

# ENSURING "GOOD GOVERNANCE" THE DILEMMA OF MULTIPLE SPHERES OF AUTHORITY IN SA

## INTRODUCTION - HAASTRUP, A

The peaceful establishment of a democratic republic, following years of oppression by the minority White ruling elite, was a dawning of a new age for South Africa, and the continent. Indeed, the aim was to make the 'new' state a model for all aspiring and established democracies worldwide, and through the values enshrined in its Constitution, one could say this was achieved.

This paper will be looking, in part, at a specific provision of the Constitution pertaining to the role of traditional leaders in the new South Africa<sup>1</sup> and it will examine two subsequent legislations, the *Traditional Leadership and Governance Framework Act*, 2003 and the *Communal Land Rights Act*, 2004 (CLRA) both of which empower the traditional leadership structures of South Africa.<sup>2</sup> Specifically, it will examine the conflict generated by the demands of a new model democracy using a rights-based model, on the one hand, and the determination to preserve sometimes incompatible customary practices through the recognition and empowerment of traditional leadership structures. The paper argues that traditional authorities have a role to play in attaining good governance. However the current tensions between the established traditional leadership structures and practices, and those of the democratic state is a threat to the promotion of good governance structures, which, in turn is detrimental to rural development, the alleviation of poverty and it may further affect service delivery adversely. At the conclusion of the paper I will propose a way in which these two seemingly antithetical institutions may function together to realise the vision of the Constitution.

## 'GOOD' GOVERNANCE: DEFINITIONS AND CHARACTERISTICS

In order to ascertain the relevance of good governance and the structures that support this notion, we must understand what it means in its general context. One can then translate it into the South African context.

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<sup>1</sup> The South African Constitution was adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly

<sup>2</sup> While implementation has started on the TLGFA, the implementation process of CLRA is currently on

In the social sciences, good governance is a term that is often found in contemporary development literature as an aim of the developmental institution; however, it is not often clearly explored. There are a few facts about this ideal. First, 'good governance' is an ideal, and as such it cannot be completely realised, but continually aspired to. Secondly, if there is 'good' governance, there must be 'bad' governance. We accept governance itself to be "the process of decision-making and the process by which decisions are implemented (or not implemented)" (United Nations Economic and Social Commission for Asia and the Pacific).<sup>3</sup> In other words, governance is a process, which in its initial form is neutral. I assume that governance may gain its neutrality when decisions are made that neither benefit nor harm any party in the process. The truth however is that there is not a process that does not impact for good or worse. Indeed, there would seem no point to participating in a process that does nothing for anyone. In addition to the notion of governance therefore, we desire good governance in the decision-making and implementation processes for a society.

Good governance, unlike governance itself, does not have a precise or concise definition although we may assume that decision-making processes and implementation benefit the society. Instead, a set of eight attributes that are assumed and generally accepted to be good must be inclusive in governance for an institution to move towards good governance. These attributes include participation, accountability, transparency, responsiveness, efficiency, equity and inclusivity, consensus - orientation and the rule of law. From this list of attributes, it is clear that although government has a huge role to play in the implementation aspect of governance, in order to push towards the goal of good governance, other actors or stakeholders have to be involved. For the purposes of this paper, the other pertinent stakeholder in terms of decision-making and especially implementation is the traditional leaders. To understand good governance better, we should outline in brief terms what these attributes mean.

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hold.

Participation means that everyone affected by the decision-making process and the implementation of those decisions that result from the process are able to give their voice to both processes. This means that it is necessary that the people are well informed and there are no legal or practical constraints to their participation. Accountability simply means that an institution is set-up to respond to queries made to it by those affected by its actions. Transparency is often used synonymously with accountability. It however means that all actions by an institution are always open, following the rules and regulations. Specifically, it means that every process is accessible to those affected by the institution's role in governance. In order to attain good governance, an institution must be responsive which means it must "serve stakeholders within a reasonable timeframe" (UN ESCAP).

Often, a democracy purports to strive for these characteristics of governance. For this reason, the South African Constitution, which espouses democracy, holds to these tenets of good governance. As the state is the largest stakeholder in governance, it is tasked with carrying out these characteristics of good governance, which should translate to effective and efficient service delivery. The question however is, can the state fulfil its role in striving towards good governance structures? As suggested in the introduction there seems to be a tension between democratic ideals and customary practices both competing for the prominence through their respective institutions. The state and the traditional leadership structures seem to be divided competitors and would-be drivers of governance in the rural areas. This tension, I argue, hinders the goal of optimum service delivery using a rights-based approach, which will affect infrastructural and economic development in rural areas. To answer my earlier question, I will examine the provisions of the Constitution about who should govern, in what capacity and how they should govern.

