

Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?

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Abstract

Our spatial environment is one of the most important determinants of our well-being and life chances. It relates to schools, opportunities, businesses, recreation and access to public services. Spatial injustice results where discrimination determines that spatial environment. Since Apartheid in South Africa epitomised the notion of spatial injustice, tools and instruments are required to transform spatial injustice into spatial justice. One of these is the employment of principles of spatial justice. While the National Development Plan (NDP) recognised that all spatial development should conform to certain normative principles and should explicitly indicate how the requirements of these should be met, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) contains a more concrete principle of spatial justice. It echoes aspects of both the South African land reform programme and global principles of spatial justice. Essentially section 7(a) of SPLUMA entails three components: (1) redressing past spatial imbalances and exclusions; (2) including people and areas previously excluded and (3) upgrading informal areas and settlements. SPLUMA directs municipalities to apply the principle in its spatial development frameworks, land use schemes and, most importantly, in decision-making on development applications. The aim of this article is to determine whether the application of this principle in practice can move beyond the confines of spatial planning and land use management to address the housing issue in South Africa. Central to housing is section 26 of the Constitution, that has received the extensive attention of the Constitutional Court. The court has not hesitated to criticize the continuing existence of spatial injustice, thus contributing to the transformation of spatial injustice to spatial justice. Since planning, housing and land reform are all intertwined not only the role of SPLUMA, but also the NDP and the myriad other policies, programmes and legislation that are attempting to address the situation are examined and tested against the components of the principle of spatial justice in SPLUMA.

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1 Introduction

The Spatial Planning and Land Use Management Act (SPLUMA)¹ contains the principle of spatial justice.² Its components can be reduced to (1) redressing past spatial imbalances and exclusions; (2) including people and areas previously excluded, and (3) upgrading informal areas and settlements. While the principle echoes aspects of both the South African land reform programme and global principles of spatial justice this article deals with the question of whether its application in practice can move beyond the confines of spatial planning and land use management and address the housing issue in South Africa. Before one can start to address spatial justice one must deal with spatial injustice. Two decades into democracy South Africa's landscape still largely reflects the spatial legacy of apartheid. Based on racial discrimination apartheid epitomises the notion of spatial injustice.³

At the outset the article attempts to get to grips with the meaning of the term 'spatial justice'. By sketching the history of spatial discrimination in South Africa a better understanding of 'spatial injustice' and the converse 'spatial justice' is possible. Since planning, housing and land reform are all intertwined in this transformational objective, not only the role of SPLUMA, but also the National Development Plan (NDP) and the myriad other policies, programmes and legislation that are attempting to address the situation must be examined.

2 Spatial justice

Henri Lefebvre was one of the first scholars to deal with the idea that the organisation of space is a key aspect of human societies and influences social relations.⁴ In his view, 'space is ideological, socially produced, disputed and constantly changing among social, political, economic, and geographic territories'.⁵ Spatial justice links social justice and space. As a result, an analysis

¹ 16 of 2013 published in GG 36730 (2013-08-05). SPLUMA comes into operation on 2015-07-01 – see Proc 26 GG 38828 (2015-05-27).

² Section 7(a).

³ Lehman-Frisch 'Segregation, spatial (in)justice, and the city' (2011) 24(1) *Berkeley Planning J* 70-90 71; Strauss and Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' (2014) 13(4) *Planning Theory* 428-448; Soja 'The city and spatial justice' (2009) 1 *JSSJ* 3 available at <http://www.jssj.org/wp-content/uploads/2012/12/JSSJ1-1en4.pdf> (accessed 2014-09-10).

⁴ Lefebvre *The production of space* (1992). See also Busquet and Lavue 'Political space in the work of Henri Lefebvre: Ideology and Utopia' (2012) 5 *JSSJ* available at http://www.jssj.org/wp-content/uploads/2013/09/JSSJ5-3.en_1.pdf (date accessed 2014-10-12).

