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Implications of Spatial Planning and Land Use Management Act (16 of 2013) (SPLUMA) on land allocation in areas under traditional authorities

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1. Introduction:

Berrisford (2015) suggests that inefficient apartheid spatial planning has proved difficult to address in the democratic era in South Africa. The adverse effects resulting from an apartheid spatial planning remains a reality more than 20 years after the demise of the apartheid regime. Consequently, it is evident that post-apartheid planning has failed or done little to address the imbalances of the past. Although the democratic spatial plans were tasked to drive development and transformation, it has perpetuated the apartheid planning model and in some respects even aggravated poverty and inequality situation in the country. Therefore, there is undoubtedly a dire and expeditious need for spatial and land use transformation to expedite the agenda of spatial redress in this democratic dispensation, postulates (Berrisford, 2015).

The above sentiment is supported by Turok (2014) who also said that apartheid planning and development was synonymous with segregation, seclusion and isolation. As a result, since the first democratic elections in South Africa in 1994, the country has been grappling at various levels from rhetoric to practice, through legislation, policies and programmes with the urban form created by apartheid. It has been widely acknowledged that the apartheid spatial planning laws and policies are no longer desired and that major redress is needed to make South Africa more inclusive, connected and efficient. Thus, spatial transformation is viewed as the panacea for addressing socio-economic and spatial disparities caused by the apartheid planning legislation, asserts (Turok, 2014:74).

However, if government needs to realize spatial transformation and development in South Africa, it surely cannot do it by itself. It will undoubtedly require the alliance

of intuitions such as traditional authorities. Keulder (1998) maintains that the institution of traditional leadership represents the pre-colonial prevailing indigenous form of local government throughout Southern Africa, and originally provided societal, political, economic, cultural and religious functions for local communities. Traditional leaders (TL) still remain – despite their manipulations use and utilization during the colonial and apartheid period- influential social and political actors in contemporary South Africa, claims (Keulder, 1998).

1.2. SPLUMA and Traditional Authority

The Spatial Planning and Land Use Management Act (SPLUMA, 16 of 2013) is the new and only national planning law in South Africa under the current dispensation. Many of its provisions are new in South African Planning Law. Although it was implemented by the 1st July 2015, many of its regulations fundamental in operationalization of many parts of this Act were delayed to be published and such undeniably had some negative impact as some municipalities as far as implementation of the Act is concerned. As such, Berrisford (2015) attested that there are numerous critical concerns as to what sort of impacts that the new law might have when it is finally implemented. Although this research cannot allay all concerns and possible impacts, it will, however endeavor to guide researchers, legal, planning professionals, leadership and communities to identify challenges and workable solutions emanating from the implications of SPLUMA, especially in areas under traditional authority. At face value, SPLUMA aims to introduce positive reforms to spatial planning and land management, however, commitment by all relevant stakeholders to the implementation of this Act is required before the fruits could be seen, argues (Berrisford, 2015). On the contrary, there are areas in which some difficulties might be expected as SPLUMA is being implemented and these will be discussed later in the report. However, the significant issue is to identify and discuss how SPLUMA will affect traditional leadership especially in areas under traditional authority.

Inevitably, SPLUMA being a new law, there is likely to be some areas of uncertainty that are likely to be resolved by the courts. Some of the anticipated uncertainties could be considering the role and legitimacy of traditional authorities as well as issues of land use planning as these are both contentious and critical to the realization of SPLUMA objectives. In focusing on SPLUMA, the research will examine the significance of traditional leadership in rural areas, especially its roles and responsibilities. The paper will seek to determine the functions of traditional authority on issues of decision-making when it comes to the fundamentals of planning and development. It will be gross ignorance or denial to dispute that the success or failure of this new planning legislation will have serious implications for traditional leaders and the areas in which they rule or control, thus the significance of this study on the subject matter (Keulder, 1998).

Turok (2014) concedes in a country such as South Africa with its history of fragmented and segregatory planning laws, it was imperative that government sought a transformative planning law. Such planning law should embrace transformative objectives aimed at meeting the need for inclusivity, mobility and access, economic development that drives local and national growth prospects. Therefore, SPLUMA was established as a spatial transformative planning law in South Africa. This law, crafted to drive critical issues of transforming space in a manner that is socially, economically and environmentally sustainable. However, it is argued that the envisaged spatial transformation and sustainable development will only be realized through effective intergovernmental collaboration and the level to which all spheres contribute to the strategic spatial planning and transformation of an area. Thus such consorted effort and deliberate commitment to collaborative governance will ensure progress through redress of spatial and socio-economic inequalities that were the legacy of the colonial and apartheid governments, postulates (Turok, 2014).

The following are motivating factors for SPLUMA:

- To address racially based pre-1994 planning legislation and deal with new political realities
- To repeal multiple laws and systems created by old order legislation and nationally unfair law for the country
- Address the unsustainable development patterns fuelled by inefficient, unsustainable and incoherent planning system
- The 1999 planning green paper and 2001 planning white paper made a case for replacing the 1995 Development Facilitation Act (DFA) (interim legislation)
- The process gained traction after the 2010 DFA ruling that provided clarity on the meaning of municipal planning and the roles of each sphere of government on land development.

The following are the objectives of SPLUMA?

Although the main object of SPLUMA is to ensure a singular, integrated and effective national spatial planning law for spatial planning, land use and land development management in South Africa, the overall objectives are as follows:

1. Provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic;
2. Ensure that the system of spatial planning and land use management promotes social and economic inclusion;
3. Provide for development principles, norms and standards; to guide land management in the country
4. Provide for the sustainable and efficient use of land;
5. Provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government; and

6. Redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems

1.3. Research Justification

This discourse intends to contribute to the planning research especially planning law, firstly by exploring the history of planning legislation in South Africa in order to enhance understanding of where we were and how or why we are here today. Given that planning in South Africa was fragmented and supported the segregated pre-democratic South Africa, SPLUMA is deemed as a panacea for all planning shortfalls in the country. Therefore, the research seeks to explore the effect of this new planning law (i.e. SPLUMA) and the focus will be on how its implementation will impact traditional leaders and areas under their jurisdiction when looking at issues of land allocation. Furthermore, findings of this study will assist municipalities as well as traditional leaders in understanding the need to work together so as to bring positive changes and address challenges of access to land and address rural poverty. This will be a springboard for local sphere of government as they deal with future challenges emanating from rural communities experiencing blockages from accessing land for both residential and economic purposes (Berrisford, 2015).

1.4. Purpose of the study

The main purpose of the study is to investigate the significance of the SPLUMA and its possible implications on land allocation in areas under traditional authority. This study will, in essence, explore how this new planning legislation (i.e. SPLUMA) will affect the roles and functions of traditional leaders in allocation of land in areas under their jurisdiction. Such will be done by scrutinizing the laws governing land in former homelands, particularly under traditional leadership by determining who is responsible for land allocation. Hopefully, the significance of this policy review is that its recommendations could serve as the basis for future policy making in the field of spatial planning and development.

1.5. Key Objectives of the study

- Exploring the extent to which SPLUMA can serve as a tool for spatial transformation in areas under traditional authority
- Deepening understanding on SPLUMA for rural governance and how it will impact areas under traditional authority;
- Encouraging both traditional leaders and government to effectively engage with the ongoing process of developing and implementing planning law in line with the approaches that have driven the evolution of SPLUMA;
- Finding the out what roles and powers traditional leaders have in spatial development; and
- Identifying the factors that could be a hindrance towards the advancement of traditional leaders into being role-players in SPLUMA implementation and development.

1.6. Research Questions

The central research question which this study seeks to answer is “what are the implications of the Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA) on land allocation in areas under Traditional Authority?”

The following outlined questions below will be central in realizing the research set objectives:

- What necessitated the establishment of the SPLUMA?
- How is it different from other Spatial and Land Use Management legislation?
- What are anticipated challenges with regard to the implementation SPLUMA vis-ả-vis traditional land issues?

- How would the state through the implementation of SPLUMA ensure land allocation in areas under traditional authority?
- Whose role and responsibility to allocate land in areas under traditional authority?
- How is land managed in traditional rural areas?

1.7. Research Methodology and Approach

a). Background:

This research report has applied a desktop review of literature as a research method. This preferred method was suitable as it permitted the researcher to orient himself with major issues of land allocations and management in South Africa and analysis of the Spatial Planning and Land Use Management legislation. The desktop review was appropriate method as it ensured facilitation of the production of quantitative report which synthesized the results of the study. This method is an intensive literature search, review and synthesis of all relevant documents concerning land allocation and management in South Africa. The findings from the desk review is synthesized into a report, organized using headings to ensure that the material covered in the report presents a fair and accurate description of the original materials while coherent.

Neuman (1997) postulates that in qualitative research, interpretative data is yielded which the researcher uses to support or dispel hunches and hypothesis emanating from the research topic. Documentary analysis methods have been reliable as its substantive contents and theoretical applications could be validated. As a result, the preferred method has helped in exploration of the land legislation (SPLUMA) regarding its relevance to the issues of land allocation in areas under traditional authority.

Most importantly, the policy-specific assessment of SPLUMA intends to outline some practical policy implications, and to identify measures which could support the potential for inter-collaboration on critical issues of spatial planning in areas under traditional leadership. While the literature focuses on how the new spatial legislation would address issues of land management in areas under traditional authority, it failed to analyze the interactions and implications between the institutions of government and traditional authority. Therefore, the method of document analysis through desktop literature review became significant approach that sought to uncover what SPLUMA is about and its implications thereof in areas under traditional authority.

b). Data gathering technique:

The only technique used to gather data for this study was through policy and literature that was reviewed to gather secondary data as discussed in chapter 2. This secondary data was sourced from the spatial planning legislation (i.e. SPLUMA, 16 of 2013), 'academic articles, dissertations, books, policy reports and presented papers' closely related to the subject matter as well as the research topic Neuman (1997:95).

According to Newman (1997) using this data collection technique, unless necessary, the researcher need not collect new data as all the required information for an analysis is readily available. The SPLUMA legislation and literature review on land management and traditional authority yielded quantitative data for this study. Although the use of such source of information is economical and effective as the researcher does not have to be concerned with obtaining consent and cooperation from participants, there are challenges with this technique. Firstly, the use of existing data may be exposed to source error. Secondly, the fact that SPLUMA is government legislation, this data may contain institutional biases, facts may be

distorted or omitted, argue (Brink, 1996). Lastly, the fact that there are no interviews conducted for this study, was advantageous as there was no necessity for drawing up mitigation measures (ibid).

c). Data analysis and interpretation:

The secondary data findings from literature/policy review will be compared to the primary hypothesis and then conclusions and recommendations will be drawn. Two cases studies of Botswana and Ghana who for decades have implemented legislative frameworks and procedures to revolutionarize tribal land administration by integrating modern government institution and customary law would be analyzed and comparisons be drawn with the South African context. SPLUMA will be analyzed to determine whether or not it promotes land access to the rural poor and further determine how the proposed tenure system acknowledges the role and responsibilities of traditional authority in areas under their jurisdiction.

d). Ethical considerations:

According to Neuman (1997) ethical consideration is of paramount importance when one is conducting a research study, especially one involving vulnerable research subjects. This is mainly crucial to protect the health, welfare and rights of the subjects. Fortunately, given the nature of this study and since it does not directly involve human subjects but policy review instead, it has no ethical implications to be considered. However, one of the fundamental ethical responsibilities that the researcher has upheld is associated with integrity and honesty. The researcher has ensured that he is competent, accurate and above all, honest in whatever the process and/or outcome of study might be (ibid)

1.8. Structure of the report

The structure of the report could be summarized as follows:

Chapter One: Introduction

This chapter has covered introduction on issues of spatial legislation and traditional land as per the SPLUMA and Traditional Authority (TA). It outlined the direction of the discourse and draws a number of conceptual relationships intended to not only define the scope of this research but further shed light onto the entire envisaged discussion regarding the subject matter. The chapter also presents research questions to be addressed in attempting to identify and resolve challenges emanating from the implementation of SPLUMA in area under traditional authority. It further looked into issues of research methodology employed to test the hypothesis. Moreover, ethical issues and limitations of the study are covered in this chapter.

Chapter Two: Literature Review

The chapter's main focus has been to review literature on key spatial and land legislation in South Africa beginning as far as pre-colonialism to the current and newly adopted spatial planning legislation (SPLUMA). The literature review seeks to identify the significance and implications of spatial and land legislation, in particular under areas of traditional authority. This chapter further offers a historical overview of how various South African governments over time dealt with traditional land and spatial planning.

Chapter Three: Theoretical and conceptual framework

This chapter has focused on key fundamental themes and theories aimed at shedding some light on issues of spatial planning and land use management focusing on land allocation systems in areas under traditional authority.

Chapter Four: Data findings

This chapter was based on the information from previous chapters. SPLUMA is going to dissected through the lens of traditional leaders to determine its implications on land allocation. Pertinent issues of significance of SPLUMA in addressing spatial and socio-economic imbalances created by the apartheid regime will be discussed. The chapter will be used to evaluate the effect of SPLUMA on issues of traditional leadership, land reform and cooperative governance.

Chapter Five: Analysis, Conclusions and Future Considerations

This last chapter analyzed the key points as drawn from the research question, literature review and conclusion will be drawn on what needs to be done in order to effectively address tensions between elected local government and traditional leadership in dealing with customary land tenure system as far as land allocation is concerned.

CHAPTER 2: LITERATURE REVIEW

2.1 Significance of Literature Review

According to Neuman (1997), literature review is very fundamental process in conducting research study. The authors in their publication of the *A-Z of Social Research,* defines a literature review as "a systematic search of published work to find out what is already known about the intended research topic" *(*Robinson & Reed, 1998: 58).The significance of a literature review in this study has many purposes including establishing the need for the research; broadening the horizons of the researcher; and most importantly, preventing the researcher from conducting research that already exists. It should further be noted that the purpose of a literature review is not only to identify and analyze all information written about a topic, but also to gain insight and understanding into the problem at hand in order to recommend practical solutions and set tone for future research, claims (Neuman, 1997).

Neuman (1997) further postulates that a literature review allows the researcher to find out what has been done in terms of the problem being investigated – in order to circumvent undesired duplication. Further specific reasons advocated by Neuman (1997) include the following:

- To sharpen and deepen the theoretical framework of the research topic;
- To familiarize the researcher with the latest developments in the area of research;
- To discover connections, contradictions or other relations between different research results by comparing various investigations; and
- To identify variables that must be considered in the research.

The literature review for this study was carried out to provide information relating to the general background and context of the study. Different bodies of literature will be reviewed in order to appreciate the history of racial separation in South

Africa, to assess the levels of segregation and urban fragmentation at the advent of democracy, the transformation which has since occurred, and government's efforts for greater spatial integration. Transformation of the South African planning system will be studied in policy papers and legislation, as well as in analysis prepared by planning scholars and political scientists.

Therefore, publications reviewed included traditional leadership and spatial planning legislation as central subject matter for the study. Such was critical as the main focus of this study was to scrutinize SPLUMA and its implications in areas under traditional authority in South Africa. Although literature was not abundant for the subject matter as it involves analyzing the new planning law in South Africa (i.e. SPLUMA), overall planning legislation and traditional leadership publications were very useful.

2.2. SPATIAL PLANNING –THE INTERNATIONAL CONTEXT

In gaining more insight into South African Spatial planning legislation and SPLUMA in particular, it has become prudent to review the historical context of the term 'spatial planning. In his commentary, Taylor (2009) argued that the term of 'spatial planning' has gained an increasing momentum over the past 2 decade, particularly in the European Union (EU). However, during the earlier years, spatial planning was referred by many terms such as town and country, city and regional', and/or land use planning. In the light of so many terms, it became sensible to create one term that will encompass the essence of planning hence 'spatial planning' gained currency among academia as a discourse, argues (Taylor, 2009). This new term was adopted many members of the EU in their legislative acts. For example, the spatial planning concept was adopted in Netherlands during the years 2000 as they enacted their new Spatial Planning Act. This new Act was aimed to supersede what was formerly termed 'Physical planning' in Dutch planning legislation (Williams, 1996).

On the other hand, when the United Kingdom (UK) formed its professional planning body, i.e. the Royal Town Planning Institute (RTPI) in 1913, one could deduce that the kind of planning this body was to be responsible for town planning. Britain for instance, during the 1932, used a term of town and country planning which was indicative of its desired to have a planned improvement of both the countryside and towns, argues (Williams, 1996). The term spatial planning has become significant at a time where different nation states, including South Africa with its 'urban and rural development', 'urban and town planning' advocated for uniformity of the planning legislation. Thus, regardless of the preferred term and limited justification, it would seem that planning policy makers globally agreed that planning is essentially concerned with planning the overall physical environment with emphasis of land use and land development management, postulate (Shaw and Lord, 2007).

2.3 CASE STUDY: BOTSWANA and GHANA: LAND ALLOCATION AND ADMINISTRATION

Introduction:

Like South Africa, for decades, Botswana has been a peaceful, prosperous and political stable country striving for universal access to resources and opportunities. However, such commitment was blemished by the growing number of poverty and income inequality concentrated in rural parts of the country. These conditions were exacerbated by the harsh climate conditions, lack of arable land and fragile ecosystem. However, the undeniable challenge, argues (Hitchcock, 2002) was due to the fact that Botswana's legal framework governing spatial planning favoured privatization of land and fencing off of grazing land. Such legal structure excluded the rural poor while supporting the rich and wealthier, resulting in poor households loosing access to land, which their entire livelihood depended on. However, through Botswana's regular review of land policies and legislation and government practice,

the country was able to turn a corner by applying progressive land legislation in Sub-Saharan Africa (World Bank, 2003).

2.3.1. THE CASE OF BOTSWANA: LAND ADMINISTRATION

i) Overview:

Adams, Martin and Robin Palmer (2007) postulate that the Government of Botswana faced serious challenges of poverty and income inequalities particularly in rural parts of the country. The government then recognised that it required to prioritise the improvement of Land Administration in its effort to realize economic empowerment and emancipation of the rural poor. It should be noted that since the period of colonialism, the Botswana had three-tier land tenure systems namely state land, freehold land and tribal land, the latter covering the most of the country. Intrusive to ignore, Adams (et al. 2007) argue that pre-1970s, tribal land management and administration in Botswana was vested with the Chiefs. The Chiefs as custodians of tribal land were responsible for the allocation of the land to the members of their respective tribes. Interesting to note that during those times, land registration and record keeping were non-existent because they were deemed unnecessary as the Chiefs and tribe members knew everybody, (ibid). Furthermore, at that time, the population was few and land uses were less dynamic, and land perceived to be 'abundant'. Such situation resulted in a state rendering land management function less important. As a results, the Chiefs as custodians of tribal land were solely responsible to the allocation of land in areas under their jurisdiction. Land was allocated to adult males, while widows were only considered with the consent of her in-laws. During this period, land could be transferred with the lineage with the approval of the Chief or headman of the tribe (Malatsi and Finnström, 2010).

ii) Botswana's Tribal Land Act, 1968

According to Adams (et al, 2003) Botswana's Tribal Land Act, (ch. 32: 02) passed in 1968, could be perceived as one of the revolutionary land legislation in the continent. The Act is purported to have modernized the customary systems of land management in Botswana and herald being one of the trailblazers of land law in the African continent for successfully concerting the customarily-held claims into formal and secure titles administered by the state, claims (Frimpong, 1993). All though the land Act was meant to revolutionize and modernize the land administrative systems, the state further ensured that it does not overtly change the complex rules and the systems by which customary land tenure was administered. Instead, it could be applauded that the state instead overhauled the existing power structure by replacing the chiefs/headmen with elected land boards (Anderson, 2005)

Adams (et al. 2007) argue that the Land Boards were set up with a central intention of forging a balance between custom and modernity, creating a new independent state that was uniquely African. This was astounding ingenious creation as the Tribal Land Act was crafted as such to create an enabling mechanism that would bring together the customary authorities, state officials and elected representatives to jointly manage and oversee issues of land in Botswana. Although such system is seems well-designed and progressive in terms of decentralization of power, its success could be found intricately between the commitment of state and customary authorities working together (ibid).

Interestingly was that the Tribal Land Act also provided the following provisions as statutory recognition of customary land rights:

☐ Customary, elected, and state-appointed leaders administer and manage land together under both customary and statutory tenure, thereby merging the two systems into one;

☐ Mechanisms to transform customary land claims into legal grants of customary land rights, as valid and enforceable as formally-granted titles;
☐ Holders of customary land rights have tenure security over their individually-held land, as well as the ability to transfer, sell, bequeath, or assign their land rights;
☐ All allocation of land is free of charge, as under custom.

According to Anderson (2005) Botswana's longevity of its Tribal Land Act has over the years provided the multiple insights into how a complex integrated customary and state land administration could evolve and be modified over time. The land system in this country never remained stagnant, it could be observed that over the years, the land boards were professionalized which resulted in customary leaders being replaced by officials appointed and accountable to the Minister of Lands. However, it should also be noted that other aspects of the land board remained relatively intact since the land boards' inception. The land boards continued to have a vital role for the ward Chiefs and headmen for their on -the-ground knowledge of local terrain, existing customary claims and community dynamics. So while the role of chiefs have been phased out, headmen have remained an integral part of Botswana's land management system which included land allocation and facilitation of the land registration with land boards and Land Ministry respectively, argue (Malatsi and Finnström, 2010)

However, Bornegrim and Collin (2010) found glaring gaps in the law – particularly regarding the land rights of women and minority ethnic groups – have not yet been filled in, despite recent amendments. Meanwhile, rural people are more hemmed in and impoverished than they were in the 1960's; in 1975, Botswana passed the Tribal Land Grazing Policy, which gave the land boards the authority to cede large tracts of what had formerly been communal grazing lands, held under customary tenure by the chiefs. In addition, in most areas Land Boards had forsaken or negated on responsibility that traditional leaders once had for consulting with their communities and engaging in the overall planning of land-use and management of natural resources. According to Frimpong (1993) government and quasi-

governmental institutions that were not accountable to local communities were exercising the authority granted to the district Land Boards. Another downside of the Botswana's land law is that decades of central government mandate about how the boards are to operate and what policies they must enact - and legislators' failure to amend the act to address its complete lack of protections for vulnerable groups - have arguably undermined the promise and intent of the land board model. In this way, Botswana's land board system sheds a clear light on the complex interplay of law and administration, of legislation and its on-going implementation by government actors which should be a lesson to other African countries who would like to pursue their desire to revolutionarize and modernize customary land tenure, recommend (Bornegrim and Collin, 2010).

iii) Tribal Land Tenure

Adams, Martin Kalabamu, and White (2003) advance that in years preceding 1968, the customary land in Botswana was administered by the Chiefs, assisted by ward heads. However, this systems seems to have changed during 1968 with the inception of the Tribal Land Act, 1968. The aforementioned Act transferred the power of land administration to Land Boards. Although it is not clear who constituted the Land Board, its functions and responsibilities was issuing of tribal land through customary and common law for both purposes of residential and business. In the advent of the Land Boards during the 1970s, land transaction and record keeping for land ownership began. The Land Boards experienced serious challenges as they struggle to locate previously issued land use rights as most of those rights were allocated by the Chiefs and no registrations or records were kept. However, the Land Boards issued certificates which only indicated general location and size of the plot. Tracing of the allocated plots remained a challenge due to subsequent transfers that might have occurred after the issuing of the certificate, argue (Adams, et al. 2003).

