue parliament. It equally led to the premature ending of the coalition agreement.

These tensions have given rise to two fundamental questions. The first one is whether a Prime Minister in a coalition government is legally bound to consult the coalescing partners on matters of government. The second one relates to the effect that a coalition agreement has on the Prime Minister's powers. The purpose of this chapter is to investigate these questions. Methodically, the chapter uses the content analysis method to analyse the provisions of the Constitution and the few decided cases in Lesotho and abroad on the questions under investigation.

2 Conceptual framework: The powers of a single-party Prime Minister vis-à-vis a coalitional Prime Minister

The position of the Prime Minister is a relatively recent creature of Westminster constitutional designs. The title of "Prime Minister" had been used officially for the first time by Benjamin Disraeli while referring to himself in the Treaty of Berlin in 1878 (Brazier, 2020). Before the general acceptance and widespread usage of the title of Prime Minister, the heads of government in England held office under the designation of the "First Lord of the Treasury" (Phillips & Jackson, 1987). Thus, the emergence of the position of Prime Minister has been, to a great extent, a matter of political expediency and practice rather than of law (Bradley & Ewing, 1997). As one British authority contends: "there is no legal definition of the office of Prime Minister or of its powers and duties" (Brazier, 2020:7). The power of the Prime Minister "waned and waxed" depending on several factors such as, but not limited to, the personality of the incumbent and the political system of a country in question (Bennister & Heffernan, 2015).

In the beginning, the position of Prime Minister started in sharp contrast to that of the President. The classical difference between the two was that while the President wielded the executive authority as a person, the Prime Minister operated within a cabinet system as the *primus inter pares* (one amongst equals). The Prime Minister was just one amongst equals in-cabinet. Although he still wielded so much policy influence, the Prime Minister was not necessarily the embodiment of the state's executive authority. In a Westminster

design, it was always the sovereign (monarch) who wielded such power (Heffernan, 2005). However, studies have shown that in recent times the position of Prime Minister has, to a great degree, materially mutated; the office has gained more power and prominence (Dowding, 2013; Foley, 2004; Heffernan, 2003). The drifting of power from the palace to the cabinet has hugely bolstered the office of the Prime Minister. It has since become either “presidentialised” or a “quasi-monarch” (Hinton, 1960; Jones, 2006). This is mainly attributable to the ascendancy of democracy, electoral politics and the political party system (Jennings, 1969). These factors have favoured the Prime Minister more than the monarch, whose power is based on heredity. The formerly indivisible powers of the monarchs over the *trias politica* – the parliament, the judiciary and the executive – have since shifted to the Prime Minister. The burgeoning of the powers of the Prime Minister has, in a way, distorted even the cabinet system of government. The Prime Minister exercises power not only over the cabinet but over the political system as a whole. These are immense powers. As one British constitutional authority observes:

...the Prime Minister's actual authority has tended to increase. He is not merely *primus inter pares*. He is not even, as Harcourt said, *inter Stellas luna minores*. He is, rather, a sun around which planets revolve. Though he may rise to office because of the Queen's choice or the election of his parliamentary colleagues, he owes his majority to the choice of the electorate. Generally, a party obtains office because of a general election. A general election is, primarily, an election of a Prime Minister (Jennings, 1969:200).

These wider-ranging powers of the Prime Minister notwithstanding, when the government is based on a coalitional majority, the Prime Minister's powers get reduced somewhat. As observed by Bennister and Heffernan (2012:778): “[f]orming a coalition involves compromise, so a prime minister heading up a coalition government, should not be as powerful as a prime minister leading a single-party government”. The basis for the reduced powers of a coalitional Prime Minister, compared to a single-party Prime Minister, is pretty obvious – the power of a single-party is based on the fact that he won a landslide victory in both general elections and Parliament. As Bogdanor poignantly points out, the power of the single-party Prime Minister rests “largely on the fact that they had won landslide victories for their parties on the manifestos that had been stamped with their own personal imprint” (Bogdanor, 2011:27). Contrarily, the same cannot be said about a coalitional Prime Minister; he cannot claim the same power wielded by the Prime Minister who won a landslide victory both from the elections and in Parliament. Oftentimes, this is the reality that coalitional Prime Ministers do not want to accept. The usual tendency is to exercise wide powers similar to the ones wielded by a single-party Prime Minister.

