Efficacy of the Spatial Planning and Land Use Management Act in the promotion of spatial justice in an urban land reform context

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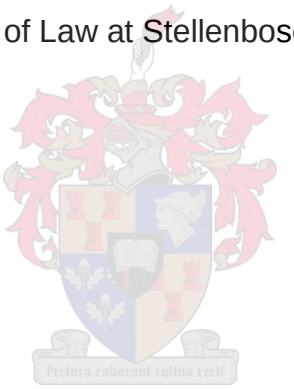

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Summary

The spatial legacy of colonialism and apartheid is clearly still intact. Problems of poverty and marginalisation are especially prevalent in informal settlements in South Africa, which showcase the immense spatial disparity so in need of redress. Due to a lack of intergovernmental cooperation as well as insufficient investment in housing and infrastructure, the inherent inequalities in urban areas are being reproduced. Other issues relate to a lack of inclusion, specifically as it relates to participation in decision-making.

Although all racially-based land measures were already repealed in 1991 and even though apartheid had officially ended by 1994, bringing about major changes in policy and legislation, with a new corresponding focus on the protection of human rights, specific attention was not given to the deep-rooted problems related to spatial patterns.

For these reasons it is necessary to evaluate whether existing policies and statutes aimed at promoting urban spatial transformation and spatial justice are effective. In this regard, the focus shifts to the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA"), a planning framework Act. The main research question is accordingly whether SPLUMA, in its current form, is able to promote spatial justice in an urban land reform context, specifically in informal settlements, with reference to sections 25(5) and 25(6) of the Constitution of the Republic of South Africa, 1996 (the "Constitution"), pertaining to the promotion of access to land and improving tenure security, respectively.

In this study it was found that SPLUMA does indeed, although to a very limited extent, promote spatial justice in the context of the particular constitutional imperatives contained in sections 25(5) and 25(6) of the Constitution. Essentially, SPLUMA is a planning tool and not inherently aimed at promoting land reform. Yet, because of the very specific touching points between SPLUMA and sections 25(5) and 25(6) of the Constitution, with some adjustment and with more emphasis on particular tools in SPLUMA, the efficacy of SPLUMA in its endeavour to promote spatial justice can and must be improved.

Opsomming

Die nalatenskap van kolonialisme en apartheid is nog duidelik sigbaar in informele nedersettings in Suid-Afrika. Probleme verwant aan armoede en marginalisering is ’n alomteenwoordige verskynsel wat die geweldige ruimtelike ongelykheid in die land beklemtoon. As gevolg van ’n gebrek aan inter-regeringsamewerking sowel as onvoldoende investering in behuising en infrastruktuur, word die inherente ongelykhede in stedelike gebiede voortgesit. Ander kwessies hier van belang hou verband met ’n gebrek aan insluiting van inwoners van informele nedersettings, veral met die oog op deelname aan besluitneming.

Alhoewel alle rasgebaseerde maatreëls reeds in 1991 herroep is en selfs al is apartheid amptelik teen 1994 afgeskaf, met die gepaardgaande veranderinge in beleid en wetgewing en ’n nuwe fokus op die beskerming van menseregte, is daar nie spesifiek aandag geskenk aan die diepgewortelde probleme wat te doen het met ruimtelike patrone nie.

Hieruit spruit die behoefte om ondersoek in te stel of bestaande beleid en wetgewing wat daarop gemik is om stedelike transformasie en ruimtelike geregtigheid te bevorder, doeltreffend is. Die fokus skuif dus na die Wet op Ruimtelike Beplanning en Grondbestuur 16 van 2013 (“SPLUMA”, die “Wet”), ’n beplanningsraamwerkwet. Die navorsingsvraag is dus of die Wet, in die huidige vorm, ruimtelike geregtigheid kan bevorder in ’n stedelike grondhervormingskonteks, spesifiek in informele nedersettings, met verwysing na artikels 25(5) en 25(6) van die Grondwet van die Republiek van Suid-Afrika (die “Grondwet”), wat verband hou met die bevordering van, onderskeidelik, toegang tot grond en verbetering van verblyfreg.