## THE CONSTITUTION AND 'GOOD' GOVERNANCE

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<sup>3</sup> <http://www.unescap.org/huset/gg/governance.htm>

The 1996 Constitution of the Republic of South Africa is touted as one of the most liberal and inclusive Constitutions in the world. It uses a rights-based model as a general framework in addressing the governance ideals the country would like to maintain. Chapter 3 of the Constitution clearly states its expectations for governance in South Africa. In the first instance, it explains that the South African state is to employ a mode of co-operative governance inclusive of a national, provincial and local government. In Section 41 (1) (a) it says "all spheres of government and all organs of the state within each sphere must: provide *effective, transparent, accountable, and coherent* government for the Republic as a whole" (Chapter 3, South African Constitution).<sup>4</sup> It is clear from the foregoing that the Constitution, which has adopted democracy as the governmental structure of the Republic and therefore the rule of law, has also adopted those other attributes of good governance to inform how the State is governed. It also seems evident that those tasked with ensuring these measures are elected government officials on the three tiers of engagement that include the national, provincial and local. Why then is there a debate as to the role of traditional leaders in governance when the Constitution seems clear?

The 'top' quality of the Constitution in its inclusivity is particularly warranted when one considers that Chapter 12 of the Constitution lays the groundwork for the participation of traditional leaders and traditional leadership structures of which a substantial portion of the populace in the new democracy still view as the highest authority. The aim was to create a new South Africa that allowed for all spheres of authority to cohere in creating a thriving democracy. As has been reiterated, good governance must include the participation of stakeholders in the governance process. For the majority of the population that lives in the rural areas, traditional leadership structures have always been the dependable governance structure especially during the Apartheid regime. This is in spite of the fact that the institution has been maligned due to its role in the perpetuation of the regime's detrimental policies (Koelble, 2004; Ntsebeza, 1999)<sup>5</sup>.

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<sup>4</sup> <http://www.info.gov.za/documents/constitution/1996/96cons3.htm> accessed 19 July 2006; emphasis mine

<sup>5</sup> While the detrimental roles that traditional leaders played during the Apartheid is not denied, some

And although the advent of democracy supposes a better and more representative governance structure, attributes such as participation and consensus-orientated decision-making may be jeopardised if traditional leadership structures had been overlooked.

During the negotiating phase of the new Constitution, traditional leaders reiterated that they were not content to be ceremonial heads and 'guardians of custom' the role they argued they had played under the Apartheid regime. Instead, they struggled for recognition as an authentic voice of the people and governance institution in the new Republic, requiring autonomy and a presence in the new governance structure of the post- apartheid democracy. To this end, the mandate of traditional leaders, as currently laid out in the *Traditional Leadership and Governance Framework Act* was initially derived from the 1996 Constitution. Many scholars would agree that this mandate is very vague and does not clearly delineate how they (the traditional leaders) will be included in the government's efforts at governance, particularly good governance (Koelble, 2005; Ntsebeza, 2005). Despite the ambiguity surrounding the specific roles of traditional leaders, the Constitutional provision generated enough political debate for this role to be considered at the minimum.

## CREATING ROLES FOR TRADITIONAL LEADERS IN SOUTH AFRICA'S POST-APARTHEID GOVERNANCE STRUCTURE: LEGISLATIONS

Given that the democratic government has been tasked with good governance it would seem that it was an effort to fulfil some of the other requirements of good governance that the TLGFA was adopted such as participation, inclusivity etc. However, there were two problems arise from the onset; the first was that, traditional leaders wanted to play a dominant role in ways they alleged they had in pre-colonial times to the general populace and during Apartheid to the rural dwellers. Given the adoption of democracy, those past glory days would be hard to come by. This is further complicated as it seems the perception of the state concerning traditional leaders is the same perception they have of other civil society organisations (CSO). Secondly,