The customary grant of land for residential was a perpetual use rights where land allocated to a particular household could be inherited and transferred within family and relatives. The majority of the populace reside in and own land parcels in rural areas under customary land grant which ensure easy, fair and equal access to communal land. However, the downside of customary land grant is that since the land is never registered with de Deeds Office, financial institutions do not accept customary land grant as collateral. Thus, one has to register a Title Deed in order to access credit in towns and peri-urban settlements. This clearly has been an obstruction to socio-economic opportunities for the rural poor as they aspire to transcend harsh rural conditions, (ibid).

Hitchcock (2002) claims that critics have further accused the Land Boards of evicting isolated groups such as the Basarwa from the Central Kalahari Games Reserve and allocating rangeland used by poor stockholders to elite ranchers and foreign interests. Botswana has a deeds registration system, and pursuant to the provisions of the Deeds Registry Act, 1996, (as amended) deeds evidencing all transactions in private and state land must be recorded at the Registry Office, which is housed within the Attorney General's Chambers.

The Registry's files generally provide reliable information about property, rights holders, and encumbrances. Compliance with the deeds registration system is high; the only transfers outside the system are customary grants of tribal land and allocations of state land for residential purposes, and in townships and municipalities to poor households under the Self-Help Housing (ibid).

iv) Land Dispute Resolutions: Land Tribunals

According to Adams (et al. 2003) it is highly inconceivable that there could a land system that is so flawless without disputes and conflicts. Although the Botswana State had a strong legislative framework and solid processes for land tenure, disputes and conflict arouse from the implementation of the Tribal Land Act. Many

of the rural populace were unhappy with the fact that land allocation was removed from the chiefs, who were the custodians of their tribal lands. Equality there was a discontent on issues of lack of consultation on matters of land use-planning, grazing land being expropriated and allocated or sold to the private business for commercial usage which resulted in lack of access to a productive land (Ibid).

In response to the ever-increasingly and frequent land disputes and conflicts, for tribal land, Land Boards serve as an initial forum to hear disputes and complaints. The Tribal Land (Establishment of Land Tribunals) Order of 1995 provided for the establishment of tribunals to hear appeals of decisions made by the Land Board. In testing, the tribunal is a three-member team chaired by a president who is also a lawyer (Fringpong, 1993). The tribunal proceedings are open to the public, and parties may appear with or without separate representation. Parties can appeal the decision of the Land Tribunal to the High Court.

The Land Tribunals appear to operate as an effective check and balance on the Land Boards in at least some instances. For instance, in one of the well-publicized cases, two Kgalagadi community trusts have successfully used the Land Tribunals to challenge the decisions of Land Boards to lease communal grazing land to foreign-owned companies without consulting with the District Council or advertising the land leases (Adams and Palmer 2007).

Furthermore, it is reported that in its report before the Seventh Africa Governance Forum, Botswana expressed the desire to improve its capabilities by enhancing the role of traditional leadership and actively engaging traditional leaders in governance and development processes to ease the tension while accelerating land allocation and administration in areas under traditional authority (ibid).

2.3.2. CASE OF GHANA: LAND ALLOCATION AND ADMINISTRATION

i) Historical Overview:

Pre – Colonial Era

In the pre-colonial era, natural resources such as land were held by communities under local rules and practices commonly called customary law which was pervasive throughout the then Gold Coast. However, it should be noted that the customary tenure diverse from place to place and community to community due to having various tribes and differing customs and practices as such (Agbosu et al, ISSER 2007: 30).

Three kinds of customary law rights in land were recognized, namely, the allodial title, held by the customary law community; a secondary law right consisting of "customary law freehold" or 'usufruct", which can be held by an individual or group of people who are part of the community holding the allodial title; and various types of tenancies (Bentsi Enchill, 1964; Woodman, 1996).

According to Woodman (1996) he postulates that at customary law, the absolute title to land was vested in the traditional authorities symbolized by the Chiefs, stools, skins, families and earth priests. The allodial title was never vested in individuals. Individual subjects of the stools and members of the family were said to have beneficial interest in these lands. Under customary law, the subject's right was and continues to be that of beneficial use, a right to benefit from community resources, the land. During this period, the indigenous people enjoyed access and benefits from the land. Furthermore, there were minimal if any land-related conflicts due to that communities or tribes had vast lands for their subsistence farming and good traditional leadership, argue (Kasanga, and Kotey, (2001).

Colonial Era

Bensti-Enchill (1964) claims that contrary to the pre-colonial era, land tenure during colonialism was a nightmare especially for the indigenous people. The land tenure system of the Gold Coast begun to change with the advent of colonization during the early part of 20th Century. Contact with the colonizing European countries tended to interfere with the customary land tenure of the Gold Coast. In colonial times, through legislative and judicial processes, the colonial state established a system of land tenure which retained some pre-colonial land interests while creating new interests based on English land law. One of the intrusive and significant change was the establishment of the role of the state in land administration and adjudication of disputes, assert (Agbosu, et al, ISSER 2007: 31). The colonial administration sought to exert state control and management over lands in the country in order to advance their economic aspirations, whilst equally exploiting the indigenous people. Enactments were passed providing sweeping state control on natural resources (the land) and further enhanced powers of expropriation and the assumption of the managerial and powers of customary land owners without the consultation of the latter (Bensti-Enchill, 1964).

Agbosu (1981-82) highlights that these interferences that occurred in Ghana during this period were fueled by the European perception that the traditional schemes of interest in land, falling short of absolute individual titles, were incapable of supporting the kind of economic development which was taking place in the country at the beginning of the 20th Century (Agbosu, 1981-82). Although erroneous, it was also understood that rights in land under customary law were indefinite and thus resulted in insecurity of title. Furthermore, it was argued that the customary tenure system was inconvenient and could prevent any part owner from effective exploitation of the land (Agbosu, 1981-82:48).

Kasanga (2002) postulates that colonialists armed with some of the preceding erroneous opinions, their powers sought to introduce new dimensions to the form of land ownership, title and land management, as well as to the rights and

responsibilities relating to land. It is instructive to note that during this period, the colonial government pursued two distinct land policy regimes which created a sharp contrast in the land tenure system and land administration between southern and northern Ghana. In the south, the policy was largely *laisez faire* while in the northern territories, the policy led to nationalization of all lands. In order to systematically own or control all land in the country, the colonialists enacted important pieces of legislations that created segregation and indirect rule. These pieces of legislations further ensured that all lands were vested in the Colonial government, rendering occupation or use of lands without government consent not only prohibited but unlawful (Agbosu, et al, ISSER 2007).

Post-Independence Era

Agbosu (1981-82) asserts that the post-independence land policy continued within the framework of colonial land tenure paradigm. The state passed laws that vested large parcels of land which were under the 8 jurisdiction of customary authorities in the nation state of Ghana For example, the State Lands Act, 1962(Act 125) and the Administration of Lands Act of 1962(Act 123)(enacted under the Nkrumah regime) nationalized lands, disregarding customary land ownership. The State Lands Act, 1962(Act 125) recognizes the state's eminent domain by conferring on the state the power to compulsorily acquire land when it considers it in the public interests so to do. The Administration of Lands Act, 1962(Act 123) on the other hand, gives the state power to take over the management and control of any stool or family land. Historically, lands in Ghana have been vested in the state on behalf of particular communities for reasons which can be classified as political (e.g. Kumasi Town lands –Part 1 Lands); chieftaincy and land disputes (ibid).

Kasanga (2002) argues that it was not until 1979 that the Constitution re-vested land administration in local authorities, while the 1992 Constitution upholds the authority of chiefs and divides land into public (vested in the President in trust for the people of Ghana and managed by the Lands Commission) and customary

tenures under chiefs. In fairly recent years, several measures including land title registration regimes have been introduced to enhance the security of tenure and promote investment in agriculture, thus leading to increased growth and development. For example, the Land Registration Law, 1985 was promulgated to register various titles and interests in land. The purpose of the compulsory land title registration is first to give certainty and facilitate proof of title and secondly, render dealings in land safe, simple and cheap and to prevent frauds relating to purchases and mortgages, argues Agbosu, et al, ISSER 2007).

ii) Ghana Land Tenure System: Land acquisition and ownership:

Over the centuries land has been believed to the most valued economic asset for humankind, so it is in Ghana. An estimate of about fourteen million populace of Ghana live off and depended on forests resources for their livelihoods (Agbosu, et al, 2007). The forest provides Ghanaians with their daily food, shelter, employment and income, health and wellbeing etc. Furthermore, the aforementioned report has recoded that agriculture, forestry and mining sectors which are heavily dependent on land resource constitutes about 70% of Ghana's gross domestic product (Land Administration Programme). Therefore, it was not only prudent for Ghana government to address the question of land allocation and management, but equally necessary to ensure secure, equal and fair distribution of land in their country. This action was aimed at addressing insecure tenure which manifest in the unequal distribution of land, sub-optimal utilization of land and landlessness which is detrimental to the livelihood of the residents and economy of the country (ibid).

Agbosu (et al, 2007) postulates that land tenure system in Ghana is bit peculiar but interesting to that of many African state in that it has made effort to combine modern and customary land systems. This kind of land tenure system is usually characterized as one of legal pluralism in which customary and statutory laws co-exist in a complex myriad, and range of institutions and regulations having

authority over land rights and multiple bodies through which disputes are resolved (ibid).

Customary and statutory land tenure may be described in terms of characteristics and forms of management which distinguish them. The former is characterized by its largely unwritten nature, based on local practices and norms that are said to be flexible, negotiable and location-specific. Those laws are not complex or subject to multiple interpretation because they are often imbedded within the community (Agbosu, et al, ISSER: 30). Customary land tenure is usually managed by a traditional ruler, earth priest, council of elders, family or lineage heads. Its principles stem from rights established through first clearance of land, conquest or settlement, argue (Agbosu et al, ISSER 2007: 30). The latter, on the other hand (The State tenurial land system) is usually codified, written statutes and regulations, based on laws having their roots in the colonial power, which outlines what is acceptable and provides consequences for non-compliance. This complex codified system is normally managed by the Government administrators with support of bodies conferred with delegated authority (ibid). The central principles under the statutory tenure system is those of citizenship, nation building and respect for constitional rights. This system ensures that land rights are allocated and confirmed through the title deeds or any other forms of registration of owners to guarantee that such citizen has absolute ownership to the land allocated to them, assert (Agbosu, et al, ISSER 2007: 30).

However, it can never be ignore that despite the fundamental differences underlying the principles and systems for managing land under the customary and statutory forms, in practice this neat distinction is not obvious, argues (Agbosu, et al, ISSER 2007:30) possibly this could be cause by certain commonalities in application or perhaps overlap of both systems. This has been a major source of confusion and dissatisfaction between government administrators and traditional authorities that continuously require clarification. Nevertheless, these two systems, which form the foundation of Ghana's land tenure system, have undergone several

years and stages of interaction in order to be refined so it reaches its efficient and effective levels of application (ibid).

iii) Current Types of tenure system at Ghana:

Aaccording to Agbosu, (et al. ISSER, 2007) the following has been identified as four distinctive land tenure systems in Ghana which has been recognized by the 1992 Constitution; these are the public lands, stool lands, private freehold lands and family

1) State / Public Lands (commonly designated as Government Land)

These are lands compulsorily purchased by the state for its administrative and developmental functions are in the absolute ownership of the state. Such lands are acquired in accordance of the State Land Act 1962 (Act 125) whereby the land in question could be deemed required for the public interest and thus the ownership is automatically vested in the State. It is estimated that Public lands constitute about 20% of all of Ghana's lands (IUCN, Ghana Country Assessment Report, 2007)

2) Vested Land

This is land previously belonging to given to traditional indigenous community or village but declared under the Land Administration Act (Act 123O to be vested in the State and administered in the benefit of the community. This type of land is similar to the State Land in that its incumbent legal ownership is also the State. However, it should be noted that under vested land, ownership is shared with the State. The state possesses legal interest and serves as trustee while the indigenous community possesses the beneficial interest as a "beneficiary".

3) Stool or Skin Land

This is a land belonging to a community with stool or skin as a traditional emblem of soul of ancestors who originally owned the stool or skin and therefore the land. This land is administered through the principle of customary law. The chief who is the occupant of stool administers al the land in trust, and on behalf of his people. The chief therefore hold an allodial or absolute interest. He therefore uses the rights attached to the absolute interest to distribute land to the members of community and strangers in some cases.

4) Family Land

This type of land is owned and belongs to a particular family, where each member has a right. The absolute interest and control of this land lies with the nominated head of the family who uses his authority and obligations to distribute the land to the members of the family as well as strangers often this is done with the council of elders.

iv) Analysis of Ghana's land tenure:

From the foregoing discussions, it is obvious that the various state interferences with land tenure administration has not yielded the desired results and have tended to worsen Ghana's the land tenure regime. Far from securing tenure through statutory titling and ensuring certainty in land transactions, land tenure and administration of land in Ghana has been plagued by a myriad of problems, mismanagement and endemic corruption (Adams, 2003). Part of the problems encountered today include what has been described as a general 'indiscipline' in the land market, where land encroachment is the order of the day; multiple land sales; unapproved maps, leading to conflict and litigation between stools, skins and other groups. Compulsory acquisition by government of large tracts of land which remain under-utilized and for which compensation has been unpaid or delayed has resulted

in landlessness and intense disputes between traditional authorities and government. Land tenure has been weakened by frail land administration and outdated legislation (ibid). Tenure insecurity due to conflicting interests between and within land owning groups and slow litigation processes; and poor consultation with landowners and chiefs regarding land allocation, acquisition and management, setting in motion disputes between the state, communities and landowners are just a few of such problems bedeviling the system of access and land administration(Kasanga and Kotey, 2001).

Furthermore, land administration in Ghana has weakened the traditional and customary institutions and authorities, stifling their functions, influence, and the basis for social and economic support. According to Kasanga "local authorities have been impoverished by their loss of control over sources of local revenue. Politicians have been allowed to neutralize opponents by acquiring their lands, to prevent local revenues from being channeled into opposition parties or groups deemed likely to challenge the government. Those in government have rewarded their comrades, cronies, top civil servants and the military in order to give them a stake in their gains, and to keep them quiet in the face of gross injustice towards the majority of the population" (Kasanga, 2002:32).

v) Land allocation: Roles and Powers of Chiefs in Ghana

Kasanga and Kotey (2001) argue that ffollowing independence in 1957, the new Ghanaian government, like many others in Africa, was torn between the desire to modernize and the desire to reclaim traditions that had been shattered by colonial rule. In the revolutionary spirit of the times, this apparent dichotomy claimed crucial importance:

> ***On the one hand, they, as African governments, feel it essential to reject those parts of their legal systems which appear to be an alien imposition, and to go back to a more "African" law relying on indigenous cultural and moral values; on the other hand, the same governments are prepared ruthlessly to sweep away any of their old institutions which seem to hold up progress or national unity*** **(Kasanga and Kotey,2001).**

Fortunately, the basic customary land law in Ghana remains deeply embedded in the social and cultural systems of tribes, clans, and other traditional groups, despite the competing machinery of the modern state, reaffirm (Kasanga and Kotey, 2001). This is true in most African nations, but particularly so in Ghana, where traditional authorities command an exceptional amount of power. As one Ghanaian commentator put it: "*Land matters are inextricably linked with the roles of traditional authorities."*

As the allodial titleholders of tribal land, customary authorities at the top of that structure nominally own nearly eighty percent (80%) of the land in Ghana. The day-to-day management of land, however, is left to those individuals, families and sub-chiefs who hold customary freeholds, leases, and other lesser interests, argue (Agbosu *et al*., 2007).

Asante (1999) reaffirms the value of chiefs in Ghana he indicates that Chiefs still performs the role of land allocation to the subject. Acquiring Land under Customary Law can be done in various ways, including grant, rent, share contract, inheritance, and gift. The forms and mechanisms of transfer under customary law are of course drawn from tradition, but also reflect the contemporary social and economic needs of each individual area. Subjects of a chief can sometimes claim a tract of unused stool land free of charge simply by virtue of their membership in the stool community. It should be mentioned that traditional leaders takes different forms and shapes in different tribes and communities. Though these leaders no longer claim much formal political or military authority, the chieftaincy appears to be gaining in popularity across the country and its power remains great (ibid).

Asante (1999) further postulates that even in areas of Ghana where they do not exercise major administrative power over land, chiefs remain the most important source of information about land matters for the majority of Ghanaians. Despite their importance, however, government land policy has scarcely tapped the power that chiefs command and the information they control. Indeed, chiefs are generally

not even aware of government land policy, objectives, and programs. However, the disconnect is being bridged by the government through its oversight role via land planning and land registration programs to ensure fair, equitable and secure land tenure to the Ghanaians(ibid).

vi) Government Administration of Customary Lands

As mentioned in the preceding paragraphs, Chiefs or customary authorities owns and control over 80% of land in Ghana, the role of the state as is somewhat minimal although still crucial on issues of land allocation. Even with 20% state land, the Constitution sets up governmental machinery to oversee, and in some cases effectively take over, the management and administration of stool lands. The two government bodies with major responsibility in this area are the Lands Commission and the Office of the Administrator of Stool Lands (OASL) note (Kasanga and Kotey, 2001).

Kasanga and Kotey (2001) wrote that the Lands Commission's constitutional charge includes managing public lands, formulating land policy, advising traditional authorities on land use, and assisting in the execution of a title registration program throughout the country. The Lands Commission and its regional offices, the Regional Lands Commissions, consist of representatives from various groups including the National House of Chiefs, the Ghana Bar Association and, at the regional level, each District Assembly within the region (ibid). Kasanga and Kotey argue that tthough the Lands Commission retains important authority over stool land, particularly the power of concurrence described below, the state's power is largely wielded by the Office of the Administrator of Stool Lands (OASL). Under the Constitution, the Administrator of Stool Lands and the Regional Lands Commissions are jointly charged with consulting the chiefs and other traditional authorities to form "a policy framework for the rational and productive development and management of stool lands. The OASL is also responsible for collecting all rents and revenues generated by stool lands. Revenue thus collected is disbursed by the

OASL as follows: ten percent to the Administrator of Stool Lands for administrative expenses, twenty percent to the "traditional authority, fifty-five percent to the District Assembly in the area, and twenty-five percent "to the stool through the traditional authority for the maintenance of the stool in keeping with its status. The OASL is required to keep separate accounts for each stool's lands and to submit these accounts annually to the sector Minister (the Minister for Lands and Forestry), who must then bring them before Parliament. Perhaps the most controversial role of stool land administration—a power actually exercised by the Lands Commission, not the OASL—is that of providing consent and concurrence to the disposition of stool lands. The government must approve all stool land transactions involving monetary consideration, explain (Kasanga and Kotey, 2001). This power has been justified as preventing duplicate grants of the same piece of land and ensuring that the intended use of the granted land conforms to zoning and planning restrictions and generates enough revenue for the stools and District Assemblies (*ibid*).

In their own analysis, Agbosu (*et al*. 2007) they found that in practice, few of these goals have been met. This could be observed from duplicate grants and freeholds continuing to spread almost unabated, as chiefs have consistently and effectively resisted government attempts to define what transactions they can and cannot carry out, at times by misreporting grants and rents. For example, the chief would receive drinks, goats, or other honorary gifts that they are unable to report to the Land Commission in monitory figures (*ibid*).

The most damning problem with stool land administration, however, is not so much practical as it is principled. As Kasanga et al. point out, "[i]t is difficult to reconcile the idea of stools owning land and managing it day to day while the government and its officials control all other important decisions affecting land, including the timing of land disposal and the distribution of the income therefrom. The government thus controls both the collection of rents and the transfer of land, perhaps the two most crucial incidents of land ownership. The latter power is "negative" only, in that the government cannot grant stool land, but in any case the government's control comes very close to full ownership, which one would

understand the need to the ongoing review of the two institutions to avoid serious and catastrophic disengagement in their seemly positive partnership (*ibid*)

vii) Land Disputes Dispute Resolutions:

Kasanga and Kotey (2001) emphasized that another sphere in which traditional authorities play a particularly valuable role in land administration in Ghana is in the resolution of land disputes. Post-Independence in Ghana, there have been many disputes over land claims indigenous citizens believed that they needed recourse from the injustices of the colonial regime. Although 80% of land in Ghana is under customary law, it is inevitable that conflicts, disputes and dissatisfaction from issues of land allocation and administration would occur. Therefore, this will remain for some time a contested area in which the government desperately needs help. In colonial Ghana, the policy of recognizing customary law but not giving strength to customary authority led to insecurity, and inadvertently but severely hampered economic growth: Moreover, the specific characteristics of land litigation make it particularly amenable to customary resolution (*ibid*).

Customary Land Tribunals:

Customary dispute resolution varies as much as customary law itself, but its rules generally incorporate both respect for tradition and concern for efficiency, argue (Agbosu *et al*. 2007). In most customary tribunals, chiefs or elders conduct some sort of hearing, which is often public and involves a wide variety of interested parties, including tenants, neighbours, and secondary rights-holders (ibid). Rules of procedure in these hearings are not as well-defined or as strict as they are in most state court systems, and the focus is on finding truth and reaching reconciliation rather than enforcing penalties or assigning blame. In part, this is necessarily so, since chiefly courts in contemporary Ghana lack state-backed power to compel attendance or enforce decisions in property disputes, clarifies (*ibid*).

Nevertheless, it is a testament to the comparative advantage of customary arbitration, argue (Agbosu *et al*. 2007) that despite this restriction customary tribunals remain the dominant dispute resolution body in Ghana. One recent study reported that in the private land market, chiefs and elders were the most common adjudicators of reported land conflicts, more than twice as popular as courts or land administrators. Approximately ninety percent of respondents claimed to be happy with the final outcome of the customary tribunals. Ghanaian courts has been trailblazers in encouraging and advocating customary resolution by suggesting to litigants that their land disputes might be better resolved in customary courts. It is interesting to note that other African countries have already done this: Recognizing the important role played by traditional authorities in dispute resolution, Uganda's Land Act 1998 explicitly allows traditional authorities to serve as mediators, and even allows the state-run Land Tribunals to, at any time during a case, advice the parties that they might be better served by such mediation (ibid).