In hierdie studie is bevind dat SPLUMA inderdaad, hoewel tot ’n baie beperkte mate, ruimtelike geregtigheid bevorder in die konteks van die bepaalde grondwetlike imperatiewe vervat in artikels 25(5) en 25(6) van Grondwet. In wese is die Wet ’n beplanningsinstrument en is dit daarom nie inherent daarop gemik om grondhervorming te bevorder nie. Vanweë die baie spesifieke raakpunte tussen die Wet en artikel 25(5) en (6) van die Grondwet, met ’n mate van aanpassing en met meer klem op spesifieke instrumente in die Wet, kan en moet die Wet se doeltreffendheid in die bevordering van ruimtelike geregtigheid verbeter word.

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acta est fabula, plaudite! – 'The play is over, applaud!'

- Augustus

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TABLE OF CONTENTS

CHAPTER 2: SPLUMA IN CONTEXT

CHAPTER 3: SPATIAL JUSTICE IN URBAN SOUTH AFRICA WITH A SPECIFIC FOCUS ON INFORMAL SETTLEMENTS

Chapter 1: Introduction

1 1 Background to the study

1 1 1 Post-apartheid South Africa and the spatiality of injustice

> "[F]or the colonized people the most essential value, because the most concrete, is first and foremost the land; the land which will bring them bread and above all, dignity."[1]

Colonialism and apartheid have resulted in deep division and inequality on various levels.[2] In *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities*, a report prepared by the World Bank, it was emphasised that poverty has a strong spatial dimension that reflects the persisting legacy of apartheid.[3] It was moreover contended that race still plays a role in the determination of poverty and inequality and that poverty is more pronounced in areas that were previously disadvantaged, such as informal settlements.[4] In the informal settlement context specifically, spatial injustice manifests in the extreme physical, social and economic vulnerability[5] experienced by the inhabitants of these areas.

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[1] F Fanon *The Wretched of the Earth* (1963) 43.

[2] High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 81. South Africa has recently been named the most unequal country in the world. V Sulla & P Zikhali *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 42. See also National Planning Commission *National Development Plan: Vision for 2030* (2012) 8. This relates to both rural and urban contexts. See furthermore J van Wyk *Planning Law* 2 ed (2012) 457.

[3] V Sulla & P Zikhali *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) xxiii. In the 2016 Integrated Urban Development Framework it was stated that it was more difficult to reverse apartheid geographies in 2016 than it was in 1994. Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 22. See also J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 27.

[4] V Sulla & P Zikhali *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 121. See also JM Pienaar *Land Reform* (2014) 678-681 and J van Wyk *Planning Law* 2 ed (2012) 590-593.

[5] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273. These areas have suffered as a result of a lack of proper planning measures and the historic lack of attention given to informal areas in formal planning processes. J van Wyk *Planning Law* 2 ed (2012) 458. Marie Huchzermeyer explains that the reality for many residents is: "[c]onsistent hostility, threats of displacement and a lack of proper recognition, all of which prevent these settlements from progressing into the living environments their residents would hope for…" M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 27. In the context of evictions particularly, see *Government of the Republic of South Africa and Others v Grootboom and others* 2001 1 SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC).

Although all racially-based land measures were already repealed in 1991[6] and even though apartheid had officially ended by 1994, bringing about major changes in policy and legislation, with a new corresponding focus on the protection of human rights, very little was done to rectify the spatial legacy of segregation in South Africa.[7] Consequently poverty is exacerbated and the development of underdeveloped areas thwarted.

It is projected that almost 75% of South Africans will live in urban areas by 2030.[8] However, cities in post-apartheid South Africa are still segregated, despite efforts to make them more integrated and inclusive, as well as democratic.[9] In this regard the National Development Plan (the "NDP") highlights the following:

> "Where people live and work matters. Apartheid planning consigned the majority of South Africans to places far away from work, where services could not be sustained, and where it was difficult to access the benefits of society and participate in the economy. A great deal of progress has been made since 1994, but South Africa is far from achieving the RDP goals of 'breaking down apartheid geography through land reform, more compact cities, decent public transport and the development of industries and services that use local resources and/or meet local needs'." [10]

The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change, prepared by the High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change, contends that the severe spatial inequality has not been addressed by measures such as the 2012 NDP and the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA").[11] The Report additionally confirms that urban land reform has been neglected.[12] Since informal settlements are central to urban land reform there is an urgent need to address issues of poverty and marginalisation in informal settlements.

