Can legislative intervention achieve spatial justice?

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Abstract

Spatial justice instruments seek to eliminate spatial injustices that result from discrimination and marginalisation. Inequitable access to housing, educational and economic opportunities and health facilities are consequences of spatial injustice. The instruments used to promote spatial justice are varied and include urban regeneration policies and programmes, plans, social movements and judicial intervention.

Legislation enacted to deal with spatial injustice is applied infrequently. Nevertheless, the United States Fair Housing Act (1968) with one recent and one proposed amendment, and Brazil's City Statute (2001) are noteworthy examples of such legislation. Since South Africa's history includes some of the worst examples of spatial injustice it is significant that it has now added its voice to these two jurisdictions in addressing spatial injustice via legislation. The Spatial Planning and Land Use Management Act 16 of 2013 includes principles of spatial justice, the components of which can be reduced to redressing past spatial imbalances and exclusions; including people and areas previously excluded; and upgrading informal areas and settlements. This paper interrogates the content, application and success of these three legislative instruments which aim to transform spatial injustice into spatial justice.

INTRODUCTION

Spatial justice is, according to Edward W Soja, the leading exponent on the principle,

> … an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. As a starting point, this involves the fair and equitable distribution in space of socially valued resources and the opportunities to use them.[1]

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1 Soja 'The city and spatial justice' (2009) 1 *Spatial Justice* 2–3.

The emphasis on the spatial or geographical aspects of justice,[2] highlights that spatial injustices are frequent. Initiatives to eradicate spatial injustice include programmes, policies, plans and judicial action. Although legislative intervention occurs less frequently, it has taken place in at least three jurisdictions. The latest piece of legislation in this regard in South Africa is the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) which includes principles of spatial justice. Given that South Africa's history includes some of the worst examples of spatial injustice, it is significant that it has now added its voice to other jurisdictions such as the United States of America and Brazil that are addressing spatial injustice via legislation.

Generally based on race, class, ethnicity, and gender, two cardinal forms of spatial injustice can be identified. The first is the involuntary confinement of any group to a limited space, and the second the allocation of resources unequally over space.[3] Apartheid South Africa provides probably one of the crudest examples of spatial injustice where people were discriminated against and marginalised on the basis of race, disadvantaging them as regards housing, mobility, economic opportunity, and education,[4] and leaving a legacy that will remain for a long time to come. In the United States of America, Harlem is cited as a classic case of spatial injustice. It is a spatially segregated and ghettoised area, where African-Americans have limited access to housing, have poorer health facilities, more crowded schools, poorer parks, and weaker security protection than the bulk of the city of New York.[5] Besides the segregation and poverty of the notorious *favelas* in Brazil's metropolises, higher income classes tend to segregate themselves territorially from the middle and lower classes in one main area of the city. Two areas are formed: one for the middle and lower classes who do not have access to the goods and services of the other. The elite seek to control the lower classes through the utilisation of space in order to optimise their own quality of life.[6] These examples emphasise that spatial justice

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2 Soja *Seeking spatial justice* (1991).

3 Marcuse 'Spatial justice: Derivative but causal of social injustice' (2009) 1 *Spatial Justice* 3–4.

4 Soja n 2 above at 39–43; Strauss & Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' (2014) 13/4 *Planning Theory* 429–430; Van Wyk 'Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?' (forthcoming (2015) *SAPL*).

5 Marcuse n 3 above at 5–6.

6 Wagner *Spatial justice and the city of Saõ Paolo* (2011) 18.

relates to the history, culture, traditions, politics and values in a society, and that it differs from place to place.[7]

After briefly sketching some of the instruments or methods used to achieve spatial justice, this paper will interrogate the content, application and success of the three legislative instruments which aim to transform spatial injustice into spatial justice.

METHODS FOR ACHIEVING SPATIAL JUSTICE

In general, instruments to achieve spatial justice should be strategic tools that test urban planning and housing decisions, taking into account their impact on the space of the city. They are tools used 'to spatialise political debate and social struggle, to gather and polarise different interests in resistance movements, to advocate for a geographically equitable distribution of resources, services, and access'.[8] Globally, different methods for achieving spatial justice exist and include policies, programmes, plans, social movements, and judicial intervention.

Two cities in the Netherlands have engaged in policy-making to give direction on how to approach spatial injustice in regeneration processes as a way of mitigating the unjust impact on cultural geographies.[9] In Amsterdam, viewed by Fainstein as the most just and equal city in the world, government policy and reconstruction programmes focus on the retention of ethnic diversity and on becoming more mixed in terms of income, by providing suitable accommodation for upwardly mobile residents.[10] In Groningen, urban regeneration policies focus on spatial cohesion, accessibility, positive/negative interference, diversity, and identity.[11]

New York City's 2007 master plan[12] aims to promote mixed-use and mixed-income development. Development in all areas of the city is emphasised and the creation of waterfront access in poor neighbourhoods is promoted. As a

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7 Soja n 1 above at 3.

