

INSTANT GOVERNANCE: JUST ADD CIVIL SOCIETY – NO MESS, NO FUSS

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ABSTRACT

Cooperative governance is a term used almost exclusively in South Africa. It is completely different from the notion of cooperative government, which is officially provided for in Chapter 3 of the constitution. This paper examines the main differences between the two notions and isolates the provision for public participation as the distinguishing characteristic. Public participation however is more than just providing an opportunity for public comment. The mechanisms for, and place of, meaningful public participation are examined. The use of an Advisory Group in the issuing of boat launch site licenses in terms of the ORV regulations is used as a case study of successful cooperative governance. Some suggestions are offered for turning government into governance.

INTRODUCTION

In order to understand the notion of ‘cooperative governance’ it is important to understand its origins, and to contrast it with ‘cooperative government’, its predecessor in South African discourse. The notion of ‘cooperative government’ was introduced to most of us by the Constitution and the deliberations that led up to it. I want to show that although government departments or organs of state acting in a cooperative manner is a ‘good thing’, it is nowhere near as good, or effective, a thing as when they act in cooperation with each other and with organs of civil society.

Definitions

Cooperative government

Our Constitution (Act 108 of 1996) devotes a chapter to cooperative governance and outlines, *inter alia*, the following principles:

- “All spheres of government and all organs of state within each sphere must ...
- c. provide effective, transparent, accountable and coherent government for the Republic as a whole; ...
- and ...
- e. co-operate with one another in mutual trust and good faith by
 - i. fostering friendly relations;
 - ii. assisting and supporting one another;
 - iii. informing one another of, and consulting one another on, matters of common interest;
 - iv. co-ordinating their actions and legislation with one another;
 - v. adhering to agreed procedures; and
 - vi. avoiding legal proceedings against one another” (Constitution, s40(1)).

Cooperative government, then, is about organs of **state** working together, to “provide effective, transparent, accountable and coherent government for the Republic as a whole” (Constitution, s40(1)).

The National Environmental Management Act No. 107 of 1998 (NEMA) builds on this theme of cooperative government in its Preamble, stating that the Act has been written because

- “it is desirable -
- that the law develops a framework for integrating good environmental management into all development activities;

that the law should promote certainty with regard to decision-making by organs of state on matters affecting the environment;
that the law should establish principles guiding the exercise of functions affecting the environment;
that the law should ensure that organs of state maintain the principles guiding the exercise of functions affecting the environment;
that the law should establish procedures and institutions to facilitate and promote cooperative government and intergovernmental relations;
that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance;
that the law should be enforced by the State and that the law should facilitate the enforcement of environmental laws by civil society” (NEMA Preamble).

What is very interesting is the way in which the terms “management”, “government” and “governance” are used in this passage. The framers of the Act and the legislature seem very clear that management occurs within a framework inhabited by both the state and civil society. To my mind, they also imply that cooperative **government** only becomes cooperative **governance** once public participation is introduced.

Cooperative governance

“Like many concepts, governance is a term with many interpretations. Some equate it with government. Some equate it with democracy. Governance implies structures and processes for determining [the] use of available resources for the public good” (Tandon, 1999).

Thus, if Tandon is correct, and my interpretation of the intention of the legislature in the wording of NEMA is acceptable, it should be possible to differentiate between government and governance based on two conditions, viz.

1. is the process concerned with determining the use of available resources for the public good, and
2. does civil society play a formative role?

I suggest that satisfying both conditions is necessary for a process to be governance rather government.

What makes the governance cooperative is a further condition, that

3. the parties play a mutually supportive role with no one grouping having a veto power.

Civil society

We all have an idea of what is meant by the term ‘civil society’. However, it is worth considering various aspects of the term that are highlighted by the following description given by Civicus, a world body dedicated to coordinating civil society and civic action.

“Civil society involves private action for the public/common good, a result of the innate human impulse to organise and join together in common purpose. It is a source of citizen power through citizens who take action responsive to their own needs. Civil society reflects such shared values as freedom of speech, peaceful assembly, freedom from persecution. It composes and enforces the social contract, i.e. who has the obligation to do what in our society. It also serves as a link between decision-makers and the grassroots. [Civicus World Assembly, Budapest, 1997]” (CORE, undated: 1).

Probably the most useful parts of this description, for these purposes, are in the last sentence, viz. the link between civil society and decision-makers through the social contract. The social contract defines “who has the obligation to do what in our society” (*ibid*) and as such must surely underlie any form of government.