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within the institution have argued that only a few traditional leaders colluded with the racist regime with

some of the roles occupied in the past are unfit for a liberal democracy where representivity and equality are paramount. Indeed, while participation may have been a consideration in the formation of the TLGFA at its best, a liberal democratic structure would encourage participation of all individuals, albeit it only with time in the case of the rural dwellers to whom this process may be unfamiliar.<sup>6</sup> Indeed as one commentator notes, the participation of civil society is integral to the promotion of good governance (Mafunisa, 2004). The current construct of traditional leadership structures have certain characteristics that sometimes conflict with some of the values necessary for good governance within a fledging democracy. For the moment however, let us consider the Constitution and the traditional leadership mandate. Although the Constitution allows for the legal consideration of the role of traditional leaders and rightly so, it was the political situation that made it almost impossible for traditional leaders to be ignored, especially given that many traditional leaders are affiliated with some of the more prominent national parties, the African National Congress (ANC) and the Inkatha Freedom Party (IFP). In these roles they were able to influence the legislative process for their benefit. Those involved in drafting a role for traditional leaders, to my mind, considered the politics of the situation as more important than ensuring that the social contract<sup>7</sup> is served.

The *Traditional Leadership and Governance Framework Act* of 2003 recognises the traditional leadership structures in six of South Africa's nine provinces. It is a national framework to aid or compel traditional leadership institutions to adapt to the post-apartheid democracy. In addition, the legislation attempts to address the concerns of traditional leaders about being sidelined once again in the new political dispensation. This Act requires these indigenous institutions to address issues of gender inequality and democratic representation to the governance structures. While it is true that the Constitution invited the debate on the role of traditional

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the implication that those currently seeking recognition are not of those few.

<sup>6</sup> During an interview with a rural dweller on another similar project, the interviewer was told that democracy was destroying the traditions of country -this is what many understand representivity to be, since by the same token they demand that their voices be heard, except they believe it can only be heard by a chief.

<sup>7</sup> Social Contract refers to the rights and responsibilities of both the state and its citizens in the promotion of strong country

leadership structures in governance, many cite the impending 2004 election as the primary motive to push through the Act in parliament. This further proves the point that the political had taken priority over the best-practice cause of action for the citizens. Based on those principles of co-operative governance, the Act encourages partnerships between the Municipal Structures and the Traditional ones. It is important to note that the Act simply *encourages* rather than *demand* a partnership.

In recent times, as the debate over the role of traditional leaders in the South African society commenced, some within these elite have conceded that a transformation is needed to align it with the realities of the current South Africa. Indeed, the "Draft Discussion Document towards a White Paper on Traditional Leadership and Institutions" reiterates that

"It is foreseen that traditional leaders will play a strong *supportive* role as regards the...implementation of good and effective governance e.g. by participating in inputs to bodies such as the Aids Council, the Demarcation Board and the Tourism Board."(DPLG, 2000)<sup>8</sup>

It is clear from this statement that institutions of traditional leadership were expected to lend support such as advice and recommendations to the institutions of governance even in those areas where the traditional leadership institutions are thought to be dominant. This support should ideally support the aims of democracy in South Africa. The reality however is that although the institution of Traditional Leadership is not uniform across the country, it has certain similarities across the board to its disadvantage especially in order to function as part of the new governance structure in South Africa. African traditional leadership structures tend to be too hierarchical and patriarchal. To some extent, these structures have remained in this way, using the defence that to change anything in the known structure would mean altering "African custom."

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<sup>8</sup> Emphasis mine

Most traditional leaders would not concede that they should be *subject* to certain democratic institutions as agreed upon in the negotiated Constitution. The dilemma here is that given that the Constitution enshrines democracy in a certain conception and traditional institutions, like all other institutions in the state must be subject to that Constitution, logic follows that the institution of traditional leadership must conform to the larger democratic machinery of the South Africa state. To contradict this logic is to jeopardise the intent of the Constitution. In short, while the Constitution does not elaborate on the exact role(s) of traditional leaders in democratic governance there should be no doubt about the position of those roles in relation to the democratic institutions. An objection that may be made to this interpretation of the Constitution concerning traditional leaders is that they (traditional leaders) do not oppose South Africa's democracy, but they simply want to be part of its governing structure in accordance with prevailing customs. The persistent problem is that this institution even through its transformation does not function as a completely democratic institution. The cultural merits to its existence have so far been accommodated. To allow it supersede the other democratic structures in rural South Africa will mean that some regions of South Africa are governed differently. Does this not defeat the purposes of equality at least? Although South Africa has been successful in many areas in implementing the model democracy, accommodating traditional leadership institutions in governance has a tendency to upset some of the democratic aims of the state using a rights model.