8 Pavoni *Looking for spatial justice* available at: http://criticallegalthinking.com/2010/12/01/looking-for-spatial-justice/ (last accessed 10 June 2014).

9 Bassett *The role of spatial justice in the regeneration of urban spaces* (2013) 2.

10 Fainstein 'Spatial justice and planning' (2009) 1 *Spatial Justice* 8.

11 Bassett n 9 above at 19.

12 City of New York *PlanNYC: A greener, greater New York* (2011 Update) available at: http://www.nyc.gov/html/planyc/downloads/pdf/publications/planyc_2011_planyc_full_report.pdf (last accessed 23 February 2015).

result more neighbourhoods have become mixed in terms of income and ethnicity.[13]

Unlike its New York counterpart, the 2011 London Plan is a statutory spatial development strategy drawn up in terms of the Greater London Authority Act 1999.[14] Its purpose is to provide affordable housing and promote policies for education, health, safety, skills development and community services, and to address discrimination. As well as guiding growth and requiring the construction of housing to accommodate predicted population increase, it addresses social and physical issues.[15]

Pressure from social movements – such as the Occupy Movement[16] – has assisted in exposing the emerging understanding of space as 'a structure created by society, a social product and not just an environmental container or context for society'.[17] By occupying city parks and reclaiming public spaces, people have shown that space is socially produced and can be manipulated to further social aims.

Courts have also had to deal with the issue of spatial justice and notable decisions include the recent ground-breaking *Inclusive Communities* case,[18] and the *Los Angeles Bus Riders Union* case[19] in the United States of America, and the South African *Joe Slovo* and *Blue Moonlight* eviction cases.[20]

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13 Fainstein n 10 above at 6–7.

14 Mayor of London *The London Plan: The spatial strategy for London consolidated with alterations since 2011* (March 2015) available at: http://www.london.gov.uk/sites/default/files/London%20Plan%20March%202015%20(FALP).pdf (last accessed 27 October 2015).

15 *Id* at chapter 3 that deals with 'London's people'.

16 Smith 'The spatiality of (in)justices' (2013) 2/1 *Sociological Imagination: Western Undergraduate Sociology Student Journal* 12–13 available at: http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1003&context=si (last accessed 22 January 2015).

17 Soja n 2 above at 91.

18 *Texas Department of Housing and Community Affairs v The Inclusive Communities Project* 576 US (2015) (hereinafter referred to as the *Inclusive Communities* case). Discussed further below.

19 *Labor/Community Strategy Center v Los Angeles County Metropolitan Transportation Authority* No 06-56866 US Court of Appeals Ninth Circuit 2009-05-05 available at: http://caselaw.findlaw.com/us-9th-circuit/1298593.html (last accessed 23 February 2015).

20 See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions and Another as amicus curiae)* 2009 (9) BCLR 847 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*

In *Bus Riders Union*, the union opposed a decision to build a new underground system in Los Angeles, as well as the related rise in bus fares, on the ground that this would discriminate spatially against various lower-class neighbourhoods overlooked by the project.[21] Instead of an underground, only an improved bus system would have provided the affordability and flexibility which the complex geography of Los Angeles requires.[22] The district court's consent decree committed the authority to a wide array of improvements in its bus services, including instituting new bus lines to and from centres of employment, education, and health care in the county, improving security on buses, improving bus shelters and maintaining fares at specific levels.[23]

The issue of spatial justice in South African housing rights and eviction cases came under the spotlight in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes.*[24] In order to facilitate upgrading, some 20 000 residents from a large informal settlement were to be relocated to a temporary resettlement unit (TRU), some fifteen kilometres away on the periphery of the city. A number of arguments were raised against the relocation, including that there had been no proper engagement and that the settlement was home to a number of well-established communities who depended on support networks in the area. Moreover, a mass relocation – far from economic opportunities and social amenities – would disadvantage the already vulnerable community. In addition, evidence was presented that an *in situ* upgrading was possible, obviating the need to relocate the community to the TRU. The court held that while it was not always possible to choose a location with adequate access to social amenities and employment, the state must attempt to ameliorate the disruptive effect of the relocation 'by providing access to schools and other public amenities as the government has done in this particular case'.[25] In 2011 the Constitutional Court had to decide whether to discharge the original eviction order. It held that it had a discretion to do so where it was just and equitable and where exceptional circumstances existed, including the facts that thousands of people were

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39 (Pty) Ltd and Another (CCT 37/11) [2011] ZACC 33; 2012 2 BCLR 150 (CC) (1 December 2011).

21 *Labor/Community Strategy Center v Los Angeles County Metropolitan Transportation Authority* n 19 above.