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[6] Abolition of Racially Based Land Measures Act 108 of 1991.
[7] I Turok "South Africa's Tortured Urbanisation and the Complications of Reconstruction" in G McGranahan & G Marine (eds) *Urban Growth in Emerging Economies: Lessons from the BRICS* (2014) 143 143.
[8] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) Executive Summary.
[9] E Pieterse "Building with ruins and dreams: Some thoughts on realising integrated urban development in South Africa through crisis" (2006) 43 *Urban Studies* 285 286.
[10] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[11] High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1.
[12] 221. See also JM Pienaar *Land Reform* (2014) 824.

While the rural dimension of land reform is not without its problems the focus of this thesis will consequently be on the urban dimension of land reform, more specifically informal settlements.[13]

1 1 2 Addressing the urban land question

> "The racial distribution of urban land, the violence that sustains it and the ideologies that mask this violence and naturalise its results have mutated into the new order. In an overwhelmingly urbanised country that is rapidly becoming more urbanised, the new willingness to confront the racial dimensions of the rural land question has not been equalled by a willingness to confront the urban land question."[14]

Informal settlements play an important role within the broader urban environment. The NDP highlighted that informal settlements provide a means of access into cities or towns for new migrants and the urban poor.[15] These settlements are moreover the result of various circumstances that relate to, but are not limited to, the effects of globalisation as well as local political processes.[16] Informal settlements are also identified as areas where residents are extremely vulnerable, physically and socially.[17]

While informal settlement is often the only viable gateway to the city, it is fraught with challenges and instability. Marie Huchzermeyer explains that the manifestation of informal settlements directly relates to poverty as experienced in urban areas and that poverty exacerbates the phenomenon of informal settlements.[18] Accordingly, the prevalence of informal settlements in South Africa shows how the state has failed and continues to fail to adequately address this problem.[19]

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[13] South African Cities Network *The Urban Land Paper Series Vol 2* (2018) 7. See JM Pienaar *Land Reform* (2014) 286-319; 460-464 for a discussion of the rural context.
[14] R Pithouse "Urban Land Question Is Also Urgent" (09-03-2018) *Mail and Guardian* <https://mg.co.za/article/2018-03-09-00-urban-land-question-is-also-urgent> (accessed 4-09-2019).
[15] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273. Broadly, informal settlements come into existence as a result of people migrating from rural areas to urban areas, often in search of employment and a better quality of life. R Mpe & A Ogra *Making Great Places in Slums/ Informal Settlements* (2014) Paper presented at the Planning Africa 2014 – Making Great Places Conference in Durban, South Africa (19-10-2014) 591.
[16] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 23. See also C Bénit & P Gervais-Lambony "La mondialisation comme instrument politique local dans les métropoles Sud-Africaines (Johannesburg et Ekhuruleni) : Les « pauvres » face aux « vitrines »" (2003) 1 *Annales de Géographie* 628-645.
[17] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273.
[18] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 23. However, informal settlements are not a uniquely South African phenomenon or manifestation. It is a global matter encountered internationally.
[19] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 29.

The state is but one of the role-players[20] relevant in any discussion of informal settlements. However, in this thesis, the focus is specifically on local government, as planning is implemented principally at municipal level.[21] In terms of the Constitution of the Republic of South Africa, 1996 (the "Constitution"), local government is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.[22] Critically, the Constitution sets out the ideal of developmental local government,[23] in terms of which municipalities must "provide democratic and accountable government for local communities, encouraging their involvement; ensure the sustainable provision of services; and promote social and economic development."[24] This applies to informal settlements as well.

However, it is argued that municipalities do not perform their crucial functions efficiently, generally, but also specifically in terms of informal settlements.[25] SPLUMA's potential to promote intergovernmental cooperation as well as the municipal role in the promotion of spatial justice are therefore explored in this thesis.[26]

In summary, two overarching and interrelated challenges to spatial justice are identified in an informal settlement context.[27] Firstly, spatial inequality, stemming from historic exclusion and marginalisation and a concomitant lack of integration due to segregation based on race and income. Secondly, relating to relevant role-players, a lack of intergovernmental cooperation and support as well as insufficient public participation[28] are identified as contributing to spatial injustices in urban areas.