Within the prevailing atmosphere of tension that has ensued between the state's democratic governance structure and that of traditional leadership institutions the South African government has sought ways to incorporate the institution of traditional leadership into its governance structure. The reoccurring question and the most difficult to answer would be how does one balance democratic processes and the parts of the traditional leadership institutions that have not been completely democratised without jeopardising the fundamental structure of the state and its attainment of good governance?



When the *Traditional Leadership and Governance Framework Bill* was presented in 2003, several entities, which constitute the civil society groups in South Africa, had reservations. Many of them acknowledged that it was fair that traditional leadership institutions were finally recognised as one institution in the new South Africa but there was concern over issues such as accountability, equality, participation, and transparency. These concerns mirror the characteristics required for good governance as defined by the international standard. In one submission from the Institute for Democracy in South Africa, IDASA, the authors note that it is not clear how the institutions can be accountable to their communities whom they claim to represent (IDASA, 2003). In addition, one of the key issues flagged and relevant to this paper is that "the roles of traditional leaders need to be distinctly separated from those of the municipality so as to avoid potential confrontations" (IDASA, 2003). Unfortunately, none of these observation and suggestion has been heeded. It is quite logical to conclude that tensions tend to hamper progress in any situation and this has been the case in a number of cases where the ward councillor and traditional leader are both competing for loyalists in their charge communities.

Good governance, I believe is further compromised in respect to integrating traditional leadership institutions into the democratic state due to recent developments (Ntsebeza, 2005). These recent developments although embarked upon to further smooth the relations between the elected officials and hereditary ones, it has the potential to impact governance in South Africa adversely. As required by the framework Act, the six South African provinces affected have adopted legislations, which should address their respective cultures and histories. The provincial Acts are supposed to iron out some of the creases left in the national Act. As of August 2006, all six provinces have started implementing the provincial legislations. This has been done to considerable political uproar and media sensationalism especially in the province of KwaZulu-Natal for instance. Translating the Constitutional guarantees of governance as well as the recognition of traditional leaders (vis-à-vis the TLGFA) has often met with concrete cases of antagonism between individuals or departments of the democratic government and

individuals in traditional communities. In addition, the politicisation of the process of integrates traditional institutions into those supporting South Africa's democracy and developmental goals have contributed enormously to the prevailing divide.

In KwaZulu-Natal, the promulgation of the provincial legislation a follow through from the national Act, which is supposed to democratise the traditional leadership institutions has not been well received by the leaders in the region. The KwaZulu-Natal Traditional Leadership and Governance Act, which is deemed controversial was first enforced in a punitive manner clearly highlighting the tensions between the state and the traditional institution. In early 2006, the Department of Traditional Affairs in the province suspended a traditional leader on several charges including misconduct as defined by the provincial legislation. The state, in form of the provincial government structure has the authority to intervene when a traditional leader is accused of not fulfilling his duties as a community head. This authority irks dissenting traditional leaders who already believe that the state's main aim is to usurp their powers. This sort of power over the institution has prompted a prominent politician and traditional leader to declare that the powers of traditional leaders are being "vanquished and obliterated" (Khumalo, 2006).

In terms of the *Communal Land Rights Act* or CLRA (pronounced "Clara") the main aim of this legislation was to correct the past injustice of land-grab from the local Black population. This legislation is another one that directly empowers traditional leaders on behalf of their communities. Not many would argue against the intent of this legislation. The legislation had resonance for the rural areas where the aim was to determine who owned land in the former homelands (Hall, 2004). The very nature of this legislative reform is inclusive of the need to restore human dignity, through ownership, equality for the same reason and freedom for all.

The CLRA was signed into law on 15 July 2004 and "empowers the Minister of Land Affairs to transfer ownership of communal land to communities" (Hall, 2004, p49). In so doing, the legislation empowers the Minister in charge to hand over lands to traditional leaders through

the traditional council as the heads of these communities, with the view to redistribute it amongst the residents, in accordance with some characteristics already mentioned. From consultations held by civil society with members of the target communities, it was gleaned that the state was abdicating its duty to administer land, thereby providing a role for unelected and until then, unpaid traditional leaders (Ibid). One point raised here, which would be raised again, is that this Act puts communal rights before individual rights contrary to the aims of the Republic.