22 Pavoni n 8 above.

23 *Labor/Community Strategy Center v Los Angeles County Metropolitan Transportation Authority* n 19 above.

24 See n 20 above.

25 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2009) par 257.

affected and circumstances had changed.[26] Strauss and Liebenberg's view is that the 2011 decision is 'not only more spatially sensitive and less disruptive but also more in line with the development approach argued for by the community and their advisors'.[27]

The case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties*[28] involved the municipality's application for the eviction of 86 people who were unlawfully occupying dilapidated, privately-owned buildings in the Johannesburg inner city which had been earmarked for commercial development. The occupiers argued that their eviction would render them homeless. Moreover, the location of the building was crucial since the occupiers would not be able to afford the transport costs if they lived elsewhere, and would have to sleep on the streets as they would not be able to find affordable accommodation. The court granted the eviction order but ordered the city to provide the occupiers with temporary accommodation in a location 'as near as possible to the area where the property is situated'.[29]

While all of these attempts at eradicating spatial justice have had some success, their reach is narrow. The question that arises, therefore, is whether legislation can address spatial injustice.

LEGISLATION TO ELIMINATE SPATIAL INJUSTICE

The legislative enactments aimed at addressing discrimination in housing and planning and thereby furthering spatial justice that I will consider are the United States Fair Housing Act (1968) with its two recent/proposed amendments, Brazil's City Statute (2001), and South Africa's Spatial Planning and Land Use Management Act 16 of 2013. These three statutes have each been enacted within a particular jurisdiction and are aimed at addressing spatial injustice issues specific to that jurisdiction.

United States of America

Fair Housing Act

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) declares that it is 'the policy of the United States to provide, within constitutional

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26 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2011) par 37.
27 Strauss & Liebenberg n 4 above at 441.
28 See n 20 above.
29 *Id* at par 104. See further Strauss & Liebenberg n 4 above at 436.

limitations, for fair housing throughout the United States.'[30] The Act makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.[31]

The Act creates a framework to eradicate, first, plainly intentional discriminatory acts, and secondly, policies that at face value seem neutral, but nevertheless permit housing discrimination to continue. In the former case a person affected by a discriminatory housing practice can file a complaint with the Secretary of the Department of Housing and Urban Development (HUD).[32] In the latter case, even though a policy may lack discriminatory intent, the impact of the policy can still be severely detrimental for individuals and families who wish to find housing.[33] This is known as 'disparate impact'. In a disparate-impact claim, a plaintiff may establish liability without proof of intentional discrimination, if an identified business practice has a disproportionate effect on certain groups of individuals and is not grounded in sound business considerations.[34] Disparate-impact claims under the Fair Housing Act are critical in addressing systemic housing discrimination and segregation in the United States.

The importance of addressing housing discrimination is emphasised by the recent drafting of two sets of regulations that aim to provide new tools to

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30 US Code Title 42 Chapter 45 Subchapter 1 Section 801 [42 USC 3601] 'Declaration of Policy' available at: https://www.law.cornell.edu/uscode/text/42/chapter-45/subchapter-I (last accessed 26 February 2015).

31 US Code n 30 above s 804 [42 US C 3604] 'Discrimination in sale or rental of housing and other prohibited practices'.

32 US Code n 30 above s 810 [42 USC 3610] 'Administrative Enforcement; Preliminary Matters'.

33 'HUD confirms disparate impact regulations under the Fair Housing Act' available at: http://www.hrc.org/blog/entry/hud-confirms-disparate-impact-regulations-under-fair-housing-act (last accessed 20 February 2015).

34 Schnapper-Casteras 'Symposium: Fair Housing after Ferguson' available at: http://www.scotusblog.com/2015/06/symposium-fair-housing-after-ferguson/ (last accessed 28 June 2015).

assist communities to obtain fairness under the Fair Housing Act. The first – 'Implementation of the Fair Housing Act's Discriminatory Effects Standard' – is in operation.[35] The second is a proposed rule issued on 19 July 2013 that, at the time of writing, had not yet been implemented. It is titled 'Affirmatively Furthering Fair Housing'.[36]

Discriminatory-effects standard

On 18 March 2013 the regulation confirming the use of the disparate impact (or discriminatory effect) theory to bring claims of housing discrimination under the Fair Housing Act came into operation. If a policy has a discriminatory effect, disparate-impact theory generally states that the policy must be changed so that it is both fair and effective. If the policy is based on a legitimate reason and no other policy could achieve the same goal with a less discriminatory effect, then the policy stands.

