SOUTH AFRICA'S LEGAL FRAMEWORK ON SPATIAL PLANNING AND DEVELOPMENT: A HISTORICAL AND CONSTITUTIONAL CONTEXT OF LOCAL GOVERNMENT[1]

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Abstract

There is an inherent nexus between spatial planning and development, and realisation of socio-economic rights, especially in the context of transformation of South Africa's local government on rural areas (residential settlements on the country site). Thus, this article discusses South Africa's post-1994 legislative framework concerning spatial planning and development, with specific emphasis on the roles and functions of the Institution of Traditional Authorities (or Traditional Leaders) and elected representatives at local government. The article adopted a traditional doctrinal method, by analysing content in legal norms established through legislative framework. Significant international legal instruments such as the Universal Declaration of Human Rights of 1948 supports the view that the state ought to guarantee environments that enable comprehensive realisation of the rights to health, food, housing and social security, among others. The Constitution, 1996 incorporated these norms in national legislation to ensure that spatial planning have regard to human rights. However, it has been observed that the underdevelopment inflicted under the historical homelands/bantustans establishment remain pervasive and poses threats to the effective implementation of Spatial Planning and Land Use Management Act 16 of 2013. This is also compounded by noted uncertainties that culminates in administrative tensions between the Traditional Leader and elected representatives at local government.

Keywords: *spatial planning, social and economic rights, rural development, communal land rights, transformation.*

JEL Classification: H83, K10, K23

1. Introduction

This article discusses the legal framework regulating Traditional Authorities and elected representatives at Local Government, within the context of spatial planning and development in South Africa. This is crucial because the institution of Traditional Leadership also derives its administrative powers from the Constitution of the Republic of South Africa, 1996[4] (*hereafter, the Constitution*). It outlines on whether there is a recognized right or duty accorded to Traditional Authorities under the constitutional framework with regards to spatial planning and development. A perspective on the importance of Spatial Planning and Land Use Management Act[5] (*hereinafter referred to as SPLUMA*) and the constitutional entrenchment of spatial planning and development is expounded upon. A brief analysis of the green rights as provided for in section 24 of the Constitution is made. A further attention is given to the constitutional provisions in s211, s212 and s156 with the view towards ascertaining their essence with regards to spatial planning and development.

It is crucial to state that for decades, local governance in Africa, particularly South Africa, was historically vested in the hands of Traditional Authorities. Not only were they vested with the authority of custodianship over the land within their area of jurisdiction but were also responsible for the allotting and development in respect to the very land. It has been shown in the White Paper on Local Government, (9 March 1998) that the Institution of Traditional Authorities provided political, societal, economic, cultural and religious leadership for local communities. In times around 1910 and beyond, the Institution of Traditional Authorities was used as a means to advance indirect subjugation

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[4] Mashele Rapatsa, *Traditional Leadership and Democratic Governance: Using Leadership Theories to Calibrate Administrative Compatibility*, "Acta Universitatis. Administratio" (2015) 7(2) p. 28.
[5] Act 16 of 2013.

over the people. It has been noted that introduction of this method of rule was a mechanism to administer Africans under the colonial administration through subjugation of traditional authorities as their agents within their area of jurisdiction. This was entrenched by the enactment of the Black Administration Act,[6] which had a profound effect on the Institution of Traditional Authorities in the sense that their powers and roles became restricted. This piece of legislation changed the pre-colonial powers, roles and structures of traditional leadership and ensured that traditional authorities promote the inherited government's strategies and objectives.