Such are the faults of this Act as we find now that the legislation is being challenged in constitutional court because it seemingly its original intent. According to the plaintiffs in a press statement by the Legal Resources Centre, the *Communal Land Right Act* reinforces those situations that are the antithesis of South Africa's democratic values. The Act makes women less secure and reinforces patriarchal power relations exacerbating the problems women face in accessing resources, in this case land (LRC Press Statement 20/04/06). Specifically, it violates Section 25 (6) of the Constitution, which calls for the security of tenure for persons who had been disadvantaged in the past. (LRC Press Statement, 20/04/06). This provision is a clear example of how the Constitution in all its parts strives for human dignity, equality and freedom.

As the complaint asserts, the TLGFA allows tribal councils of old, some of the same ones complicit in Apartheid to the detriment of those they governed, can simply change their name to become traditional councils, there is no guarantee that unfavourable practices in land allocation would cease. There is especially no guarantee against those practices that seem contradict the notion equality as found in the Constitution, such as the historical advantage of men over women in accordance with 'custom'. In essence, the CLRA allows that more land be returned to the traditional authority on behalf of the disenfranchised as a condition of democratic reform, there are no provisions that the disenfranchised would be better off, unless they continue to play the game of patronage that dominates traditional affairs.

According to Ruth Hall, because of the local government reforms and demarcation process, all rural areas technically fall within municipal jurisdiction, including the communal lands. However, the mandate of CLRA through ownership transfer makes those communal lands "private property." Since the municipality cannot service private land, there is justifiable concern that service delivery will be impossible in a substantial portion of these areas to the detriment of the populace (Hall, 2004, p51).

The roles of governance between the state and the traditional leadership institutions are often confused and contested especially at the local government level where the above Acts have done more, than less to aggravate these contests. To understand how, a basic description of the local government structure is due.

#### LOCAL GOVERNANCE IN SOUTH AFRICA

The biggest achievement of South Africa's local government structure is its intent: optimum service delivery to every citizen of the Republic no matter where they are situated. As to if it has achieved its primary goal is highly debateable. One recent observation notes that South African local governments are grappling with "poor service delivery" (ITWEB, 2006) and editors David A McDonald and John Pape (2002) confirm this. They argue that the move from a welfare municipal system to a more neo-liberal outlook, which included privatisation, has jeopardised the initial intent of adequate service delivery (McDonald and Pape, 2002). From this, there is evidence that poor service delivery as it currently stands is not the fault of traditional structures. Aside from those points already made by McDonald and Pape, the current system is inhibited by a lack of adequate capacity; however, the point here is that there is gradual improvement and the current arrangement, which involves conflict that hampers good governance, will make it more difficult to go about providing adequate services.

The situation is particularly dire for rural dwellers most of whom can barely afford their livelihoods, and have been previously disadvantaged by the former regime. In addition to this,

they have to contend with the skirmishes between elected local government and the hereditary institution of traditional leadership, both vying for authority in these areas. One area that has been flagged as a potential collision course for the traditional leaders and elected government is on the issue of demarcations, where a municipal construction may separate a leader from the majority of those he or she claims to govern. The municipal demarcation processes creates local government jurisdictions. According to Robert Cameron, because demarcation redistributes political power, it is bound to be continually contested (Cameron, 2006, p76). Even if it were the case that no leader is left out of his or her community, the idea that this could be a reality, especially the part about power being redistributed, is bound to affect local good governance.

The idea behind local government in South Africa is that it will be closer to the people and their needs.<sup>9</sup> In essence, the Constitution envisioned Local Government as a governance structure that would contribute to rapid development while delivering basic services to the electorate (McDonald and Pape, 2002, p2). In addition, theoretically, it was supposed to provide more accountability for the people. This vision of post-apartheid local government, all things being equal, should have benefited the inhabitants of 'rural' South Africa the most given their previous disadvantage. Although rural local government was initially shunned when the debates about local government commenced, this state was soon remedied. In 1995, a National Rural Development Strategy was revealed (Ntsebeza, 2004). According to Ntsebeza, it was an attempt "to align the objectives of the Reconstruction and Development Programme (RDP) with those of developmental local government" with a rural context (Ibid). This initiative however failed, and was replaced by subsequent strategies, also not adequate enough. Following the election of current President Thabo Mbeki into office, a new strategy was formed in 2000 called the Integrated Sustainable Rural Development Strategy (ISRDS). This, according to Lungisile

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<sup>9</sup> "Event Focuses on Service Delivery in Local Government," ITWEB, May 2006  
<http://www.itweb.co.za/sections/business/2006/0605170821.asp?S=IT%20in%20Government&A=ITG&O=FRGN> accessed 7 June 2006

Ntsebeza, emphasised that local government and its structures was responsible for development in rural areas (Ntsebeza, 2004).