Through this regulation, the HUD formalises its recognition of discriminatory-effects liability under the Act. For purposes of providing nationwide consistency, it formalises a burden-shifting test to determine whether a certain practice has an unjustified discriminatory effect which can lead to liability under the Act. In terms of this test, the person allegedly discriminated against (plaintiff) initially bears the burden of proving its *prima facie* case that a practice results in, or could result in, a discriminatory effect on the basis of a protected ground. Once the *prima facie* case has been established, the burden of proof shifts to the opposing party that allegedly performed the discriminatory act (defendant) to prove that the practice in question is necessary to achieve one or more of its substantial, legitimate, non-discriminatory interests. If the defendant satisfies this burden, the plaintiff may still establish liability by proving that the substantial, legitimate, non-discriminatory interest could be served by a practice that has a less discriminatory effect.[37]

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35 Department of Housing and Urban Development 24 CFR Part 100 [Docket No FR–5508–F–02] RIN 2529–AA96 'Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule II. Background' *Federal Register* 78/32 (2013/02/15) available at: http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf (last accessed 20 June 2015).

36 Department of Housing and Urban Development 24 CFR Parts 5, 91, 91, 92 et al. 'Affirmatively Furthering Fair Housing: Proposed Rule' (2013/07/19) 78/139 *Federal Register* available at: http://www.gpo.gov/fdsys/pkg/FR-2013-07-19/pdf/2013-16751.pdf (last accessed 25 February 2015).

37 Department of Housing and Urban Development 'Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule I. Executive Summary' n 35 above.

Against the background of the new regulation the recent landmark US Supreme Court decision on discrimination based on disparate impact, should be mentioned. After two cases dealing with discrimination based on disparate impact failed to offer – through resolution and withdrawal – a definitive finding by the United States Supreme Court,[38] the Supreme Court was approached in 2014 to decide whether the district court used the correct standard for evaluating a Fair Housing Act-claim of discrimination based on disparate impact. In the *Inclusive Communities* case,[39] the Inclusive Communities Project (ICP), a non-profit organisation dedicated to the racial and economic integration of communities in the Dallas area, sued the Texas Department of Housing and Community Affairs (TDHCA), which administers the low income housing tax credits in Texas. The ICP claimed that TDHCA had granted disproportional tax credits to developments in minority neighbourhoods and denied the credits to developments in white neighbourhoods. The ICP claimed that this practice resulted in the concentration of low-income housing in minority neighbourhoods, thereby perpetuating segregation in violation of the Fair Housing Act.

On 25 June 2015, the Supreme Court – by a narrow five-to-four margin – upheld the application of disparate impact under the Fair Housing Act. In a landmark judgment Justice Kennedy, for the majority, explained that disparate impact counteracts 'unconscious prejudices and disguised animus that escape easy classification as disparate treatment'[40] and 'also plays a role in uncovering discriminatory intent.'[41] In this way, 'disparate impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.'[42] He pointed out that the vestiges of *de jure* segregation have persisted:

> Racially restrictive covenants prevented the conveyance of property to minorities; steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas.[43]

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38 Seicshnaydre 'Is disparate impact having any impact; an appellate analysis of forty years of disparate impact claims under the Fair Housing Act' (2013–2014) 63 *American University Law Review* 357.

39 Note 18 above.

40 *Inclusive Communities Case* n 18 above, Opinion of the court 17.

41 *Ibid*.

42 *Inclusive Communities Case* n 18 above Opinion of the court 18.

43 *Inclusive Communities Case* n 18 above Opinion of the court 6.

These practices caused social and economic harm to individuals and neighbourhoods.[44] However, the court imposed important limitations on the application of the theory 'to protect potential defendants against abusive disparate-impact claims'.[45] The court emphasised the plaintiff's burden to establish a robust causal connection between the challenged practice and the alleged disparities.[46] Furthermore, governmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers'.[47] Finally, remedial orders must concentrate on the elimination of the offending practice through 'race-neutral means'.[48]

Affirmatively furthering fair housing

The proposed regulation,[49] published on 19 July 2013, recognises that segregation is due in part to an historical legacy of discrimination that has adverse impacts, with the dual concentration of poverty, and racial and ethnic populations still too prevalent.[50]

Informed by lessons learned across the country, the proposed rule furthers what the Fair Housing Act set out to achieve. Its purpose is to improve existing requirements by introducing a fair housing assessment and planning process. This will aid HUD programme participants to incorporate fair housing considerations more fully into their existing planning processes, and assist them in complying with their duty to further fair housing affirmatively.[51] In terms of this approach, the HUD will provide states, local

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44 *Inclusive Communities Case* n 18 above Syllabus 5. See further Schnapper-Casteras n 34 above.

45 *Inclusive Communities Case* n 18 above Opinion of the court 21.

46 *Inclusive Communities Case* n 18 above Syllabus 3.

47 *Inclusive Communities Case* n 18 above Opinion of the court 21.