A coalition arrangement does not only reduce the ordinary powers of the Prime Minister over the cabinet, like the appointment and dismissal of ministers; it also profusely affects even the powers of the cabinet itself. In a single-party government, the cabinet is the uncontested repository of government policy (Jennings, 1969). The established conventions

such as collective ministerial responsibility enable the Prime Minister to control the activities of individual ministers (King, 1985). In a coalition government, the dynamics change somewhat. The government becomes beholden to the extra-cabinet coalitional arrangements. In the end, the decisions made at that level turn out to be more important than the decisions of the cabinet. In effect, the cabinet often finds itself in an awkward situation of having to “rubber-stamp” decisions made at a coalitional level. According to Bogdanor, writing in the context of Britain, the structure called “Coalition Committee” during the 2010 coalition government became more important than the cabinet itself, and “Cabinet government might have come to be replaced by coalition Committee government” (Bogdanor, 2011:67).

In the case of Lesotho, the situation is even more dire because the coalitional structures – which are often established by coalition agreements – are often dysfunctional. As a result, the informal interactions between the coalition leaders end up being the basis for the functioning of the government. That is why the coalition governments’ stability often depends on the cordial relations between the Prime Minister and his deputy and other coalition partners (Shale, 2017). Two coalitions in Lesotho bear testimony to this. The first one was the 2012 coalition. The 2012-2015 coalition ultimately collapsed only two years into its normal five-year parliamentary term when the relations between the then Prime Minister, Thomas Thabane, and his deputy, Mothejoa Metsing, broke down irretrievably (Weisfelder, 2015). Another coalition that, amongst others, collapsed because of the contest for power between the Prime Minister and his coalition partners, amongst other reasons, is the 2017 coalition. That coalition collapsed in 2020. Intriguingly, while the 2017 quartet coalition disintegrated when the relations between partners broke down, the relations between Prime Minister Thabane and his Deputy, Moleleki, were somewhat still harmonious when the coalition unravelled in 2020. The main disagreement came from their partners, the BNP leader Thesele Maseribane and the RCL leader Keketso Rantšo over the Prime Minister’s intention to prorogue Parliament to ward off the enactment of the Ninth Amendment to the Constitution (Motsoeli, 2020).

3 The constitutional framework for the powers of a coalitional Prime Minister in Lesotho

The Constitution of Lesotho (1993) has always anticipated that a government may be formed based on either a single-party majority or a coalitional majority. To that end, section 87(2) provides that: “[t]he King shall appoint as Prime Minister the member of the National Assembly who appears to the Council of State to be the leader of the political party or coalition of political parties that will command the support of a majority of the members of the National Assembly.” While governing through coalitions only started in earnest in 2012, this section is the successor to section 71(3) of the Constitution of Lesotho 1966, which ushered the country into independence.

Section 95(2)(h) of the 1993 Constitution also provides that the leader of opposition may be recognised based on a coalitional majority. The High Court reaffirmed this principle in the case of *Mokhothu v Speaker of the National Assembly* (2017). In this case, the applicant was deprived of his status as the official leader of the opposition after his party lost one member of parliament to the government. The Speaker did this despite the fact that the other opposition parties had written to assure the Speaker that they support the first applicant as the official leader of the opposition. The court reversed the Speaker's decision.

Section 87(2) is the most crucial section for formation and sustenance of a coalition government in Lesotho. The Constitution does not have any other section that guides coalitions beyond the formation stage. This is a very awkward constitutional position. After the formation, the government exercises normal executive powers, regardless of whether it is a coalition or a single-party government. The Prime Minister, who is the effective head of government, exercises the powers of that office virtually unaffected by the nature of government. The section which establishes the office of the Prime Minister (section 87(1)), unlike the one that provides for formation (section 87(2)), is silent about the possibility of the Prime Minister being either based on a single-party majority or a coalition. It only provides that: "[t]here shall be a Prime Minister who shall be appointed by the King acting in accordance with the advice of the Council of State".