2.4. *ROOTS OF* SOUTH AFRICAN *URBAN* PLANNING LEGISLATION

According to (Muller, 1993:2) "the history of planning cannot, but be the history of circumstances within which planning has developed. It is therefore, imperative to note that town planning is and has been a product of evolution in modern society. This could be validated by works of one of the trailblazers in contemporary town planning such as Ebenezer Haward, especially his notion of garden city. The said evolution in town planning evolves from one context to another, argues (McCarthy & Smit, 1984).

Town planning in South Africa has been influence and dominated by both the United Kingdom (UK) and United States of America (USA) planning models. The reasons for such influence could emanate from the fact that formal planning was long adopted in these countries. It is alleged that planning in these countries as necessitated by the need to respond to poor living conditions. It is for that reason that reformist such as Howard worked tirelessly, within the utopian traditions to transform industrial cities into beautiful physical environments. It was thought, according to the utopians, that provision of decent living environment was a panacea for many social ills including slums and poverty, hence town planning was necessary even as early as the 1950's (McCarthy & Smit, 1984).

Contrary to United Kingdom reforms, South African town planning emerged out of growth of the economy through industrialization which served as a magnet for attracting people to urban areas. The growing influx of people in urban areas created a need for zoning and laws which was borrowed from the USA and the town planning act of 1925 in Britain, argue (McCarthy & Smit, 1984).

Consequently, as early as the 1900's when most urban areas in South Africa were small and town planning was only implemented in restricted main town. However, the discovery of gold in areas of Witwatersrand resulted in rapid and uncoordinated urban growth. The pressure associated with rapid urbanization dictated the need for town planning laws and control. The governor in the then Transvaal, through the Ordinance No. 57? was given power and authority to regulate the establishment of townships which was followed by the 1905 Township Ordinance No.19 and Township Board which created criteria for approving new developments. As a result, more effective controls were established in the Transvaal (Morris, 1981).

Potgieter (1993) maintains that before 1931, there were no real guidelines for the physical planning of towns. However, such challenge improved with the introduction

of the Transvaal Provincial Council in the Township and Town Planning ordinances. This resulted in an attempted to prepare and implement town planning schemes in South African in particularly the then Transvaal. Potgieter argues that the town planning schemes at the time were mainly restrictive, pragmatic and minimalist interventions. These schemes were seen as upholding or advancing existing patterns of growth and vested interests (Potgieter, 1993). Town planning in South Africa was used to address issues of housing deficiencies emanating from rapid urbanization.

2.4.1. Planning policies under apartheid

Harrison (2002) argues that during the apartheid regime, government has used laws and planning policies to deepen separate and unequal development and service delivery based on race. This ideology was necessitated by the perceived success of the colonial rule and the need to advance the rights of the minority whites. It is argued that many problems in South African cities emanate from the historical legacy of the apartheid regime especially the Group Areas Act, 1952. This act could be classified as a cornerstone of apartheid policy which ensured residential segregation of racial groups. At the time, white people were provided with land, property rights and effective service delivery while other racial groups especially black were treated as second class citizens. Black people were not allowed to reside in cities or urban areas but were only allowed to be in those areas for work purposes and had to return to their designated township located at the periphery of the cities (Mabin, 1991).

Consequently, the apartheid legacy is reflected in massive social and spatial inequalities which are still evident in some parts South Africa even today. Whilst the poor majority understandably wants immediate improvements to their living standards more than 20 years after the demise of apartheid and born of democracy in South Africa, in reality this will take generations to achieve, maintain (Berrisford, 2015).

2.4.2. Spatial Planning post-1994

Spatial planning post apartheid had a new role in the reconstruction of South Africa towards integration, equity and sustainable development. However, the role of planning stalled for sometime because some planning institutions, policies and frameworks were not yet transformed to realize their new function and objective, argued (Harris and Hopper, 2004). However, spatial planning has re-emerged in the integrated planning landscape of South Africa to redress the apartheid legacy. Given this, there has been an outcry that spatial planning initiatives conducted at national, provincial, and local levels have often been inadequate (Watson 2002).It has also been suggested that spatial planning in South Africa requires a stronger engagement with and understanding of the complex dynamics of social and economic spatial patterns. In response to this call, a number of significant advances have been made in the spatial planning environment in South Africa, maintains (Todes, 2008).

The South African policy and planning environment has, in more recent years, been characterized by a renewed focus on the need for aligned, collaborative, as well as spatially coordinated and targeted investment. In order to contribute toward enhanced quality of life and sustainable development, and for government to achieve the development objectives set in this regard in South Africa, various policy and planning initiatives such as the National Spatial Development Perspective (NSDP)(Republic of South Africa 2006a), numerous provincial development strategies and perspectives and municipal Integrated Development Plans, have called for and indeed started to incorporate, some of the aforementioned innovations (Watson 2002). The enactment of SPLUMA as a singular and uniform Spatial Planning and Land Use Management Act could be traced from all the initiatives and concerted effort to consolidate spatial laws so that they could become effective and efficient.

2.4.3. Implications of Spatial Planning on a National and Provincial Level

Apartheid planning has resulted in spatial inequality and underdevelopment have left a legacy of segregation and inequality in terms of access to resources and land (Lester et. al.2000). In South Africa the apartheid planning ideology created what proved to be an unsustainable and costly system which only benefited the minority white populace (Tomlinson and Addleson, 1987). The government only planned for 10% of the population being the white people and excluded to cater for the majority. However, after 1994, the post-apartheid government recognized the need to address the development challenges of the country as a whole and those of the poorest areas in particular (Lester et al. 2000). In an endeavour to respond to deep-rooted inequality since 1994, the democratic government applied a range of interventions which have been designed to create employment, address development backlogs, empower local governments and create opportunities for the historically disadvantaged (Lester et al. 2000).

Only after over a decade of democracy that a clear effort had been made to examine inequalities and backlogs in spatial terms. The key contemporary South African policy document is the 2006 National Spatial Development Perspective (NSDP), which identifies various categories of development potential in the space economy of the country and provides the basis for determining guidelines and interventions appropriate to the development needs of the people (The Presidency, 2006).The NSDP should not stand in isolation but rather be seen in the context of a range of economic and spatial development instruments and policy interventions which are hallmarks of the contemporary era and which variously seek to identify and respond to persistent spatial inequalities, although subsequently discredited (The Presidency, 2006).

Taken together, these legislative interventions underline the commitment of national government to addressing spatial inequalities in South Africa. In seeking to grapple with the deep-rooted spatial imbalances of the country, the historic legacy of the concentration of activity in the country's metropolitan areas is recognized

(Davies 2008). This could be seen in government's initiative and dedication to rural development and infrastructure investment in townships. Efficient services delivery has been primary focus of the government ensuring that South African population especially the previously marginalized, have access to land, housing, water, electricity among other basic services. SPLUMA is aimed at integrating cities, ensure sustainable development and equity in South Africa (Davies 2008).

Though there have been many spatial development intervention over the years in South Africa, it should be acknowledged that the pace and impact of such initiatives were unsatisfactory. Indeed, most of the 'spatial' interventions undertaken during the first decade of democracy functioned only on an ad hoc and often decentralized basis, with the(unintended) consequence that ultimately the most well-resourced (mainly large urban) areas benefited the most, whilst less well-off areas of South Africa experienced little or no change in their status (Harris and Hooper, 2004).

In the wake of these weak 'spatial policies', major shifts have taken place in the South African spatial landscape since political transition and the demise of formal apartheid planning. Two decades after the fall of apartheid, the South African Government have developed spatial policies and legislation which is democratically oriented to specifically address issues of spatial disparities in the country. Importantly, to mention are the National Development Plan (NDP) and Spatial Planning and Land Use Management Act, 2013.

The aforementioned are geared to vigorously redress apartheid legacy of segregation, inequality and spatial disparities. They also seek to advance sustainable and integrated socio-economic development (www. Spatial planning and land use management).More importantly, the current policies, NDP and National Spatial Planning Act provides hints of a potential future introduction of more direct interventions to address spatial inequality in South Africa (Harris and Hooper, 2004).

2.4.4. Local Government and Integrated Development Plans (IDP)

The Constitution of the Republic of South Africa has set out functions of the different spheres of governments which are national, provincial and local. Part B of schedule 4 of the constitution has emphasized that the role and function of the local government should be developmental in nature and that it is autonomous. However, in terms of the constitutional principle of co-operative governance, all the spheres are obliged to work together to develop and manage the country effectively.

As set forth in the Municipal Systems Act of 2000, which defined developmental government as a government that works with citizens and all stakeholders in local community to ensure sustainable solutions to the challenges of socio-economic and basic services aimed at improving the quality of their lives. During the democratic dispensation in South Africa, the role of developmental local government which is the closest government sphere to the people was clearly to sustain and maintain growth and development from the grass-root level. As a result, local government should be sensitive to the needs and concern of the people, argues (Kihato, 2000).

Consequently, the Integrated Development Plan (IDP) was introduced in South Africa as an instrument for local authorities to advance the objectives of transformation and development set out in Reconstruction and Development Programme (RDP). The IDP has played a fundamental role by ensuring integrated socio-economic development and effective service delivery in municipalities across the country. The IDP has also facilitated local processes of democratization, empowerment and social transformation in South Africa, argue (Harrison et al. 2000).

2.4.5. The value and significance of Planners and Spatial Planning in South Africa

It is indisputable that planning, by its very nature is apprehensive about the state of urban and rural environment. As affirmed by Rose, this profession is mostly concerned about the changing and enhancing human conditions and standard of living (Rose, 1974). During the current dispensation in South Africa which is characterized by serious need for transformation, spatial planning policy and practice has a central role of redressing apartheid legacy which resulted in fragmented and underdeveloped cities. There spatial planning aims to create habitable environment for humankind and sustainable urban development (Rose, 1974).

Moreover, planning is central in a just redistribution of resources in a bid to mitigate the legacy of injustices and inequalities of the apartheid government. This assertion is substantiated by Claassens (2014) where she emphasized that in redistribution of land and a services, planning is essentially concerned with the balance of opportunities between various sections of the population. Just like in the 20th century, where inequalities, deprivation and squalid habitant environment necessitated the birth of planning profession, in this country undergoing rapid change, spatial planning is a justifiable and indispensible with expertise to navigate and alleviate the aforementioned challenges Claassens (2014). Furthermore, within this thinking, planning should be viewed as a profession to effect change in socio-economic, political and spatial environment. Thus implying that, professional planners should aspire to be change agents, not the mindless instruments of insensitive political system and bureaucracy (Campbell and Marshall, 2002).

Healy (1992) postulates that the public must objectively recognize the need and value for the planning profession. However, the supposedly required recognition should be matched with professional skills. That is, if planning is to be recognized as an engine for change and development, expectations of the users and

beneficiaries of the planning service should be adequately matched. If not, then planning would be branded irrelevant, impractical, and importantly dispensable profession with “limited influence” in its supposed constituents. Therefore, spatial planning as a dynamic field, it needs to continuously assess and its relevance, impact and value in order to constantly reinvent itself for the realization of societal needs and expectations. Therefore, with the enactment of SPLUMA in South Africa as a singular planning legislation, it is believed that this piece of legislation will revolutionarize challenges of land planning and administration, assert Berrisford, 2015).

2.5. SPATIAL PLANNING AND LAND USE MANAGEMENT ACT (16 OF 2013) (SPLUMA)

2.5.1. SPLUMA: Historical Background

Turok (2014) argues that apartheid planning law was segregatory. SPLUMA is aimed at being an integrated and innovative national planning law which will be progressive and responsive to the developmental needs of all as set out in the Constitution of the Republic. Although this section will be examining the historical evolution of planning in South Africa, the emphasis will be on the period of 1990 to the present. Such timeline is significant as fundamental in influencing the process of rationalizing and modifying planning law in South Africa since the demise of the apartheid era (Turok (2014).

Fig. 1: Historical evolution of planning in South Africa 1990 to present

Adopted from Berrisford (2015)

Time lines	Planning Legislation
1993	Inlogov and Urban Foundation Processes thinking of new approaches to planning law , feeding into new ideas for new legislation and the new interim constitution, under the umbrella of the National Housing Forum
1994	RDP Ministry established with strong emphasis on mainstreaming 'Development Planning' in all government departments.
1995	Development Facilitation Act (DFA) enacted as first unitary planning legislation
1996	Final Constitution approved, including schedule 4 and 5 that determine functional areas of legislative competence for 'urban and rural development' and 'municipal planning'.
1997	First Development Tribunals s established under DFA, Development and Planning Commission established
1998	KZN Planning and Development Act; Northern Cape Planning and Development Act
1999	National Environmental Management Act (NEMA)
2000	Municipal Systems Act requires all municipalities to prepare Integrated Development Plans (IDPs)
2001	White Paper on Spatial Planning and Land Use Management: Wise Land Use
2001	Land Use Management Bill 1 (LUMB1)

2003	Gauteng Planning and Development Act
2006	Land Use Management Bill 2 (LUMB2)
2008	Kwazulu-Natal Planning and Development Act
2008	Land Use Management Bill 3 (LUMB3)
2010	Constitutional Court judgment on DFA determines that 'municipal planning' as a functional area of legislative competence' includes 'township establishment and rezoning', thus paving way for law reform to proceed with greater certainty
2013	Spatial Planning and Land Use Management Act (SPLUMA) approved
2015	Spatial Planning and Land Use Management Act (SPLUMA) implemented

It is evident from the above period that there were number of opportunities for change that opened at different points to ensure realization of the envisaged spatial planning transformation seriously required to move South Africa forward towards sustainable spatial planning and development, asserts (Berrisford, 2015).

2.5.2. The challenges of the 1990

According to Turok (2014) as the prospects of fundamental constitutional change came closer and closer in the early 1990s, policy-makers in and around government started changes to the country's planning laws. Firstly, the apartheid planning laws played a key role in achieving the spatial patterns of apartheid and secondly, they reflected approaches to planning in general that were outdated and old-fashioned. With the design of the new system of government, there was a need too for the design of a new system of planning that will effectively reverse the spatial imbalances created by the apartheid segregatory land planning legislation (Harrison, Todes, and Watson, 2008).

Berrisford (2015) argues that the new window of opportunity to effect fundamental change in planning laws was in a build-up to the transition to democracy, marked by the first democratic elections in 1994. In the years between 1990 and 1993 there was a considerable activity among a wide range of stakeholders interested in the urban future of the country. In terms of interest in planning law reform there were two main thrusts of efforts. The first was based in the National housing forum and supported primarily by technical experts aligned with or working for the Urban Foundation[1].The second was aligned broadly with the ANC and was based at the institute for Local Governance and Development at the University of the Western Cape (Berrisford, 2015)

Turok (2014) attested that these two interest groups then were eventually formed into a recognized structure called the Forum for effective Planning and Development. Such was to promote and advance the emergence of interim reformed planning laws as the long-term vision for urban and planning regulatory reform. One of the fundamental aspects of the proposal of this interim planning approach was the provision of an alternative for the approval of land development projects as envisaged by the then incoming democratic government (Turok, 2014). Such was aimed at realizing and operationalizing the Reconstruction and Development Programme (RDP). This proposed new law was aimed at dismantling concerns that many local councils remained and would remain for few years during the new democratically elected government in the hands of the "old guards" (Berrisford, 1998).This intervention was in response to the anticipated presumption that forces both in political and technical arms of council might resist and block any radical and transformative projects. In so doing, the new law intended to reinforce its efforts by seizing the power of decision-making from the hands of the local

[1] a business-funded think-tank that had for many years focused on alternative urban policy and practice aimed at advancing economic development.

councils (which were mainly white) and give such powers to the appointed tribunals who will have authority to override any resistance, claims (Berrisford, 1998).

Furthermore, Berrisford (1998) argued that another object of this new law was to lay a foundation that would necessitate the provision of somewhat a quick and easy system for councils to put in place new and reformed spatial plans for the future. Significantly, such proposed new planning laws would be binding on councils and all other decision-making bodies in the field of planning, including the proposed tribunals. Berrisford (1998) further indicated that a set of substantive principles were to be put forth in order to ensure that decisions taken by the tribunals are indeed aligned and consistent to the new vision of development South Africa. Lastly, it was proposed that the new law would be responsible for setting up a high level body that will research effective and alternative approach to the inherited legal framework of urban (and rural) development and planning. This body will also be an advisory apparatus for the new government on matters of law and policy reforms in the area of governance, argues (Berrisford, 2015).

Van Wyk (1999) acknowledged the immense contribution that were made by the aforementioned proposals as she highlighted that all proposal brought forth by the legislation was adopted in the DFA, (67 of 1995). The DFA was one of the first pieces of legislation passed by the newly elected government. Van Wyk (1999) further reiterated by indicating the DFA was a “significant piece of land development legislation to have enacted in recent times” which provided for:

- ✓ far-reaching set for land development
- ✓ the establishment of a Development and Planning Commission
- ✓ the establishment of one Development Tribunal for each provinces, and
- ✓ compulsory, binding Land Development Objectives (LDOs) to be set by every municipality.

The implementation of the new law began in 1997 with Development tribunals established and Land Development objectives were drawn up by many municipalities in the country. However, the victory of the DFA was short lived three years later as municipalities were required by the Municipal Systems Act (32 of 2000) to produce Integrated Development Plans (IDPs). Nevertheless, the DFA principles remained a trailblazer and a significant factor that was filtered into all planning and land development decisions taken under DFA or any other planning legislation to date (Berrisford, 2015).

2.5.3. A decade of indecisiveness (2000-2010)

Berrisford (2011) has branded this period as a period of indecisiveness as minimal progress was made regarding spatial planning law reform. Firstly, due to DFA, it is clear that the second part of the 1990s was vibrant with activities of urban planning and development in the new dispensation. This was very encouraging for law reform and there seemed to be ample windows of opportunities for change. However, Berrisford (2015) determined that although many processes were taking place in this regard, there was lack of coordination and integration as such processes were running parallel with each other. Due to this lack of cohesion, the DFA made a proposal for having a National Development and Planning Commission which was appointed in 1997 jointly by the three ministers responsible for Land Affairs, Constitutional Development and Housing (Berrisford, 1998). This commission then completed a Green paper on Development and Planning in 1999, which proposed new approach to regulation of planning and land development with emphasis being on provincially specific. After a due process by the Minister of then Land Affairs, a White Paper on “Spatial Planning and Land Use Management” was published in 2001 (Turok, 2014).

Secondly, the ministry for Constitutional development submitted to parliament a bill that was approved and published in 2000: the Municipal Systems Act. As indicated before, this law required every municipality to produce an Integrated Development

Plan (IDP). This was based on an assumption that an IDP would build on the Land Development Objectives as required in the DFA, as there was no provision in the new legislation to repeal them, argued (Berrisford and Oranje, 2012).The National Environmental Management Act (107 of 1998) was also significant as it sought to enforce regulations for carrying out environmental impact assessment (EIA). However, the NEMA regulations were only proclaimed in 2006 (Berrisford and Oranje, 2012).

Turok (2014) argues that although the new South Africa had gained significant strides in the terrain of planning, land use and environmental management during the first decade of the 21st century, the period from 2001-2010 were characterized by the sense of paralysis and indecisiveness. This was as a result of many factors stemming from legal to administrative challenges, maintain (Berrisford and Oranje, 2012).

The first and obvious intractable challenge was with regarding to the interpretation of the Constitution's provisions that set out which sphere of the government (i.e. national, provincial and local) has the power to make planning laws. The second, although it received less attention, was the extent to which planning laws can interfere with and restrict the exercise of property rights (Turok, 2014).

2.5.4. Constitutional Powers and Functions

Schedule 4 and 5 of the constitution of the Republic of South Africa 1996, set out the areas of legislative competence of national, provincial and municipal government. The most relevant functional areas of legislative competence here are the following:

Fig. 2: Schedule 4 and 5 of the constitution, 1996 for legislative competence

Schedule 4 (areas of concurrent legislative competence		**Schedule 5 (areas of exclusive provincial legislative competence**	
Part A	Part B	Part A	Part B
Environment	Municipal Planning	Provincial Planning	-
Regional Planning and Development	-	-	-
Urban and rural development	-	-	-

Source: Constitution of the Republic of South Africa, 1996

The powers listed in schedule 4A are shared by the national and provincial spheres of governments. Conflicts are resolved by using section 146 of the Constitution. The powers listed in 5A are exclusive to provincial governments except when national government has special reasons to make law on those matters. The powers listed in 4B are exclusive to local government with national and provincial governments exercising limited oversight. Berrisford (2011:254) argue that" because 'land' is not specified as a functional area of legislative competence it automatically becomes an area of exclusive national legislative competence'. However, Berrisford further points out that considering other land development factors, land development forms an integral part of urban and rural development and as such, remains a concurrent competence of both national and provincial spheres of governments. In that regard, it appears that matters of spatial planning in South Africa is in the main decided by National and Provincials tiers of government, postulates (Berrisford, 2011). Consequently, local government as a sphere where people resides is excluded, hence this is the sphere of government which is central in the implementation of Spatial Planning legislation and enforcement of legislative transgressions (ibid).

2.5.5. SPLUMA and Property Rights Protection

Van Wyk (1999) cautioned spatial law and policy makers to be cognizant of the rights to property as these are enshrined in the constitution. She advised that it is imperative, when drawing up a new spatial law to consider and understand the context in which the law could permit the organ of the state to make a planning decision that may restrict a land-owner to develop or use the land as they wish. Such profound warning is corroborated by the South African history of land dispossession and segregation during the colonial and apartheid regimes. During the 20th century, both colonial and apartheid regimes, the state through its laws and organs, dispossessed non-whites of their land and further imposed legal restrictions for them to own land, argue (Van Wyk, 1999).

As a result, the majority of black populace in urban areas could not own properties during that period. The land dispossession and segregation had far-reaching effects in the lives of many black South African even today. Therefore, SPLUMA as new spatial planning legislation seeks to address those unjust inequalities and segregation by ensuring inclusivity and fairness. Van Wyk (1999) advises that efforts undertaken to redress the spatial legacy and segregation would be met with resistance from parties with property rights, mainly whites. She highlighted that such resistance will be in two fold. Firstly, any efforts to promote investment in formerly deprived areas by curbing the exercise of unused development rights, the holders of those rights will claim violation of their constitutional rights. The holders will seek restitution as per sec 25 of the constitution as such action constitutes “expropriation of property” thereby the state will be legally compelled to compensate the holders financially. Lastly, Van Wyk draws attention to access to land for development or redevelopment for the sole purpose of low-cost housing for the poor and previously marginalized. Such has been a dreadful process as people in the neighbourhood (whites and middle-class) have challenge this effort by the state claiming that their rights to use and the enjoyment of their land is being restricted or lost due to many undesired factors such as increased crime, air pollution, water pollution and reduced property values. The rights to property as

enshrined by the constitution, has been a central factor that stalled governments' efforts towards integrated development and land redistribution over the past years (Van Wyk, 1999). Although SPLUMA has given power and authority to government, the key element is to navigate property rights to avoid unnecessary legal and financial implications.