In 1948, the National Party became a governing party, thereby officially bringing about a policy of 'separate development', commonly known as 'apartheid', which entrenched racial segregationist policies. A further enactment of the Bantu Authorities Act[7] made traditional leaders the administrative agents of the apartheid regime, especially in the reserve areas called '*homelands/bantustans'*, starting a process of setting up new separate political institutions for the native population. This was reinforced by the passing of the Promotion of Bantu Self-Government Act,[8] which provided for the establishment of such ten self-governing '*homelands or bantustans'*. The aftermath of these establishments was a rapid separate spatial or physical planning, and separate development outside the self-governing areas. After the post-1994 dispensation, a new constitutional framework founded a three-tier system of governance, namely; National, Provincial and Local government across nine provinces, in terms of which there shall be separation of powers, and the local authorities consists of metropolitan areas, rural areas, local and district councils. Under the new dispensation and its framework, the racially premised spatial planning and separate development system of apartheid was reformed.

The Institution of Traditional Authorities, its status and roles under the new constitutional democratic dispensation were given due recognition and protection especially in terms of section 211 of the Constitution. However, such roles of the Institution of Traditional Authorities, in terms of spatial planning and development at local government level, are not clearly spelled out. The adverse consequence of this, is that Traditional Authorities are being ignored on matters relating to land use planning and development projects, with the effect that the elected representative assumes that such authority is vested in them at local sphere of government. Therefore, this article emanates from this discernible absence of clear constitutional clarity, which presents a constitutional conundrum, which gives rise to a question on whether the Constitution recognises and protects the Institution of Traditional Authorities in real sense?

2. A perspective on the importance of SPLUMA

It is worth mentioning that the historical industrial revolution brought about the evolution of planning legislation due to massive health, welfare and housing problems.[9] In South Africa, the effects of such revolutions, colonialism and apartheid respectively are still noticeable today, in the sense that there is still a perpetuation of people working and living in places defined and influenced by the past spatial planning and land use laws. These laws were primarily based on racial inequality and unsustainable settlement patterns.

With the advent of democracy, legislative frameworks attempted to bring about a drastic transformation of spatial planning and land use. In the main, the Constitution, which became the supreme law of the republic, indicted that all legislation had to conform with it, and the rights enshrined in the Constitution had to be fulfilled and be given practical effect. Consequent to this, various laws governing land use were enacted. However, there remained endless uncertainties regarding the status of municipalities in spatial planning and land use management systems and their

[6] Act 38 of 1927.
[7] Act 68 of 1951.
[8] Act 46 of 1959.
[9] Michael Kidd. *Environmental Law*, (2011) 2nd Edition, "Cape Town: Juta & Co. Ltd." p. 211.

procedures.[10] Land use development processes under traditional leaders were poorly integrated into formal systems of spatial planning and land use management planning. Many parts of urban and rural areas had no applicable spatial planning and land use management legislation. This had the adverse effect of excluding the Institution of Traditional Authorities and or their communities of governance from the benefits of the new spatial development planning and land use management systems.

It should be noted that section 24 of the Constitution gives everyone the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures, which include a land use planning system that is protective of the environment. Further, section 25 (5) of the Constitution provides that the state should ensure the protection of property rights including measures designed to foster conditions that enable citizens to gain access to land on an equitable basis.[11] Section 26 and 27 on the other hand, provides that everyone has the right to access to adequate housing which includes an equitable spatial pattern and sustainable human settlements, while section 27(1)(b) direct the state to take reasonable legislative measures, within its available resources, to achieve the progressive realisation of the right to sufficient food and water. In order to ensure progressive realisation of an enhanced spatial planning in South Africa, a uniform, recognisable and comprehensive system of spatial planning and land use management became an immediate necessity. This need prompted the promulgation of the Spatial Planning and Land Use Management Act (SPLUMA) whose principal aim is to ensure equal access to opportunity, to maintain economic unity and access to government services by all citizens, in an open and democratic establishment.

2.1. An international law perspective on the right to spatial planning and development

Reflecting on international legal instruments is fundamental because legal norms established at the international level, and accepted by various states are considered to be a rich framework through which the states are enabled to manage their affairs in a manner that resonate the spirit and purport of such established human rights values. The significance of spatial planning is evident even in the absence of such explicit entrenchment of spatial planning in any of the international human rights instruments. However, there are some other rights upon which spatial planning can be implied or inferred upon.