Although it is a common mantra that the Prime Minister is the "head of government" (Government of Lesotho, 2020), the Constitution does not expressly provide for the Prime Minister as the repository of executive authority in the country. Instead, section 86 provides that: "[t]he executive authority of Lesotho is vested in the King and, subject to the provisions of this Constitution, shall be exercised by him through officers or authorities of the Government of Lesotho". This formulation is in keeping with the classical Westminster designs where the sovereign (monarch) is ordinarily the holder of executive authority, but it is effectively exercised by the government of the day. Rather than giving powers to the Prime Minister expressly, the Constitution creates the cabinet (section 88(1)) and empowers it "to advise the King in the government of Lesotho" (section 88(2)). To that end, it further renders the "cabinet collectively responsible to the two Houses of Parliament for any advice given to the King by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office" (section 88(2)). This design seems to be more in favour of a Cabinet Government than a Prime Ministerial Government. This notwithstanding, the Prime minister appears to wield wide-ranging powers, most of which are more political than legal. He, nevertheless, often brings the broad powers he wields at the political level to bear on his constitutional powers.

Although the Constitution seems to be fundamentally more in favour of cabinet government than the Prime Ministerial Government, the practical decisions of government seem to repose in the Prime Minister more than in cabinet. This is because all the former prerogatives

of the King related to parliament, judiciary, and even the executive have shifted to the Prime Minister personally – not necessarily the cabinet. This is a constitutional anachronism and somewhat of a contraction in the design. The Prime Minister is catapulted as the sole “chief adviser” of the King; thereby deviating from the time-honoured principle that the Prime Minister is one amongst equals in the cabinet (Jones, 1985). As the “chief adviser”, the Prime Minister effectively has the powers that originally belonged to the King.

The courts have confirmed that the King may not decline “the advice” of the Prime Minister (*Makenete v Lekhanya*, 1991; *Phoofolo v The Right Honourable Prime Minister*, 2017). Similarly, courts in Lesotho seem to support the view that where the Constitution grants the powers to the Prime Minister, there is no need for him to consult the cabinet. The matter came under sharp focus in 2015 in the case of *Attorney General v His Majesty the King and Others* (2015). The case arose out of a coalition arrangement where the relations between Prime Minister Thabane and his deputy, Mothejoa Metsing, had virtually broken down. The Prime Minister had advised the King to appoint the President of the Court of Appeal. The Deputy Prime Minister was opposed to the decision and consequently alleged that the Prime Minister’s decision was unilateral and therefore unconstitutional. The Prime Minister ought to have consulted the cabinet before advising the King to make the appointment. Therefore, the courts were called upon to decide a narrow question, but which has far-reaching implications for the constitutional design in the country, of whether the Prime Minister is obliged before advising the King on the appointment of a new President for this Court of Appeal to consult cabinet. The court noted that while section 88(2) of the Constitution empowers the cabinet to advise the King “in the government of Lesotho”, the various provisions of the Constitution that provide that the King must act on the advice of the Prime Minister in person without mentioning the cabinet. For instance, in terms of section 83(4) of the Constitution, the King is required to exercise his power to dissolve or prorogue Parliament on the advice of the Prime Minister. Other appointments that the King makes upon the advice of the Prime Minister in person include the Chief Justice; an acting Chief Justice; the President of the Court of Appeal; Acting President of the Court of Appeal; the Ombudsman; the Attorney-General; the Auditor General and Ambassadors; High Commissioners or other principal representatives of Lesotho in any other country and the heads of security forces.