2.5.6. The development of SPLUMA

The Planning White Paper adopted a new approach to tackling a question of which sphere has the power to make planning laws. It effectively sidestepped the difficulties experienced in the previous decade of whether to classify planning laws as falling under 'municipal planning' or 'urban and rural development'(Berrisford, 2015). The white paper adopted a different approach. It proposed a much stronger role for national legislation rationalizing the provincial laws into one uniform set of national rules and procedures. The basis for this approach was the view that planning is fundamentally about land use and that 'land is an area of exclusive national legislative competence. Following this line of argument the white paper proposed one national planning law to sweep away all the inherited Acts and regulations (Turok, 2014)

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Berrisford (2015) argued that the inability to enact the new planning legislation aggravated many actors, both within and outside of government. Such frustration resulted in the Department of Land Affairs ('DLA') having to work increasingly in isolation on drafts of LUMB, beginning in 2001. These drafts initially reflected a position proposed in the white paper and provided the wholesale repeal of all provincial laws and the creation of uniform, national planning system, in which the national minister will wield ultimate authority. However, Berrisford (2015) indicated that these drafts were widely rejected by national and provincial department and eventually by the parliament in 2008. It was becoming clear that DLA was failing to effectively address the aggravated question as how to distribute planning authority across all spheres government.

Berrisford (2011) declared that these dissatisfactions were perpetuated by powerful interests in national departments such as Treasury, Presidency and later by Housing as its Minister lashed out in frustration and argued that her department could not be expected to deliver 'sustainable human settlement' under the circumstances where legislative framework for planning was so inappropriate and unmanageable. In light of this challenge Treasury and Presidency made endless efforts to reform the planning regulatory environment and the results was a detailed review of the DFA. The DFA became the national planning framework, although short-lived, it was instrumental in the successful enactment of SPLUMA as a national spatial planning law as it draws many lessons from it (Berrisford, 2011).

2.5.7. The Courts step in 2010-2014

Berrisford (2015) maintains that in June 2010 this impasse on which sphere of government was responsible for spatial planning and land use/development management was finally broken by a decision of the Constitutional Court in City of Johannesburg v Gauteng Development Tribunal 2010 (9) BCLR 859 (CC). In this case the City of Johannesburg had taken issue with the Gauteng Development Tribunal's role of rezoning land and deciding on the establishment of townships/subdivisions of land within its jurisdiction. It was urgued by the City of Johannesburg that these powers fell within its constitutional competence of 'municipal planning' and at provinces should not do the same. The City maintained that laws dealing with approval and consideration of development applications are about 'municipal planning' rather than 'urban and rural development' or 'provincial planning'. The court unanimously judged in favour of the City. The court struck down those parts of the DFA that established and empowered the provincial tribunals to rezone land and decide of the establishment of townships/subdivion of erven. This was victory for municipal planning autonomy and cast doubt over the strong role hitherto played by the provinces in land use planning matters (Berrisford, 2015).

According to Berrisford (2015) the (City of Johannesburg/Gauteng Development Tribunal judgment provided a clear direction to the stalled law reform efforts. Firstly, it made it clear that new planning law must be enacted as 'municipal planning legislation. Both national and provincial may pass that legislation, subject to special rules governing a possible conflict between the two and provided the new law concentrate of decision-making powers to the local level. Secondly, the court was also clear that there was a need for far-reaching law reform and effectively gave national government two years within which to do this, setting a deadline of mid-2012. Consequently, South Africa travelled treacherous roads in planning and development as it struggled to revolutionarize the apartheid planning legislation, while it waited for a progressive, transformative and integrative national spatial planning law (i.e. SPLUMA) aimed at redressing the effects of segregatory and unjust planning law.

2.5.8. Current Constitutional Questions

Claassens (2011) argued that the court judgment discussed above have provided much needed clarity in the spatial planning landscape. The crucial decision by the Constitutional Court that prohibited both national and provincial governments from passing laws or taking decisions that remove municipal decision making on municipal planning matters, has completely changed the shape and complexion of spatial planning in South Africa. The judgment has clarified once and for all the meaning of the term 'municipal planning' and its impact thereof. The judgment also solidified the municipal autonomy as it emphasized that the national and provincial spheres of government may not interfere with municipal town planning instruments (i.e. zoning schemes and applications) or remove a municipality's power to decide a land use application. The two spheres of government in question (national and provincial) were warned to deal with their own interests in terms of their own laws and by using their own administration, not by imposing laws on municipalities (Berrisford, 2011). Although this was a sweet legal victory for

municipalities, especially metros, the need by the government spheres in questions to play a leading role in matters of land use and development for district and local municipalities which are under capacitated is in jeopardy because some of those municipalities do not have adequate human and financial resources to effectively implement the new planning legislation as ruled for by the court, argues Claassens (2011).

2.6. SPLUMA AS FRAMEWORK LEGISLATION

2.6.1. Introduction:

SPLUMA is a framework for spatial planning and land use management system in South Africa which is aimed at is aimed to facilitate and promote an inclusive, developmental, and equitable and yet efficient spatial planning at different spheres of government (SPLUMA, 2013). Its main functions to the coordinate, monitor and review all spatial planning and land use management legislation and policies to ensure that norms and standards are met, while addressing spatial past imbalances and injustice. All this the framework would ensure that is done to stimulate consistency and uniformity in the application of procedures by all authorities and institutions responsible for land use management (SPLUAM, 2013).

Although this framework appears to be one of its kink and a panacea for Spatial Planning deficiencies in South Africa, Berrisford (2015) highlighted that SPLUMA is not entirely new and original. The foundation laid by the DFA has provided SPLUMA with ample opportune lessons that are fundamental for filling gaps that existed before it was enacted. Analysis of SPLUMA shows that some provisions can be applied directly and do not require further legislation while some sections will require regulations. SPLUMA is partly a framework, a set of rules and standards that apply alongside or parallel to other legislation. For municipalities it is important to understand the distinction as such knowledge could be valuable in sidestepping

spatial planning challenges which might be found perpetuating the spatial disparities created by the apartheid government, argues (Turok, 2014).

Berrisford (2015) pointed out that Chapter 4 is a good place to look for example of this dual nature of SPLUMA. Parts B, C, and D, the parts that deal with national, provincial and regional development frameworks are new, stand-alone parts of this chapter. They require and regulate spatial planning at the national, provincial and regional spheres that cannot be found in any other legislation. Part E, however is very different. It establishes a framework for municipal spatial development frameworks that has been required and regulated since 2000 through the Municipal System Act (MSA). Therefore, when dealing with part E, it is important that one pays close attention to the parallel requirements in the Municipal Systems Act (Berrisford, 2015).

On the other hand, SPLUMA being a framework, does not prescribe in detail what the municipalities should do. Further detailed compliance requirements will be set in provincial legislation to clarify this dilemma. However, it would appear that the provincial legislation is a moving target also which pose a daunting challenge for the municipalities on how exactly to comply with both SPLUMA and the relevant provincial legislation in each municipal and provincial context (Berrisford, 2015).

Furthermore, municipalities have an overwhelming challenge of being able to ensure compliance with variety of laws and equally so, the applicants will need to be aware which legislation is applicable to their application. Therefore, this would mean that municipalities would have to determine whether through a policy or by-law, how they respond to the diverse compliance requirements of SPLUMA framework as well as to the specific demands of provincial legislation, agued (Berrisford, 2015).

2.6.2 Decision-making on land use development application in SPLUMA

SPLUMA provides for decision-making by a number of different actors in different spheres of government. These are set out below beginning with the municipality where the bulk of SPLUMA decisions will take place and then covering provincial and national decision-making (Berrisford, 2015).

2.6.2.1. Municipalities

This section will discuss the types of envisaged decision-making in municipalities as set in SPLUMA. However, the different roles of district and local municipalities are going to be examined first. It is crucial to note that such discussion is applicable to the situation outside the eight metropolitan municipalities. Chapter 5 of the Municipal Structures Act 117 of 1998 regulates the relationship between these two types of municipalities and it is fundamental to indicate that their powers are distinct of each another. Berrisford (2015) maintains that district municipalities will always be empowered to adopt spatial development frameworks (SDF's) as part of its IDP. Such is significant as it provided for by the Municipal Structures Act which clearly emphases that integrated development planning are a district function. However local government remains the crucial player in the implementation of SPLUMA as many of the spatial planning and land use management system are its prerogative, (Berrisford, 2015).

According to Berrisford (2015) both district and local municipalities have a complex and critical role to play in spatial planning and development. It would appear that the powers of land use management and land development management reside within these municipalities by default. This is because the Municipal Structures Act does not list these powers as 'normal' district powers. Furthermore, given the complexities of land use and land development management, in principle, these powers are situated within local municipalities (Berrisford, 2015).However, the

system is not stagnant as empowered by MSA, and the provincial governments may authorize districts to perform local municipalities' powers. In other instances, the provincial governments have utilized their powers to instruct or authorize district municipalities to perform land use and land development management powers instead of local municipalities within a district. Therefore, if that situation applies, it is the district, and not the local municipalities who will take land development decisions, stresses (Berrisford, 2015).

2.6.2.2. SPLUMA and decision-making in municipalities

SPLUMA refers to municipal decision-making in five different ways, which are going to be discussed in details below. However and broadly speaking, there are two decision-making powers to be assigned. Firstly, decision-making on policy-forming matters are vested in municipal council and land use or development applications decisions are to be made by the municipal planning tribunal (or an authorized official) (SPLUMA,2013).

Decision by the Municipal Council

Section 20(1) of SPLUMA is clear that the municipal council is the only body that may adopt a municipal Spatial Development Framework. This decision may not be delegated to a member of the municipality's executive or to an official because it is part of the Integrated Development Plan (IDP). The municipal council has to follow the procedures for preparing and adopting a municipal spatial development framework as set in the MSA and its IDP process plan (SPLUMA, 2013).

The other area for decision-making by the municipal council is the adoption and approval of a land use scheme. This is another decision that cannot be delegated no matter what, as it is a municipal by-law. The rules in the MSA pertaining by-laws as well as municipality's own internal rules on the adoption of such by-laws should be adhered to. Again, provincial legislation may contain further procedures.

Furthermore, another decision or responsibility that may not be delegated by the municipal council is the appointment of municipal planning tribunal members, where a municipal planning tribunal has been established. Although the preparation part (i.e. the recruitment process) may be delegated to the municipal executive or an official, the actual decision of appointing remains that of the municipal council (SPLUMA, 2013).

Decision by 'the Municipality'

According to SPLUMA, the municipality has been empowered to make decisions regarding amendments, reviewing and enforcing a land use scheme. This will include recording of amendments to the schemes and authorizations in term of the schemes as required by other legislation. Such decision making powers has been defined by SPLUMA in a broad manner to include municipal departments, the municipal council or the municipal manager. Therefore, the municipal council would be able to delegate these decisions to a specific department or the Municipal manager. However, the municipal council would have to firstly ensure that such delegation is done under the prescripts of section 59 of the Municipal Systems Act to ensure that the relevant delegates are legally empowered to fully exercise those powers. In light that SPLUMA refers to 'the municipality' numerous times and not being always clear if it refer to a municipal department, manager or council, it would be imperative during initial implementation for the municipality to clearly define those municipal functions (SPLUMA,2013).

Decision making by the Municipal Planning Tribunal (MPT)

As already alluded to above, the municipal planning tribunal is established by the municipal council. Further, the municipal council may concede to delegate this power or responsibility to an office bearer provided they retain the power to appoint its members. The main object of the tribunal is the 'determination of land use and development applications within its municipal area' Berrisford (2015).

Decision making by the municipality's executive authority

SPLUMA defines the executive authority of the municipality as one of the following depending on what system the municipal council has put in place:

- The executive committee
- The executive mayor
- A committee of councillors

The role and function of the municipality's executive is to make a determination in situations where there is an appeal of a decision taken by the Municipal Planning Tribunal (MPT). SPLUMA has made a provision for any person or groups whose rights have been affected by a tribunal's decision to appeal such decision. Also, section 23 of SPLUMA has given the executive authority to 'provide policy and other guidance in relation to land use management schemes. It further requires the executive authority to also monitor and oversee the work on the land use and management scheme by officials (SPLUMA, 2013).

Decision-making by a municipal official

Section 35 (2) provides for the delegation of powers to a municipal official to decide on 'certain land use and development applications'. In the event that such delegation has been made, the decision of such application would no longer be made by the municipal planning tribunal, but it will remain that of the authorized official. Such delegation under section 35 (2) of SPLUMA serves as an example of how the municipality delegated particular types of decision-making, argues (Berrisford, 2015 p.21).

Joint Planning Tribunals (MPT)

According to Berrisford (2015) Section 34 (1 and 2) of SPLUMA makes a provision for a collaborative and intergovernmental agreement between two or municipalities to ensure compliance and successful implementation of the act. Firstly, a

municipality may partner with others and establish joint MPTs. This joint municipal planning tribunal will then receive and determine all applications from applicants in the combined areas of participating municipalities. The other option would be that of a district municipality having to establish a district-wide MPT. However, this could only be possible if all the local municipalities within the district agree. Therefore, this district-wide tribunal will receive and consider all applications from applicants in the district area. Nonetheless, if the district municipality is authorized to take land use and development management decisions, through the adjustment of its powers through the adjustment of its powers, there is no need for an agreement or consent by the local municipalities (SPLUMA, 2013).

2.6.2.3 SPLUMAs Development Principles

Berrisford (2015) argues that probably the most distinctive features of framework legislation like SPLUMA is that it prescribes a set of general principles that apply to decision-making by wide range of authorities. So the first aspect of the municipal compliance with SPLUMA is that a municipality must apply the principles contained in Section 7 of SPLUMA (2013) to the following decisions that it makes:

- 'The preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or land use…; SPLUMA (2013)
- The compilation, implementation and administration of any land use scheme or other regulatory mechanism for the management for the use of land…; SPLUMA (2013)
- The consideration by a competent authority of any application that impacts or may impact upon the use and development of land…; and SPLUMA (2013)
- The performance of any function in terms of this Act or any other law regulating spatial planning and the land use management. SPLUMA (2013).

In the light of such progressive principles of the DFA, it should also be noted that the DFA was the first South African law to introduce the sort of principles that

subsequently became common in other laws. Therefore, it is imperative that the principles of SPLUMA be understood similarly, because similar to the DFA principles, many are skeptical on the feasible application of these principles citing its width and vagueness as a pitfall which will result in confusion and frustration as practitioners and applicants are likely to have dissimilar and contradictory interpretation, argues (Claassens, 2011).

However, through the implementation of DFA, decision-makers conceded that such application of principles was actually practical and acknowledged that they (principles) reflected an overarching set of concern. They further recognized that the lack of rigidness was helpful in weighing concerns pertaining planning and land use decisions. Unlike, the DFA principles; SPLUMA's are only 5 and are more precise and unambiguous. Furthermore, these principles are indicative of the current government's commitment to hastier implementation of spatial transformation. It should be noted that this was to respond to the last seven decades of spatial planning in South Africa pre-1994 which has been dominated by two ideologies: the planning, ideology of modernism and the political ideology of apartheid or separate development (ibid).

These "normative" planning ideologies resulted in spatial patterns that were fragmented, sprawling and segregatory, in turn these patterns underpinned a wide variety of socio-economic and environmental challenges. However, after the collapse of apartheid regime in South Africa, the Government of National Unity introduced new spatial planning legislation, placed a set of normative values central to the planning system to ensure it redress the spatial imbalances of the past, asserts (Berrisford, 2005:25).

2.7 Traditional Authority Leadership and Land Reform in South Africa

2.7.1 Introduction:

According to Bikam and Chakwizira (2014), traditional leadership in SA has consistently been neglected, misjudged or undermined in the democratic dispensation in South Africa. However, the ANC government acknowledge such oversight and has been committed in recognizing and fostering the roles and functions traditional leaders in rural areas. The below quote by the former President Thabo Mbeki accentuates the preceding discourse and similar sentiments have been echoed by the current President (Hon Jacob Zuma):

"The challenge we are faced with at this moment in time is to find a way of Stabilizing our system of governance in the rural areas by creating a climate within which the institution of traditional leadership and elected institutions of government can co-exist" (President Thabo Mbeki,2000).

A Traditional leader is defined as any person, who in terms of customary law of the traditional customary community concerned, holds a traditional leadership position, and is recognized in terms of the Traditional leadership and Governance Framework Act 41 of 2003 (TLGF).

Bikam and Chakwizira (2014) asserted that the role and involvement of traditional authority on matters of land and rural development has been ignored by many developmental analysts. This, they view as a mistake and injustice to the role and involvement of traditional authority on issues of land allocation, and adminstartion. The authors further alleged that the authority and legitimacy of the traditional authority was severely dented by the fact that even through the Municipal Structures Act of 2000, their roles were never clearly stipulated. There was an outcry by the traditional leaders that they were given a passenger seat as they were only recognized for public participation process but never given a decision-

making opportunity on issues of land reform and development in areas under their jurisdiction (Bikam and Chakwizira, 2014). By contrast the roles and duties of the municipal officials in areas under traditional authority has been overstepping that of traditional leaders in that land allocation matters are a prerogative of the municipality while involvement of traditional authorities is conditional through the signed Service level agreements (SLAs) (ibid). Consequently, the active role and involvement of traditional leaders in land reform and development in South Africa has and still remains a bone of contention between the municipalities and traditional authority institutions. Thus the enactment and implementation of SPLUMA is seen to be fueling such contestation and conflict between the two structures, in areas under traditional authority (ibid).

In the light of the above discourse, it is therefore fundamental to acknowledge that over 20 years since the dawn of democracy in South Africa, traditional leadership has been central in land use planning and development in general. The function and role of traditional leaders is enshrined in the Constitution of the Republic of South Africa. The significance of traditional leaders was echoed by the Municipal Structures Act 117 of 1998 as it made provisions for municipal officials in rural development to work collaboratively with traditional leaders (1996 Constitution of South Africa). Various administrations at the local sphere of government have collaborated with traditional authorities on issues of development aimed at realizing the needs of communities.

The above sentiment is reverberated by (Khan and Loovoet, 2001) who claim that the only guarantee of promoting and realizing rural development is through the involvement of traditional leaders. Khan and Loovoet argue that the role and influence of traditional leaders is very significant as they cited that their involvement in areas of rural land use development as they are likely to win and promote interest and community by-in (ibid).

According to the Department of Rural Development and Land Reform (DRDLR) 1995, the emphasis on active participation and involvement of the tripartite

institutions (i.e. local government council, community and traditional leaders) was one of the fundamental components of the MSA which spoke volumes about the desired effectiveness of the new system of local administration in South Africa post-apartheid era. By this assertion, it was thus understood and anticipated that traditional leaders should play a central role in land reform, land use planning and development initiatives. Unfortunately, there seem to be serious challenges in merging customary law and statuary law, hence the struggle to get the tripartite institutions to work together (Department of Rural Development and Land Reform (DRDLR), 1995).

2.7.2 Traditional Leadership in Historical Perspective in South Africa:

Ntsebeza (2003) postulates that any realistic assessment on the future role of traditional leadership in South Africa inevitably requires a deeper understanding of changing roles, functions and influence of the institution during pre-colonial, colonial and apartheid times, to determine its role and function in the democratic South Africa. The role and significance of the institution of traditional leaderships has been questioned before by some critics because the power and authority of the traditional authority was centralized to the chief and headmen, tis in itself undermined the principle of democracy. However, the roots of the institution of traditional leadership remain entrenched in the historical context of this country, even before the advent of the colonial rule (ibid).

As put forward by Bikam and Chakwizira (2014) in their investigation of the involvement of traditional leadership in land use planning in South Africa, traditional leadership was in the forefront of local governance in the continent long before the dawn of colonialism. The protection and development of communities were the sole responsibility of traditional leaders. Over time, traditional leaders were referred to as kings and chiefs and they were regarded as the sole custodians of the land under their jurisdiction and as such their role was significantly substantial in issues of land and development. The chiefs (Tihosi) presided over issues of land allocation for

their subjects for residential, subsistence farming and grazing needs. In other words, the chiefs were responsible and concerned with the safety, welfare and development of their respective communities (ibid).

However, Houston and Somadoda (1996) argue that it should be noted that not all traditional leaders were compassionate and empathetic to the needs of their subjects as some were autocratic and repressive. They were further reputed for resolving conflicts and community mobilization for ensuring active citizenry in the welfare of the communities. Undoubtedly, this role remains central for political and socio-economic advancement even during this democratic dispensation in South Africa, claims (Bikam and Chakwizira, 2014).

The appeal and decree of traditional leadership was derailed during colonialism in many countries on the African continent, including South Africa. Sadly, some of the powers and functions of traditional leaders discussed in the foregone paragraphs were taken away by the colonial rulers and later by the apartheid regime in South Africa. Such calamity meant that the role and authority of traditional leadership had been deteriorated on issues of community governance and land use and allocation. Therefore, the role and function of traditional authority should be carefully considered during this democratic era in order to ensure that this institution is not only preserved but also developed, argues (Ntsebeza, 2003).

Ntsebeza (2003) however argue that traditional leaders were demoted to become agents of colonial and apartheid rulers solely responsible for day to day administrative activities, compared to leadership and control. To exemplify how the traditional leaders were downgraded into merely an instrument of the colonial and apartheid rulers, they were used as agents for social control against indigenous people in many parts of the African continents. In Northern Nigeria and South Africa, the British colonial rulers used traditional leaders to mobilize natives and black people for labour requirement. Such role was reassigned to the traditional leaders during the apartheid regime in South Africa through indirect rule of the Bantustans. As such it is evident that the institution of traditional leaders had been

eroded and somewhat eliminated from issues of land use planning and development (ibid). Such bad reputation had serious ramification as traditional leaders were even ignored on matters related to land use planning and development during the period leading to the negotiations for a democratic South Africa. However, sympathizers such as Mangosuthu Buthelezi of the Inkatha Freedom Party advocated for this institution to be recognized, which resulted to the establishment of Congress of Traditional Leadership of South Africa (CONTRALESA). As a result, traditional leaders were later involved in processes of an integrated Development Plans (IDPs) and municipal SDF's. Their role and involvement on the said matters is still significant even today (ibid).