Civil society is not just a good idea; it’s also a vital building block in democracy. One commentator believes that “democracy requires organisations and an interest in public affairs; thus civil society is that part of society that connects individual citizens with the public realm and the state” (Hyden, 1996, p. 92). Following this view it would seem that civil society occupies the space between the state and its citizens, and plays a vital role in connecting the two.

Civil society has another crucial role to play in society and that is in exerting a moderating influence on government.

“In normative terms, civil society has been widely seen as an increasingly crucial agent for limiting authoritarian government, strengthening popular empowerment, reducing the socially atomising and unsettling effects of market forces, enforcing political accountability, and improving the quality and inclusiveness of governance” (Manor et al, 1999:1).

It is these characteristics of civil society that make it the leaven in the bread of cooperative governance, transforming ‘government’ into the more democratic ‘governance’.

Good governance

“We take ‘good’ governance to mean (in general terms) a broad array of practices which maximize the common/public good. More specifically, this term refers to the following things, within civil society and especially within governments: transparency, effectiveness, openness, responsiveness, and accountability; the rule of law, and the acceptance of diversity and pluralism. In all of this, we are also concerned with practices that benefit poor and excluded groups” (Manor et al, 1999: 2).

The intriguing question raised by this position is whether government alone can deliver good governance or whether it needs to be joined by elements of civil society before being able to do so. In this paper I contend that the latter is the case and attempt to illustrate this with the following two case studies drawn from recent events in KwaZulu-Natal.

CASE STUDIES

With the building blocks outlined above in place I would like to contrast the following two cases of cooperation that seem to me to illustrate rather nicely the difference between cooperative government and cooperative governance.

Case Study A: Cooperative Government – Babanango Judicial Services

The following excerpt from the Sunday Times reports on:

“The long arm of the law: Babanango’s state prosecutor Zandile Mbanjwa, magistrate Nicolaas Grebe and station commissioner Captain Nonkululeko Ntombela have proved that effective communication and teamwork can get the wheels of justice turning.

An Afrikaner magistrate and an African prosecutor and police chief have joined forces to stop crime in its tracks in northern KwaZulu-Natal’s rural district of Babanango. Magistrate Nicolaas Grebe, 48, prosecutor Zandile Mbanjwa, 30, and Babanango’s police commissioner, Captain Nonkululeko Ntombela, 42, have been praised for turning the tide against crime in the area. Grebe said modestly that his court, which resembles an old farmhouse, dealt with an average of 10 cases a day, ranging from murder and stock theft to common assault. Many cases were remanded before going to trial. The court managed to complete around 50 cases a week.

Mbanjwa said that in Babanango, which has a population of just over 30 000, the justice system was working efficiently with the rate of resolved cases exceeding the rate of incoming cases. She added that her prosecutions had achieved more convictions than acquittals. Ntombela, who took over as station commissioner of Babanango police station in 2001, said she, Grebe and Mbanjwa met each month to review the performance of Babanango’s justice system. ‘We need to know what the prosecutor finds wrong in our investigations. The magistrate needs to know why cases are investigated and prosecuted poorly, and we need to know why cases get thrown out of court,’ said Ntombela. Ntombela and Mbanjwa, who took over as Babanango’s prosecutor in 2000, said they relied on Grebe’s experience.

Wearing a grey suit and velskoene, a stern-faced Grebe presides over the court like the patriarch of a household. 'We are all eager to learn from each other. This has made our work easier,' he said.

Mbanjwa said Babanango's police force worked closely with the local tribal authorities. 'We leave minor community disputes to be resolved through tribal customs. We only prosecute serious cases like assaults, theft and murders. Stock theft is our biggest problem in the area, but together with the traditional leaders we have turned the situation around,' she said. To help the smooth administration of justice, the court has employed five additional people, including an administrator, interpreter, general worker and clerk of the court. 'We are all committed and know that we have to rely on each other. The court cannot function properly if any one of us is not doing our level best, so we all pull our weight,' she said. Ntombela is head of a staff of 32, of which only 26 are police officers. The police station has only two functional police vehicles. 'Even our detectives and crime prevention officers have to travel in marked police cars because their unmarked cars are still being repaired. But nobody here is whingeing. We have limited resources, but give no quarter to crime,' she said. She said that through effective communication and joint decision-making, she had raised morale at the station. 'We have divided ourselves into different sections, with five members doing investigations, five in crime prevention and eight doing shift work to keep the station open 24 hours a day,' she said" (Jubasi, 2003).

This instance of praiseworthy cooperation between different organs of state is an excellent model of cooperative government as envisaged by the Constitution. It shows clearly how everyone involved benefits from a team approach. However, it is still cooperative **government**, not governance.