The provision of Article 25 of the UN Universal Declaration of Human Rights of 1948 (UDHR) provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. The aspect of housing in this provision is equally supportive to the right to development in the sense that development is a people centered process with the primary objective of improving the quality of life. Land use is controlled for numerous reasons; to ensure that land units are of proper size and location in order to achieve proper usage for residential and other purposes. This is mainly done in the interest of promoting health, welfare and amenities offered to the people living together in urbanized society.[12] The right to access to property envisaged in the Constitutional framework is equally supported by the right to development, which is understood to be an inalienable right. This is premised on the notion that Every human being is entitled to participate in, contribute to and enjoy economic, social, cultural and political development.

Article 6 of the United Nations Declaration on Social Progress and Development of 1986 provides that 'social progress and development require participation of all members of society in productive and socially useful labour and the establishment in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of land, of forms of ownership of land and the means of production which preclude any kind of exploitation of man,

[10] Kimberly Joscelin, *The Nature, Scope and Purpose of Spatial planning in South Africa: Towards a more coherent legal framework under the Spatial Planning Land Use Management Act*, MPhil mini-dissertation, at University of Cape Town, (2015), p. 1.
[11] Section 25 (5) of the Constitution upholds that "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."
[12] Michael Kidd. *Environmental Law,* (2011) 2nd edition, "Cape Town: Juta & Co. Ltd." p. 210.

ensure equal rights to property for all and create conditions leading to genuine equality among people.[13] It can thus be concluded that international law recognizes spatial planning and the inherent right to property and development. In light of this, the state has a positive duty to ensure a progressive realisation of the right to development in accordance to the principles of sustainable development.

2.2. The Constitution, 1996 and spatial planning and development

The advent of democracy brought about the Reconstruction and Development Program of 1994, which became a policy framework to achieve a broader transformation objectives of South African society. The overall goal of this programme was to promote a fundamental transformation of the social, economic and moral foundations by redressing inequality. Spatial planning and development featured tremendously at the heart of the Reconstruction Development Program (RDP) policy framework. This is evidenced by the inclusion of the land reform and environmental protection provisions in the RDP policy framework. The RDP identified national land reform as the anchor and mainspring of rural development and envisaged that such a programme would effectively address the injustices of forced removals and the historical denial of access to land caused by apartheid.

Chapter 8 of the newly formulated National Development Plan connotes that though South Africa has made great progress from 1994, the country has not yet realised the vision set out in the RDP program, being to break down the historic land inequalities through land reform, building more compact cities, descent public transport and the development of industries and services that use local resources and or meet the local needs.[14] Section 24 of the Constitution regulates the right to development, which can be inferred to include spatial planning and land development in South Africa. There are two parts to this right (a) is a fundamental right whilst (b) is more in the nature of a directive principle requiring the state to take progressive and reasonable measures to ensure the realization of the right.[15] The provision that 'everyone has the right to an environment that is not harmful to their health and well-being' is a right that would have been at least recognised under common law. It is very imperative that the right to health encompassed in section 24 be distinguished from the right to access to health care services in section 27.[16]

According to the World Health Organisation (WHO), health is loosely defined as a state of complete physical, mental or social well-being. Heath overlaps with wellbeing, which is also included in section 24 of the Constitution. The WHO publication on Ecosystems and Human well-being provides that environmental changer and ecosystem impairment (such as biodiversity loss, desertification and climate changer) can lead to health impacts including floods, heatwaves, water shortages, landslides, and the exposure to ultraviolet radiation.[17] The notion that the state must take reasonable and other measures to ensure the progressive realisation of a right as embedded in section 24 has been well conceptualised and clarified in the constitutional case of *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paragraph [45]. Section 24(b) further provides that everyone has the right to have the environment protected for the benefit of the present and future generations through legislative and other measures prevent pollution and environmental degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. With this provision, the Constitution gives impetus to green rights.