2.7.3 Current Statutory Powers and Functions of Traditional Leaders:

This section will introduce the concept of traditional leadership in the Constitution and in the Traditional Leadership Framework Act. We will see that it does highlight the statutory contractions that causes tensions between the institution of local government and traditional leadership and the vague and ambiguous powers and functions will have to be addressed to ensure cooperative governance.

2.7.4 The Constitution of South Africa, 1996

The legitimacy of the traditional leaders is as critical as it is embedded in the country's supreme law. Therefore, the Constitution as a supreme law of the Republic has accentuated the imperatives of the powers and function of traditional leaders. In Section 2.12, the Constitution firstly recognizes and promotes the role of traditional leadership as an institution at local level aimed at addressing matters affecting local communities; secondly, it endorses the role of traditional leaders as custodians of customs of traditional communities as observed through a system of customary law. The imperative of this law further gives effect to the establishment

of Houses of Traditional Leaders and the Council of Traditional Leaders (1996 Constitution of South Africa).

Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA)

Section 20 of the Traditional Leadership and Governance Framework Act gives a lot of rein for responsibility to traditional leaders in respect of a range of matters including land administration and economic development. The Act further deems all traditional authorities as traditional councils. Such proclamation promotes the entrenchment of the 1994 status quo by vehemently downplaying the disputes regarding boundaries, imposed by tribal councils on ethnic groups. This is problematic because the only body responsible for the land demarcation in South Africa is the Municipal Demarcation Board not traditional councils (Constitution of South Africa, 1996).

This Act seem to create a blanket system for dealing with all homeland rural areas, further undermining the rights of freeholders or community Property Associations (CPAs). Even though the Act acknowledges the power of traditional leadership, it could be debated that this Act hollows out democracy in rural areas as it undermines the process of public participation and collective decision-making (Traditional Leadership and Governance Framework Act 41 of 2003).

2.7.5 Communal Land Rights Act 11 of 2004

According to Bikam and Chakwizira (2014) the key functions of traditional leaders are clearly described in the Communal Land Rights Act 11 of 2004 (CLaRA), they however warn that this piece of legislation remains silent on their role in Land Use Planning and Development and Land Distribution. CLaRA is a fundamental Act as it provides for the security of tenure by transferring communal land to communities in order to redress the imbalances and injustices caused by the colonial and apartheid

regimes. This ACT also guarantees the awarding of a comparable redress, as well as provision for democratic administration of communal land by communities. However, this Act was unfortunately struck down in 2010 (ibid).

The key ground for the above-mentioned challenge was accentuated by the earlier fact that the Municipal Systems Act of 2000 did not provide a functional role for traditional leaders. Under the Constitution of the republic, matters relating to the functions and responsibility of land planning remained the prerogative of both the national and provincial spheres of governments, while most of developmental mandate and functions were assigned to the municipalities under the Municipal Systems Act 32 of 2000, Section 156 of the Constitution. It is thus apparent that there is an overlapping of functions and responsibilities between the traditional leaders and municipal officials and that was fueling confusing and conflict on matters of land use planning. Therefore, in order to relieve the tension between the two institutions and promote effective and collaborative relations, the planning legislation and Constitution should be clearer and traditional leaders be capacitated so they could be well-equipped to actively participate in land use planning matters in areas under their jurisdictions (ibid).

2.7.6 The Role of Traditional Leaders in Land use Planning and Development under traditional authority

The critical analysis of SPLUMA and other planning legislation in South Africa reveal that roles and functions of the traditional authority has been severely undermined when it comes to issues of land planning and development regardless that traditional leaders are and have been custodians of land, argued (Berrisford, 2015). He accentuated that there should be a mutual understanding and commitment for the traditional leaders' involvement to forge a cooperative engagement between themselves and local government structures responsible for planning and implementation of developmental projects.

However, Ntsebeza (2001) was equally quick to point out inadequacies regarding the nature of the proposed relationship. He highlighted several drawbacks which exacerbated challenges of collaborative relationship between these two critical and fundamental structures. Firstly, Ntsebenza draw attention to the fact that the roles and responsibilities regarding land use and development were not clearly defined. The institution of traditional authority was paraded as the custodians of customary laws and customs. Consequently, by that virtue, this institution' competitive advantage and relevance was stripped away which as a result gave power advantage towards municipal structures. Although the concept is not well defined with respect to roles, it is an ideal aspired by democratic government the world over. One of the main drawbacks of traditional leaders' involvement in land use planning and development is related to the role they should play and how different would it be from those of municipal officials?

For example on the one hand, elected officials at the local government level in Vhembe District municipalities in South Africa control the affairs of land use planning and development projects in areas under the jurisdiction of traditional leaders. On the other hand, land use planning and development to traditional leaders, means having access to decision-making processes on issues related to land development in their areas of jurisdiction even if the areas falls under areas where municipal officials should implement forward planning and development control. Further to this, land use planning is not an easy subject to define with respect to the involvement of traditional leaders in development projects. According to (Beatty, Petersen, and Swindale, 1978), the definition of land use planning, it is said to be synonymous with the process of processing land for development appropriately.

2.7.7 Functions Municipal Officials in the 1996 Constitution:

The preceding paragraphs have begun to highlight the confusion and potential conflict that emanates from dubious role allocation between the institutions of traditional leadership and the municipalities. It is therefore imperative that the functions of local government officials should be clearly outlined. It should be noted that most functions accorded to the municipal officials were similar to those given to the traditional leaders under the Black Authority Act, 2010 (Constitution of South Africa, 1996). This bone of contention was gravitated by Section 151 (1) of the constitution which when it spelt out the establishment of the municipalities, it also remained silent on how the municipalities were going to function in relation to traditional leadership. Furthermore, Sec 156 of the Constitution spells out executive powers and function of municipalities which evidently guarantee overlap with powers and functions of traditional leaders. These constitutional Roles and Responsibilities within Local Government include the following:

- to provide democratic and accountable government for local communities;
- to ensure the provision of services to communities in a sustainable manner;
- to promote social and economic development
- to promote a safe and healthy environment; and
- to encourage the involvement of communities and community organisations in the matters of local government.

The Constitution also assigns developmental duties to municipalities. Section 153 provides that a municipality must:

- structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- participate in national and provincial development programmes (Constitution of South Africa, 1996)

Although the constitution recognizes traditional leaders and envisages a role for them in local government, in Section 211of the Constitution, it is not clear on what

the functions of the role of traditional leadership in “accordance with customary laws” (1996 Constitution of South Africa).

2.8 Land Management Legislation in South Africa

2.8.1 Introduction:

This section will review legislative process to determine whether access and ownership to land remains a fundamental mechanism to ensure that household livelihoods are fully realized. Moreover, given the value placed on land, it is therefore significant, to determine how land management has been addressed over time in South Africa through statutory imperatives. Such exploration will be central to this study report as it will seeks to ascertain whether or not the statutory powers through various pieces of legislation are necessary in dealing with land management challenges in South Africa, in particular, rural areas. This section will first scrutinize customary land tenure, and then look at the historical context of land distribution and management in South Africa dating from pre-colonial era until democratic dispensation. Acts such as the Native Land Act of 1913, the Native Urban Areas Act, 1923, Bantu Trust and Land Act of 1936, and Group Areas Act of 1950 are key pieces of legislation that were responsible for the construction of inequitable land access and ownership, the ramifications of which remain a key challenge for the current government. Lastly, the section will discuss how South Africa is dealing with issues of land reform to address the historical imbalances and inequalities and promote development opportunities for the black majority from which their land had been unfairly dispossessed (Ibid).

According to Letsoalo (1987), Land has been and still perceived by many as a natural resource that is central to the survival and development of mankind. Land use and ownership remains a significant factor in human life as it is central in the realization of social-economic purposes through residential, farming, industrial and conservation land usage. Letsoalo (1987) highlights that in most African countries,

agriculture was the main economic activity which households depended on for subsistence and income generation. Consequently, the government's land reform programme is a key in redressing the inequalities of land access and ownership in South Africa. Given the importance and value of land, debate around this discourse has been too politicized and relevant stakeholders such as government, community and traditional leaders have contested with each other when it comes to matters of land ownership. Although some progress has been made, the speed and commitment by the government leaves a lot to be desired (ibid).

2.8.2 Customary Land Tenure

Comaroff and Roberts, (1981) postulate that it is crucial to describe or define some characteristics of customary land tenure in order to draw a concise understanding of the subject matter. Customary "law" is a body of (usually unwritten) rules founding its legitimacy in "tradition". It has been applied over time from generations to generations and has been perceived as the legitimate law of the land by the people. However, it is fundamental to highlight that since these sets of rules were often unwritten, that made customary law extremely diverse. There has been variance in the application and interpretation of the customary law from village to village (Comaroff and Roberts, 1981:70). Furthermore, it can never be over-emphasized that customary rules were not static but changed due to cultural interaction, population pressure and political discourse (ibid).

Although still relevant today, the customary land tenure system was central to land management systems during the pre-colonial era in South Africa. The customary laws were exercised and enforced by Tihosi (chiefs) as they were the traditional authority of the land. The traditional leaders were responsible for governing the way the land and natural resources were held, managed, used and transacted by or within the community. The customary tenure system ensured that land rights were regulated by the chiefs who would oversee and coordinate land allocation and management. As a result, subjects always had access to land for residential and

cultivation purposes until they experienced uninviting segregatory laws which resulted in senseless dispossession of land from the black South Africans during the colonial and apartheid era (Adams, Cousins and Manona, 1999).

Long before colonization of the African continent, traditional leaders and chiefdomship ran supreme in the continent. During those times, chiefs were solely responsible for land allocation to their subjects for residential or food production purpose. Chiefs as customary authorities, they were able to maintain or even strengthen their power and legitimacy through their role as the custodians of the communal land (ibid).

Like in many African countries, South Africa has had customary land tenure systems for many years before colonization. During this period, the local chiefs were afforded a duty and responsibility of allocating land to the members of the community within the customary system in areas under their jurisdiction. Communities and family groups were entrusted with the management of the land that had been allocated to them by the chief. Communities and households never had the ownership rights to the land, but rather right to access and use for livelihood purposes. The customary tenure system enabled the native households to obtain land under the general conditions set by the traditional authority and the community. The set of conditions agreed upon by the traditional authority and the community was aimed at the promotion of land control and regulation by the chiefs. Some of the key and often widely known and accepted conditions for access to land under customary tenure system were that “the applicant should be a member of that particular community” and “women were not allowed to access piece of land”. Although this seems preposterous during this era of democracy and social justice, this system and its conditions were widely accepted by the communities and this seemed to work when addressing issues of land use management (ibid).

2.8.3 LAND DISTRIBUTION 1910-62

During the era of settlers in South Africa, it has been claimed by Pampillas (1991) that land has been a central reason for conflict and wars. In the new Union of South Africa (1910), only whites could be elected into parliament and whites were permitted to vote. However, an exception was afforded to few property-owning blacks to vote, but the irony of their voting rights was that they could only vote for white candidates. Fortunately, only in the Cape where black voters could be elected to the provincial council, maintains Pampillas (1991:49).

It was evident that the Union of South Africa did not recognize the rights of the black people. But in November 1910 Parliament appointed a selected committee with the Minister of Native Affairs, Henry Burton, as chairman to investigate the question of African land settlement with particular reference to the "squatting" problem. The union was adamant that sustainable solutions to the challenges of squatting should be found, argue Barker, Bell, Duggan, Horler, Leroux, Maurice, Reynierse, and Schafer (1988:511).

The Committee set up by the Native Affairs Department concluded that squatting laws of the Transvaal, Natal and Orange Free State were unsatisfactory and ineffective. Thus the committee recommended that there should a uniform policy throughout the Union for regulating the settlement of Africans on private property and, where such settlement existed or was permitted, ensuring of power control by the owners of such property as well as by the government. As a result, the Union promulgated the Native Land Act in 1913 which is discussed in detail below. This Act has immensely contributed to the state of diverse and unequal spatial patterns of this country which need to be redressed through land reform programmes (Barker, et al., l988:511).

2.8.4 The NATIVE LAND ACT of 1913

This Act was ratified into a law on 19 June 1913 with an aim of making further provisions regarding purchasing and leasing of land by the natives. It entrenched the racial segregation ideology and kept the native population away from any opportunities associated with occupying land for residential or occupational purposes, asserts (Letsoalo, 1987). The Act dealt a severe blow to the prospects of the black people of South Africa who felt that they were being relegated to become second class citizens in their own country. Such perception and feeling was reverberated by one of the leading liberation struggle icon, the late Sol Plaatje in 1913 when he remarked: ***"Awakening on Friday morning, June 20, 1913, the South African Native found himself not actually a slave, but a pariah in the land of his birth."***

Land distribution, spatial and settlement discourse in South Africa has been shaped by historical processes of colonial and apartheid systems. The Native Land Act was crafted as a system of territorial segregation and racial discrimination which South Africa inherited from colonial rulers. One of the key provisions of the Native Land Act was the prohibition of Africans from acquiring land in 93% of the country, effectively reserving 7% of the national land to the Africans who were the majority populace. It was estimated that when the Land Act was promulgated, the population size of whites was about 20% compared to that of 80% Africans (Letsoalo, 1987).

Bundy (1990) argue that while the Native Land Act's intention was purportedly to regulate the acquisition of land by Africans, its true intention was conjectured "to prevent squatting by Africans on white-owned land, promote agricultural labour, stop land purchases by Africans, and to promote segregation in the recently formed Union of South Africa. Therefore, as evident in figure 1 below, Africans were confined to homelands which were better known as reserves because they provided cheap labour to the mining industry (ibid).

This Act was so effective and beneficial to the white South Africans. It was then not surprising as it was adopted by the apartheid government when it gained power in 1948. Consequently, apartheid government began the mass relocation of black people to poor homelands and to poorly planned and serviced townships or reserves. Africans were prohibited from acquiring or occupying land outside the reserves, thereby resulting in overpopulation and stark poverty. It is further argued that when this Act came into effect, over one million of Africans were earning a living from the land of white farmers through some form of tenancy. Therefore, the Land Act had ruinous consequences for Africans in general and tenant farmers in particular as they lost the tenancy when they got evicted. As a result, their livelihood and quality of life was severely affected, as they had to also sell their livestock (Harley, and Fortheringham, 1999).

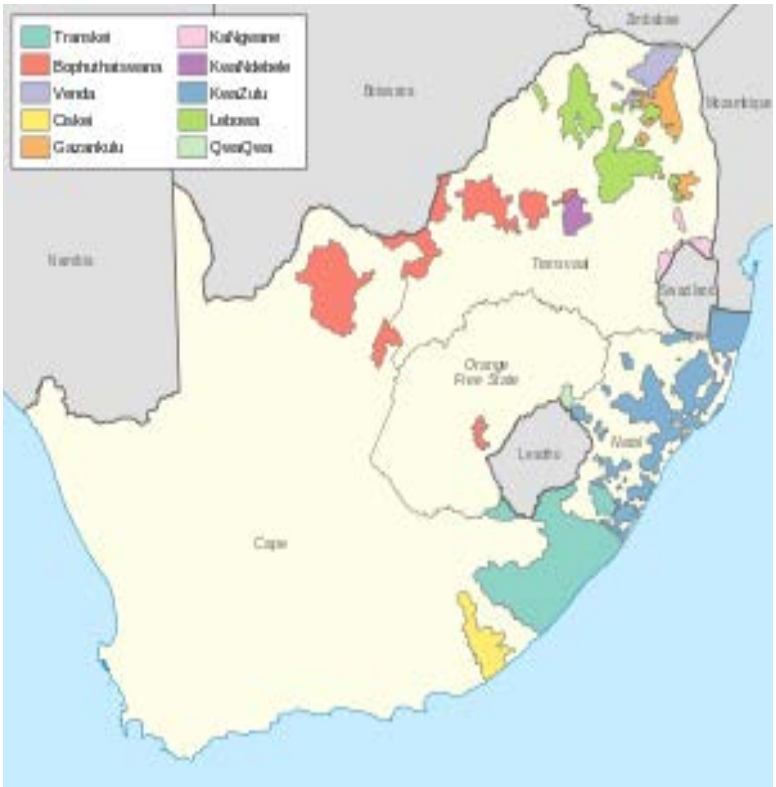


Fig. 3: RESERVES SET ASIDE IN TERMS OF THE 1913 NATIVES' LAND ACT
Source: Harley & Fortheringham (1999)

The Native Land Act of 1913 remains the key piece of legislation which set a tone and necessitated the changes in land and spatial policies in South Africa to date (Harley, and Fortheringham, 1999). The catastrophic impact of this piece of legislation can still be seen or felt in many parts and households of South Africa. The crux of this legislation resulted in many black South Africans' land being dispossessed and resettled in former homelands as indicated in figure 1 above. Many blacks were restricted to the homeland where they worked in farming industry while the services and living conditions were appalling. The legacy of the 1913 land Act is socio-economic injustice which has resulted in over 61% of black South African living in poverty in the democratic South Africa (Stats SA, 2001). Therefore, effective and efficient land reform programme could be a panacea to address abject poverty and redress the social injustice that resulted in black losing their valuable land. It should be noted however, that this is a simplistic analysis and could not in any way attribute all poverty to the Native Land Act of 1913 (ibid).

2.8.5 Effects of the 1913 Natives Land Act

The Native Land Act of 1913, through its design and implementation, proved to be an effective system that ensured white supremacy in land ownership in South Africa. Though it could be seen by many as undesirable measure, the Act was effective in reducing competition in white areas by peasant producers. The loss of land by blacks, through this Act, was a severe blow for black peasantry and the black economy. The tribal economy and traditional mode of production could not survive without more land and access to white resources (Tatz: l962:27).

The implementation of the Natives Land Act contributed towards the creation of concentrated pockets of poverty across South Africa. The effect of the Act was to outlaw at least two of the forms of tenancy which had been practiced on such a wide scale by African farmers – rental tenancy and share cropping. Subsequently, white land owners took an opportunity provided by the act to exploit the Africans in

their farms because they realized that their options were limited, purported (Lasserve, 2002 in Payne, 2002). African farmers had a dilemma; they could either opt for eviction or provide their services as farm labourers in exchange of small piece of land to cultivate for their own subsistence. Such labourers were also provided with accommodation with a condition that the former tenants' spouse and children also be employed as farm labourers. Even though the living conditions on farms were generally poor, African had no options but to endure the suffering and poverty emanating from the promulgation of the Native Land Act which meant insecure land tenure for the Africans (ibid).

Many Africans in the reserves (including women and children) also had numerous challenges. Due to the fact that the reserves only constituted 7% of land surface, there was serious overcrowding. Furthermore, the reserves lacked infrastructure and basic services which compromised the health and wellbeing of the African population. Therefore, it is evident that during those times, there was little or no development in the reserves that were occupied by the Africans, argue Minnaar (1994).

In contrast, 93% of the land in South Africa was given to the whites and was registered under individual ownership. Consequent of the promulgated land act, whites were able to access large areas of land for their occupation, usage and development. Dissimilar to the African in the reserves, whites had secure tenure. This secure tenure enabled commercial white farmers to receive credit and other financial support from the government. As a result, white enjoyed success, prosperity and accumulate wealth while the Africans in the reserves experienced the opposite. The significant difference between land tenure between the whites and Africans was compounded by the fact that in the reserves, land was nationalize and considered the property of the state. In the reserves, the land was not registered to the occupier, thereby the majority of the African had insecure tenure as they did not have tittle deeds to the land they occupied. On the contrary, whites had secure tenure as their land was registered in their individual's names and they

were issued with title deeds. In the reserves, the customary tenure system continued to be recognized by the colonial state (ibid).

2.8.6 Native (Urban Areas) Act of 1923

The colonial government of South Africa adopted the Native (Urban Areas) Act of 1923. This piece of legislation was enacted as a general white discourse of urban segregation for Africans. The fundamental element of this act was property rights and the control of African urbanization. The Act favoured whites to have formal or registered land ownership while systematically excluding Africans from land ownership in urban areas. Through this, Africans could not legally live in an urban area, unless consented by a white land or property owner. This Act also made provision for slum clearance and prevention African urbanization (Morris, 1981 and Urban foundation, 1984).

The ruling whites perceived this legislation as a panacea for managing the influx of African population into urban areas, although there was no blueprint in existence to enforce such urban segregation prior. This Act compelled the African population to reside in rural areas where they were permitted to access some land for subsistence farming but never ownership of land. Moreover, the Native Urban Areas Act, 1923 "forbade the further granting of freehold property rights to Africans on the grounds that they were not permanent urban residents and 'should only be permitted within municipal areas in so far and for so long as their presence is demanded by the wants of the white population' (Worden 1994: 43).

2.8.7 Bantu Trust and Land Act of 1936

In an attempt to reform and improve access to productive land for the Africans, the colonial government introduced the Bantu Trust and Land Act of 1936. This Act was an attempt to redress the impact of the 1913 Native Land Act. Letsoalo (1978)

postulated that through this Act, the 7% of land allocated to the Africans was going to be significantly increased for both residential and production purposes. This was in response to the Beaumont Commission that recommended that land should be distributed equally between whites and African, which the whites vehemently rejected. Instead, some land was released into a Trust and it was rented to the Africans for settlement and promotion of agricultural activities in the reserves, (ibid). However, Africans remained subsistence farmers or labourers to white commercial farmers who were substantially subsidized or could easily access financial support as they had land as surety unlike Africans. Furthermore, this Act was futile in reforming land tenure security or improving the lives and situations of Africans in urban areas as they remained renters but not owners (Department of Land Affairs, 1997).

The race segregation was adopted and refined by the National Party which came into power in 1948. This political party introduced the infamous apartheid policy. The apartheid policy divided Africans into tribal affinity and transformed the Bantu reserves into Bantustans (which later became the homelands), argued (Harley and Fotheringham, 1999). Africans endured inhumane hardships has they were forcefully removed and relocated to the periphery of urban areas through Group Areas Act of 1950 discussed below (ibid).

2.8.8 Group Areas Act of 1950

Harley and Fotheringham (1999) maintained that the key function of the Group Areas Act of 1950 was to segregate Africans according to their tribal kinship. This Act enables the apartheid government to forcefully remove Africans from the tribally and racially integrated areas into designated homelands. This process of forceful removals bore no compensation as Africans were perceived as having no rights to property or land tenure. The forced removals have adverse impact of Africans livelihood, stability and development. During the time, families were

separated while thriving African framers had to seek employment from their counterpart white farmers, as labourers (ibid).

One of the significant outcomes of the mentioned forced removals was the creation of homelands in South Africa, Transkei and Ciskei (for Xhosa Speaking people), Bophuthatswana (for Tswana Speaking people and Venda (For Venda Speaking people), Natal for Zulu Speaking people and Lebowa (for Pedi speaking people. Interestingly, Transkei, Bophuthatswana, Venda and Ciskei) commonly known as TBVC were turned into pseudo states as they were alleged to have been given independence by the apartheid government. However, the apartheid government continued to interfere or rule by appointing prime ministers and bestow them a responsibility to administer land. In contrast to the TBVC, in rural areas, chiefs or traditional leaders were afforded special land ownership rights and extensive powers over land allocation (ibid).