48 *Inclusive Communities Case* n 18 above Opinion of the court 22. See further Hancock & Gass 'Symposium: The Supreme Court recognises but limits disparate impact in its Fair Housing Act decision' available at: http://www.scotusblog.com/2015/06/paul-hancock-fha/#sthash.TVT9Wmdq.dpuf (last accessed 28 June 2015).

49 Department of Housing and Urban Development 'Affirmatively Furthering Fair Housing: Proposed Rule' (n 36 above). This rule proposes to amend the regulations in 24 CFR Parts 5, 91, 92, 570, 574, 576 and 903.

50 See generally Berube & Holmes *Affirmatively furthering fair housing: considerations for the new geography of poverty* available at: http://www.brookings.edu/research/opinions/2015/06/12-fair-housing-geography-of-poverty-berube-holmes (last accessed 27 June 2015).

51 Department of Housing and Urban Development 'Affirmatively furthering fair housing assessment tool: Solicitation of comment-60-day notice under Paperwork Reduction Act of 1995' available at: www.federalregister.gov/articles/2014/09/26/2014-22956/affirmatively-furthering-fair-housing-assessment-tool-solicitation-of-comment-60-

governments, insular areas, public housing agencies, and the communities they serve, with data on: patterns of integration and segregation; racially and ethnically concentrated areas of poverty; access to education, employment, transportation, and environmental health, among other critical assets; disproportionate housing needs based on the classes protected under the Fair Housing Act; data on individuals with disabilities and families with children; and discrimination. From this data, programme participants will be able to evaluate their present environment to assess fair housing issues, identify the primary determinants that account for those issues, and identify fair-housing priorities and goals.

The proposed rule does not prescribe specific outcomes for the planning process. Instead, it recognises the importance of local decision-making, establishes basic parameters, helps to guide and educates public sector housing and community development planning and investment decisions, and provides relevant civil rights information to the community and other private and public sector stakeholders.[52]

Effects of legislative measures to promote fair housing

On the understanding that the aims of the Fair Housing Act are to promote integration and eliminate discrimination, the two recent legislative innovations discussed above, will play a significant role in addressing lingering and long-standing spatial injustice in the USA.

One of the most important enforcement tools in promoting residential integration is the challenge to discriminatory zoning resulting from reliance on the disparate impact standard of proof. This is because that while discrimination in the social and economic mainstream of American life remains widespread, it is often masked in more subtle forms. One sees this in exclusionary zoning and land-use cases where municipalities often take seemingly proper discriminatory actions. That is why the formal adoption of a disparate impact standard of proof in the regulation – which makes it clear that a violation of the Act does not require proof of intentional discrimination – is so important to the goal of residential integration.[53]

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day-notice-under (last accessed 16 February 2015).

52 Department of Housing and Urban Development 'Affirmatively Furthering Fair Housing: Proposed Rule: Executive summary' (n 36 above).

53 Rich HUD'S new discriminatory effects regulation adding strength and clarity to efforts to end residential segregation available at: http://www.lawyerscommittee.org/admin/fair_housing/documents/files/disparate-impact-summary-final-5-17-13.pdf (last accessed 20 June 2015).

The proposed regulation is seen as a promise that the statutory obligation affirmatively to further fair housing by addressing the legacy of racial segregation and concentrated poverty in the United States, will be fulfilled. If it can successfully promote racial and economic integration in the areas where more and more of its low-income minority populations live, the mistakes of the past can be avoided and greater social and economic opportunities for low-income people and places be secured in future.[54]

Brazil

3 2 1 Constitutional background

Brazil's twenty year military rule ended in 1985, setting the re-democratisation of the country in motion. Throughout the period of military rule, and even thereafter, social movements were active throughout the country. This led to the formation of a robust urban reform movement, notably the National Urban Reform Movement, later the National Forum for Urban Reform.[55] It collected more than twelve million signatures supporting urban reform based on the concept of a 'right to the city'. As a result, the 1987 urban policy recognised the following general principles: the autonomy of municipal government; the democratic management of cities; the social right to housing; the right to the regularisation of consolidated informal settlements; the social function of urban property; and the need to prevent land and property speculation in urban areas.[56] The Forum proposed instruments to establish the social function of property and of the city, as well as the right to the city in the overall concept of urban planning and in the planning process. This led to the incorporation of two articles in the new Federal Brazilian Constitution of 1988. Articles 182 and 183 strengthened the role of the municipalities in the management of urban development policy, established the concept of the social function of the city and urban property, and recognised the right to the city. The inclusion of these provisions in the Constitution paved the way to implement limits to the right to property so that property could fulfil its social role.[57] However, the Constitution made no provision to regulate these rights formally.

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54 Berube & Holmes n 50 above.