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[13] United Nations Declaration on Social Progress and Development adopted by General Assembly Resolution 41/128 of 4 December 1986.

[14] National Planning Commission, *"*South Africa's National Development Plan 2030 - *Our Future- Make it work"*, Pretoria: Sherino Printers, (2013) at p. 233.

[15] Iain Currie & Johan De Waal. *The Bill of Rights Handbook*, 6th ed., "Cape Town: Juta & Co. Ltd" (2013) p. 518.

[16] Section 27 of the Constitution provides that (1) "Everyone has the right to have access to: (i) health care services, including reproductive health care; (ii) sufficient food and water; (iii) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment."

[17] Corvalan Carlos, Simon Hales & Anthony McMichael. *Ecosystems and Human well-being: Health Synthesis*, (A Report of the Millennium Ecosystem Assessment). Geneva, Switzerland: WHO Press. 2005, p. 26.

3. A green right clause in regard to Spatial Planning and Development

A comprehensive reflection of section of the Constitution 24 reads as follows:

(1) Everyone has the right:

(a) "to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

The comprehensive context of section 24, in particular section 24(a), provides for a right to an environment that is not harmful to people's health or well-being. This wording suggests that section 24(a) can be construed as a traditional, positively formulated fundamental right to which every person is entitled to.[18] Section 24(b) however, contains directive principles and therefore resembles the character of a socio-economic right that imposes duties on the state to protect the environment for present and future generations through reasonable legislative and other measures.

(i) *Section 24 (a): "an environment not harmful to health or wellbeing"*. The phrase 'everyone has the right to an environment that is not harmful to their health and well-being' encompasses two aspects. *First,* the right to an environment that is not harmful to health and second, the right to an environment that is not harmful to wellbeing.[19] They both revolve around the meaning of an environment. This word is not loosely defined in the Constitution but the National Environmental Management Act (NEMA)[20] as 'the surroundings within which humans exist and that are made up of:

(i) The land, water and atmosphere of the earth

(ii) Micro-organisms, plant and animal life

(iii) Any part or combination of (i) and (ii) and the interrelationship among and between the two; and

(iv) The physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.'

The definition embedded in NEMA is relatively narrower as it refers to what could be the physical environment and places human beings at the center of the environment itself. The health aspect of the right is not particularly novel hence the notion that under common law there is right to health could have been recognized. For example, a person seeking an interdict for nuisance on the basis that the activity has the impact to impede with the applicant's health would be able to rely on the right to health encompassed in section 24 of the Constitution at common law.

The right to health encompassed in section 24 must further be distinguished with the right to access to health care services in section 27 of the Constitution. Well-being on the other hand is more novel in nature in that it is only recent that the Court have had the occasion to consider the meaning of this phrase. In *HTF Developers (Pty) Ltd v. the Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T), Murphy J held that 'the term is open ended and manifestly incapable of precise definition. Nevertheless, it is critically important in that it defines for the environmental authorities that constitutional objectives of their task.[21] Murphy J further quotes Glazewski as follows: 'In the environmental context, the potential ambit of the right to well-being is exiting but potentially limitless. The words nevertheless encompass the essence of environmental concern, namely the sense of environmental integrity; a sense that we ought to utilize the environment in morally responsible manner. if we abuse the environment we feel a sense of revulsion akin to the position where a

[18] Louis Kotze, *The Constitutional Court's contribution to Sustainable Development in South Africa,* "Potchefstroom Electronic Law Journal" (2003) 6(2) p. 86.

[19] Michael Kidd. *Environmental Law,* (2011) 2nd Edition, "Cape Town: Juta & Co. Ltd." p. 22.

[20] Act 62 of 2008.