Since the inception of the Native Land Act in 1913, the establishment of homelands seemed to provide genuine opportunity for Africans to gain access to and utilize the land. However, through customary system (the land was held in trust by the chief) who had a responsibility to allocate and manage land to households (not individuals) to use for residential and agricultural purposes. Similarly, Africans still had no land ownership rights under this customary system. They only had permission to occupy instead of desired title deed to the land. Evidently, the vast majority of land remains owned and registered under the state (Ralikontseng, 2001).

2.9 CURRENT LAND POLICY in South Africa: The 1994 and beyond

In the post-apartheid era, the democratic government led by the African National Party had a vision for sustainable economic growth, non-discriminatory and active citizenry in economic processes. However, to realize this, the democratic

government introduced land reform programme, beginning with the drafting of the white paper on South African Land Policy (1996). The fundamental intent for the land reform programme, with key objectives observed from the Reconstruction and Development Programme (RDP), was to ensure access to land for those without secure land ownership due to the discriminatory laws and policies (Department of Land Affairs, 1997).

Surprisingly, more than over two decades in the democratic South Africa, the land reform landscape and progress has hardly made any significant change. The issue of land ownership and land development still favours the minority as the economic patterns still reflect the conditions of the apartheid era. Racially based land policies and insufficient land caused insecurity, landlessness and poverty for the black people (ibid).

In South Africa presently, many whites still hold vast land tenure and spatially located to affluent environment while Africans have urbanized due to poverty and hard conditions of the rural areas (former reserves and homelands) to seek better opportunities in the cities. However, the Africans find themselves living in worse conditions in slums and townships, without or with inadequate infrastructure and basic services compared to their white counterparts in the suburbs (ibid). Therefore, land policy to address the following in both rural and urban:

- Redress the injustices of land dispossession
- Inequitable distribution of land ownership
- Need for security of tenure
- Need for release of land and its sustainable usage
- The need to record and register all rights in property and
- The need to administer the public land in an effective manner.

The Department of Land Affairs has made sufficient progress in laying the foundation for land reform, inadequate implementation of the below three primary

components remains undesirable: Land Restitution (this component provide for the victims of land dispossession since 1913 to have their land returned or rather be compensated financially); Land Redistribution makes provision for poor and disadvantaged people acquire land with the assistance from the Land Acquisition Grant from the government; and Land Tenure Reform is the most complex area of land reform which aims to bring about unitary and legally validated system to land ownership which will help address land disputes, postulates (Mojaki, 2003).

2.10 Land Reform in South Africa: The need for land reform:

As previously discussed in this report, South Africans suffered a long history of colonization and apartheid which resulted in the majority of black people being dispossessed of their land through the Native Land Act. Documented research by historians attest that indigenous and black people were forcibly removed through conquest, trickery and later application of unjust policies. All these methods and the enacted apartheid polices confined 80% of Africans population to the 13% of reserves where land was barren while the white minority of 20% was allocated over 80% of fertile land for residential and development such as commercial farming. Blacks were prohibited from accessing land outside the reserves. As results, black people had to sell their labour to the white farmers (Rugege, 2004).

Subsequent law such as Group Areas Act of 1950 enabled the state to forcibly remove black people from areas declared to be white areas. Even black people who had title deeds had their land dispossessed due to the fact that they were not white, therefore could not own the land. The Prevention of Illegal Squatting Act of 1951 augmented the Group Areas Act and other racially based land laws by making provision for the eviction of people who had no formal rights on land. The Prevention of Illegal Squatting Act empowered the Minister of Native Affairs to compel Africans to move off public or privately owned land, [and] at the same time authorising local authorities to establish resettlement camps where squatters could be concentrated" (Davenport 1987: 373).

Pampallis (1991 postulates that one of the fundamental priorities of the Freedom Charter of 1955 was sharing of land to ensure that everyone has a right to occupy land wherever they chose. However, as South African democracy was a negotiated settlement, the land issues were compromised. The dreams of many black people were shattered as this negotiated settlement meant that land distribution patterns mainly remained unchanged through the constitutional guarantee of the right to property with only a limited form of restitution (ibid).

CHAPTER 3: THEORETICAL AND CONCEPTUAL FRAMEWORK

3.1 Introduction:

Turok, 2014 claims that due to the scourge of poverty and inequality in South Africa particularly in areas under traditional authority, the ruling government has been criticized for its permissive approach in finalizing key policies relating to land use management and the roles and functions of traditional authorities. As a result, a dire issue of poverty, communal land tenure and rural governance remains unresolved and also key worrying responsibilities for the ruling party. Whilst the aforementioned issues could be justified as complex, the government should allay the concerns and despair of rural communities and traditional leadership by effectively implementing spatial and land use management policies and land reform programmes while recognizing the value of collaborating with traditional leaders (ibid.).

This chapter intends to establish a conceptual framework and discuss some policy aspects related to the understanding of land use management and the role of traditional leadership in rural development. This section will examine issues emanating from SPLUMA, Land Use Management legislation, rural local development and traditional leadership. Firstly, underlying concepts and themes will be highlighted and further discuss broader debates which frame opportunities and challenges. Consequently, the conceptual framework will act as a guide in formulating the study analysis and it will further inform the recommendations (ibid).

The concept of rural local governance which is key instrument which traditional leaders have identified as their perimeter which SPLUMA seeks to undermine or destroy, will be explored below. This exploration is crucial in gauging the extent to which this concept has been practiced over the years and how significant it is to rural governance and development imperatives (Turok, 2014).

3.2 SPLUMA and Traditional Authority

Berrisford (2015) argues that Spatial Planning and Land Use Management Act (SPLUMA) could be panacea for addressing spatial disparities and landlessness experienced by black South Africans, particularly for residents of former homelands. SPLUMA, being the singular national planning law in the democratic South Africa has been hailed as the champion for land redress and accelerated rural development. After the Act began to be implemented in July 2015, there are still some struggles with the finalization of fundamental regulations which affect the full operationalization of the Act and assessment of its implications thereof (ibid). Consequently there are numerous critical concerns as what sort of impacts would SPLUMA have in areas under traditional leadership. The latter chapter is going to examine the feasibility of SPLUMA realizing key principles of Spatial Justice, Spatial Sustainability, Efficiency, Spatial Resilience and Good Administration. This will be critical in identifying the gaps and setting out workable propositions that will ensure SPLUMA has positive impact in spatial planning and land use management imperatives (ibid).

Furthermore, it would be significant to identify and discuss how SPLUMA will affect traditional leadership in areas under traditional authority, with an emphasis on issues of land allocation and administration (Berrisford, 2015). The study would seek to find answers to the obvious anticipated uncertainties regarding the role and legitimacy of traditional authority on land reform and management. This is important as there seem to be overlapping in functions and roles of the local government and that of traditional leaders when it comes to land management and development. This is the case even though the two institutions have been recognized by the Constitution of the Republic of South Africa. This study will seek to determine the functions of the traditional authority on issues of decision-making when it comes to the fundamentals of planning and development in areas under jurisdiction of traditional authority (Keulders, 1995).

This study seeks to understand the complexities and opportunities in the processes of contestation surrounding roles and functions in rural governance and development. The question remains, is SPLUMA an effective planning law that is going to offer support to those engaged in struggles that challenge patriarchal and autocratic power relations in former homeland areas or is it an instrument which avoids people and continue to perpetuate unilateral approach instead of collaborative governance with the institution of traditional leadership?

3.3 Land Allocation

Introduction

In South Africa and globally, there is an ongoing debate and discussion around best solutions to alleviating poverty. Interestingly, there seems to be consensus that central to any proposed solution is access to land for the poor. In South Africa, land redistribution aim at redistribution of land from a wealthy group of landlords to poor people in general or to tenants actually cultivating the land to achieve better social justice and give the poor a chance to improve their living conditions. It also aims to access to land controlled by the State or customary land to an increasing population through land allocation (Hull, Sehume, Sibiya, Sothafile, and Whittal, 2016).

Land allocation can be defined as an allocation of land that the State claims to own or control on behalf of the nation. This is usually marginal land, which is not used intensively by any specific user. Land allocation very often means that the State allocate the land to de facto users, sometimes combined with conditions of development of the land use, on the size of an allocation to one family etc. land allocations in rural areas has been the responsibility of traditional authorities but such role seems to be bestowed to the municipality as per SPLUMA provisions (Hull et al. 2016).

Land allocation in areas under traditional authorities

Land in urban areas and most commercial farms are formally surveyed, well defined and recorded in a formal cadastre that has been described as being equal to the best in the world attests (Syms, 2010). By contrast, many people in rural areas occupy and use land under a system of rights that is conveyed through oral tradition and not documented under the formal cadastre. This means they are not formally recognized as legal holders of rights to this land. Instead, indigenous knowledge systems are used to allocate land rights and define property boundaries. These parcel boundaries are rarely officially recorded. The relevant communities depend on memory and reference to natural and artificial features to define plots of land, which could result in uncertainty regarding the location of boundaries (Ibid.).

When land allocation is undertaken in traditional council areas, allocation is generally driven by indigenous knowledge of their areas but very minimally influenced by provincial and national imperatives, e.g. environmental context , mineral rights, servitudes. Therefore, there is a critical need for national land allocation guidelines to promote efficient allocation of communal land by the traditional councils and to promote orderly development including human settlement. While the development of the traditional council areas needs to be unique to the area, its specific attributes and opportunities and its needs, the development nevertheless needs to be integrated into the development of the wider municipality. To this end the success of the guidelines will be dependent on forward planning and in our view there is no substitute for this, argue (Hull et al. 2016**).**

Components of land allocation:

There are four components that drives land allocation in rural areas. These components are instrumental in the process of land allocation and key in reducing land disputes.

Four components of land allocation to be considered are:

1) The processes of allocating land parcels to potential rights-holders (individual, family or community).

Applicant: who is applying for land?

Applicants may be from the same community as the village to which they are applying for land, or they may be 'outsiders' and not part of that cultural group. In the former case, the applicant submits an expression of interest to the sub-headman. Following the chain of command is very important, and if the applicant goes directly to the tribal office or the chief it is considered an insult! Being a member of the community, the applicant is automatically eligible for an allocation of land, but their application will still be scrutinised and may be rejected. However, for 'outsiders', a motivation and community support are required along with the application. The motivation takes the form of a letter of recommendation from the authority (chief or magistrate) in his place of origin. Also it should be noted that land allocation is done different from one rural area to another and in some the element of gender is key, where land is only allocated to men and single woman, orphan or widow should be represent by a male family member before a land could be allocated (Claassens and Counsins).

2) The procedures of demarcating land boundaries within a tribal jurisdiction

Authority – Who has the authority to grant access / use to land?

Once the application has been submitted it moves through a hierarchy of traditional authority (social institutions) from sub-headman to headman to traditional council (a gathering of headmen presided over by the chief) and finally to the public institutions of local government and magistrates. It is evident that the traditional authorities have legitimacy and authority to allocate land under their jurisdiction. However, there is still a need for the government to play a role of land

administration to ensure proper spatial land planning and land use, whilst ensuring proper land registration and record keeping (Claassens and Counsins, 2008).

3. Demarcations

Demarcations are important to be known and properly documented in order to minimize conflicts between the chiefs and communities members. Traditionally, demarcations were not formal and communities relied on land marks such as trees and rivers as rural land was never properly surveyed (ibid).

4) Land tenure security

Land tenure security arising as a product of the first three components. These components all feed into the land tenure function of the land management paradigm. Historically, most of the land owners in rural areas were given verbal ownership by the chief. There has been an improvement as in recent years. Towards the end of the allocation process the applicant pays a registration fee to the traditional authority and an allocation fee to the headman. The headman issues a PTO certificate which contains the applicant's information and site description. A copy is retained at the traditional authority office, and the applicant is 'registered' with the traditional authority as a member of the community (Claassens and Counsins, 2008).

3.4 Traditional Leadership in Democratic South Africa

Meer and Campbell (2007) argue that the dawn of democracy in South Africa has afforded an opportunity to develop an equality-driven society. This equality-driven society is enabled by the fact that all political ideals and rights of all citizens have been entrenched in the Constitution of the Republic of South Africa. However, it should be cautioned that democratization and liberation in South Africa that gave

way to a new political system, has created contention and confusion when it comes to matters of indigenous governance by traditional leaders (ibid).

According to the proponent of traditional authority, Ntsebeza (2004) emphases that the institution of traditional leadership is ancient and for centuries it has played significant and unpredictable roles over time under different regimes. He claims that such evolution has entrenched the legitimacy and authority of this institution over time. However, it would seem that the institution of traditional authority is being degraded by the democratic government as policies are formulated which are perceived to rescind its power and authority. Such actions raise red flags on the significance and future of traditional leadership in the democratic South Africa, argues (Ntsebeza, 2004). On the contrary, there is an argument by traditional leaders that allays the preceding concerns and prepositions, where they claim that through their cultural rights, they have a fundamental role to play in the developmental local government. The traditional leaders' claims that they are being unfairly compromised and excluded by the current democratic system, resulting in their role in governance and development of rural areas being negated (Ntsebeza, 2004). Therefore, one of the fundamental questions is whether traditional leadership is relevant in the implementation of SPLUMA in area under traditional authority. Does it have a role to play within South African in terms of land use and administration? The section below seeks to answer these commanding uncertainties regarding the institution of traditional authority.

3.5 Traditional authority and the Constitution:

Nthai (2005) argues that during the drafting of the Constitution of the Republic of South Africa, 1996, the significance and relevance of the institution of traditional leadership was one of the contested issues which warranted broad and deep discussion which resulted in a compromise. Thus, a critical decision be made on how to accommodate ancient institutions while embracing principles of equity and democratic representation. Eventually, through the House of Traditional Leaders

and robust negotiation by CONTRALESA, the institution of traditional leaders was acknowledged through chapter 12 of the South African Constitution as the key role player in the system of democratic governance (ibid). Therefore, the latter chapters would have to determine whether or not this institution has a legitimacy and authority to function and participate within the broader legislative framework at local government level?

3.6 Rural Local Development

The first democratic local government elections was held in 1995 which resulted in the establishment of municipalities in South Africa. These established municipalities were made up of elected representatives, including those from the rural areas or former "Bantustans". Thus, the elected local government meant that democratically-elected representatives were now given a legal mandate to govern and develop areas previously ruled by traditional authorities. The White Paper on Local Government, 1998, defined post-apartheid local government as "developmental local government that uses IDP to develop communities in a sustainable and inclusive manner" (Pycroft, 1998:129).

Coetzee, Graaff, Hendricks and Wood (2001) advance that developmental local government sought not only to democratize local governance by introducing elected representatives in rural area, but also to improve the living conditions and quality of life for the rural people. Furthermore and most critical, developmental local government required active participation by all individuals, structures and institutions in development initiatives in their areas. The Municipal Structures and Systems Acts created a platform for traditional leadership to partake in the development of their rural areas. As to the extent to which the traditional leaders have and are utilizing their opportunities to maximize rural capacity is still unclear (Davids, 2003). It should be noted and emphasized that apartheid did not provide for the system of local government in rural area, but used traditional leaders for indirect rule and control. Traditional authorities were recognized by the apartheid

government as an institution for social and political control, which undermined the significance and authority of this institution as it was degraded through abuse and manipulation by the colonial and apartheid regimes (Davids, 2003). Development in rural areas during the colonial and apartheid eras were little to non-existent. In homelands, where the majority of rural people (mostly blacks) were concentrated, public service normally associated with local government was provided by the systems of tradition authority. On the contrary, in rural areas under the control of white commercial farmers, services and infrastructure were provided by either the national government or provincial administrators and such provision enabled white commercial farmers to enjoy competitive advantage (Coetzee, et al., 2001).

In his writing on Development as Freedom, Sen (1999) argues that the vision for development local government has strong resonance with the principles of freedom, equity and choice. When viewed from this perspective, local development has a fundamental obligation to remove the "unfreedoms and inequalities" that prevent the rural poor from articulating their needs and experiencing improved quality of life within their areas of residence without having to migrate to urban areas (Sen, 1999). It is with this preceding premise that the enactment of SPLUMA could be viewed as an attempt by the democratic government to redress the imbalances and inequalities of the past. Thus, the study wants to determine whether traditional authorities as institutions of governance in rural areas are viewed (even subtle) as ineffective and incompetent institution to be mandated as agent of change and redistribution of communal assets, land in particular (*ibid*).

3.7 The role of traditional leaders in rural governance

Ntsebeza (2004) postulates that the dawn of the democratic South Africa during the 1994 elections marked a new and exciting era not only for the country but for the poor and formerly marginalized people. The infant democracy gave hope and promised to the majority of the citizens that it will fulfill and advance freedom, social justice and improved quality of life and living conditions. To realize the

promise and the expectations of its citizens, the elected government had a mammoth task of establishing and reforming systems and institutions of governance. According to Ntsebeza, (2000) the institution of traditional leadership was no exception as it remained a fundamental partner for advancing rural development agenda. It should never be ignored that for many centuries, the institution of traditional leadership was a centre of governance for the rural populace especially in the former homeland or “Bantustans“. Subsequently, this study will be scrutinizing the role of the institution of traditional leadership in rural development and governance in the post-apartheid South Africa, with specific reference to the enacted Spatial and Land use Management Act 16 of 2013 (SPLUMA).

The assessment is viewed to be significant, especially 20 years after the adoption of the Constitution of the Republic of South Africa. Chapter 12, Section 211 of Constitution of South Africa, 1996 recognizes the status and role of traditional leadership in areas where they observe a system of customary law. The SPLUMA seem to be expounding the fine details regarding traditional leaders’ role and authority in matters of governance and socio-economic development process in the democratic state, hence the ambiguity and the contestation between the elected local government and traditional authority (SPLUMA, 2013).

It should be noted that at the centre of all this confusion and frustration was the debate whether this institution should have any role in the democratic South Africa, and if so what role? Given the assertions that the institution of traditional leaders was an apparatus of the colonial and apartheid rule, the significance and reputation appeared to have been eroded (ibid). In addressing this challenge, Traditional Leadership and Governance Framework Act was ratified to provide powers and authority of traditional leadership in the development and governance of rural areas. On issues of land, traditional councils were authorized with land administration and promotion of sustainable use of land as some of the core roles of traditional leaders, particularly in areas under the jurisdiction of traditional

council. The question of whether or not the mentioned pieces of legislation are or have been adequate enough to entrench the role and powers of traditional leadership on issues of land use management and rural development, remains a critical one to be answered during the analysis and recommendation section of the study (*ibid*).

3.8 SPLUMA and Rural Development

The significance of SPLUMA is that it is singular national legislation aimed at streamlining all spatial and land use management needs of the country in order to redress not only socio-economic but also spatial discrimination created by both colonial and apartheid regimes. This piece of legislation was also meant to address challenges of none or under development in rural areas (SPLUMA, 2013). Therefore, the study seeks to explore the concept of rural development with reference to the role of traditional leaders and local government. However, in an attempt to map out these roles, it would be a gross mistake to ignore to define what rural development means.

Rural development could be a contested concept, however, Onokerhora (1994: 50) defines rural development " as a process of not only increasing the level per capita income in the rural sector, but also the standard of living of the rural population". This definition indicates that rural development has multiple and complex factors that should be considered before one can claim that rural development has been realized. However, rural development is associated with transforming social and economic structures, institutions and relations in rural communities. Furthermore, rural development is so significant that it goes deeper and beyond agriculture and economic growth, but entails the creation of just and equitable environment that would necessitate socio-economic justice and improved standard of living for the rural population (Lele, 1975).

As rural development is defined as “a process” which as driven towards capacitating rural people to control their environment by Onokerhora (1994), the study seek to examine what roles did traditional leaders play in the realization of rural development and such would be used as a yardstick to determine the role and anticipated implications of the implementation of SPLUMA, especially in areas under traditional authority.

3.9 Customary Law System and Democratic System

George and Binza (2011) ascertain that there are two school of thoughts deliberating on the significance and relevance of the above-mentioned two systems of governance in South Africa, particularly in areas under traditional leadership. The two schools are democratic pragmatism and organic democracy. The school of democratic pragmatism delineates democracy and human rights from the liberal tradition that recognizes and protects rights of people to choice and freedom. The Constitution of South Africa reverberate this school of thought through its underpinning definition of democracy and human rights (*ibid*).

Sithole and Mbele (2008) postulate that many scholars have applied the theory of pragmatism when scrutinizing the institution of traditional leadership’s compatibility with democratic governance. Three arguments made by the democratic pragmatists against the institution of traditional leadership, firstly is the fact that this institution sanctions inheritance of leadership which is contrary to the principles of the democratic system. The second argument is that traditional leadership in rural areas seems to propagate due to permissive changes of the local government institutions. Such situation is perpetuated by the fact that government supports the institution of traditional leadership which is in contradiction with local democracy. The last argument is that despite cultural relativism of those who support traditional leadership, the objectives and rational principles of democracy mandate the state to ensure access to democracy as a commodity to which all people are entitled (Sithole and Mbele, 2008:05). Consequently, the proponents of the

democratic pragmatism school of thought are adamant that traditional leadership should not be recognized and sustained in a political democracy, as it vehemently contradicts the core values of democracy which are freedom and choice (*Ibid*).

Contrary, the proponents of the school of organic democracy hold firm belief on the institution of traditional leadership. They view traditional leadership as different, effective and grass-roots democracy, which is not necessarily compromising or contradicting democracy but as critical partner in advancing democracy and rural development mandate of the government (Sithole and Mbele, 2008:09). It is clear that their view on traditional leadership can exist and flourish in a legitimate setting of modern democracy that upkeeps development and good governance. The organic democrats endorse the system of traditional leadership as form of governance that fulfills diverse developmental and governance needs of the rural populace. This institution is resilient as evident how it survived the abuse and manipulation by the colonial and apartheid regimes. Its physical and cultural location renders it as a unique instrument for realizing the needs of the rural people (*ibid*)

3.10 Legitimacy and authority in Local Governance

The relationship and levels of co-dependence between the institution of traditional leadership and the local government has been contentious one. In their discourse, Bikam and Chakwizira (2014) postulate that government has never perceived traditional leaders as true partners, especially on issues of governance and land use management. Thornton, (2001) alleges that the government strung along the traditional leaders in order to satisfy issues of consultation and community mobilization as they recognize that traditional authorities command high level of influence on the rural people. Thus, government had to string this institution along in order to advance its political agenda, alleges (Bikam and Chakwizira, 2014).Such allegations could be witnessed on how the government has deliberately and actively entrenched policies and legislation aimed at undermining the authority of this

institution. However, this study will examine whether the legislation on spatial planning and land use management has been an instrument for such conspiratorial allegations (Thornton, 2001).