As a result, the court concluded that where the Constitution specifically empowers the Prime Minister to advise the King, there is nothing which “requires that any particular matter of government policy, or any decision by the Prime Minister, should be debated in cabinet” (2015:para 37). This case is a huge blow to the notion of a strong cabinet government. It further emboldens the Prime Minister even against the coalition partners who may hope to exercise some influence within the cabinet setup. This is the position even though after 2015, coalition agreements continue to include clauses that enjoin the Prime Minister to

'consult' the coalition partners when making important decisions. It would seem that, in view of the decision of the Court of Appeal, those common clauses of coalition agreements may not be judicially enforceable. That, however, does not settle the recurring question of whether a coalition agreement as a whole is a mere "gentleman's agreement" – without any juridical value to the Constitution. The way section 87(2) of the Constitution is couched envisages that the government may be based on a coalition.

A coalition is undoubtedly an agreement between political parties in the National Assembly. Therefore, it may not be conclusively said that an agreement that forms the government and determines the allocation of cabinet positions does not have a constitutional value. While the Constitution of Lesotho remains so brief on the operations of a coalition government after formation, the purposive and generous interpretation of section 87(2) of the Constitution may help to give more meaning to the operation of a coalition government. Where coalition agreements do not contravene the Constitution or any other law, they help to enhance it and, therefore, have a constitutional value.

3.1 The constitutional experiences of the 2012-2015 and 2017-2020 coalitions

Ever since the advent of coalition governments in 2012, the country has had some experience about the contestation of power between the Prime Minister and his government partners. The differences became so pronounced that the courts had to intervene. Those were the coalition governments of 2012-2015 and 2017-2020. Both of these coalitions were led by Thomas Thabane as the Prime Minister. The 2015-2017 coalition government, which Pakalitha Mosisili led as the Prime Minister, did not have major intra-coalition differences. This was the case despite the fact that with seven coalition partners in government, that coalition remains the coalition government with most partners hitherto. The main differences – which even led to the collapse of that coalition – were within the Democratic Congress (DC) party as the then main partner in the coalition (DC, et al., 2015). The seven political parties that announced a constituted 2015-2017 coalition government were the Democratic Congress (DC), Lesotho Congress for Democracy (LCD), Popular Front for Democracy (PFD), National Independence Party (NIP), Marematlou Freedom Party (MFP), Lesotho People's Congress (LPC) and Basotho Congress Party (BCP). During the two coalitions led by Prime Minister Thabane – the 2012-2015 and the 2017-2020 coalition governments – the tensions within the coalition partners over the exercise of the Prime Minister's powers became more pronounced. Hence, this section is dedicated to these two coalitions.

3.2 The contest over the powers of the Prime Minister during 2012-2015 coalition government

The 2012-2015 coalition was the first formal coalition government since the country attained independence in 1966. The advent of coalition governments broke with the long tradition of a single-party dominant political system since the return to electoral democracy in 1993; and the defeat of the longest-serving elected Prime Minister, Pakalitha Mosisili, who had been the Prime Minister since 1998. This coalition was constituted of three political parties – the All Basotho Convention, the Lesotho Congress for democracy and the Basotho National Party (ABC, et al., 2012). The tripartite alliance had a hairbreadth majority as it only managed to get the support of 61 of the 120 members of the National Assembly. Ten other political parties, which styled themselves “The Bloc” in Parliament, had promised to support the coalition (Kapa & Shale, 2014). They later withdrew their support. That meant that the coalition was left in a very precarious position because its majority in the National Assembly was just one seat. This in itself became the recipe for the challenges of the coalition that were later to besiege it. The real challenges started in May 2014 when the two members of parliament – Mr Mophato Monyake and Mr Thabiso Lit'siba – defected from the ABC and government. With this defection, the government was no longer enjoying the majority of the members of the National Assembly. Mindful of the fact that the government no longer had a majority in the National Assembly, the opposition opportunistically launched a motion of no-confidence seeking to depose both the Prime Minister and his government (Mail & Guardian, 2014). When the relations between the Prime Minister and his deputy deteriorated, the Deputy Prime Minister's party publicly supported the move to remove the government through the motion of no-confidence (Mail & Guardian, 2014).