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[20] Other stakeholders include the private sector.
[21] J van Wyk *Planning Law* 2 ed (2012) 593.
[22] S 7(2) of the Constitution. See *Government of the Republic of South Africa and Others v Grootboom and others* 2001 1 SA 46 (CC). See also J van Wyk *Planning Law* 2 ed (2012) 594.
[23] Ss 152 and 153 of the Constitution.
[24] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 354.
[25] J van Wyk *Planning Law* 2 ed (2012) 595. See the latest dismal municipal audit results: Auditor-General South Africa *Integrated Annual Report 2018-19* (2019).
[26] See Chapter 4 3.
[27] See the legislative dimension giving rise to these challenges set out in Chapter 2 2 as well as a discussion of spatial justice challenges as set out in the NDP and IUDF, discussed in Chapter 3 3.
[28] Hoexter explains that public participation is a crucial element of democracy. She describes public participation as "the active involvement of members of an informal community in the decision-making processes that affect them." C Hoexter *Administrative Law in South Africa* 2 ed (2012) 80. In the *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) case, at para 15, the value and purpose of public participation were explained as follows:

Apartheid was a system that preserved and protected the privilege that white people experienced on many levels, including economic and political levels.[29] In this regard, cognisance must be taken of the fact that privileges can be manufactured on the foundation of class as well as race.[30] While these privileges persist, spatial justice cannot exist. Consequently, the existence of spatial justice is inextricably linked to the promotion of, at the very least, fairness and human dignity.[31] For this reason, spatial justice can be seen as a concept which is supported by the Constitution, investigated in more detail below.

1 2 Exploring the notion of spatial justice

1 2 1 Introduction

1 2 1 1 Defining spatial justice

Spatial justice is a difficult concept to define for various reasons, not only because it draws from a multitude of disciplines, but also because it is context-dependent.[32] In the context of urban land reform imperatives, the principle of spatial justice, as it is set out in SPLUMA, encompasses the promotion of access to land.[33] However, the definition of spatial justice is much broader. To start, spatial justice can be defined with reference to its two components: space and justice (or injustice).[34] Simply put, spatiality is socially produced.[35] This connects to the ideas that spatial injustice is derivative of social injustice and that social injustices always have a spatial impact.[36] While the concept of spatial justice in urban contexts is explored in more detail in

> "[P]articipation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institution of government and become familiar with the laws as they are made. It enhances civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people."

[29] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 2. See also CH Feinstein *An Economic History of South Africa* (2005) and S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002).

[30] J Seekings & Nattrass N *Class, Race and Inequality in South Africa* (2005) 300.

[31] See 1 1 1. E Soja "The city and spatial justice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 3.

[32] On the challenges of providing a definition of spatial justice, see E Soja *Seeking Spatial Justice* (2010) 6.

[33] See 1 2 3.

[34] See E Soja *Seeking Spatial Justice* (2010) 13-30; 67-110.

[35] E Soja *Seeking Spatial Justice* (2010) 103.

[36] P Marcuse "Spatial justice: Derivative but causal of social injustice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 3.

Chapter 3 below, a brief exposition is warranted here for purposes of better contextualising the research question.

1 2 1 2 Spatial justice as distinct and separate from other types of justice

Spatial justice can conceptually be divided into two parts: space and justice. Although a full discussion on the nature and definition of the first component, justice, is beyond the scope of this thesis,[37] spatial justice will be contrasted with other forms of justice, in order to better explain the concept. From the outset, spatial justice needs to be distinguished from social justice.[38] It is not merely social justice in spaces. In this regard it can be said that spatial justice is the application of a critical perspective to social justice and builds on conceptual notions of social justice.[39] In this line, Soja argues that thinking critically about space will enable society to bring about justice and true democracy.[40]

Spatial justice has previously also been defined as "the intentional and focused emphasis on spatial or geographical aspects of justice and injustice."[41] However, some scholars argue that this idea of spatial justice – as merely social justice viewed in a geographical context – needs to be reconstructed and reconsidered in order to unlock the concept's full potential.[42] Additionally, spatial justice needs to be distinguished from the notion of redistributive justice.[43] Although the notion of redistributive justice figures prominently in the context of land reform, both in rural and urban contexts,[44] spatial justice envisions more than redistributive justice only. In this regard, Marcuse

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[37] For more on justice, see J Rawls *A Theory of Justice* (1971); IM Young *Justice and the Politics of Difference* (1990) and CW Mills "Rawls on race/race in Rawls" (2009) 17 *The Southern Journal of Philosophy* 161-184.