Lestoalo (1987) assert that in any context, effective leadership is solemnly dependent on legitimacy. Importantly, he emphasizes that such is reliant on the extent to whom wants to be led grants one authority to lead them. Thus, such is reverberated by the African saying that goes "***Hosi I hosi hi vanhu***" (chief is a chief through the people). Mindful to this fact, it should be noted that research and comments on the history of traditional authorities in South Africa has poked many holes in the institution that has enormously degraded its legitimacy. Some of the historical crippling critics that undermine this institution since it is hereditary and ascribed include low levels of education, professional performance, and patriarchal tendencies which sidelines women and their rights, argues (Keulder, 1998).

Therefore, serious questions remain with regard to the legitimacy of traditional authority especially when traditional and democratic principles collides. Thus the question is which supersedes the other. The contestation occurs on the very grounds that traditional leaders claim legitimacy and authority to exercise power, whereas democratic and modern forms of government challenge this institution and endorse itself as government of people by the people. The analysis section of the study will focus in critically analyzing issues of legitimacy and authority, particular in rural areas. The question would be which institution is best suited and authorized to address issues of land reform and rural development. Rather, will the collaboration of these institutions be beneficial to the needs of the rural people?

3.11 Accountability

Bikam and Chakwizira (2014) argue that accountability is the central principle in leadership and governance which should be agreed upon before one takes or is

given a task or responsibility. As the two institutions (i.e. elected government and traditional authority) wrestle for power and control to govern the rural areas, one of the critical questions is that who among the two should be accountable to who? Proponents of traditional leadership has argued that this institution is legitimate and has authority bestowed by the traditional law and the constitution, but similarly, the elected local government has acquired those principles through democratic system and constitutional imperatives, argues Nthai (2005). Regardless, it would be foolish and futile to believe that traditional authority has no role, legitimacy and authority on issues of land and rural development. Therefore, as much as traditional authority should have a meaningful and credible role on matters of land use management and development issues in areas under their jurisdiction, then they should be accountable to the people they lead and to the government within which they operate under (ibid). This study will later examine the question of accountability between the two institutions to determine what effect such has on the rural people.

3.12 Gender Equity, Democracy and Customary Law

During the democratic dispensation of the South African government since 1994, the principle of gender equality has been fundamental when committing to rural development, attest (Bikam and Chakwizira, 2014). Such conviction of realizing the rights and value of women stems from centuries of oppression which undermined women as equal partners in both families and communities. The institution of traditional authorities is and has over the decades been influenced by the principles and values that encourage patriarchy, whereby leadership, authority, inheritance and succession were mainly preserved for men (ibid). Consequently, the patriarchal tendencies seem to have inherently undermined women's rights and freedoms that are enshrined in the Bill of Rights of the Constitution of the Republic of South Africa. Thus, it is undoubtedly correct to assert that the institutions of traditional authority need vigorous transformation to ensure that it embraces values of gender equality. Such transformation will resonate with rural women especially

on land and development issues. Traditional authority should adjust to the following three key areas which affect rural women' socio-economic imperatives:

(i) Inheritance rights,
(ii) Land-use and access rights, and
(iii) Participation in local governance and decision-making.

Bikam and Chakwizira (2014) claims that historically, customary law systems and traditional practices governed and dealt with the preceding matters through the relationship women had with men, particularly marital status and not as individual citizens with their own rights. Furthermore, women's power in decision-making and influence both at macro-micro level remains low, and evidently dictated by men. Women are compromised by power structures especially in rural areas where customs and traditions are heavily biased towards men (ibid). Nevertheless, it is worth noting that it could be misleading and narrow thinking to assume that traditional authorities are the only institution advancing patriarchal values in a broader South Africa. Thus, this study will examine how gender equity is exercised by the institution of democratic government and traditional authority when dealing with matter of land rights when it comes to land allocation of women in particular (ibid).

Williams (2011:09) argue that for centuries, customary legal systems in many countries has posed threats to women's equality rights by legitimizing and enforcing discriminatory rules with respect to a host of issues including marriage, property and land ownership to name but few. As enshrined in the Bill of Rights of the Constitution of the Republic, everyone has a right to practice one's culture and religion as it's a fundamental human right. However, the central question is that, "is it possible for a country to both respect and accommodate the customary law system of its various populations, and, similarly protect the equality rights of its women citizens?" or must the country choose between these two positions, necessary sacrificing one to the other? In the light of such predicament, this study will later scrutinize whether or not the customary legal system recognizes, protects

and promotes the rights of women in its cultural practice or otherwise violate equality norms of the country's constitution? Therefore, the compelling question to the preceding dilemma and conflict should be whether or not South Africa through its democratic system (SPLUMA) and customary system (Traditional authority) should sacrifice equity to protect culture or vice versa?

3.13 From Land Dispossession to Land Restitution in South Africa

Kepe (2012) argues that one of the conquest and legacies of the colonial and apartheid regimes is the dispossession of indigenous people from their land. Such was achieved through segregation policies that were aimed at denying blacks land ownership rights, especially outside the designated homelands. This has devastating effects on the black majority of this country which such effects has been felt by the "born free" generation of 1994.

Evidently, the democratic government of South Africa since 1994 to date has been faced with a daunting challenge of crisis due land dispossession. Therefore, it becomes imperative for the government to institute land reform policies to address the historical legacy of colonial and apartheid policies. This is being done through the land redistribution to the landless communities and restitution of rights to those who lost them as a result of the 1913 Land Act, and lastly through secure tenure rights (Kepe, 2012).

Therefore, the study will examine the role of the state and traditional authority on defining rural property rights and what implications they have on the success or failure of rural development imperatives. It will seek to determine the locus and nature of political authority at local level against the traditional institution of customary law.

3.14 Participation, Good Governance and Democracy

Miltin and Thompson (1995) argue that participatory methods are not a new phenomenon as they were developed during the 20th century. It was and remains a critical approach of increasing decision-making, access and control over vital resources. Participation by local leaders is deemed necessary in ensuring that the needs of the rural communities are addressed by the government. Such participation amounts to good governance and good democratic practice. Traditional authorities are seen as representing local/rural communities and promoting their developmental needs, postulate (Miltin and Thompson, 1995). Consequently, the value of participation by traditional leaders on matters of land reform and development should never be perceived as a lip service exercise, rather a fundamental paradigm which can never be compromised in the name of rural development (ibid). The later chapter aims to look at levels of participation by traditional leaders in development and implementation of spatial planning and land use management. This is critical as it would highlight (if any) levels of participation and its effects on land reform issues and development in rural areas of South Africa.

3.15 Land tenure and land reform

This section aims to explore what processes resulted in many black south Africans being dispossessed from their land and confined in the so-called homelands. Bikam and Chakwizira (2014) claims that through political and discriminatory laws, past governments deliberately sought to drastically reduce the amount of land available to blacks; this was a means of social control and means to advance the needs of white minority. Such systems resulted in social injustice and landlessness, where the majority of blacks lived in abject poverty. As a result, land tenure and land reform remains one of the things of the contentious issues in the democratic South Africa. The government of today has a responsibility to redress the injustices of the past. Bundy (1990) argue that due to the value of the land, all land disputes worldwide have been caused by the conflict emanating from land access and land

ownership. Prior legislation including the 1913 Land Act were devised to ensure that black Africans could not own land and those having access to land were dispossess. Therefore, lack of land tenure was prevalent amongst blacks and in most cases still persistent in modern democratic South Africa. Letsoalo (1987) as a proponent of blacks land tenure argues that the system of land tenure should be addressed in a holistic manner, not as a two separate forms of tenure, i.e. individuals and communal landownership. She is convinced that provision of tenure to the blacks will profoundly improve their socio-economic environment (ibid).

The traditional land tenure has been practiced in Africa over time. King (1977) purports that communal land tenure has been a prominent form of landholding in many rural communities across the African continent. He further attests that land allocation and control was conducted through kingship system. Traditional leaders were authorized by the virtue of chieftaincy to oversee all matters relating to land allocation and administration. Although the indigenous land rights systems could be praised as a panacea to issues of landlessness, it would be a mistake to compare it to the Western interpretation of land right which emphasizes individual ownership. It can be entirely disputed that communal tenure system is complex and often does not respond to the needs of the individuals. Such complexity could be found from the problems and challenges that emanate from the effort of assigning title deed to land, points out Davenport and Hunt (1974). Another crucial source of confusion is with regard to the role which the chief plays in communal land system as the land of the tribe is perceived to be belonging to the chief. They argues that the chiefs had rights to allocate land but even them, they do not own the land. They simply control the allocation of land. Once the land has been allocated, it became, by implication, owned by the person to whom it was allocated. By virtue of being a member of a tribe, the land could never be repossessed from the family unless they leave the tribe, where after the land could be reallocated to another family, argues (Davenport and Hunt, 1974).

The study will later determine the governments' efforts to address land tenure and land reform through progressive land legislation and its implications. The role and authority of traditional leaders in land allocation and ownership will be measured to determine their relevance and significance in rural development in the modern and democratic South Africa (ibid.).

CHAPTER 4: DATA FINDINGS

4.1 Introduction

This chapter would be dissecting critical and contentious issues raised by SPLUMA drawing from the literature review. It will highlight what SPLUMA is about and its potential implications in areas under traditional authority. This assessment will be done through the lens of traditional authorities as custodians and primary governance institutions in the former homelands.

4.2 Significance of SPLUMA and its Regulations

Berrisford (2015) describes SPLUMA as a singular integrated planning law in South Africa which governs and directs spatial planning imperatives. It's a legal spatial framework that provides for the regulation of spatial planning throughout all the spheres of government. Although SPLUMA will ensure uniformity on issues of spatial planning, its other central significance is the fact that it is going to repeal the discriminatory legislative frameworks and policies that were created and perpetuated by the colonial and apartheid regimes. Often those planning laws were segregatory, fragmented, complicated and inconsistent. This new law grants the Department of Rural Development and Land Reform (DRDLR) the power to pass Regulations in terms of SPLUMA to provide additional detail on how the law should be implemented. The final version of these Regulations (Regulations in terms of SPLUMA *GG* 38594 GN R239) was published on 23 March 2015. The law came into effect on 1 July 2015, while a commencement date for the Regulations are yet to be published. As such some of the municipalities are yet to fully implement this law as there are some ambiguities and grey areas when it comes to responsibilities and functions of traditional authorities (www.customcontested.co.za).Therefore, this Act, regardless of some challenges and dissatisfaction, has been commended by many including traditional authorities for its commitment to uniformity, efficiency and promotion of socio-economic inclusion that is aimed at redressing spatial and socio economic legacy left by the apartheid regime (ibid.).

4.3 Legitimacy and authority

The question of recognition and legitimacy of traditional leaders in matters of spatial planning and land development is central to the successful implementation of SPLUMA or its failure. SPLUMA has been in implementation phase for seven months since July 2015 but it was met with defiance from the institution of traditional leaders and rightful landowners (indigenous clans and families) in areas under their jurisdiction. This defiance was so serious that traditional leader, should there need to be, were ready to be arrested for their fight against SPLUMA, claims Ndenze. The disappointment and dissatisfaction about SPLUMA was reverberated in the deputy chairman of the National House of Traditional Leaders, Mr Sipho Mahlangu when he said:

"With this Act, abakhosi (Chiefs) are very angry. They are very angry and we were praying that the minister will give us an explanation that we can understand; we don't want ourselves fighting with our own government. We plead with the minister to suspend the implementation until amendments are made." (www.timeslive.co.za/.../Angry-chiefs-vow-to-defy-new-law-on-land-use, July 2015).

The bone of contention as mentioned in the preceding section was lack of recognition as traditional leaders and landowners. Consequently, such lack of recognition could be catastrophic for rural governance and development. Traditional leaders believe that the Act (SPLUMA) has undermined their power and authority with regards to issues of active participation and leadership. Tihosi believes that for the fact that SPLUMA gives sole discretion to the municipality on who gets to sit on the Municipal Planning Tribunals, even on communal land, it a deliberate and confrontational action aimed at degrading their authority, influence and means of income. This is seen as a direct attack on the ancient traditional institution which has weathered the storms of colonial and apartheid region. Thus, traditional leaders have been calling for the suspension of SPLUMA and its implementation thereof, while the state was steadfast and on the July, 1st 2015 implementation date which was adhered to, claimed (Ndenze, 2015).

It would appears that the process of consultation of amakhosi has been flawed as some of their major concerns were never addressed or recognized. One of the critical concerns was that the chiefs needed is to be recognized that they were the custodians and rightful owners of the communal land in areas under their jurisdictions while the Act only recognize them as the de facto owners of the land as the rural land is owned by the state in South Africa. Such contradictions will remain a contentious issue that could have a detrimental effect of the realizing of SPLUMA objectives (ibid.).

4.4 Consultation versus participation:

The state claims that SPLUMA and its Regulations have granted too much power to the traditional councils, whereas the traditional leaders and their proponents deny this as they claim that they were not properly consulted during the legislative process hence their role and powers on issues of land are being stripped away by the government who has given mandate and powers to the local municipalities even in areas under traditional authority to deal with issues of planning, land allocation and management (ibid.). Nonetheless, through extensive exploration of the literature review and analysis of the Botswana and Ghana cases studies, it is undeniable that the institutions of traditional leadership and state should work collaboratively on addressing issues of land allocations in rural areas. The success of such partnership would be dependent on role clarifications and mutual respect. The SPLUMA being the unitary planning legislation has bestowed the local government with land planning power and authority over national jurisdiction including areas under traditional authority. However, the institution of straditional authority remains key to managing customary land. As it was a practice for centuries, land allocation is best done by the traditional leaders since they have customary and cultural knowledge of their communities. Communities still hold this institution dearly and have faith in how land allocation processes are conducted in

their area. The two institutions should actively engage and communicate with each other to ensure sustainable land allocation, asserts (Ntsebeza, 200).

4.5 Powers and authority: What do SPLUMA regulations say?

The powers of traditional councils in relation to planning and land use are governed by regulation 19(1) and (2) of the SPLUMA Regulations, which read:

"19 (1) A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of any relevant national or provincial legislation, in terms of which the traditional council may perform such functions as agreed to in the service level agreement (SLA), provided that the traditional council may not make a land development or land use decision.

(2) If a traditional council does not conclude a service level agreement with the municipality … that traditional council is responsible for providing proof of allocation of land in terms of the customary law applicable in the traditional area to the applicant of a land development and land use application in order for the applicant to submit it in accordance with the provisions of the Regulations."

The provisions in the above section of the regulations undoubtedly indicate that issues of power, authority and control in relation to issues of land planning and land use remain a contested space. It is evident from the provisions of the SPLUMA regulation 19 (1) (2) that powers afforded to the traditional authorities on land planning and land use imperatives is limited and has stringent conditions. The provisions provide that traditional authorities perform functions related to land planning and land use, including land allocation and developmental initiatives in areas under their jurisdiction provided they have signed a Service Level Agreement with the municipality. It further directs that such function could only be permitted subject to the compliance with both provincial and national legislation. In an event that the SLA was not concluded with the municipality, the state demands that

traditional leaders would be required to provide proof of land allocation in terms of the customary law. It is thus unmistakably clear why traditional leaders are so determine to fight against SPLUMA for their power, authority and autonomy in rural areas are taken by force by the state just like how the institution was used as an instrument of the then regime to " indirectly rule" Africans in homelands. The traditional leaders believe that this (indirect rule) is the same approach that was used by the apartheid regime to dilute the power and legitimacy of the institution of traditional leaders (www.customcontested.co.za).

A closer scrutiny of the above-mentioned regulation 19 (1) (2) raise critical question of whether traditional councils can legally be granted land planning and land use powers in terms of SLAs with municipalities. Such apprehension is due to the fact that there is no Constitutional provision for the delegation of traditional leaderships or traditional council to perform or execute governmental functions and powers. This uncertainty was confirmed through the decision by the Constitutional Court where it was ruled against traditional leadership or traditional council exercising municipal powers or functions (www.customcontested.co.za).

The ruling indicated that if the traditional leaders were supposed to have governmental powers and functions the 1993 Interim Constitution could have specifically indicated so. Instead, the Constitution merely stated that the status and role of the institution of traditional leaders should be recognized. Such recognition is in line with Section 211 of the Constitution at present, with emphasis their role of customary law custodians. Against this background, the constitutionality of replacing elected local government officials with traditional leaders (largely unelected and other apartheid-imposed) to perform land planning and land use management functions for municipality remains troublesome (ibid).

4.6 Legitimacy of the Traditional Council

There has been a serious concern by the traditional leaders over how their power is being legally recognized by SPLUMA. Even though, SPLUMA Regulations give powers to traditional councils as defined in section 3 of the Traditional Leadership and Governance Framework Act of 2003 (the Framework Act). The Framework Act does not recognize tribal authorities that were created under apartheid as they are deemed undemocratic and none-progressive. As a result, these tribal authorities to be legally recognized and be given powers, they would have to be transformed to subscribe to democratic principles of the republic. The transformative requirement put forth by the Framework Act included that the firstly, traditional council should at least have 40% of the traditional council members elected, secondly it called for one third of the traditional council members to be women to achieve gender equity imperatives. This was problematic and mammoth challenge as majority of the traditional councils across South Africa has not or simply reluctant to meet the said requirements (ibid).

This evident as traditional council elections were non-existent and even where they have been held there are claims that the principles and processes of democratic elections have been flouted. It is also claimed that for over a decade, no traditional council elections has been held in Limpopo Province and just like in many other traditional councils, the women's quota remains to be met. In the light of failure by most traditional councils to meet the set requirement by the Framework Act, it therefore means that they are not validly legally constituted. Accordingly, those traditional councils may not have legal capacity to exercise powers granted to them by the SPLUMA regulations. Therefore, traditional authorities are unhappy and disappointed that this state through technical legality has once more undermined their power in discharging their roles and functions on matters of land planning and land use in areas under their jurisdiction, and that remains their source for contestation with SPLUMA (ibid).

4.7 Customary Law and land Management

It should be noted that the customary law and the role of traditional authority in relation to land planning and land use has been recognized through Regulation 19(2) of SPLUMA. The said regulation empowers traditional councils to provide proof of a customary land allocation to anyone living in areas under their jurisdiction that makes an application for development and land use. Although such recognition brings a ray of hope regarding powers and the role of traditional authority, it has myriad of challenges to consider. Firstly would be the issue of determining what constitute customary law when it comes to issues of land management. The regulations gave provision only to the traditional council to use their prerogative in defining and determining what qualified “customary law” when allocating land. Consequently, this process is open to corruption and abuse by some traditional councils which could aggrieve many families, households, clans and communities. The second challenge is the assumption that traditional councils are the sole and rightful institutions entitled to determine the content of customary land rights. Such assumption is shortsighted and treacherous to many families, households, clans and communities for whom their land rights, customary laws and practices may be undermined for economic gains. This is because of the fact that in many rural communities or villages, land allocation and management takes place in manifold layered systems in those communities. For instance, if a family member needs a piece of land, they would request from the head of the household (mostly fathers), if not available they would then ask from their relatives (uncles), clans, then to the headman (Nduna), and thereafter to the traditional council. Therefore, this indicates that in many rural communities, land allocation and management is dealt with in multiple different levels. Therefore, this could appear to be a Catch 22 situation as the focus on land planning and land use in traditional council could entice traditional leaders to support SPLUMA, on the other hand, this could alienate and disadvantage many rural people living in the former homelands (ibid).

4.8 Traditional leadership, Powers and Accountability

SPLUMA regulation 19 has stated that traditional leaders could not have decision-making powers in relation to land planning and land use management as whatever functions they perform should be as per agreed upon in a service level agreement with the municipality. In such cases, the municipality's powers and authority supersede that of traditional authorities. Ironically, the Regulations provide for the municipality to outsource its powers and functions to traditional leaders. However, those powers and functions are not clearly defined or articulated and this is likely to cause confusions and frustrations between local municipalities and traditional leaders. Consequently, such lack of clarity between the two institutions is likely to have an adverse impact on rural community people. There could be delays in land allocations or disputes as who had an authority to rightfully allocate the land between the municipality and the chiefs. The traditional leaders may allocate a piece of land and the same land could also be allocated to someone else by the municipality because the land allocated by the chief is often not registered with the Deeds' Office. This problem could cause frustration, loss of money and lack of access to allocated land, affecting their wish to reside or development such land for commercial purposes. Against this backdrop, the question of whether or not traditional leaders should be bestowed powers to execute land planning and management remains a critical one (ibid).

Taking into account the provisions of this regulation, the question of competency and accountability as fundamental components of good governance arises. Given that many members of traditional councils are not conversant with issues of spatial planning and land use management, their competence in the powers and responsibilities given to them is questionable. If that is the case, then should traditional leaders be held accountable for failures to advance spatial and land use management functions? Although traditional leaders and municipality could be viewed as partners who compliments each other, as per regulation, traditional leaders can still do as they please because land allocation and proof of customary land allocation remains with them. Therefore, all land development and use

applications for individuals residing within the jurisdiction of the traditional council are still dependent on actions and prerogative of that traditional council. This is because the regulations make emphasis that before a municipality could consider any applications on land, traditional councils should first provide proof of customary land allocation (ibid).

Further, non-existence on definition and clarity of powers and functions in this regard aggravate the need to debate and reconsider the regulation provisions. Therefore, unless the highlighted elusive powers and functions outsourced to traditional leaders are properly addressed, the institution of traditional leaders can never be held accountable. This lack of accountability to both ordinary people and local government is due to the fact that the effective mechanism for holding traditional leaders accountable is absent in this SPLUMA regulations (ibid). Therefore, to ensure that customary law and modern governance of local municipality work collaboratively, the powers and functions of traditional leaders in respect to land allocations should be clearly defined so that there could be checks and balances. There should be a national guidelines and procedures that should be adhered to by all traditional leaders when allocating land. This will probably ensure that there is uniformity across all areas under traditional authorities (www.customcontested.co.za).