55 Friendly 'The right to the city: Theory and practice in Brazil' (2013) 14/2 *Planning Theory and Practice* 162; Maricato 'The Statute of the peripheral city' in Carvalho & Rossbach (ed) *The City Statute of Brazil: A commentary* (2010) 16 available at: http://www.citiesalliance.org/node/1947 (last accessed 20 February 2015).

56 Friendly n 55 above at 162.

57 Rodrigues & Barbosa 'Popular movements and the City Statute' in Carvalho & Rossbach (ed) *The City Statute of Brazil: A commentary* n 55 above at 23.

In early 2000 a constitutional amendment was introduced that confirmed housing as a social right, conferring upon it the same status as education, health, employment, leisure, security, social welfare, maternal and child protection, and assistance to the homeless.[58] Incorporation of the right to housing and urban development policy principles in the Constitution, led authorities to implement new actions on slum upgrading and the territorial organisation of the city. However, conservative sectors rejected these initiatives, arguing that the lack of a regulatory framework rendered the initiatives unconstitutional.[59] What was required was a proper regulatory instrument that could implement the constitutional ideals. This was the City Statute[60] adopted on 10 July 2001 after a thirteen year negotiation process among urban reform, social and environmental movements, the real estate sector, municipalities, the states, and federal government institutions responsible for housing and the environment.[61]

Brazil City Statute

The City Statute contains three guiding principles:

- the concept of the social function of the city and property;
- the fair distribution of the costs and benefits of urbanisation; and
- democratic management of the city.[62]

These three principles inform the whole statute and are the means through which pressure can be brought to bear on municipal authorities to implement the law.

Chapter II of the Statute contains spatial dimensions of inclusiveness. These provide municipalities with tools to enable a range of social intervention measures dealing with the free use of private property. The legal and political measures include the following: expropriation; administrative easements and limitations; earmarking buildings or urban properties of historical interest; establishing conservation and special social interest

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58 Constitution of the Federative Republic of Brazil. Constitutional Amendment No 26, 2000 alters the wording of article 6 to read: 'Education, health, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute, are social rights, as set forth by this Constitution.' Available at: http://www.law.yale.edu/constitution_of_republic_federative.pdf (last accessed 20 June 2015).

59 Reali & Alli 'The city of Diadema and the City Statute' in Carvalho & Rossbach (ed) *The City Statute of Brazil: A commentary* n 55 above at 39.

60 Law no 10.257.

61 Rodrigues & Barbosa n 57 above at 23–34.

62 *Id* at 23–35.

zones; concession of real rights to use and special use for housing purposes; compulsory parcelling, building or utilisation; rights of pre-emption; awards of the right to build or change of use; transfer of the right to build; land tenure regularisation; free technical and legal assistance for poorer communities and social groups; and legitimation of possession.[63]

The Master Plan, dealt with in Chapter III, is the basic instrument of urban development and expansion policy. Its introductory provision reiterates the social function of property:

> Urban property fulfils its social function when it meets the basic requirements for ordering the city set forth in the Master Plan, assuring that the needs of the citizens are satisfied with regards to quality of life, social justice and the development of economic activities, respecting the guidelines established in Article 2 of this Law.[64]

The Master Plan is compulsory for certain types of cities listed in the Statute. These include the following types of city: those with over 20 000 inhabitants, located in metropolitan regions and urban conglomerations; cities where the municipal government intends to use the instruments established in article 182(4) of the Federal Constitution; cities of special tourist interest; and cities falling where developments or activities have a significant environmental impact in the regional or national domain.[65] The Master Plan applies to the whole of the municipal area, it must be revised at least once every ten years and in its preparation and in the monitoring of its implementation an extensive public participation process is prescribed.[66]
The concept of a Master Plan presupposes the need to address urban problems – in particular the enormous liability resulting from social inequality in Brazilian cities. Moreover, it calls for a dynamic and ongoing planning process in the municipality itself. Consequently, the Master Plan should not be conceived merely as a technical piece of urban planning, but as a political process involving decision-making as to the management of the municipal territory which involves the entire community.[67]

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63 Article 4 (V).
64 Article 39.
65 Article 41.
66 Article 40(2)–(4).
67 Barros *et al* 'Commentary on the City Statute (Law Nº 10. 257 of 10 July 2001)' in Carvalho & Rossbach (eds) *The City Statute of Brazil: A commentary* n 55 above at 13.

Chapter IV (arts 43–45) is entitled 'Democratic administration of the city'. Article 43 provides for a variety of instruments to guarantee the democratic administration of the city. Article 45 provides that:

> The administrative entities of metropolitan regions and urban conglomerations must assure the compulsory and substantive participation of the population and of associations representing different segments of the community in order to guarantee to them direct control of administrative activities as well as assuring the population of complete exercise of citizenship.