The difference between the Prime Minister and his deputy became much more brazen over three decisions that the Prime Minister took, which the Deputy Prime Minister and his party alleged had occurred although neither the coalition nor the cabinet had been consulted. The first decision was the prorogation of parliament for nine months, which was done in June 2014 to ward off an already impending motion of no-confidence in the National Assembly. In terms of section 83 of the Constitution, the power to prorogue parliament is vested in the King upon the advice of the Prime Minister. It has been fairly established, both at judicial as well as scholarly levels, that when power is exercisable by the King on the advice of the Prime Minister, it effectively means the power belongs to the Prime Minister as the King may not decline the advice of the Prime Minister (Newman, 2009; Blackburn, 1988). Despite it being a potent political weapon that drifted from the King to the Prime Minister against parliament (Tremblay, 2010), the power to prorogue was rarely utilised and has been less controversial in Lesotho since the return to constitutional democracy in 1993. Following the apparent abuse of the power to prorogue parliament by the Prime

Minister in 2014, it was deemed necessary to reduce the time within which parliament may be on prorogation. The Ninth Amendment to the Constitution (2020) changed the maximum duration of prorogation from twelve months to three months.

However, the Ninth Amendment only changed the duration of the prorogation without changing the substance of prorogation itself, which include the reasons for which prorogation may be invoked and the procedure that the Prime Minister must follow in advising the prorogation. Both in 2014 and in 2020, Prime Minister Thabane did not only seek to exploit the long period of twelve months provided by the Constitution for which the parliament may be prorogued, but he also abused the open-ended nature of the provision relating to the reasons for prorogation.

With the relations of the Prime Minister and his Deputy – and by extension their political parties – already on a slippery slope, the Deputy Prime Minister opposed almost every major decision that the Prime Minister took. Three such decisions were the dismissal of the Commander of Lesotho Defence Force (LDF), Tlali Kamoli; the dismissal of the then Minister of Communications, Selibe Mochoboroane; and the appointment of the President of the Court of Appeal, Kananelo Mosito.

All these contestations had far-reaching consequences for the stability of the country (Matlosa, 2020). That notwithstanding, the decision which had the superior courts to weigh in on the recurring constitutional question of whether the Prime Minister, in exercising his constitutional powers, is obliged to consult cabinet, was the decision to appoint the President of the Court of Appeal. Although the challenge was brought by the Attorney General, the Deputy Prime Minister filed an affidavit in support of the Attorney General (*Attorney General v King*, 2015). Despite their vehement opposition to the appointment, neither the Deputy Prime Minister nor his political party participated in the case as litigants. It would be interesting to see whether they would invoke the Coalition Agreement to challenge the unilateral decision of the Prime Minister. Article 5(g) of the Agreement provided that:

The Parties agree that in the exercise of executive authority including appointments, the Prime Minister, Deputy Prime Minister and Ministers and Deputy Ministers shall have regard to the principles and spirit underlying the formation of the inclusive government and accordingly act in a manner that seeks to promote cohesion both inside and outside government (ABC, et al., 2012:art 5(g)).

It would be interesting to see how the attitude of the superior courts would be to the constitutional question raised by this on the exercise of executive powers of a coalitional Prime Minister – whether the coalition agreements have a limiting effect on the executive powers of a coalitional Prime Minister.

However, the challenge was limited to the relationship between the Prime Minister, regardless of whether he is coalitional or single-party based, and the cabinet. The court settled the question in that the Prime Minister was entitled to act unilaterally – without consulting cabinet – where the Constitution expressly empowers him (*Attorney General v King*, 2015). This approach of the Court of Appeal is still inconclusive on the effect of a cabinet government in view of section 88(2) of the Constitution, which establishes the cabinet with a function “to advise the King in the government of Lesotho”. How is the function performed by the cabinet when there are certain matters concerning the government which the Prime Minister is allowed to do unilaterally?