Case Study B: Cooperative Governance – KwaZulu-Natal Boat Launch Site Advisory Group

Background

The National Minister of Environmental Affairs and Tourism, Mr Vali Moosa, published regulations to control the use of off road vehicles (ORVs) on the coast which became effective in January 2002. These regulations impose a general ban on the use of ORVs on the beach for recreational purposes. Certain uses of vehicles within the coastal zone are however permissible, including the use of a vehicle:

- on a public road;
- in an emergency situation (in order to safeguard human life or health);
- by an employee of the State for the purposes of performing public duties; and
- the use of electrically propelled vehicles by physically disabled persons.

In terms of these regulations, the provincial department responsible for environmental affairs, in KwaZulu-Natal the Department of Agriculture and Environmental Affairs (DAEA), is responsible for considering applications for:

- licences for boat launching sites within which the use of vehicles will be permissible;
- a permit, outside of coastal protected areas, for one or more vehicles to be used for the purposes of scientific research, any tourism business conducted by a tour operator, and gaining access to properties (provided there is no reasonable road access to those properties and the rights to occupy or use them have been lawfully acquired).

This case study is concerned only with the process adopted for boat launch site applications.

Potential problems in respect to issuing of licences

1. **Time constraints:** In terms of Regulation 24 (1), regarding transitional arrangements, driving a vehicle in a boat-launching site was permissible until 21 July 2003, after which it became an offence for anyone to do so unless the site is licensed and the vehicle is involved in either launching or recovering craft.
2. **Numbers:** Historically there have been 47 boat launch sites in use on the KwaZulu-Natal coast, of which 15 fall within the jurisdiction of either the Greater St Lucia Wetland Park Authority or are in a proclaimed harbour and therefore exempted from the regulations. This means that the process had to be able to assess up to 32 applications between approximately mid-January 2003 (when the boat

launch site operators began to realize they had to get cracking) and 21 July 2003 (the eve of the cut-off date).

3. **User conflict:** Where applications for a launch site license was received from a club rather than a municipality the process had to ensure that the granting of a license did not confer any exclusivity in the use of the site on a particular group.
4. **Environmental protection:** The process had to ensure that one of the prime objectives of the regulations, i.e. environmental protection, was promoted.
5. **Safety aspects:** In considering each application the safety of boat operators, other users such as surfers, and the public on the beach had to be borne in mind.
6. **Rights:** The right to enjoy access to the common national heritage of the coast had to be balanced against other rights, i.e. the right of access is not unfettered or absolute, but is moderated by the equally important rights of others.
7. **Economic issues:** Many users of the existing sites are commercial fishers and the launch sites are a vital part of their capacity to make a living. Equally, many charter boat operators are dependent on a launch site for their business operation.

The Boat Launch Site Advisory Group

To deal with these issues the Coastal Management Unit (CMU) within the Chief Directorate: Environmental Management, set up a multi-stakeholder forum, the KwaZulu-Natal Boat Launch Site Advisory Group (BLSAG), to assist with assessing applications and to advise on the licensing of sites and under what conditions, if any. The BLSAG consists of representatives of organs of both state and civil society as reflected in [Table 1](#).

Table 1: Members of the KwaZulu-Natal BLSAG, grouped by sector

Organs of civil society	Organs of state
<ul style="list-style-type: none"> • Boating Industry Association of SA • Coast Watch • Durban Undersea Club • Life Saving Association • Natal Deep Sea Angling Association • Natal Underwater Union • National Sea Rescue Institute • Oceanographic Research Institute • Personal Watercraft Association • Small Marine Business Association 	<ul style="list-style-type: none"> • Department of Agriculture and Environmental Affairs • Ezemvelo KwaZulu-Natal Wildlife • Greater St Lucia Wetland Park Authority • Natal Sharks Board • Provincial Planning and Development Commission • SA Maritime Safety Authority • SA Navy (J Op Tac HQ KZN) • SAPS Border Police

The process followed to date in respect licensing boat launch sites

1. The Oceanographic Research Institute (ORI) was contracted by the CMU to undertake an initial assessment of all launch sites along the KwaZulu-Natal coast.
2. Applicants were issued with a standard application form and a Pre-Scoping Checklist. The Pre-Scoping Checklist was used to assess those sites with less environmental impact as well as a basis for screening those sites for which more information is required for responsible informed decision making.
3. A Technical Sub-Committee, chaired by the CMU and consisting of representatives from Ezemvelo KwaZulu-Natal Wildlife (EKZNWL), the Natal Sharks Board (NSB), ORI and Phelamanga Projects (a consultant appointed to support the CMU) prepared summaries of each application received to date and the accompanying pre-scoping checklist. This Technical Sub-Committee then compared the information submitted with the information assembled in the ORI database mentioned above. Issues of concern that required further discussion or investigation were flagged. After such further discussion and/or investigation the technical Sub-Committee drew up a draft Recommendation for each application for discussion by the BLSAG. This draft Recommendation advised the BLSAG on:
 - whether a full EIA process is required,
 - appropriate conditions for the Record of Decision, and
 - the requirements for a site-specific Environmental Management Plan.