One of the fundamental points of departure in the City Statute is the promotion of public participation in the entire process of urban management. It is not merely 'consulting' popular opinion about proposals advanced by the municipality, but guaranteeing the existence of genuinely effective consultative and deliberative fora during the urban planning process.[68] To that end the Statute prescribes the use of instruments such as national, state and local urban policy councils and conferences, debates, hearings, public consultations and popular initiatives related to bills, plans, programmes and projects.[69] It is also essential to ensure citizen participation in decisions involving the use of public funds. In the struggle to overcome the massive social inequality that is a feature of Brazilian cities, the participatory process now plays an important role in the battle for investments and in efforts to reach agreement on an urban planning scheme that takes the needs of the poor living in the city into account.

Success of the City Statute

The City Statute has had mixed success. On the negative side, the unfair and unsustainable pattern of urban land occupation which has existed for centuries, has changed little. Moreover, strong forces opposed to the implementation of the social function of property – in civil society, the judiciary, the executive, and the legislature – have hampered its application.[70] The scale of the urban problem in Brazil is so vast and the effort needed to confront it so urgent, that it is no longer sufficient to talk of 'municipal' policies. Rather, all three levels of government must jointly address the problem. In addition, community, voluntary, academic, private

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68 *Id* at 114.

69 Article 43.

70 Maricato n 55 above at 22.

sectors and others must all participate in the development of national urban and housing policies.[71]

On the positive side, the approval of the City Statute undoubtedly consolidated the constitutional order by redirecting state action, the property market, and society as a whole towards the acceptance of new economic, social and environmental criteria.[72] The formalistic and positivist tradition of the law has been realigned by the introduction of new principles and norms in the different instruments, mechanisms, procedures, and resources. Its implementation has become a point of reference around which national and local movements have been able to rally and to pressure and demand responses from public authorities at all levels of government.[73]

South Africa

National Development Plan

South Africa's apartheid legacy looms large in the debate around spatial injustice.[74] While some post-apartheid housing legislation and associated policies have, in theory, sought to address spatial inequalities, in practice they have failed to do so.[75] The concept of spatial justice first appeared in the 2011 National Development Plan (NDP). Chapter 8 deals with transforming human settlements. It refers to the principle of spatial justice describing it as the reversal of both the historic policy of confining particular groups to limited space (ghettoisation and segregation), and the unfair allocation of public resources between areas to ensure that the needs of the poor are addressed first rather than last.[76] It stresses that normative principles should inform all spatial development and should clearly show how its requirements will be met. A break with the past requires the reversal of the unfair allocation of resources between areas.[77] The NDP's proposals include: developing tenure arrangements; prioritising development in inner cities and around transport hubs; introducing incentives to support compact mixed

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71 Fernandes 'The City Statute and the legal-urban order' in Carvalho & Rossbach (eds) *The City Statute of Brazil: A commentary* n 55 above at 68.

72 *Ibid*.

73 Maricato n 55 above at 22; Fernandes n 71 above at 69; Reali & Alli n 59 above. See also Rolnik 'Ten years of the City Statute in Brazil: from the struggle for urban reform to the World Cup cities' (2013) 5/1 *Int J Urban Sustainable Development* 54–64.

74 See generally Strauss & Liebenberg n 4 above; Van Wyk n 4 above.

75 Strauss & Liebenberg n 4 above at 433.

76 *National Development Plan 2030: Our Future – Make it happen* (2012) 277. This principle was later incorporated into the Spatial Planning and Land Use Management Act 16 of 2013 s 7(a).

77 *Id* at 246.

development within walking distance of transit stops and densifying housing along transit routes; including an element of affordable housing in all new developments; regularising informal settlements; and recognising residence rights.[78] While the ideas presented in the NDP are noteworthy, none of the proposals is legislatively regulated and, sadly, none of the proposals has been directly incorporated in the new Spatial Planning and Land Use Management Act 16 of 2013.[79]

Spatial Planning and Land Use Management Act

The objects of SPLUMA include ensuring that the system of spatial planning and land-use management must promote social and economic inclusion, redress the imbalances of the past, and ensure that there is equity in the application of spatial development planning and land-use management.[80] Yet, few provisions in the Act itself translate these objects into concrete and enforceable provisions. This will, to a large extent, be left to the municipal by-laws that SPLUMA envisages will be drawn up and will provide the detail required to make SPLUMA practically and procedurally applicable.

Among the provisions that do address spatial justice, is a set of principles based on constitutional imperatives that apply to spatial planning, land-use management, and land development. These are: spatial justice; spatial sustainability; efficiency; spatial resilience; and good governance.[81] As set out in SPLUMA, the components of the principle of spatial justice[82] can be reduced to:

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78 *Id* at 256.

79 *GG* 36730 (2013–08–05). SPLUMA came into operation on 2015–07–01 – see Proc 26 *GG* 38828 (2015–05–27).