[38] For a discussion on social justice, see D Smith *Justice and Reconciliation in Post-Apartheid South Africa* (1994); D Harvey *Social Justice and the City* (2009); D Miller *Principles of Social Justice* (1999); D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) and T Tyler, RJ Boeckmann, HJ Smith & YJ Huo *Social Justice in a Diverse Society* (1997).

[39] E Soja *Seeking Spatial Justice* (2010) 6.

[40] E Soja "The city and spatial justice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 1.

[41] E Soja "The city and spatial justice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 2. See A Philippopoulos-Mihalopoulos "Spatial justice: law and the geography of withdrawal" (2010) 6 *International Journal of Law in Context* 201 201.

[42] A Philippopoulos-Mihalopoulos "Spatial justice: law and the geography of withdrawal" (2010) 6 *International Journal of Law in Context* 201 201.

[43] A Philippopoulos-Mihalopoulos "The movement of spatial justice" (2014) *Mondi Migranti* 7 10. Redistributive justice "may require the redistribution of wealth from the wealthy within the state or nation to the less advantaged members of that society." S Caney "International distributive justice" (2001) 49 *Political Studies* 974 974.

[44] JM Pienaar *Land Reform* (2014) 273. See generally C Walker, A Bohlin, R Hall & T Kepe *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (2010).

argues that it is not enough to only focus on redistributive justice in the hopes of creating an equal society.[45] A "just" city will go beyond the creation of equality on the surface and rather consider the potential of its inhabitants and encourage the realisation of their potential.[46]

1 2 1 3 Linking space and spatial justice

Soja describes the relationship between the social and spatial aspects of our lives as a "socio-spatial dialectic", whereby social processes are shaping space at the same time as space shapes social processes.[47] Space and society are linked and it is necessary to critically analyse and evaluate the interplay between society and space to comprehend the spatial injustices in order to decide on ways to address these injustices.[48] Therefore, the notion of spatial justice takes into consideration that space is socially produced and that there are inherent power relations in spaces.

1 2 2 Spatial justice and its relevance in the South African context

Applying the aforementioned ideas to the South African context, Soja explains that "locational discrimination", which in South Africa was especially brought about by racial segregation,[49] leads to spatial injustice when some groups receive more benefits than others.[50] Similarly, uneven development is also a cause of spatial injustice when some groups receive continued privileges.[51]

The enactment of the Constitution marked the start of a new era that made a clear break from the apartheid past.[52] The Constitution is viewed as a transformative

[45] P Marcuse "Spatial justice: derivative but causal of social injustice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 2.
[46] P Marcuse "Spatial justice: derivative but causal of social injustice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 2.
[47] E Soja *Seeking Spatial Justice* (2010) 18.
[48] J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 27.
[49] Soja explains that the practice of segregation and boundary making under apartheid in South Africa amounted to the creation of unjust geographies. E Soja *Seeking Spatial Justice* (2010) 39.
[50] E Soja "The city and spatial justice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 3.
[51] E Soja "The city and spatial justice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 3.
[52] P Langa "Transformative constitutionalism" (2006) 3 *Stell LR* 351 353.

document,[53] and one of the main principles encapsulated by the notion of transformative constitutionalism is that of promoting more equality in terms of economic means and power.[54] In this sense the transformation required in terms of the Constitution is "a social and an economic revolution."[55] It is argued that transformation should go beyond just promoting socio-economic rights and should promote access to opportunities.[56] In this sense, then, the notion of spatial justice is compatible with and supported by the transformative view of the Constitution.

It has been noted that spatial remedies are not enough to eliminate spatial injustice and that there should be more far-reaching developments with regard to power relations and resource allocation.[57] It is contended that social problems cannot be solved without having regard to their spatial facet.[58] Worded differently: dealing with or addressing the end result of spatial injustice is insufficient. What is also required is having preventative measures in place before injustice occurs.