⁵ Bassett refers to Lefebvre (1991) and Soja (2010) in *The role of spatial justice in the regeneration of urban spaces* 3 available at https://www.ideals.illinois.edu/bitstream/handle/2142/45124/Bassett_NEURUS_Capstone.pdf?sequence=2 (accessed 2014-09-05).

of the interactions between space and society is necessary to understand social injustices and to formulate methods of tackling them. From this view the concept of spatial justice was developed. While he was not the first person to use the term,⁶ Ed Soja's work⁷ is the most informative in coming to grips with the meaning of the phrase 'spatial justice'. In essence he contrasts spatial injustice with spatial justice and says that spatial (in)justice refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. This involves the fair and equitable spatial or physical distribution of socially valued resources and the opportunities to use them.⁸

A fundamental objective in all societies should be to continually strive to increase justice or to decrease injustice.⁹ The physical environment in which we are born and grow up is one of the most important determinants in our well-being and life chances. It relates to schools, opportunities, businesses and access to public services. Location affects communities, local economies, labour markets and infrastructure networks. Access to markets and suppliers determines their survival and profitability. Long distances between jobs and housing and poor services exacerbate poverty and inequality.¹⁰

The three most familiar forces that shape spatial discrimination are class, race, and gender.¹¹ A spatial environment that is determined by these discriminatory forces is unjust – and this we can refer to as spatial injustice. Some global examples of spatial injustice include the gerrymandering of electoral districts,¹² the redlining of urban investments,¹³ exclusionary zoning, the creation of spatial structures of privilege and institutionalised residential segregation.¹⁴ In the South African context a particularly pertinent example that comes to mind is the development of enclosed neighbourhoods or gated communities. These are viewed as a mechanism for residents of particular race or income groups to insulate themselves against access by members of other 'undesirable' groups.¹⁵

⁶The first use of the term 'spatial justice' was in the 1973 unpublished doctoral dissertation of O'Laughlin, entitled *Spatial justice and the Black American voter: The territorial dimension of urban politics*.

⁷Most notably *Seeking spatial justice* (1991).

⁸Soja (n 3) 2-3; Basset (n 5).

⁹Soja (n 3) 3.

¹⁰National Planning Commission *National Development Plan: Vision for 2030* (2011) 234.

¹¹Soja (n 3) 2.

¹²'Gerrymandering' is the drawing of boundaries of electoral districts in a way that gives one political party an unfair advantage over other political parties.

¹³'Redlining' is the practice of arbitrarily denying or limiting financial services or investments. This can occur where the residents are poor or belong to a specific race group that is discriminated against.

¹⁴Soja (n 3) 3.

¹⁵Landman 'Private space – 'private citizen': What kind of cities are we creating?' (2006) 21 *SAPR/PL* 51-71; Moran 'The safety and dangers of enclosed communities: Space, social justice and the emotions' (2006) 21 *SAPR/PL* 72-94; Oranje 'Neoliberalism, shallow dreaming and the

While a broad, common conception of spatial justice exists, principles of spatial justice are generally tied to the history, culture, traditions, politics and social values in a society.¹⁶ Hence, the South African conception of spatial justice as set out in SPLUMA contains an own brand of spatial justice, the subthemes of which are integration, inclusivity, diversity, participation and location. These coincide with Susan Fainstein's three hallmarks of urban justice, namely equality, diversity and democracy.¹⁷

Apartheid is *par excellence* one of the most blatant forms of spatial injustice¹⁸ and since our country still bears the physical scars it is imperative that, in order to properly deal with spatial justice and more particularly spatial injustice, the root causes must be investigated – the history.

3 Spatial injustice in South Africa

A very brief foray into history is necessary for two reasons. The first is to remind ourselves of how vast and unjust the spatial apartheid system really was and secondly to show that structurally, so much needed to be done after 1994 to start addressing, adjusting and repairing the system.

In South Africa land was always at the centre of injustice. Legislative and other tools were employed to legalise spatial discrimination. During the 1800s restrictive covenants imposed restrictions on who could live where.¹⁹ In a rural context the notorious Black Land Act 27 of 1913 and Development Trust and Land Act 18 of 1936 were promulgated, setting aside 'scheduled areas' and 'released areas' for exclusive occupation and acquisition by black people.²⁰ After 1948, the National Party government decided that these reserves would become black 'homelands' or 'bantustans' separate from the 'white' South African state.

unyielding apartheid city' in Tazan-Kok and Baetan (eds) *Contradictions of neoliberal planning* (2012) 173-204 178.

¹⁶Soja (n 3) 3.

¹⁷Fainstein 'Spatial justice and planning' 2009(1) *JSSJ* 1-12 5 available at <http://www.jssj.org/wp-content/uploads/2012/12/JSSJ1-5en1.pdf> (accessed 2014-09-10).

¹⁸Strauss and Liebenberg (n 3) 429-430; Lehman-Frisch (n 3) 71.