CHAPTER 5: ANALYSIS AND CONCLUSION

5.1 Introduction:

This chapter is going to analyze key themes associated with SPLUMA and its implications in areas under traditional authority. The discourse will thus determine whether SPLUMA could be applicable in tribal communities and its implications thereof. Conclusions will be drawn as a form of possible recommendations to be considered for future research or implementers of SPLUMA in areas under traditional authority

5.2 Economic implication: Tribal Levies and Customary Law

Traditional leaders are constitutionally tasked through Section 212(1) with conception and implementation of rural development programmes being the custodians of the customary law. Even during pre-apartheid era, traditional leaders have been surviving financially through the tribal taxes and rural levies in order to run the affairs of their communities. Traditional council as the institution of governance in rural areas requires operational funding for covering day to day expenses the developmental mandate from their community with regard to service delivery aimed at improving the quality of life for the rural people. According to Claassens (2011) the seriousness of the tribal levies was unearthed during rural consultation sessions about Traditional Courts Bill which was held between 2008 and 2010 in former homelands. She claims that the resurgence of tribal levies in Bantustans by traditional leaders was highlighted as a critical problem, with adverse ramification especially to the poor, unemployed, pensioners and women. It was reported that traditional leaders were extorting monies through annual levies or ad hoc levies from the members of their rural community. The collected funds have been reported to be for activities including chief's protection, chief's lobola, chief's residence (often Villas), chief's car and petrol consumption. These activities indicate

that traditional leaders were enriching themselves instead of uplifting their communities from poverty. The amounts paid for the levies are reported to be between R100 to R150 per household in many tribal communities. There have been mechanisms to ensure that levies are paid which included traditional leaders refusing to issues confirmation of residence letters which are required when one is to apply for an identity document, applying for employment, opening of a bank account (ibid,).

As SPLUMA regulations 19 (1)(2) has made provision for the traditional councils to exercise power and functions of municipalities to allocate land and exercise powers and functions of local government, the situation for rural dweller could be worsen as this has created perfect opportunities for some traditional leaders to exploit the system for their own personal gains. One could not help but notice that traditional leaders could use SPLUMA to advance compliance with tribal levies as they are likely to refuse access to land and other community based services (ibid.). Even though this could be the case, SPLUMA promotes that spatial and land planning and development in rural areas should be the mandate and function of elected local government, this raise concern to traditional leaders as this Act is interpreted and perceived as being imposed upon them to depower them and also rob them of financial gains and influence in areas under their jurisdiction. The fact that the regulations have indicated that traditional leaders would not have decision-making powers on land rights and land management remains one of the worrying factors that compel traditional leaders to spurn SPLUMA (Ibid.).

Oomen (2005) asserts that although tribal levies have been an established practice that is being exercised in many parts of the former homelands, there have been serious problems and irregularities against this practice. Some of the common irregularities related to how the tribal levies were unlawfully collected for the community fund but diverted for personal use by the chiefs and council members. There has been an outcry of traditional leader being living lavish lifestyles while their rural subject swam in abject poverty. For decades, there has been no accountability to the subject regarding the levies, claims Oomen (2005).

In terms of legality of the tribal levy practice, the Constitution of the Republic of South Africa has given power to the three spheres of government (national, provincial and local), to legislate and impose taxes. However, such is subject to stringent legislative and procedural requirements that are aimed at protecting the rural people, (Claassens, 2011). Even though Legal experts have advised that traditional councils cannot levy taxes, as they are not a sphere of government expressly mandated to do so by the Constitution, the advice fell on deaf ears as the practice still continues today, decades after the rural people's contestation (ibid.). Furthermore, the Traditional Leadership and Governance Framework Act (Framework Act) is silent on whether or not traditional councils or chiefs have the authority to impose tribal levies. Nonetheless, the Framework Act made some reference to financial accountability through having proper records, receipt, audited financial statements and conducting annual feedback meetings on activities and finance But the question remains, how many traditional leaders comply with the Framework Act and what measures are available to deter or hold traditional leaders accountable (White Paper on Traditional Leadership, 2003, 46, 47.).

5.3 SPLUMA undermines Customary Land Rights

Claassens, (2014) claimed that SPLUMA could be an Act that undermines customary land rights. This they argue, could be as a result that traditional authorities or councils through regulations 96, 97 and 98 has been conferred with decision-making powers over land administration as they made provision that they could be responsible for allocation of land and development. Such provisions for power and control has been made under the assumption that land administration is in the main, a function of traditional council, argue (Claassens, 2014). Although the conceptual basis for these regulations are similar to that of Communal Land rights Act of 2004, which was found to be unconstitutional by the Constitutional Court in 2010, it underpins the current policy on communal land tenure. In areas where traditional leaders feel the need to monopolize business opportunities, such

provision of power by SPLUMA could be used to undermine households' rights and communal land rights. Further concern is that the aforesaid regulations rely on misconstrue role of traditional leaders in land administration that is inconsistent with the existing system in communal areas (ibid.).

SPLUMA regulations also empower traditional authorities to define customary law and provide proof of notification in line with customs of the land. This is problematic as in doing so, the assumption that customary law is the conserve of traditional leaders. As results, the rights of rural people are trampled upon as their active participation on matters of customary imperatives is negated, claims (Claassens, 2014). Consequently, SPLUMA provides for the unilateral determination of land administration by the traditional leaders that are customary permissive and beneficial to them. This approach is peculiar to the practice of customary law and existing systems of land administration in communal areas, wherein decision-making on land allocation and management occurs at multiple different levels of the traditional community.

Furthermore, the powers conferred to the traditional leaders are likely to undermine the rights of smaller or vulnerable groups and abbreviate their ability partake in decision-making process in their communities. Also, the regulations assume that there is a uniform customary law observed by all living in so-called traditional areas. This could be so far from the truth given that customary law is not static but changes with time and space. Therefore, it should be noted that unlike the centralized decision-making powers on land administration, decentralized decision-making powers are preferred and common model in areas under traditional area where communal land rights are paramount in South Africa. The later system is commendable because it affords accountability through mediation of power by multiple levels of authority and social organizations such as households, families and clans (ibid.).

5.4 Accountability and Transparency

The principles of accountability and transparency are central in South Africa's founded democracy in that they are enshrined in the Constitution of the Republic. As such, SPLUMA's regulations 97 and 98 have failed to ensure that traditional authorities that have been offered powers and responsibilities towards members of the public, subscribe to similar principles, as it would also be required of them by customary law. Yet, the regulations have dismally failed to ensure that traditional authorities uphold similar democratic principles when dealing with matters of land allocation and land development applications (Claassens, 2014).

These regulations assume that 'traditional authorities' are responsible for approving allocations of land in traditional areas and then make unilateral decision-makers in respect of land developments but then fail to incorporate checks and balances or guidelines for how those decisions should be made – stating only that they must be 'in accordance with customary law' where there is no service level agreement with the municipality. These regulations clearly show the confidence that the government has on the institution of traditional authority. However, there is clearly a need for checks and balances as well as uniformity on how allocation of customary land was conducted. There should be guidelines on land allocation which will provide guidance to the traditional leadership without knowledge and experience of land allocation. The state should provide land administration services to ensure that all land allocations by traditional authorities are properly registered and recorded (ibid).

5.5 The role of traditional authorities in land administration

SPLUMA and its regulations have painted a perplexing confusion around the role and status of traditional authorities, especially in relation to land ownership and land administration. The legal situation is clear on the matter of land ownership. Firstly, the land is owned by the state (Republic of South Africa) and secondly rights

vest with the informal rights holders in terms of INTERIM Protection of Land Rights Act no. 31 of 1996(IPILRA). Section 2(1) of IPILRA provides that people cannot be deprived of 'informal rights' to land unless they consent to being deprived of the land (or the government expropriates the land and pays suitable compensation). Therefore, this means that a person can only give up their informal or customary land right if they agree to give up their right.

These are our two points of departure in the proposed approach on land administration. However, it is clear that the role of traditional leaders is the so-called elephant in the room. Even with the legal position being clear, municipalities appear reluctant to proceed without agreements with traditional leadership institutions being in place. An example might be a services level agreement. However, without including the rights holders in such agreements, the risk is that their existing tenure security will be undermined and their legal rights ignored. In the light of the above, regardless of the powers conferred to the traditional authority to address matters of land administration in areas under their jurisdiction, the contestation of who owns the land and has a right to dispose of it remains.

Thus, considering the above, the critical question would be how people access land in areas under traditional authority. There are three common ways for site allocation, i.e. allocation by Induna, self-allocation (which is often deemed illegal by traditional authorities and government) and allocation by the third party. The former way is the widely practiced process where the process begins with approaching the local Induna for site/land allocation. The common practice to conclude the transaction is a nominal fee or donation of a goat, sheep or a case of beer or bottle of spirit alcohol to appease the Induna. This money exchange is not regarded in a context of seller-buyer because it is believed that the site being allocated is not for sale because it belongs to the chief (although Chiefs are de facto owners as land in rural areas is owned by the state). The site administration fees ranges between R300-R60 000. Interestingly, there is no or little government involvement during this process. For instance, in Mabayeni Village, land is allocated

by the local Induna for a nominal fee, thereafter a letter is issued that should be taken to the Paramount Chief (Madonsi) where your designated land would be registered for another fees. Since municipalities have been reluctant to actively play their role in matters of land use and development in areas under traditional authorities, traditional leaders have been in the forefront if not the sole actors in land allocation processes. Often, land transactions or allocations were seldom recorded or registered with the deeds office. As results, the same land could be reclaimed and be allocated to another individual or household for residential or business purposes. Consequently, this practice is open to fraud, corruption and injustice by some traditional leaders who are unscrupulous. However, many of the traditional leaders through their council conduct the process of land allocation as transparently as possible and to the satisfaction of their subjects (ibid).

The fragmentation and centralization of land allocation and development presents tensions and conflicts between the institutions of local government and traditional authority. The tension emanates from the fact that traditional authorities are reluctant to recognize municipalities as a partner who has a pivotal role to play in the process of land administration. The interest of most municipalities is not with who get which land or site, rather in the layout process of the village to ensure that there are not structural challenges when municipality wants to service or spatially development the homelands. On the other hand, traditional authorities generally view municipalities as invader and opportunists who want to “take over” from them. Although municipalities are constitutionally mandated to perform planning functions including in areas under traditional authorities, SPLUMA and its regulations are at an infancy stage to resolve the tensions between the institution of traditional authority and municipality to ensure joint and complementary interventions in creating sustainable spatial and rural development in the former homelands.

5.6 CONCLUSIONS AND FUTURE CONSIDERATIONS:

5.6.1 Conclusions:

a) Central argument: Customary Law versus Statutory Law

Reconciliation of customary and statutory property law in South Africa has never been more important, nor more difficult, than it is now. Countries across Africa such as Botswana and Ghana have been struggling to create rational, efficient land policies that merge modern statutory law with the traditional customary law that governs many people's day-to-day lives. The case studies of Ghana and Botswana has unveiled a potential success for collaborative local governance. The two countries are some of the African trailblazers for dealing with tribal land allocation and administration through merging of customary law and statutory law, where government and traditional authorities joined forces instead of competing. Ideally, traditional authorities in South Africa, albeit some challenges described above, should be bestowed full authority in their role and function to allocate land and resolve any land disputes. The municipality on the other hand, should be responsible for the land administration in term of facilitating recording and registration of allocated tribal lands and issuing of title deeds to the land owners. The institution of traditional authority is matured enough and has experience in land allocation. Even the SPLUMA regulations acknowledge that land allocations in areas under traditional authority should be a responsibility of the traditional leaders (Claassens, 2014).

In spite of certain features which have often given cause for serious concern and the not altogether satisfactory record of some chiefs in rural areas, the researcher remains resolute that the institution of traditional authority has an important and indispensable role in the life and government of South Africa, both for the present and for the foreseeable future in addressing allocation of customary land. Just like in Ghana, South Africa, therefore should consider it right and necessary that the

institution should be protected and preserved by appropriate constitutional guarantees. At the local level, traditional authorities are at the centre of governance and development. It is therefore important to recognize them and involve them in the formulation and implementation of local development policies and tribal land act since to ignore them might lead to frustrations, injustice and landlessness by the rural residents (Ntsebenza, 2001).

b) Property Rights Protection Versus land Reform and Restitution

It would be ignorance to believe that South Africa has made reasonable or tremendous strides in address the challenge of land reform and restitution. The current land reform legislation together with willing buyer and willing seller has resulted with majority of land ownership being private (owned by a minority) remaining in their hands. Compare to her counterparts (Ghana and Botswana) the state through its customary land systems own the majority of land of which the custodians of the tribal land are the traditional leaders. As a result, the state play more of a facilitative and oversight role on issues of allocation of tribal land. The state provides land legislative and administrative support. On the contrary, South Africa is struggling to address the question of indigenous land dispossession as the minority land owners are protected by the Constitution under the clause of property rights protection. Consequently, the question of land reform in South Africa needs to be addressed expeditiously to ensure that tribal lands are returned to its rightful owners so as the traditional leader could have a land to allocate subjects (Turok, 2014).

c) Inadequate consultation with Traditional leaders

Director of the Department of Rural Development and Land reform had claimed that SPLUMA held a particular significance for traditional authority as custodians of tribal land. Therefore, the House of Traditional Leaders (HTL) (should be recognized as a partner in development of land, particularly in areas under traditional authority. It was further argued that public participation and engagement was crucial through

the process of adopting and enacting SPLUMA, especially pertaining to traditional leaders represented by the House of Traditional Leadership. This was pseudo consultation as SPLUMA is adopted, municipalities and provinces still required to develop their own planning legislation and development framework. This was because Traditional leaders are of a view that SPLUMA is silent about the role and powers of traditional authorities in relation to land issues. The DRLD assured the public that traditional leaders were extensively consulted, even at the national level. Clause (23)2 House of Traditional Leaders (HTL) was critical in that it mandated municipalities to include participation of traditional leaders. Regardless, it would appear that the question of whether or not traditional authorities were consulted, but was the consultation meaningful and effective? Were the views and concerns raise the traditional authorities and their proponents considered in drafting the SPLUMA and its regulations? The answer would be a firm negative as this could be realized through the confusion and frustration reported by the institution of traditional leadership in terms of their role and authority in land allocation responsibilities (Berrisford, 2015).

d) Ambiguity on Power and Authority

The SPLUMA also dictate that a Municipal Planning Tribunal (MPT) must be established and that the (MPT) should be comprised of a mixture of politicians and officials. Consequently, the omission of Traditional leaders is a grave mistake as they could be crucial participants in the MPT where matters of land use are discussed. Such omission unfortunately propagate the view and perception by the traditional leaders that their recognition, involvement and active participation throughout the whole process of SPLUMA adoption and implementation is nothing but mere tokenism, assert Berrisford, 2015). The involvement of traditional leaders in this structure is paramount as them being the custodians of the tribal land, they should be knowledgeable on issues of land use so that when they execute their land allocation responsibilities, they should be informed. Such knowledge would be beneficial to both the government and rural communities as the environment and minerals would be preserved while the government infrastructure and services

would not be under pressure due to lack of proper planning emanating from silo spatial planning by the municipality, excluding the traditional leaders (ibid).

Through the House of Traditional Leaders, the concern was that the establishment of tribunals from local level to upper echelons does not only degrade but undercut the participation of traditional leaders. The House of Traditional Leaders accentuated that they are a state organ and constitutional structure which should be taken as such by the government, municipalities in particular. It is argued that MPTs are institutional arrangements in municipalities, therefore, politicians, as representatives of the public, could not be removed from this important process. Traditional leaders also complained that SPLUMA is vague on the issues of the specific expertise that would be needed by the MPT and the technical support it would need. Therefore, it legitimizes the dissatisfaction of the traditional leaders' omission from the MPT. However, it could never be emphasized how important for the two institutions to collaborate as this will ensure that traditional leaders understand spatial plans and various land uses so that they know when and what land to allocate. Such will ensure that infrastructure and other essential services brought by the municipality in rural areas are never stretched as they would also be aware which land would the traditional authorities be allocating (Claassens, 2014).

e) The role of Land allocation

In light of SPLUMA enactment and implementation, there has been a concern regarding potential conflict that could emanate from lack of role clarification on matters of land allocation between municipal officials and traditional leaders. The question of who allocate land, in particular in areas under traditional authority, has been contentious one throughout the SPLUMA process. The SPLUMA seem to give authority to the municipality but the traditional leaders who claims to be the custodians of customary land, strongly believe that the state is merely undermining their role, authority and legitimacy when it comes to issues of land allocation in areas under their jurisdiction. SPLUMA allow TA's to do land allocation.

Some sections of SPLUMA emphasis that the relationship between the 3 spheres of government and traditional authorities is of utmost importance, with the role of traditional authority being adequately acknowledged. Such relationship is skewed as traditional authorities are viewed to be non-experts in the field of spatial planning and land development. Therefore traditional authorities should not only be acknowledged but be empowered through training to ensure their understanding of their role in land allocation and overall land development in areas under their jurisdiction, argues (Claassens, 2014).

f) Land Dispute Resolution (Customary Land Tribunal)

In an event of any land dispute in areas under traditional authority, it is imperative that such be resolved by this institution instead of government courts. The system of Customary Land Tribunals in South Africa should be implemented promptly as such system has proved to be the best system to deal with any issues such as ownership and demarcation, emanating from land allocation in rural areas. The Customary Land Tribunal are affordable, accessible and are representative of the local community with the chief being the facilitator, while the decision is taken by the Customary land tribunal which consists of members selected interested groups such as neighbours and other members from the community. To ensure that there are proper checks and balances, instead of Municipal Planning Tribunals, there should be Municipal Land Tribunal where the customary land tribunals could be accountable.

g) On land invasion

There is a major concern regarding the unscrupulous land-related practices being perpetuated in former homelands. In the absence of traditional leaders in land allocation and development, there is a gap which could be taken by some developers and individuals of unlawfully grabbing land. Just like in some urban areas, these problems could mushroom and eventually seek government to

intervene through court process to get an order to reclaim that land in question. Therefore, active role and adequate power should be afforded to the traditional leaders to collaboratively work with elected local government on issues of land allocation and development, argues Van Wyk, 1999).

h) On issues of resource implications

There was a serious concerned from all the stakeholders that up to the point of the implementation of SPLUMA on the 1st July 2015, DRDLR had not cleared all their financial aspect that was to necessitate the smooth implementation of SPLUMA. Traditional leaders are of the view that areas under their jurisdiction, will experience serious challenges in term of capacity and funding. They warned that failure to consider the capacity and financial implications of SPLUMA would result in the detrimental effect to the effective implementation of the Act.

The concern is that SPLUMA is promulgated as the panacea for planning and land disparities, but could fail to achieve its objectives due to inadequate implementation arising from lack of funding and capacity in both provincial and/or local government level. SPLUMA as a spatial planning law is being implement for the first time in 2015 in other municipalities and the question of regulations, capacity and financial resources remains critical in determining the failure or success of the this legislation.

i) Challenges associated with land allocation processes:

One of the first challenges is the need to balance land tenure and use rights against need for development including conservation. Some of the land tenure rights of the members of a community extend beyond a portion of land allocated to each household and include grazing, fire-wood collection, harvesting of herbs, etc. Lack of standards and norms for the allocation of different land uses in a rural context is another challenge. Rural areas, particularly those falling under the traditional

councils, have not benefited from spatial planning nor has the relevant authorities developed norms and standards for land allocation. As a result there is no common practice/pattern in the manner in which traditional councils deal with the issue of land allocation generally. Lack of clarity on the factors that should be taken into account when allocating land for a range of uses is another outstanding factor. Some of imizi is located on areas prone to flooding, community facilities are located on poorly accessible areas, uses with serious environmental impact are found within settlements, etc. Lastly, there are some overlapping land rights arising from the lack of proper systems and procedures, and technical support from the government

5.6.2 Future Considerations:

- ✓ In the light of the premise of SPLUMA and the interrogation of key issues and themes regarding its implication in areas under traditional authorities, the following key points should be considered for the effective implementation and accomplishment of the objectives set out in this Act:

- ✓ **When the traditional councils allocate land in their areas of jurisdiction due consideration should be taken of the following:**

- The allocation of land shall be made by a traditional council of the area concerned and such allocation shall be confirmed in writing, unlike random allocation which is never recording or confirmed in writing
- The traditional council may only allocate land in an area defined as its area of jurisdiction.
- In allocating a site/land, the traditional council shall be guided by the availability of appropriate services and infrastructure, including transportation in the area**,**
- The land allocated will be used or developed only in accordance with the land use plans of the area approved by the municipality

- Traditional Council shall make sure that the procedures for allocation, acquisition and termination of land rights are made known to the community

Fig. 4: Proposed 9 Steps for land allocation process in areas under traditional authorities:



Source: Provincial Planning and Development Commission, 2010

- ✓ Roles and Power Clarification: the Act has been challenged by traditional leaders on the basis that their roles and powers were subtle and this hampers their support on the implementation of this act. This Act should wholly and clearly pronounce that land allocation is the responsibility and duty of traditional authorities in which the area are under their jurisdiction.
- ✓ Acknowledgement of the institution of traditional authority: Although this institution has been recognized by the Constitution of South Africa, their role and powers within SPLUMA seems ambiguous and unclear, which undermined

their power and legitimacy. Thus to eradicate tensions and sabotage, the regulations should seriously consider the concerns and issues raised by the traditional leaders such as allowing traditional leaders to deal with customary land tenure without interference by the government. Though it has been established in the preceding paragraph that these two institutions should work collaboratively, clear roles and responsibilities should be defined.

- ✓ Involvement of Traditional Councils in the development and reviews of Municipal Spatial Development Frameworks and land use schemes to manage the utilization of environmentally sensitive areas, high potential agricultural land, and disaster prone areas remains a critical point. Fragmented planning would be disastrous as traditional leaders randomly and blindly allocate land for residential or development without the knowledge and input of the municipality that provide infrastructure and services.
- ✓ Support cooperative rural governance: Municipalities in conjunction with Traditional Councils should collaborate on issues of spatial planning and land use management, thus rural communities stand to gain abundantly from integrative planning that recognizes customary land law and statutory land law towards effective rural governance.

  Traditional Councils should have representation in Municipal Planning Tribunals during the evaluation of land use applications in tribal land to ensure that the interest of the tribal authority and community is considered or be allowed to set up Customary Land Tribunals to resolve tribal land disputes
- ✓ Strengthening capacity of traditional authorities in land administration where simple techniques of record keeping and registration on land transactions should be introduced in land administration, public awareness on modern land planning methods to ensure effective land use. Furthermore, capacitation of traditional councils could never be overemphasized as this role and responsibility is compounded by myriads of challenges. For instance, in KwaZulu-Natal, traditional councils and Ingonyama Trust Board experienced enormous pressure to allocate land for a range of uses within Ingonyama Trust land and this posed serious predicaments as those various

uses were competing for the same space. This resulted in inappropriate locations for the type of use in some cases which consequently affected the municipal spatial plans. Most common land uses in traditional council areas include settlement (minti), grazing, limited agriculture, and limited commercial and community facilities. There is increasing pressure in some areas to allocate land for tourism, conservation, mining and other non-traditional settlement uses., and

- ✓ Proper demarcation of land boundaries, and the enforcement of rules on land usage should be considered to deflate tribal land disputes between government and traditional councils and further between the subjects

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