3.3 *The contest over the powers of the Prime Minister during 2017-2020 coalition government*

The contest over a coalitional Prime Minister’s powers came under sharp focus again during the 2017-2020 coalition government. This coalition comprised four political parties – the ABC, the Alliance of Democrats (AD), the BNP and the RCL. Concerning the powers of the Prime Minister, the Coalition Agreement provided that: “[t]he Prime Minister shall always exercise his constitutional powers in the interests of preserving the stability of the Coalition Government and shall consult members of the Coalition Government” (ABC, et al., 2017:art 5.12). The coalition partners started differing openly with the Prime Minister in January 2020 when they wrote a letter to the King raising disagreements with a set of decisions taken by the Prime Minister (Moleleki, et al., 2020). In the letter, they raised mainly three decisions of the Prime Minister which they complained about. The first one was what they called “illegal suspension of the Commissioner of Police”. In December 2019 and in January 2020, the Prime Minister had sought to place the Commissioner of Police on forced leave and suspension respectively (Lesoma, 2020a; Lesoma, 2020b). In their letter to the King, they alleged that the suspension of the Commissioner was retaliatory because, in December 2020, the police had started the criminal investigations against the Prime Minister and his wife over the murder of the former Prime Minister’s wife, Lipolelo Thabane (Moleleki, et al., 2020; The Post, 2020). The decision by the Prime Minister to suspend or retire the Commissioner of Police was set aside by the High Court in *Holomo Molibeli v The Prime Minister and Others* (2020).

The second decision which they raised in the letter to the King was what they called “unilateral change of Lesotho’s foreign policy and putting the country in a policy crisis regionally and internationally”. They alleged that the Prime Minister sent the then Minister of Foreign Affairs to Morocco, “without knowledge of the Cabinet of Lesotho to go and somersault on the standpoint (sic) of Lesotho on the issue of Morocco and Western Sahara”. The Minister of Foreign Affairs had, presumably with the instruction of the Prime Minister, gone to Morocco to assure Morocco that Lesotho no longer supports the independence

of Western Sahara (Kabi, 2020). The third complaint was what they styled “meddling of the First Lady in the running of the government”. They alleged that the then First Lady was meddling in the business of government in that: “she summons most ministers and senior government officials to the State House, usually to give them illegal instructions” (Moleleki, et al., 2020:2). The letter by these three leaders in the coalition was very vague about what the King should specifically do. They requested the King to “receive and take into consideration” that there has been a series of events that portray “a state of constitutional crisis that are perceived to be orchestrated, perpetrated or committed by the sitting Prime Minister” (Moleleki, et al., 2020:1). Interestingly, the authors knew quite well that the King does not have any powers of discipline over the Prime Minister in terms of the Constitution; neither did the Coalition Agreement carve out any role for the King in the event of disagreement in the coalition government.

The dynamics within the coalition took a fresh and somewhat intriguing turn in March 2020 when the Prime Minister, this time working together with his deputy, sought to prorogue parliament to forestall the enactment of the Ninth Amendment to the Constitution and a looming vote of no-confidence. The Ninth Amendment was proposing the reduction of the erstwhile prerogative powers of the Prime Minister on dissolution and prorogation of parliament. For the first time since the advent of coalition governments in 2012, the decision to prorogue parliament was challenged in the courts of law by coalition partners because the Prime Minister was not consultative in exercising executive powers. The other two coalition partners, BNP and RCL, challenged the Prime Minister’s decision. The ABC was also amongst the applicants, even though the Prime Minister was from it, because it was experiencing internal factional contestations, and the executive committee of the party was opposed to the decision to prorogue parliament. Hence, the parties instituted the proceedings in *All Basotho Convention and Others v The Prime Minister and Others* (2020). The brief facts of this case merit mention here. The case concerned the prorogation of parliament by the Prime Minister purportedly in terms of section 91(3) of the Constitution. The section provides that where the Constitution requires the King to do any act according to the prime minister’s advice, and the King does not do that act, the Prime Minister may do such an act.

Consequently, such an act will be deemed to have been done by the King. On 20 March 2020 at 18h00, the Prime Minister wrote a letter to the King advising him to prorogue parliament, cleverly citing the Covid-19 pandemic as the reason for such prorogation. However, the court found that the real reasons for prorogation were political. Two important political processes seem to have precipitated the decision to prorogue parliament: a) the National Assembly had just passed the Ninth Amendment to the Constitution which, amongst others, prevents a Prime Minister who has lost the confidence of the house to call an early election; b) there was a pending motion of no-confidence against the Prime Minister. To

that end, the court admonished that: “the Court’s view is that prorogation is not a blunt instrument available to a Prime Minister to resort to its use to fight political battles or to frustrate Parliament in the performance of its constitutional roles such as the passing of the Budget...” (para 41).