¹⁹Van Wyk *Planning law* (2012) 25.

²⁰See comments by the courts in eg *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC) paras 11-15; *MEC for KwaZulu-Natal Province, Housing v Msunduzi Municipality* 2003 4 BCLR 405 (N). See further Robertson 'Black land tenure: Disabilities and some rights' in Rycroft *et al* (eds) *Race and the law in South Africa* (1987) 119-138, 120; Olivier 'Property rights in urban areas' (1988) 3 *SAPL* 23-33; Robertson 'Dividing the land' in Murray and O'Regan (eds) *No place to rest* (1990) 122-136, 126; Van Wyk and Oranje 'The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?' (2014) 13(4) *Planning Theory* 349-369.

A complex of laws²¹ accomplished the task of dividing Africans into 10 homelands based on language and ethnicity.²² Later these homelands became either self-governing territories or independent states within the broader boundaries of South Africa. In 1994 these areas were all reincorporated into South Africa, but 80 years of neglect had rendered them poor and underdeveloped with little security of tenure.

In what was 'white' South Africa there were, and still are, the townships – 'areas set aside for black occupation' on the peripheries of the 'white' towns.²³ In these areas the Group Areas Acts²⁴ designated certain areas for exclusive occupation by other race groups and classified persons living there as 'disqualified persons' who were not permitted to occupy that land and forcing them out. In the townships government erected the most basic of structures for the inhabitants who were regarded as temporary residents in labour camps serving white-owned mines, businesses and homes. No thought was given to the development of viable and dignified places or the improvement of people's living conditions.²⁵ Residents had no choice as to the type of house and the same standardised one-family units of between 40-70m² were used all over the country. Streets and public open spaces amounted to approximately 35% of the land and the floor area ratio²⁶ was usually less than 0.25. As a result the densities were extremely low. Moreover, no consideration was given to climatic differences or cultural traditions.²⁷ This neighbourhood model explains the tremendous urban sprawl from which South African urban areas suffer today. This urban sprawl contributes to extremely high costs for infrastructure, transportation and, ultimately to the survival of spatial segregation,²⁸ perpetuating spatial injustice.

²¹See, eg, The Promotion of Bantu Self-government Act 46 of 1959, the National States Constitution Act 21 of 1971. See further Van Wyk 'The legacy of the 1913 Black Land Act for spatial planning' 2013 SAPL 91-105; Vestbro *Housing in the apartheid city* 3 states that between 1948 and 1966 Parliament passed no less than 87 laws with an effect on 'Non-European Affairs' available at <http://www.diva-portal.org/smash/get/diva2:578181/FULLTEXT01.pdf> (accessed 2014-08-25).

²²Transkei, Bophuthatswana, Venda, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa. See further *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 42.

²³Initially regulated in terms of the Blacks (Urban Areas) Consolidation Act of 1945 and later by the Black Administration Act 102 of 1982 and the Black Communities Development Act 4 of 1984.

²⁴Acts 41 of 1950 and 36 of 1966.

²⁵Van Wyk and Oranje (n 20) 354-356; Vestbro (n 21) 5.

²⁶'Floor area ratio' (FAR) is the percentage of living space permitted on an erf. A FAR of 0.25 is very low. See Van Wyk (n 19) 280-281.

²⁷Vestbro (n 21) 4-6.

²⁸Vestbro (n 21) 5.

4 Towards spatial justice in South Africa

Faced with a situation where people had been deprived on so many levels, with no secure tenure to land and having to live in abhorrent poverty and squalor a new South Africa dawned in 1994. Government was set the task of urgently addressing a spatially fragmented country. Although not stated in these words, one of the main focus areas was to transform spatial injustice into spatial justice. This was addressed in different ways: First, in the Constitution, secondly by the legislature which, since 1995, has enacted new planning and housing legislation, thirdly in the housing and planning policy arena, fourth by means of numerous housing programmes and fifth by the Constitutional Court in its criticism of the pernicious system still in place. What I have done is identified some of the signposts or landmarks on that long (and potholed) road to the point where SPLUMA has now recognised the concept of spatial justice. I have also tried to extract the elements that define our South African understanding of the concept. It is often not the 'what' but the 'how' that is significant. The 'what' is easy, the 'how' is difficult.