Overall, it would seem that developmental local government in rural areas did not leave much room for traditional leaders to participate. While in my view, it is clear who should be in charge of developing the rural area, the democratic state, the political reality necessitated that some concessions be made.

The initial legislation addressing the roles of traditional leaders and the institutions they control were the *Municipal Structures Act* 117 of 1998 and the *Municipal Systems Act* of 2000.<sup>10</sup> Following from the provision in section 151 of the Constitution, these Acts were passed to establish municipalities as well as allocate their function (Ntsebeza, 2004). It was also the first time legislation, especially the former, seemed to carve out a niche for traditional leaders that had only been suggested by the constitutional provision of Chapter 12. Initially, these Acts were deemed to restrict the powers of traditional rulers in the former homelands or Bantustans, especially by the traditional leaders since the creation of municipalities imposed local government jurisdiction in (rural) areas considered their dominion. The *Municipal Systems Act* was seen as an attempt to impose non-customary norms, such as representative democracy to the institution. What the Act did was effectively reduced the number of municipalities as well as create room for elected officials -councillors -to govern in electoral local government structures; these councillors were charged with the development of these rural areas a domain which had long been the purview of the traditional leaders. Traditional leaders feared that the far-reaching changes to the local government system, in which they had been dominant until 1994, would usurp their powers, especially in regards to land.<sup>11</sup>

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<sup>10</sup> The Local Government Transition Act, 209 of 1993 was, in my view, the initial confrontation between the democratic and traditional leadership institutions to determine what form of governance should take place in rural areas. In its amendment in 1995 it allowed MECs to identify interest groups that could form 10 percent of its council. Traditional leaders at this time were identified only as interest groups. This role is consistent with how stakeholders may participate in governance to promote good governance.

<sup>11</sup> EPolitics SA -Afrol News "South African Local Government Election" 5 December 2005 IDASA [http://www.afrol.com/html/Countries/South\\_Africa/backgr\\_elections2000.htm](http://www.afrol.com/html/Countries/South_Africa/backgr_elections2000.htm) accessed 25 May 2006

These Acts were conceived as a democratic reform to local governance and are a departure from the Apartheid system. This attempt at democratic reform, while it has succeeded in intent by including as many stakeholders as possible, has not done so in practice. The numbers of the municipalities as well as councillors that service them have been sharply reduced by the Act making local governance quite tedious in terms of the space that has to be serviced and the capacity to do so (Ntsebeza, 1999; 2002; 2004; Claassens, 2001). For this reason, and the fact that some 20 percent of the municipal seats have been designated for traditional leaders (Koelble 2004), the rural citizenry still tends to be dependent on the traditional leadership structures some of whose functions contradict the ideals of the new republic.<sup>12</sup>

The Municipal Acts have been to the advantage of the traditional leaders. The power of traditional leaders has been further consolidated with the help of democracy-at-work. Undoubtedly, local government is currently very weak as it lacks capacity. It is ill-equipped to deal with the enormity of the situation that confronts rural South Africa due to years of abuse under the Apartheid regime. In addition, although developmental local government should almost induce thoughts of a social- democratic scheme on the part of the state, economic governance from the national government has been largely neo-liberal in nature. In essence, democratic local government has not been able to deliver, as it should. With their knowledge of these weaknesses, and using it to their advantage, it would seem that traditional leaders hold the state at ransom. By this, I mean that with these Acts, the traditional leaders had a chip, a large one, in the person of rural dwellers (a large percentage of the electorate) to bargain with in negotiating more power, autonomy and control over land and development projects, including service delivery implementation With the government at the national, provincial and local levels. The extent of the power of traditional leaders is proven in the manner by which the *Communal Land Rights Act* (discussed above) was passed in Parliament, without adequate debate or considerations for concerns that had been raised by members of civil society. This sort of advantage in-of-itself, I argue, impedes the tenets of good governance and the proper

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<sup>12</sup> The 20 percent representation was a concession by the state to placate the leaders whose

functioning of a democratic state. The power wielded by traditional leaders through CLRA alone has far exceeded what the Constitution could have intended. In addition, it tramples on individual rights undermining the rights-based model of governance. Furthermore, specific groups in the society such as women and illegitimate children or children born out of wedlock remain disadvantaged by this legislation (see LRA press brief on Constitutional challenge to the CLRA).