Spatial justice is linked to the background of the society in which it exists (or is absent from).[59] Accordingly, it can be useful to look at how other jurisdictions have dealt with spatial injustice, but only up to a point. Some other jurisdictions have adopted legislation to address the prevalence of spatial injustice, with mixed results.[60] For this reason, it is necessary to place it in a South African context, including policy documents. The first principle for spatial development listed in chapter 8 of the NDP

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[53] KE Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146-188; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 157; D Moseneke "The fourth Bram Fischer memorial lecture: Transformative adjudication" (2002) 18 *SAJHR* 309-319; M Pieterse "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *SAPL* 155-166; S Liebenberg "Needs, rights and transformation: adjudicating social rights" (2006) 1 *Stell LR* 1-36; A J van der Walt "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1-47; J Brickhill & Y van Leeve "Transformative constitutionalism: guiding light or empty slogan?" (2015) *Acta Juridica* 141-171. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 262 and *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 142.

[54] P Langa "Transformative constitutionalism" (2006) 3 *Stell LR* 351 355. S 7(1) of the Constitution emphasises the values of human dignity, equality and freedom. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 23-78.

[55] P Langa "Transformative constitutionalism" (2006) 3 *Stell LR* 351 352.

[56] P Langa "Transformative constitutionalism" (2006) 3 *Stell LR* 351 352.

[57] P Marcuse "Spatial justice: derivative but causal of social injustice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 5.

[58] P Marcuse "Spatial justice: derivative but causal of social injustice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 3.

[59] E Soja "The city and spatial justice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 3.

[60] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 381. The jurisdictions considered were the United States of America and Brazil.

is that of spatial justice.[61] The principle proposes the reversal of the past "policy of confining particular groups to limited space (ghettoisation and segregation) and the unfair allocation of public resources between areas..."[62]

Moreover, as was mentioned in the introduction, SPLUMA similarly incorporates spatial justice as a development principle to be applied in all spatial planning matters throughout South Africa.[63] It is accordingly clear that the South African interpretation of spatial justice, as it appears under section 7(a) of SPLUMA, is particular to the South African context and focuses on integration, participation and inclusivity.[64]

The implications of a failure to deal with spatial justice issues, particularly in the South African context, have been far-reaching and extend beyond land-access concerns. It also has major implications for access to housing, access to health and education services and facilities, as well as economic opportunities.[65] Although the government has attempted to attend to some of these matters, for example housing[66] and planning by way of legislation[67] and policy initiatives,[68] and although decisions of the Constitutional Court[69] have likewise contributed, progress has been slow and piece-meal.

While all of these considerations remain valid and require urgent attention, the broad scope of these interrelated problems cannot be investigated in the study at hand. It is in this context that the main purpose of the study has emerged, namely the necessity of evaluating whether legislation such as SPLUMA can effectively address the prevalence of spatial injustice in South Africa, specifically within an urban land reform context. In this light the focus shifts to land reform and its relevance for purposes of this study.

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[61] National Planning Commission *National Development Plan: Vision for 2030* (2012) 246. The other principles are spatial sustainability, spatial resilience, spatial quality and spatial efficiency. The principle of spatial justice was not recognised in South Africa before it was included in the NDP. J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 41.
[62] National Planning Commission *National Development Plan: Vision for 2030* (2012) 246.
[63] SPLUMA s 7(a).
[64] J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 29.
[65] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 381.
[66] Such as the Comprehensive Housing Plan for the Development of Integrated Sustainable Human Settlements ("Breaking New Ground") published in 2004.
[67] Such as the Development and Facilitation Act 67 of 1995. This Act was repealed by SPLUMA.
[68] Such as the 1994 Reconstruction and Development Programme (the "RDP").
[69] J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 31.

1 2 3 Spatial justice and the urban land reform dimension

Spatial justice, its origin, operations and objectives have, as alluded to above, been integral in the "right to the city" developments and have been explored rather extensively within various contexts, including housing[70] and planning.[71] Spatial justice *per se* has not, however, been explored fully within a land reform context specifically. While land reform is a multi-dimensional and all-encompassing concept,[72] of particular relevance regarding the South African context is section 25(5) and 25(6) of the Constitution.[73] Section 25(5) provides that the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis, whereas section 25(6) states that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

Given the particular prevailing conditions in urban contexts specifically,[74] the question arises as to whether SPLUMA promotes spatial justice, given the particular constitutional imperatives contained in section 25(5) and (6). In this regard it is striking that SPLUMA, with regard to spatial justice, provides *inter alia* in section 7(a) that:

> "(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 persons 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;

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[70] See M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation Stellenbosch University (2017); M Strauss & S Liebenberg "Contested spaces: housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428-448.
[71] See, for example, J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381; S Fainstein "Spatial justice and planning" (2009) 1 *Justice Spatiale/ Spatial Justice* 1.
[72] See JM Pienaar *Land Reform* (2014) 166, 285.
[73] Although the discussion of urban land reform is restricted to sections 25(5)-(6) of the Constitution in this thesis, for the most part, it necessarily extends to other, connected areas, such as planning and housing. However, due to space constraints, the focus remains on these particular sections of the Constitution.
[74] See 1 1.