The most important landmark is the Constitution and its principles as implemented by the Constitutional Court. In section 26 it provides that everyone has a right of access to adequate housing and eviction is permitted only in terms of a court order.²⁹ In terms of this provision residential displacement – a spatial injustice that was widely practiced under apartheid – is prohibited. Not only has the Constitutional Court given meaning to section 26, but it has not hesitated to criticise the continuing existence of spatial injustice.³⁰ Moreover, it has contributed to the transformation of spatial injustice to spatial justice first, by ordering the City of Johannesburg to provide the occupiers with temporary accommodation in a location as near as possible to the area where they were residing³¹ and secondly by acknowledging that the state is under a duty to 'have regard to the proximity of schools and employment opportunities when it seeks to relocate people for purposes of providing them with decent houses'.³² Within the first decade of democracy much effort was put into addressing the housing situation. The progressive 1994 Reconstruction and Development Programme (RDP)³³ aimed to '... break down apartheid geography through land reform, more compact cities,

²⁹See further Strauss and Liebenberg (n 3).

³⁰See *Tongoane v Minister of Agriculture and Land Affairs* (n 20) and *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* (n 22). See further Strauss and Liebenberg (n 3) 431-432.

³¹*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2012 2 SA 104 (CC) para 104. See also Strauss and Liebenberg (n 3) 436.

³²*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR 723 (CC) para 256.

³³*White Paper on Reconstruction and Development* GG 16085 (1994-11-23).

decent public transport and the development of industries and services that use local resources and/or meet local needs'.³⁴ In the same year the White Paper entitled *A new housing policy for South Africa*,³⁵ marking the beginning of a process, was published. In its Preamble it states that:

Housing the nation...is one of the greatest challenges facing the Government of National Unity. The extent of the challenge derives not only from the enormous size of the housing backlog and the desperation and impatience of the homeless, but stems also from the extremely complicated bureaucratic, administrative, financial and institutional framework inherited from the previous government.

Then followed the Development Facilitation Act 67 of 1995 (DFA). It introduced a normative planning system aimed at alleviating the enormous housing backlog.³⁶ A set of principles was introduced to guide legislation, policy and practice. Many of the components of what comprises spatial justice are contained in one of the principles providing that policy, administrative practice and laws should promote efficient and integrated land development; the integration of residential and employment opportunities as well as a diversity of land uses. In addition it should contribute to the correction of the historically distorted spatial patterns of settlement in the country, discourage the phenomenon of 'urban sprawl' in urban areas and contribute to the development of more compact towns and cities³⁷ and facilitate the active participation by members of communities affected by land development in the process of land development.³⁸ The DFA met its demise, partially in 2010³⁹ and finally by its repeal in terms of SPLUMA in 2014.⁴⁰

With a similar focus on the normative the Housing Act 107 of 1997 stated that housing is a vital part of integrated developmental planning⁴¹ and stressed that principles of integration and consultation must play a role in housing development by all spheres of government.⁴² Not only was public participation in housing development emphasised, but government also stressed that communities must be involved in local government matters. As a consequence of the *White Paper on Local Government*⁴³ a new local government dispensation

³⁴Paragraph 4.3.3.

³⁵Department of Human Settlements (1994) available at http://www.dhs.gov.za/sites/default/files/legislation/Policies_Housing_White_Paper.pdf (accessed 06-09-2014).

³⁶Van Wyk and Oranje (n 20) 18.

³⁷Section 3(1)(c).

³⁸Section 3(1)(d).

³⁹*Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).

⁴⁰Section 59 read with Sch 3.

⁴¹Preamble.

⁴²Section 2(1).

⁴³(1998) available at <http://mfma.treasury.gov.za/MFMA/Guidelines/whitepaper.pdf> (accessed 2014-09-09).

was laboriously put into place in terms of constitutionally mandated provisions, the first of which is that local government has specified objects⁴⁴ and the second that municipalities have developmental duties.⁴⁵ Communities were allocated a specific role to participate in local government matters.⁴⁶ These were translated into a suite of local government legislation that included provisions on integrated development planning, public participation and Ward Committees.⁴⁷

In mid-2001 the *White Paper on Spatial Planning Land Use Management and Land Development* and a draft Land Use Management Bill appended to it were published.⁴⁸ Included were a set of principles stating that spatial planning, land use management and land development must be sustainable, equal, efficient, integrated and based on fair and good governance.⁴⁹ Although the Bill never became law, some of its provisions now resonate in the SPLUMA.