The current Constitutional case concerning CLRA only illustrates the technical problems of the legislation itself. In practice, the CLRA has even greater ramifications for good governance and its anticipated results. If one takes for granted that land considered communal is within the purview of the traditional leadership in a given community, there are bound to be problems in terms of developing that particular community. As per the current arrangement, the local government of the municipality and ward is in charge of development (Hall, 2004, p51). If then there is continued acrimonious resistance to democracy or at least its representatives, development simply cannot take place (Oomen, 2000, p.66). For instance, if a village Chief does not give over land for tarred roads, it cannot happen even if local government had the capacity to provide the road. Undoubtedly, "this legislation, [...] entrenches the power of traditional leaders over their rural subjects" (Sparks, 2004). Although it seems that "...initial collaboration [among traditional leaders is] quite clear" (Ntsebeza, 2004), that is, there should be no confusion as to the role traditional leaders have to play with the state in order to promote good governance structures that promote democracy, this is not the case. Indeed the current collaboration is in opposition to democratic structures, of which good governance is intrinsic; this spells doom for the governmental aims of development, poverty alleviation and adequate service delivery in rural areas.

In terms of the TLGFA and its provincial counterparts, while the traditional leaders are unsatisfied by its provisions, many activists are also not satisfied with the implications it may

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dissatisfaction has often led to political volatility.



have for governance. Traditional leaders continue to reject the function of the current local government structure in rural areas arguing that they, not the elected officials should play the central role in development (Ntsebeza, 2005b).

## CONCLUSION

This paper does not argue that traditional leadership structures do not have a place in South Africa's democracy. On the contrary, the author believes that the recognition and participation of these institutions may be important in striving towards good governance especially for those South Africans that reside outside of the urban centres. The state however, cannot be at the mercy of the traditional structures especially as the former seeks to implement developmental goals as it is tasked to do for the whole country. This will ultimately contribute to a better livelihood for all. Undoubtedly, traditional leaders would rather that the state "seek their agreement before development projects are decided upon and implemented" (Holomisa, 2004), however, this is not feasible. While it is important that the views of these community leaders are taken into consideration, the first concern of the state cannot be patriarchal courtesy ahead of fulfilling socio-economic rights which are guaranteed by the Constitution. Good governance practices cannot be achieved if there are blockages in the system caused by tensions between the elected authorities and the traditional ones. The traditional leaders must therefore concede to the state as the institution through which agreed upon decisions are implemented.

The traditional leadership institution is better suited to act as a fierce and efficient interest group, campaigning for the rights of those under its traditional jurisdiction as opposed to its own self-aggrandisement. In essence, the institution is better suited to be part of civil society. So far, the institution has not been convincing in its defence that its primary concern is the people and the preservation of custom and tradition. While there are other accusations levied against traditional leadership institutions in South Africa as it concerns the maintenance of incompatible traditional practices with a rights-based framework of governance, this is not the focus here. It is however crucial to note that custom and democratic norms are not necessarily incompatible

inasmuch as the individual is respected substantively in all respects and his or her dignity is prime.

The state for its part must not engage with traditional leadership institutions with a pre-conceived notion of what the entity should be. A certain sensitivity must be accorded to this institution which itself suffered to some extent under the apartheid government. The consideration must perpetually aim to fulfil Constitution demands and promote participation and all other attributes of good governance. Without a doubt, the influence of traditional leaders is entrenched than that of elected officials in some geographical areas. In these cases especially, the state must recognise an opportunity to fulfil its mandate adequately to the people by enlisting the help of the traditional authorities, just as they would other Community Based Organisations (CBOs).

Power in South Africa primarily held by the people has been vested in a democratic government since 1994. The power wielded by traditional leaders however, threatens to eclipse that of the democratic state thereby jeopardising good governance attributes that support South Africa's democracy. The state, whose primary responsibility is to its citizens, must clearly articulate the boundaries of its authorities versus those of traditional leadership structures in law and practice to end the prevailing quagmire.

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**Legislations**

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