[21] Michael Kidd, *op. cit.*, 2011, p. 22.

beautiful and unique landscape is destroyed, or an animal is cruelly treated.[22] The concept of well-being is further considered in the case of *Hichange Investments (Pty) Ltd v. Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 (2) SA 393 (E). In this case, the exposure to "stench" was regarded as being averse to one's health and well-being. It is further submitted that well-being includes notion of concern for the aesthetic and spiritual dimensions of the natural environment, including the idea of 'sense of space.

(ii) *Section 24 (b): "to have the environment protected through legislative and other measures"*. Paragraph (b) is more in the nature of a directive principle, having the character of a so called second generation right imposing a duty on the state to secure the environmental rights through reasonable and other legislative measures.[23] These measures must be aimed at objectives enshrined in paragraph (b)(i) to (iii). In *Government of the RSA v. Grootboom* 2001 (1) SA 46 (CC) paragraph [38]. Yacoob J. held that the state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve their intended result, and the legislative measures will invariably have to be supported by appropriate, well directed policies implemented by the Executive. These policies must be reasonable in both their conception and implementation. The formulation of a program is only the first stage in meeting the states obligation. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the states obligation. Such programmes must be balanced and flexible.

Section 24(b) of the Constitution provides for "the right to have the environment protected for the benefit of the present and future generations through legislative and other measures which:

(i) "prevent pollution and environmental degradation

(ii) promote conservation and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

The third sub-section provides for the concept of sustainable development. The Constitutional Court had the occasion to consider the provisions promoting sustainable development in the case of *Fuel Retailers Association of Southern Africa .v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC). In this case, the Court referred to the explicit recognition of the right to realise the obligation to promote justifiable economic and social development and held as follows; 'the Constitution contemplates the integration of environmental protection and socio economic development. The Constitution further envisages that environmental considerations will be balanced with socio economic considerations through the idea of sustainable development. Later in the judgement, the Court observed that the role of Courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.

The overall significance of the constitutional environmental right was well expressed in the case of *Director: Mineral Development, Gauteng Region v. Save the Vaal Environment* 1999 (2) SA 709 (SCA) at 719 C-D, wherein it was held that the Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.[24]

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[22] Ibid, p.23.

[23] Iain Currie & Johan De Waal. *The Bill of Rights Handbook*, 6th Ed., "Cape Town: Juta & Co. Ltd" (2013) p. 522.

[24] Michael Kidd, *op. cit.*, 2011, p. 26.

4. The Constitution on traditional authorities and local government in regard to Spatial Planning and Development

4.1. The powers, status and function of traditional authorities

Section 211 of the Constitution provides that:

„(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

Section 212 of the Constitution further provides that: „national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities:

(1) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law:

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders".

The traditional authority clause enshrined in the Constitution is somewhat ambiguous in the sense that the roles, status and functions of traditional authorities in accordance with customary law are not outlined. This further raises a question as to what the very powers entail and what is their extend, especially regarding land use planning and advancement of human rights realisation. The traditional customary law as it is, has been modified by various statutes and has developed over the years. This was mainly occasioned and influenced by the historical challenges of disenfranchisement under the apartheid regime. To wholly depart from the apartheid past, the Constitution influenced the enactment of the Traditional Leadership and Governance Framework Act,[25] which would in the end have profound impact on conferring unto the Institution of Traditional Authorities, some clear functions in regard to local governance. These powers or duties include; the support to municipalities in the identification of community needs; facilitation of the involvement of traditional communities in the development or amendment of Integrated Development Plans of a municipality; recommendation of appropriate intervention to government towards development and service delivery in the areas of jurisdiction of the traditional leaders; participation in the development of policy and legislations at the local level; promotion of the ideals of co-operative governance and the IDP process and indigenous knowledge systems for sustainable development and disaster management.