In 2004 the inclusionary and rapid housing provision policy *Breaking New Ground (BNG)* ended a decade of major legislative and policy urban restructuring.⁵⁰ The vision of *BNG* is 'to promote the achievement of a non-racial, integrated society through the development of sustainable human settlements and quality housing'.⁵¹ Objectives of the *BNG* include increasing densities, promoting social cohesion, deconcentrating poverty and improving the quality of life for the poor.⁵²

Government had never had a dedicated policy instrument for informal settlement upgrading.⁵³ Informal settlements in South Africa are home to about 5 million people. The *Blue Moonlight* case⁵⁴ puts the number at 1,8 million households. Since informal settlements are a source of many social ills urgent intervention was required. As part of the *BNG*, the *Upgrading of informal settlements programme (UISP)* explicitly called for a 'paradigm shift' and put forward a radically different approach to dealing with informal settlements. As a result, the *UISP* was seen as a key programme of government that aimed to upgrade the living conditions of millions of poor people by providing secure tenure

⁴⁴Section 152.

⁴⁵Section 153.

⁴⁶Section 152(1)(e).

⁴⁷See further Van Wyk (n 19) 270-271.

⁴⁸GG 22473 (2001-07-20).

⁴⁹Section 4(1).

⁵⁰Oranje (n 15) 175.

⁵¹Department of Housing (2008) 4.

⁵²*Id* 5.

⁵³Van Wyk (n 19) 479-480.

⁵⁴*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* (n 30).

and access to basic services and housing.⁵⁵ It foresaw that all informal settlements would be upgraded by 2014.⁵⁶ This did not materialise.

It is also possible to formalise informal settlements outside of the *UISP*. However, the location of the settlement must be aligned with provincial and municipal plans and policy such as the integrated development plan and the spatial development framework. Moreover, formalisation must take place in terms of township establishment legislation, and only once townships are formalised can they be legally recognised as townships.⁵⁷

According to the Social Housing Act, the Social Housing Programme aims to provide rental or co-operative housing options for low to medium income households provided by accredited social housing institutions and in designated restructuring zones.⁵⁸ Finance is provided by both government and the private sector, while the approach is single project based. There seems to be little direct linkage to broader urban development and urban regeneration programmes and the single project approach lessens the impact of government investment compared with what is achieved through a more programmatic intervention linked to other government investment.⁵⁹

Well into the second decade of democracy the NDP stands out. Chapter 8 is about transforming human settlements. It proposes that all spatial development should conform to certain normative principles and should explicitly indicate how the requirements of these will be met. It lists the principle of spatial justice by referring to spatial injustice, which is described as the historic policy of confining particular groups to limited space (ghettoisation and segregation) and that the unfair allocation of resources between areas must be reversed.⁶⁰ In words that echo many of the sentiments that comprise global principles of spatial justice it proposes the 'how'. These include developing tenure arrangements; prioritising development in inner cities and around transport hubs; strengthening links between public transport and land use management by introducing incentives to support compact mixed development within walking distance of transit stops and prioritising higher density housing along transit routes; incentivising new

⁵⁵ *Introduction to the simplified guide to the national housing code 2009*. See *National housing policy and subsidy programmes: Simplified guide to the national housing code, 2009* (2010) Section 1 part A.

⁵⁶ *Upgrading of informal settlements*. See *National housing policy and subsidy programmes: Simplified guide to the national housing code, 2009* (2010) Section 1 part B chapter 2.

⁵⁷ Van Wyk (n 19) 505-506.

⁵⁸ 16 of 2008. Section 1 definition of 'social housing'. See further *Reviving our inner cities: Social housing and urban regeneration in South Africa* (2013) 7 available at <http://www.nasho.org.za/wp-content/uploads/2012/03/HDA-NASHO-Reviving-Our-Inner-Cities-SH-UR-in-SA-Reseach-Report-2013.pdf> (accessed 2014-09-07).

⁵⁹ *Reviving our inner cities: Social housing and urban regeneration in South Africa* (n 58) 26.

⁶⁰ National Planning Commission. *National Development Plan* 246.

developments by including a proportion of affordable housing; regularising informal settlements and recognising residence rights.⁶¹

In 2013 the Spatial Planning and Land Use Management Act (SPLUMA)⁶² was eventually promulgated. Its point of departure is, once again, a normative one, and it lists a number of principles that apply to spatial planning, land use management and land development. These are spatial justice, spatial sustainability, efficiency, spatial resilience and good governance.⁶³ Section 7(a) contains the principle of spatial justice, the components of which 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 characterized 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.