In the letter advising the King to prorogue parliament, the Prime Minister indicated that if the King did not comply with the advice by 21h00 the same day – which was effectively a three-hour ultimatum – the Prime Minister would invoke section 91(3) of Constitution and prorogue parliament himself. Indeed, the King did not comply, and the Prime Minister consequently went ahead and prorogued the parliament the same day (Government of Lesotho, 2020).

The coalition partners challenged the decision on the basis, among other things, that:

...the collusion of 1st [Prime Minister] and 2nd [Deputy Prime Minister] respondents leading up to the advice to prorogue parliament and actual publication of the decision in Government Gazette, Legal Notice No. 21 of 2020 without the unanimous consent of the other coalition partners is unconstitutional and or unlawful (*All Basotho Convention and Others v The Prime Minister and Others*, 2020:para 4).

The decision was also challenged because the Prime Minister failed to consult the cabinet (para 4). The applicants were very adventurous to allege that the Prime Minister’s failure to exercise an executive decision without the “unanimous consent of the other coalition partners” is unconstitutional. The court was called upon to decide, for the first time, the recurrent question of whether coalition agreements do attenuate the powers of the Prime Minister; and the corollary question of the juridical nature of coalition agreements. The question of whether the Prime Minister ought to have consulted cabinet had already been settled in the case of *Attorney General v The King* (2015) to the effect that the Prime Minister doesn’t have to. In this case, the court reiterated that view and found that the Prime Minister does not need to consult the cabinet. Its decision was based on section 88(3) of the Constitution, which enumerates the decisions that the Prime Minister may take without the need to consult the cabinet. The court held that the section “is dispositive of the issue whether the Prime Minister is obliged to consult Cabinet and get its approval before advising the King to prorogue Parliament” (para 23).

In a similar manner, the court rejected the applicant’s contention that the Prime Minister ought to have consulted the coalition partners in line with the Coalition Agreements. The court held that:

...the proposition advanced by the political parties is devoid of any constitutional basis and therefore, must be rejected. The coalition agreement does not have any constitutional status. Its status is political and not legal. It is an agreement *res inter alias acta*. By signing such an agreement, the Prime Minister does not thereby contract out his executive powers. But even if he purports to do so, the agreement would

be unenforceable... In any case, it is common cause that the Prime Minister and his coalition partners did discuss prorogation and disagreed among themselves. That must answer the complaint that the Prime Minister breached his *inter pates* obligation to consult in the matter (para 112).

This generic discarding of coalition agreements as mere “political agreements” is problematic – more so when the court did not interpret section 87(2) of the Constitution. If the court engaged in the extensive interpretation of section 87(2) of the Constitution – which permits the formation of coalition governments – its conclusion that coalition agreements are mere “political agreements” would perhaps be more convincing. The purposive interpretation of section 87(2) would probably lead to a different conclusion – that the Constitution itself recognises coalitions, and therefore, it may not be entirely accurate to say agreements that give birth to a coalition do not have constitutional value. This is the approach taken by the former Israel Chief Justice Barack in the case of *Rubin v Berger* (1987). He convincingly observed that: “[m]aking a public agreement non-justiciable, will, in the end, lead the parties to renege on the agreement and on their consent, and this renegeing will in the end damage public trust in the institutions of government. This result must be prevented”. Lessons from the Israeli constitutional law would be more helpful for a court in Lesotho dealing with the juridical nature of coalition agreements. There is a growing body of both judicial (*Zerzevsky v The Prime Minister*, 1991; *Shalit v Peres*, 1990; *Ressler v The Minister of Defence*, 1988) as well as the scholarly opinion to the effect that coalition agreements cannot be discarded as mere political agreements without any constitutional value (Zamir, 1992; Shalev, 1992). Therefore, it may not be proper to lay a hard and fast rule, as the court wanted to suggest in the *All Basotho Convention* case that coalition agreements are not enforceable.