4. In coming to a decision regarding what recommendation it would make to the DAEA the BLSAG used the decision tree illustrated in [Figure 1](#).
5. In applying the decision tree it became obvious that what was needed was a mix of scientific knowledge about the effects of vehicles on the beaches; roads and pedestrian walkways through the dunes; activities in or near estuaries; and the effect on marine living resources of different levels of effort by fishers, divers and other recreational users. It was also clear early on in the process that a survey of a site by a scientific team was invaluable, but deficient unless backed up by local knowledge. For example, an aerial photograph of a particular site and a site visit only reflected the situation at that time, and did not account for things like lagoon mouth migration.
6. Meetings of the BSLAG therefore became an exercise in trading knowledge, balancing interests and ensuring fairness. On occasions the ‘trading’ became heated, but the process was robust enough to ensure that all points of view were heard and that positive sum (win-win) outcomes obtained.

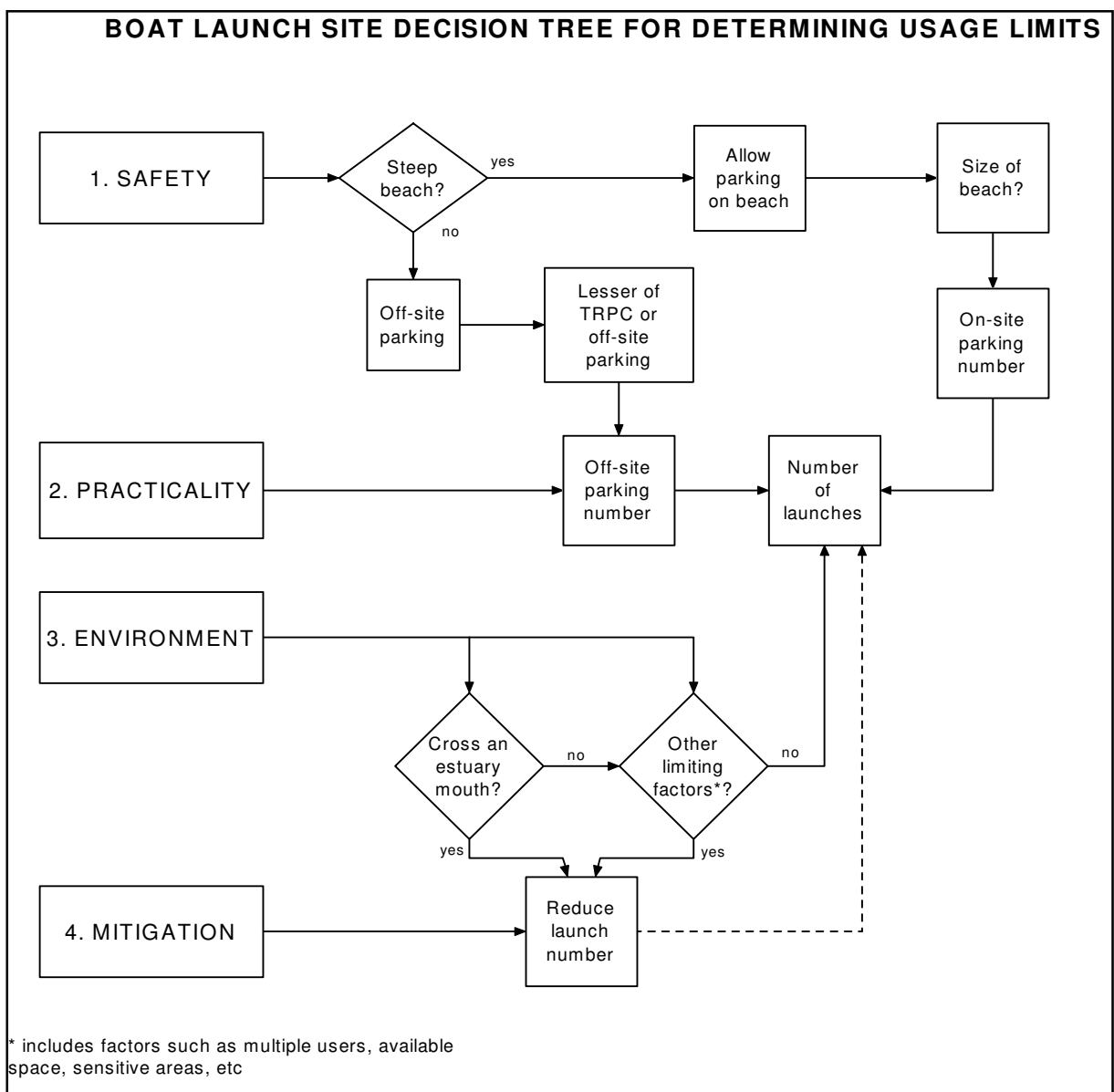


Figure 1: Decision tree used by the KwaZulu-Natal BLSAG

The interesting thing about this exercise was that the BLSAG took its task very seriously and refused to merely “rubber stamp” decisions that otherwise might have been taken by the government authority. The Technical Committee referred to was composed of both government and civil society. The recommendations made by the Technical Committee were carefully scrutinised and interrogated by the BLSAG for fairness, consistency and “the public good”. On more than one occasion the recommendations were amended, sometimes made less onerous and sometimes made more so. The entire process was characterised by vigorous debate, a pooling of knowledge and a commitment to ensuring fair play within the framework prescribed by the regulations. The exchange of specialist knowledge held by scientists, policy makers, and government on the one hand and local experience held by local civil organisations on the other enriched the process and enabled it to achieve its aim with the maximum acceptability possible under the circumstances.

The inclusion of civil society in the process created the conditions for cooperative governance and achieved all of the aims outlined by Manor et al (*op cit*) of “limiting authoritarian government, strengthening popular empowerment, reducing the socially atomising and unsettling effects of market forces, enforcing political accountability, and improving the quality and inclusiveness of governance”.

CONCLUSION