The 'how' of the application of the principle of spatial justice is that 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

⁶¹*Id* 256.

⁶²16 of 2013

⁶³Section 7.

- 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.⁶⁴

Not only in determining land uses through spatial development frameworks and land use schemes,⁶⁵ but also in decision-making on development applications (such as township establishment, amendments to land use schemes, removals of restrictive conditions, subdivisions and consolidations)⁶⁶ are municipalities now obliged to take the principle of spatial justice into account. Instruments to achieve developments such as township establishment and the incremental upgrading of informal areas are directly concerned with the provision of housing. An 'incremental upgrading area' is a specific land use zone or area defined in a spatial development framework or land use scheme for which specific policies have been drafted for incremental upgrading of informal areas or slums.⁶⁷ In such an area more detailed local plans must be drawn up and shortened land development procedures may be applicable.⁶⁸ 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.⁶⁹

Measures to address spatial injustice in housing outside of legislative and policy measures in South Africa are few. One of these, inclusionary housing, is a strategy to densify cities and to promote social integration. It had emerged in the USA in the 1970s as an attempt by the civil rights movement to address racial segregation. It is gaining popularity in Europe where the decline of the welfare state led to traditional public housing programmes being limited or scaled back, and in response to growing social instability linked to social exclusion in cities.⁷⁰ Few inclusionary housing policies are to be found in developing countries, other than in a few rapidly growing economies, such as Malaysia, China and India.⁷¹ The reasons are that the private property sector is very small and there are huge income differences between rich and poor.⁷²

⁶⁴Section 6.

⁶⁵Sections 12-22; 24.

⁶⁶Section 41.

⁶⁷Section 1.

⁶⁸Section 20(k)-(l).

⁶⁹Section 22(d).

⁷⁰Klug, Rubin and Todes 'Inclusionary housing policy: A tool for reshaping SA's spatial legacy' (2013) 28 *J of Housing and Built Environment* 667-678 668.

⁷¹*Framework for an inclusionary housing policy (IHP) in South Africa* (June 2007) available at <http://abahlali.org/files/Framework%20for%20an%20Inclusionary%20Housing%20Policy%20in%20SA.PDF> (accessed 2015-05-19) 5.

⁷²Klug, Rubin and Todes (n 69) 668.

In South Africa the idea of inclusionary housing took root some years ago. An interesting example of the implementation of the principles of inclusionary housing is Cosmo City, situated to the north-west of the Johannesburg CBD. It was developed in response to the plight of the informal settlers of Zevenfontein and Riverbend who were illegally occupying privately owned land. A public-private partnership arose between the City of Johannesburg, the Gauteng Province and private enterprise, the aim being to provide a residential node catering to a broad spectrum of income earners and racial groups. Upon completion, Cosmo City should comprise 12,500 residential properties housing approximately 70,000 people in an area measuring 1105 hectares. 5000 of the homes are RDP houses, 3000 have been set aside for middle income earners and are partially subsidized, 1000 have been made available on a rental basis and 3300 are bonded houses. Many positives have resulted from this initiative, the most important being that it is an integrated housing development that addresses some of the ills of spatial injustice. Despite this, there are negatives, such as high crime levels, fuelled by the lack of a resident police station.⁷³

5 Components of spatial justice addressed

The initiatives that have been mentioned must be unravelled to see whether they address the principle of spatial justice as set out in SPLUMA. We can extract a number of objectives that form part of the components of this principle:

- (1) Eradication of segregation along racial and income lines;
- (2) Prioritising densification, intensification and mixed land use;
- (3) Upgrading of informal areas and settlements.

5.1 *The eradication of segregation of racial and income groups, in other words, inclusion*

An area where most progress has been made is racial integration and desegregation. However, what progress there has been has occurred mainly in the middle and higher income areas where private sector driven development of gated communities and golf estates has taken place on the outskirts of many urban areas.⁷⁴ Some inner cities are increasingly being occupied by poor black

⁷³Grey Cosmo City a mixed success story available at <http://www.privateproperty.co.za/news/market-news/cosmo-city-a-mixed-success-story-.htm?id=863> (accessed 2014-08-30).