(iv) land use management systems must include all areas of a municipality and specifically 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 accommodate *access to secure tenure* and the incremental upgrading of informal areas."[75]

There are clear touching points between constitutional imperatives to broaden access to land and to improve secure tenure and spatial justice as set out in SPLUMA. In this light the NDP specifically highlighted the relevance of the land reform programme and called for the revision of aspects thereof to integrate the spatial dimension.[76] In terms of strategies to promote inclusion, the NDP proposed a number of solutions, including a focus on the reversal of apartheid geographies through the institution of new spatial norms and standards.[77] It is thus possible that these norms and standards may be aligned to land reform measures or that land reform measures may be adjusted to be better aligned with spatial justice considerations.

Specifically, there are a number of spatial justice challenges giving rise to the need for urban land reform measures.[78] Prominent spatial justice issues prevalent in informal settlements are especially the result of, but not limited to: increased urbanisation without the proper structural support,[79] measures dealing with unlawful occupation of land,[80] spatial inequality persisting into the post-apartheid era[81] and a lack of intergovernmental cooperation, as well as, finally, local government capability and capacity (or the lack thereof) to tackle the aforementioned issues.[82]

In light of the background exposition above, some of the main goals of spatial justice, as is argued throughout this thesis, constitute the eradication of segregation based on

[75] SPLUMA s 7(a) (emphasis added).
[76] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[77] National Planning Commission *National Development Plan: Vision for 2030* (2012) 465.
[78] See JM Pienaar *Land Reform* (2014) 659-811 for a discussion of the issues surrounding unlawful occupation and eviction impacting on informal settlements. See in general also J van Wyk *Planning Law* 2 ed (2012) 457-513 for the challenges surrounding informal settlements. See specifically J van Wyk *Planning Law* 2 ed (2012) 470-504 which sets out the situation in informal settlements in the context of s 26 of the Constitution, pertaining to housing. The focus of this thesis is not on housing, but on land reform elements, therefore the housing-adjacent issues will not be discussed in any great detail here.
[79] See JM Pienaar *Land Reform* (2014) 662-667.
[80] JM Pienaar *Land Reform* (2014) 659-814.
[81] See specifically part 1 1 of this discussion.
[82] See generally J van Wyk *Planning Law* 2 ed (2012) 90-91 for a discussion on local government's developmental duties.

race and income – the promotion of inclusion,[83] and also the integration of said different groups. Spatial justice in the urban land reform context is thus still urgently needed, many years after the end of formal apartheid, despite the removal of problematic measures and the introduction of new legislative measures generally designed to promote spatial transformation and equality.[84]

1 3 Rationale and motivation

The impetus for this study flows from a consideration of some of the most pressing problems faced by South Africans in an everyday context: problems such as poverty, inequality and unemployment, especially as they exist in the context of informal settlements.[85] Despite the historical transition to democracy in 1994, South Africa is still plagued by various social and economic ills, which must be alleviated urgently. The NDP underlined that South Africa's spatial organisation is maintaining exclusions and aggravating economic and logistical inefficiencies.[86] Spatial disparity was consequently identified as the biggest challenge for a national spatial framework in South Africa.[87] The drive to promote spatial transformation as a way of addressing these problems has recently gained traction, and the need to promote spatial justice has also been recognised in a South African context in recent years.[88]

However, it is argued that many of the issues identified above are still prevalent and that very little has been achieved in the way of the promotion of spatial transformation and spatial justice.[89] There is need for a reconsideration, or at least an evaluation, of the measures set out to promote spatial transformation and spatial justice, which are intended to eradicate or ameliorate these issues. In this context, the Constitution's influence is paramount.[90] It is argued throughout this study that the Constitution is a transformative document which supports and facilitates true transformation, on spatial,