4 Conclusion

This chapter sought to investigate the extent to which the powers of a Prime Minister who owes his tenure in office to the coalition of political parties are affected by such a coalition arrangement. What is emerging from the above investigation is that indeed coalitions attenuate the Prime Minister’s powers – both politically and constitutionally. Politically, the Prime Minister who did not win an outright majority both from elections and the National Assembly is deemed less powerful than the one who has an outright mandate at all levels (Bogdanor, 2011). The coalitions that the country has seen, from 2012 until 2020, bear testimony to this finding. The disagreements scuppered those coalition governments over the exercise of certain powers by the Prime Minister.

At the constitutional level, there are a lot of controversies. The controversy is primarily fanned by the fact that while the Constitution recognises that government may be formed based on coalitions, there is no guidance on how a coalitional government can operate. The basic presumption is often that government management will also be based on the initial

consensus that the coalescing parties had when they initially formed a government. Yet, the Constitution is cast in a manner that gives the Prime Minister power, regardless of whether he is coalitional or based on a single party. Furthermore, the Constitution grants powers to the Prime Minister, different from the powers he wields in-cabinet. This has been another area of controversy. The coalition partners often hope that if they fail to influence the Prime Minister at coalitional level, perhaps another collective platform would be the cabinet. However, the decisions of the superior courts in Lesotho in the recent decisions such as *Attorney General v His Majesty the King and Others* (2015) and *All Basotho Convention and Others v The Prime Minister and Others* (2020) confirm that the Prime Minister is constitutionally empowered, under certain circumstances to act unilaterally. The slight problem with the approach of the courts in these two decisions is that it is more literal, rather than purposive and general, about the powers of the Prime Minister. The import of these decisions, in the main, is that there is no obligation on the Prime Minister to consult either his coalition partners or cabinet, thereby leaving the Prime Minister with untrammelled powers. In *All Basotho Convention and Others v The Prime Minister and Others* (2020), the High Court has gone to the extent of stating outright that: “[t]he coalition agreement does not have any constitutional status. Its status is political and not legal” (para 112).

This literal approach preferred by the court is problematic in two fundamental respects. Firstly, it renders the cabinet system established section 88 of the Constitution nugatory; it has fortified the apparent ascendancy of the Prime Ministerial Government as against the cabinet government. This approach creates certain dangers to the design. The country is already battling with the phenomenon of wide and oftentimes abused powers of the Prime Minister. The problem has already manifested in areas such as security and the judiciary. Secondly, this approach is problematic in that by discounting the juridical value of coalition agreements, the court has rendered section 87(2) of the Constitution equally nugatory. It renders the section procedural – in that it only deals with the formation of government – and it does not have any substantive value during the currency of the coalition government. Furthermore, the generalisation that coalition agreements are mere political agreements, without assessing the merits of each case, is not in keeping with the public law approach; it is based on the private law approach where contradictions without *animus contrahendi* (intention to be bound) are regarded as unenforceable (Hutchison, et al. 2012). Coalition agreements, it may be argued, are coalitions by another name as envisaged by section 87(2) of the Constitution; they are in the realm of public law ('Nyane, 2019). Rather, a more appropriate public law maxim is *pacta sunt servanda* (agreements voluntarily entered into must be honoured).

Given this, two main recommendations may be made. The first one is that there is a need for improvement on the legal framework for coalitions in Lesotho. This will need the revision of the Constitution, the passage of an act of parliament and the manuals guiding the

exercise of powers in a coalitional government. However, care should be taken in creating such a legal framework, not to “over-regulate” politics. The intention should just be to give a framework for the roles of players in a coalition setup. The second recommendation is that perhaps the literal approach adopted by the courts in relation to the powers of the Prime Minister may need to change in favour of a more liberal and purposive approach. The liberal approach will resuscitate sections 87(2) and 88 of the Constitution; thereby allowing each part of the Constitution to have value in the design.

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