⁷⁴Oranje (n 15) 178.

people and many of the old spatial patterns and practises remain.⁷⁵ On the whole the pattern of socially, economically and spatially segregated cities remains with the attendant problems of lengthy and expensive travelling and growing informal areas suffering from poverty and exclusion.⁷⁶ Municipal spatial policies to restructure cities to address these inequalities have largely been unsuccessful.⁷⁷

A key question then is whether inclusionary housing policies have the potential to contribute towards restructuring South Africa's cities.⁷⁸ As a programme inclusionary housing does not seem to offer many solutions – not yet, at least. Inclusionary housing will not solve the housing backlog that is continuing to increase. Estimates are that as at September 2011, approximately 12 million people were still without adequate housing. There are concerns that since it is based on market demand for market housing, and it is estimated that 70-80% of the population in South Africa falls in this category, only a very small amount of affordable housing will be provided by inclusionary housing. Furthermore, it could have negative effects since lower income groups living in affluent areas could face problems with the cost of food, transport, schools, hospitals and other services in these areas. Instead of benefiting lower income groups, inclusionary housing in poorly chosen areas could cripple them.

What is required is national policy and legislation that is both flexible and implementable and municipalities with the ability to administer the complex programme. In order to further equality, housing developments should provide for households with incomes below the median and mega projects should provide benefits to low income people.⁷⁹ Alternative forms of mixed income developer-led housing seem to have greater potential, although they are focused on low/middle-income housing and rely to a significant extent on government subsidies.

However, the small scale of the impact that inclusionary housing could have on eliminating the housing backlog, is of secondary importance to the impact that it could have on the social face of cities. It could be the catalyst that is needed to transform South African cities from fragmented environments into positive, racially-integrated environments that bridge the social and racial divide.⁸⁰ Inclusion invariably also comprises participation by individuals and communities.⁸¹

⁷⁵Klug, Rubin and Todes (n 69) 668.

⁷⁶Harrison, Todes and Watson *Planning and transformations: Learning from the post-apartheid experience* (2008) 11-14; Fainstein (n 17) 10.

⁷⁷Harrison, Todes and Watson (n 75) 128-130.

⁷⁸Klug, Rubin and Todes (n 69) 668.

⁷⁹Fainstein (n 17) 10.

⁸⁰Verster *The role of inclusionary housing policy in transforming South African cities* (2009) available at <http://repository.up.ac.za/bitstream/handle/2263/9356/Housing%20policy.pdf?sequence=1> (accessed 2014-09-12).

⁸¹Fainstein (n 17) 1; Van Wyk and Oranje (n 20) 359-361.

Where policy and legislation contain initiatives to fulfil this transformative principle, practice paints another picture.⁸² Little guidance is available on the precise ambit of 'participation' and serious differences of opinion exist between decision-makers and objectors on exactly where participation starts and ends.⁸³ Moreover, the will to implement (appropriate and adequate) measures to ensure participation has proven to be sorely lacking in practice.⁸⁴

On a positive note, however, court decisions that stress the value of public participation⁸⁵ as well as the creation of an additional tier of local government comprising active neighbourhood committees to rebuild local place and community could provide the catalyst to successful public participation.⁸⁶

5.2 *Eradication of sprawl, in other words, densification, intensification and compact cities*

The apartheid black housing model explains the tremendous urban sprawl from which South African cities continue to suffer today. The apartheid city structure has also not changed much since democracy. In fact, cities have become even more spread-out in the last decade. Urban sprawl contributes to extremely high costs for infrastructure, transportation, and to the strengthening of the spatial segregation.⁸⁷ While government policy is to promote more compact and integrated cities, its programme of subsidised low-cost detached 'RDP' housing, which has yielded over two million units, has reinforced these patterns as land costs are lower, large tracts of land are available, and projects are easier to mount on the periphery of cities. The envisaged development of low-income areas in closer proximity to employment opportunities and to locate new economic activities closer to low-income areas has not materialised.⁸⁸

A very recent study of eight South African cities looked at the influence of a range of spatial policies and planning instruments aimed at achieving more compact urban structures and higher densities. The research results confirm

⁸²Oranje (n 15) 176.

⁸³In *SAPOA v The Council of the Metropolitan Municipality of Johannesburg* (648/2011) [2012] ZASCA 157 (8 November 2012) 'adequate public participation' was described as a prescribed process to be followed, properly advising, consulting and considering the views of the local community, the entitlement to be notified timeously and to be provided with all relevant information, as well as a reasonable opportunity to respond. See further Van Wyk and Oranje (n 20) 359-361.