The functions of traditional leaders are now well defined in the Communal Land Rights Act[26] (CLARA), an Act which was however found to be unconstitutional in *Tongoane and Others v. National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010). This piece of legislative framework was however silent on their role in relation to land use planning and development projects around communal land. In principle, CLARA was to provide security of tenure through transferring communal land to communities. From these reflections, it is clear that the Constitution provides for the recognition of the institution, status and functions of traditional leaders. However, it remains silent on the exact roles and powers which this institution should exercise. In terms of section 212, the Constitution does provide for the national legislature to pass legislation to provide for a role for traditional leadership. The 1998 White Paper on Local Government correctly state that where Chapter 7 of the Constitution allocates a function to a municipality, the municipality has sole jurisdiction over that matter. Consequently, giving

[25] Act 41 of 2003.
[26] Act 11 of 2004.

traditional leaders a role regarding functions already allocated to elected local government would require an amendment of the Constitution.[27] This would however be contrary to the provision of section 212 of the Constitution because it cannot be inferred anywhere that the drafters of the Constitution had such intentions of granting traditional leaders the functions allocated to the elected representatives at the local government.

4.2. The powers, status and function of elected representatives

In contrast to what has been expounded upon about the Institution of Traditional Authorities and Traditional Leaders, section 156(1)(a) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution and any other matter assigned to it by national or provincial legislation. The Constitution further recognises the municipal council as the highest legislative and executive authority within a municipality that can make decisions on the exercise of these powers within the municipality. This inherent power conferred upon elected representatives appear absolute in that they cannot be removed or amended by ordinary statutes or provincial acts but through the amendment of the Constitutional establishment itself. The secondary source of power for elected representatives is assignment in terms of section 156(1)(b), which exclusively provides that a municipality has executive authority in respect of, and or has the right to administer any other matter assigned to it by national or provincial legislation. Assignment can take the form of either general assignments or assignments to individual municipalities.[28] In the case of *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998(12) BCLR 1458 (CC), the Constitutional Court made an unequivocal statement as to the status of elected representatives in the post-1994 constitutional framework by emphasizing that local government is no longer a public body exercising delegated powers, and that its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.

In terms of management and implementation of objectives of the new constitutional establishment, the Land Use Management at the local sphere of government has been guided through legislation such as the Municipal Demarcation Act,[29] the Municipal Structures Act,[30] and the Land Use Management Bill of 2001, the Municipal Systems Act[31] as well as the Municipal Systems Amendment Act.[32] The Development Facilitation Act made land use and development control in South Africa the responsibility of the province. The profound effects of the Act were the institutional adjustments and rearrangements of the planning function to the elected representatives on the local sphere of government where there is greater community involvement. However, the enactment of the Municipal Structures Act introduced a slightly liberal approach in that it provides for representation and participation of traditional leaders within municipal Councils. Municipal Structures Act made it mandatory for inclusion of the Institution of Traditional Leaders in Municipal Councils. This accords to the White Paper on Spatial Planning and Land Use Management by the Ministry of Agriculture and Land Affairs of 2001. The Land Use Management Bill of 2001 had the effect of providing a legislative basis for the inclusion of the traditional leaders towards participating in all matters pertaining to the use as well as the management of land in rural municipalities within their area of jurisdiction. Traditional leaders were clearly identified in the Bill as part of the Municipal Land Use Committee consisting of 15 members, however, the shortcoming of the Bill was that it did not provide the exact guidelines on matters relating to land use. The profound effect of the Municipal Systems Act was that it made it peremptory that local municipalities in South Africa prepare and adopt an

[27] South African Government, "White Paper on Local Government 1998", Pretoria: Cooperative Governance and Traditional Affairs, (1998) p. 62.
[28] Jaap de Visser. "Powers of local government", "*South Africa Public Law Journal*" (2002) 17(2), p. 223.
[29] Act 27 of 1998.
[30] Act 117 of 1998.
[31] Act 32 of 2000.
[32] Act 44 of 2003.

Integrated Development Plan (IDP), with a Spatial Development Framework (SDF) as a component that will guide municipal land use management systems in the years to come.