“A recent study by the Commonwealth Foundation (in cooperation with CIVICUS) registered the concerns of more than 10,000 citizens in 45 Commonwealth countries ... [t]hey want responsive governance in their societies ... [t]hey want to be listened to and invited to participate on issues of public concern and policy on an ongoing basis. Citizens are equating responsive governance not only with formal institutions or systems of democracy but also with the processes and culture of democratic inclusiveness and participatory governance” (Tandon, 1999).

The case for cooperative governance rests on the superior outcomes obtained when civil society is included in enforcing the social contract, i.e. deciding who has the obligation to do what in our society. Cooperative government, as Case Study A shows, is a good thing, with benefits for the community. However, cooperative governance, exemplified in Case Study B, allows for an exchange of ideas and knowledge, better decision-making and more outcomes that are acceptable for all, including for environment.

However the question still remains of how the two cases I have described differ. On reflection perhaps the most important distinguishing characteristic is that of where accountability lies. In Case A the actors were accountable to their governmental organisations only; in Case B the actors were accountable to their constituencies, which included organs of state and of civil society. Accountability was directly to the people most affected by the decisions taken.

Cooperative government then can be turned into cooperative governance by applying at least the following to any deliberative or decision-making process.

- Include all those organs of state that have a stake in the process;
- Include all those organs of civil society that have a stake in the process;
- Keep the doors open for others to join the process as they are identified;
- Ensure meaningful participation as opposed to token representation;
- Avoid vetoes;
- Take local knowledge seriously;
- Ensure direct accountability to a broad constituency.

For us who work in the environmental arena cooperative governance makes more sense than cooperative government.

BIBLIOGRAPHY

Constitution of South Africa Act 106 of 1998.

Co-operative for Research and Education (CORE). Undated. *Civil Society and Governance: The Case of South Africa*.

Hyden, G. 1996 'The Challenges of Analysing and Building Civil Society', *Africa Insight*, Vol. 26, No. 2.

Manor, J., Robinson, M., and White, G. 1999. '*Civil Society and Governance*': A Concept Paper. Institute of Development Studies, University of Sussex, England.

National Environmental Management Act No 107 of 1998

Tandon, R. 1999. 'What Is Good Governance?', *Foreign Policy*, Fall, 1999. [accessed June 2003; available at <http://www.findarticles.com>]

Jubasi, M. 2003. "Rural cops and court team up to beat crime", *Sunday Times*. 8 June 2003. [accessed June 2003, available at <http://www.sundaytimes.co.za/2003/06/08/news/news18.asp> 30/06/03].