⁸⁴Harrison, Todes and Watson (n 75) 209.

⁸⁵See, eg, *South African Property Owners Association v The Council of the City of Johannesburg* (n 82); *Strata International (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (79/2014) [2015] ZASCA 47 (26 March 2015).

⁸⁶Ashton '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.

⁸⁷Vestbro (n 21) 5.

⁸⁸Oranje (n 15) 176.

modest increases in densities and changes to urban form since 1994 with overall net population density increases in all eight cities, ranging between 1.4 persons/ha and 15 persons/ha. The growth patterns of the four larger metropolitan cities show that there are relatively low levels of physical growth (generally below 2 per cent per annum) at distances up to 20 km from the city centre, while areas of most rapid physical growth are those at distances between 20 km and 30 km from the city centre at levels between 3 per cent and 4 per cent per annum. In the smaller intermediate-sized cities, physical growth is largely concentrated at the peripheral locations of the urban structure. Cities that achieved the most success were able to limit the extent of the residential footprint growth, although not necessarily always at the idealised locations closest to the historical city centres. These results seem to suggest that, although historical city centres still dominate the South African urban landscape, a more decentralised structure is emerging with the focus areas of most significant physical growth at increasing distances from the historical city centres. A study such as that done is not without its shortcomings. Urban form does not change dramatically over a period of 15 years and an extended time period of 20-30 years may be the most appropriate for the investigation of intensification trends. It may thus be somewhat premature to express a definitive opinion on the levels of influence of the spatial planning policies in South Africa since 1994.⁸⁹

5.3 *The upgrading of informal areas and settlements*

Informal settlements are identified as the most pressing problem for South African cities.⁹⁰ What makes any exercise extremely difficult is the fact that there is no uniform understanding of informal settlement and its extent. A major distinction is made between households living in shacks not in backyards and households living in backyard shacks.⁹¹ The number of households living in shacks not in backyards or informal residential enumeration areas for census purposes has stabilised while there has been a significant increase in the number of households living in backyard shacks at a rate of 4.5 per cent per year. Census 2011 indicates a total of 712,956 households living in shacks in backyards, compared to 459,526 in 2001.⁹² This probably reflects government's focus on upgrading existing settlements and limiting growth in informal settlements. While some

⁸⁹Du Plessis and Boonzaaier 'The evolving spatial structure of South African cities: A reflection on the influence of spatial planning policies' (2014) *International Planning Studies* (online 2014-08-20) available at http://www.tandfonline.com/doi/abs/10.1080/13563475.2014.942505#.VK_RE0zqFqU (accessed 2014-09-21).

⁹⁰See further Pienaar *Land reform* (2014) 678-681; Van Wyk (n 19) 590-593.

⁹¹*South Africa: Informal settlements status (2013)* Housing Development Agency (2013) available at http://www.thehda.co.za/uploads/images/HDA_South_Africa_Report_Ir.pdf (accessed 2014-08-26).

⁹²*South Africa: Informal settlements status (2013)* (n 90) 16.

progress has been made, the 'how' of the *UISP* shows that it has not yet solved many of the complex issues that informal settlements represent.⁹³

6 Conclusion

Reshaping our cities to adhere to principles of spatial justice is no easy task. Urbanisation continues unabated,⁹⁴ low-income groups are still marginalised to the outskirts of cities, the wealthy control the economic centres, unemployment continues to rise and the population continues to grow rapidly. These problems all affect the provision of housing, and the quality of our cities. Until its recognition in the NDP and SPLUMA the application of the principle of spatial justice in South Africa was non-existent. By directing municipalities to apply it in its spatial development frameworks, land use schemes and, most importantly, in decision-making on development applications SPLUMA lays the foundation for an inclusive spatial planning and land use management system in terms of which integrated housing development is facilitated and the housing rights of disadvantaged communities in South Africa are addressed. To build on that foundation so that spatial injustice in housing is transformed into spatial justice requires a proper understanding of the content of spatial justice, a realisation that there no choice in applying it and in doing so to engage with affected communities.

⁹³Fieuw *Decade after BNG: Does UISP work?* (2014-02-12) available at <http://sasdialliance.org.za/a-decade-after-bng-does-uisp-work/> (accessed 2014-09-12).

⁹⁴The NDP predicts that by 2030 another 7.8 million people will be living in South African cities and by 2050 a further 6 million, adding enormous pressures to housing, services and infrastructure.