5. Cooperation between elected representatives and the traditional leaders

5.1. The Constitution on cooperative governance

Chapter 3 of the Constitution entrenched the notion of Cooperative Governance. It provides that government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. It further provides that all spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within its parameters. Section 41 of the Constitution provides that all spheres of government and all organs of state within each sphere must; preserve the peace, the national unity and the indivisibility of the Republic; secure the well-being of the people of the Republic; provide effective, transparent, accountable and coherent government for the Republic as a whole; be loyal to the Constitution, the republic and its people; respect the Constitution status, institutions, powers and functions of government in the spheres; not assume any power or function except those conferred on them in the terms of the Constitution; exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institution integrity of government in another sphere; and co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, informing one another of and consulting one another on matters of common interest, coordinating their actions and legislation with one another, adhering to agreed procedures; and avoiding legal proceedings against one another.

The three spheres of government are distinct in their powers, interrelated in a hierarchy of supervisory powers, and interdependent to perform the task of government in a cooperative manner. It is discernible that the local government was reserved a place in both national and provincial decision-making through the system of cooperative governance. The creation of municipalities in the local sphere of government had the profound effect of creating efficiency. Section 154(1) of the Constitution provides that the national government, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Section 154(2) further provides that draft national and provincial legislation that affect the status, institutions, powers or functions of local government must be published for public comment before or is introduced in Parliament or a provincial legislature, in a manner that allows organized local government, municipalities and other interested persons an opportunity to make representation with regard to the draft legislation. The national sphere of government has been tasked with the development of a sound intergovernmental relation system that is favorable to socio-economic transformation and advancement of human rights. This should provide a range of support mechanisms with the sole intention of assisting and supporting municipalities in effecting fundamental change at grassroots level. However, transformation is vested in the capable hands of each municipality through the provisions of local government as enshrined in Constitution. This implies that each municipality should make a critical consideration on their relation and operation to local communities. They have the onus to develop their own strategies in order to meet local needs and promote progressive social and economic transformation of communities. The provision of section 41 on co-operative government is an affirmation of the integrity of the three spheres of government and their mutual interdependence and interrelatedness. The provision of section 40(2) further stipulates that all spheres of government must observe the principles of co-operative government and intergovernmental relations and conduct their activities with their pre-defined parameters.

In terms of the provisions of section 155 (7) of the Constitution, the national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred

to in section 156 (1). It is apparent that both the national and provincial government, have the exclusive legislative competency to realise and ensure effective performance of municipalities. These authority is however subject to limitation in the sense that such regulation as purported authority should not compromise and or impede with municipality's ability to govern. It appears that the rationale behind the intergovernmental relations is to harmonise the relationship between different spheres of government and organs of state within each sphere, in relation to their political, financial and institutional arrangements. The Intergovernmental relations are further regarded as one of the means through which the values of cooperative governance may be given institutional expression throughout the Republic. As a subsequent, the Department of Traditional Affairs and local Government was established, and its primary agenda is to build and strengthen the capability and accountability of provinces and municipalities. This amongst others include includes; the establishment of capacity building programmes; focusing on critical areas such as integrated development planning, local economic development (LED) and financial management; service delivery and public participation evaluating the impact of government programmes in municipal areas; improving the quality of reporting on the Local Government Strategic Agenda (LGSA) and improving the monitoring; reporting and evaluation of capacity in local government; coordinating and supporting policy development; and implementing the LGSA and monitoring and supporting service delivery.