80 Section 3.

81 Section 7.

82 Section 7(a) contains the principle of spatial justice. The components of the principle are: (i) past spatial and other development imbalances must be redressed through improved access to and use of land; (ii) spatial development frameworks and policies at all spheres of government must address the inclusion of people and areas that were previously excluded with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation; (iii) spatial planning mechanisms including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons; (iv) land use management systems must include all areas of a municipality and must include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas; (v) land development procedures must include provisions that include access to secure tenure and the incremental upgrading of informal areas; and (vi) a Municipal Planning Tribunal considering an application before it may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of the land or property is affected by the outcome of the application.

- redressing past spatial imbalances and exclusions;
- including people and areas previously excluded; and
- upgrading informal areas and settlements. (Echoes of aspects of both the South African land reform programme and global principles of spatial justice are evident here.)

The principle of spatial justice finds application in practice because it must apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land, and guide:

> (a) the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land;
> (b) the compilation, implementation and administration of any land use scheme or other regulatory mechanism for the management of the use of land;
> (c) the sustainable use and development of land;
> (d) the consideration by a competent authority of any application that impacts or may impact upon the use and development of land; and
> (e) the performance of any function in terms of this Act or any other law regulating spatial planning and land use management.[83]

Municipalities are now obliged to take into account principles of spatial justice that stress access to land, inclusivity, security of tenure, and the upgrading of informal areas in determining land uses through spatial development frameworks and land-use schemes, and also in decision-making on development applications (such as township establishment, amendments to land-use schemes, removals of restrictive conditions, subdivisions, and consolidations).[84]

The only instrument introduced by the Act is the 'incremental upgrading area'. This is a land-use zone or area defined within a spatial development framework or land-use scheme for which specific policies have been drafted for the incremental upgrading of informal areas or slums.[85] In such an area specific criteria apply to local plans that must be more detailed while land-development procedures may be shortened.[86] This entails the progressive

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[83] Section 6.
[84] Section 42.
[85] Section 1.
[86] Section 21*(k)–(l)*.

introduction of administration, management, engineering services, and land-tenure rights to an area that has been established outside existing planning legislation. It may include any settlement or area under traditional tenure.[87] The SPLUMA requires that municipal spatial development frameworks identify the designation of areas where incremental upgrading approaches to development and regulation will be applied, where more detailed local plans must be drawn up, and where shortened land development procedures may apply – in which case land-use schemes may be amended.[88] Similarly, land-use schemes must include provisions that permit the incremental introduction of land-use management and regulation in informal settlements, slums, and areas not previously subject to a land-use scheme.[89]

Effects of spatial justice principles

SPLUMA's spatial justice principle must apply to practices and decision-making. The application of a principle – albeit a legislative one – in practice, is not enforceable and remains subjective in the hands of the planner or decision-maker. The Act provides few tangible mechanisms, instruments, procedures, and resources required for the transformation of spatial injustice into spatial justice in planning procedures. The fact that much of the implementation of the Act is left to by-laws, while SPLUMA provides the framework, condemns the planning system to the inconsistency, uncertainty and fragmentation experienced in the past.

As the hallmarks of spatial justice are equality, diversity and democracy,[90] what South Africa needs is an active citizenry to rebuild local place and community.[91] This can be achieved through 'meaningful participation', integration, inclusivity, diversity, and location.[92]

CONCLUSION

Spatial injustice is endemic in many jurisdictions and a variety of methods are used to address it. Some countries have opted for the legislative route and the three statutes discussed each contains provisions aimed at converting spatial injustice into spatial justice. While they all sprang from situations

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87 Section 1.

88 Section 21*(k)–(l)*.

89 Section 24 (2)*(c)*.

90 Fainstein n 10 above.

91 Ashton 'Creating pockets of diversity in South African cities: How to unlock well-located land in urban areas' in *Ismael Mahomed Law Reform Essay Competition Winners 1999–2013* (2014) 20–37.

92 See further Van Wyk n 4 above.

where disadvantaged communities suffered at the hands of essentially discriminatory planning and housing systems, the tools/methods differ considerably. This emphasises that spatial justice reflects the history, culture, traditions, politics and values of a particular society.

The legislative provisions make it clear that at the heart of spatial justice is equality, diversity, integration, and democracy. In an attempt to identify which provisions could be most effective in achieving spatial justice, the involvement, participation, or 'meaningful engagement' of those affected must be paramount.

Legislation is but one of the instruments that can be used to transform spatial injustice to spatial justice. A range of spatial remedies are a necessary part of eliminating spatial injustice, but they are insufficient on their own. What is required are

> … much broader changes in relations of power and allocation of resources and opportunities … if the social injustices of which spatial injustices are a part are to be redressed.[93]

[93] Marcuse n 3 above at 5.