6. Conclusion

The object of this article was to demonstrate that South Africa's post-1994 legislative framework entrenched a comprehensive set of legal norms in terms of which local government could add impetus to the Constitution's transformative imperatives, especially towards ensuring a realisation of socio-economic transformation and the wellbeing of motive forces of the historical political and economic injustices. It is asserted that there are still practical challenges besieging local government, and that these challenges mainly emanate from constant ambiguities regarding the roles and functions of the elected representatives and those of the Institution of Traditional Authorities, and Traditional Leaders in particular, when it comes to spatial planning and rural development. Spatial planning is critical towards transforming South Africa's social outlook, particularly concerning people's wellbeing, rights realisation and capabilities development. Accordingly, it is clear that international law recognises the importance of spatial planning and development across all spectra. Hence, the key rights-based international legal norms do provide guidance to the states on how to protect environments and ensure that well-planned sustainable development initiatives take into account a variety of environmental factors and human rights such as to health, housing and food security. Therefore, this means that both international law and the Constitution embraces an approach which obligates the state to ensure sustainable development. Nonetheless, owing to observed ambiguities associated with the roles and functions of the Institution of Traditional Authorities at local government, it is asserted that the legislature ought to immediately develop a clear framework within which spatial planning is to happen, especially in rural areas. This is necessary in order to eliminate practices that stifle development in rural areas, whereby a perpetuation of under-developed rural establishment is pervasive. Hence, Traditional Leaders ought to be trained on how to initiate residential sites in collaboration with the elected representatives at local government, thereby giving effect to chapter 3 of the Constitution in order to foster sustainable cooperative governance.

Bibliography

I. Books and articles

1. Corvalan Carlos, Simon Hales & Anthony McMichael. *Ecosystems and Human well-being: Health Synthesis,* (A Report of the Millennium Ecosystem Assessment). (2005). Geneva, Switzerland: WHO Press.
2. Iain Currie & Johan de Waal. *The Bill of Rights Handbook*, (2013) 6th Ed., Cape Town: Juta & Co. Ltd.
3. Jaap de Visser, J. (2002) "Powers of local government", *South Africa Public Law Journal,* Vol. 17, No. 2, pp.

223-243.
4. Kimberly Joscelin. *The Nature, Scope and Purpose of Spatial planning in South Africa: Towards a more coherent legal framework under the Spatial Planning Land Use Management Act*, MPhil mini-dissertation (2015), at University of Cape Town.
5. Louis Kotze. *The Constitutional Court's contribution to Sustainable Development in South Africa*, "Potchefstroom Electronic Law Journal" (2003) 6 (2), pp.81-95.
6. Mashele Rapatsa. *Traditional Leadership and Democratic Governance: Using Leadership Theories to Calibrate Administrative Compatibility*. "Acta Universitatis Danubius. Administratio" (2015) 7(2) pp.27-36.
7. Michael Kidd. *Environmental Law*. 2nd edition, (2011) Cape Town: Juta & Co. Ltd.
8. National Planning Commission, *"South Africa's National Development Plan 2030 - Our Future- Make it work"*, Pretoria: Sherino Printers.
9. Willemien du Plessis & Theo Scheepers. *Traditional Leaders and Development: Recognition and The Road Ahead*, "Potchefstroom Electronic Law Journal" *(1998)* 1(1), pp.93-120.

II. Legislative instruments and policies

1. Bantu Authorities Act 68 of 1951.
2. Black Administration Act 38 of 1927.
3. Constitution of the Republic of South Africa, 1996.
4. Development Facilitation Act 67 of 1995.
5. Land Use Management Bill of 2001.
6. Municipal Demarcation Act 27 of 1998.
7. Municipal Structures Act 117 of 1998.
8. Municipal Systems Act 32 of 2000.
9. Promotion of Bantu Self-Government Act 46 of 1959.
10. Reconstruction and Development Programme, 1994.
11. Spatial Planning and Land Use Management Act 16 of 2013.
12. Traditional Leadership and Governance Framework Act 41 of 2003.
13. UN Universal Declaration of Human Rights of 1948.
14. White Paper on Local Government 9 March 1998.

III. Case law

1. *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environmental and land Affairs* 2004 (5) SA 124 (W).
2. *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA).
3. *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998(12) BCLR 1458 (CC).
4. *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
5. *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC).
6. *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).