[83] See also J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 37-39.
[84] In this regard, Van Wyk explains that planning in South Africa still bears the legacy of our apartheid past. J van Wyk *Planning Law* 2 ed (2012) 49.
[85] See 1 1.
[86] National Planning Commission *National Development Plan: Vision for 2030* (2012) 277.
[87] National Planning Commission *National Development Plan: Vision for 2030* (2012) 278. See also the SPLUMA preamble and J van Wyk *Planning Law* 2 ed (2012) 16-54.
[88] See Chapter 3 3.
[89] P Murray "Zoning matters: A 'SPLUMA' score-card one year on" (2016) 569 *De Rebus* 26.
[90] S 2 of the Constitution.

social and economic levels.[91] In this regard section 25(5) and section 25(6), which provide for broadening access to land on the one hand and more secure tenure on the other, are likewise integral. However, various legislative and other measures are necessary to make the constitutional vision a reality.

Although not the main focus of this study, the thesis also considers the role of local government as the functionaries who implement planning measures and their effectiveness at promoting spatial justice.[92] In this regard, section 152 of the Constitution (relating to the objects of local government) and section 153 of the Constitution (relating to the developmental duties of local government) are especially significant.[93] From these considerations, the main research question emerges, as well as further research hypotheses which all relate to the main research question.

1 4 Research question, aims and hypotheses

1 4 1 Primary research question

The primary research question in this thesis is whether SPLUMA, in its current form, is able to promote spatial justice in an urban land reform context, with reference to section 25(5) and 25(6) of the Constitution, pertaining to the promotion of access to land and improving tenure security, respectively.

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[91] *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 157. For more on transformative constitutionalism, see KE Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146-188; D Moseneke "The fourth Bram Fischer memorial lecture: Transformative adjudication" (2002) 18 *SAJHR* 309-319; M Pieterse "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *SAPL* 155-166; S Liebenberg "Needs, rights and transformation: adjudicating social rights" (2006) 1 *Stell LR* 1-36; A J van der Walt "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1-47; J Brickhill & Y van Leeve "Transformative constitutionalism: guiding light or empty slogan?" (2015) *Acta Juridica* 141-171. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 262 and *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 142.

[92] Van Wyk points out that "[t]he duties and responsibilities in relation to land use planning and management are contextualised by the attitude with which the municipality performs them." J van Wyk *Planning Law* 2 ed (2012) 87. Local government must promote a safe and healthy environment. S 152(1)(d) of the Constitution. Van Wyk furthermore explains that the aforementioned provisions are to be read together with the housing provision. J van Wyk *Planning Law* 2 ed (2012) 89. Refer also to the Local Government: Municipal Systems Act 32 of 2000 s 4(2)(i).

[93] See also the *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC) decision at para 348, referencing ss 152(1)(b), 152(1)(c) and 153(a) of the Constitution:

> "The Constitution deals expressly with the duties of councils towards the disadvantaged sections of our society. It states that the objects of local government include ensuring "the provision of services to communities in a sustainable manner" and 'promot[ing] social and economic development', and that a municipality must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community'."

1 4 2 Research aims

The main aim of the study is to indicate to what extent, if at all, SPLUMA promotes spatial justice in an urban land reform context. This overarching research objective is also linked to the following aims: To

a) Determine whether SPLUMA meets constitutional requirements.
b) Establish to what extent, if at all, SPLUMA is aligned with the land reform policy framework and related policy frameworks, particularly in an urban context.
c) Establish whether the tools in SPLUMA can be reasonably employed to reach the objectives of the Act, specifically spatial justice within an urban land reform context.
d) Indicate the particular lacunae or disconnects between the various policy and legislative frameworks and measures.
e) Suggest relevant amendments or actions to be effected to improve the efficacy of SPLUMA.

1 4 3 Hypotheses

The question whether SPLUMA promotes spatial justice in an urban land reform context is explored in light of the following hypotheses:

a) SPLUMA has to meet constitutional requirements and imperatives for it to be employed effectively.
b) Although SPLUMA is to some extent aligned with relevant policy documents in a land reform context, as well as some related contexts, specifically concerning informal settlements, some adjustments may be necessary to promote efficacy.
c) The tools and mechanisms contained in SPLUMA can reasonably be employed to achieve the objects in the Act, but may need amendment regarding intergovernmental cooperation and the participation of stakeholders, given the main focus of the study.
d) There may be specific gaps or disconnects between the various policy and legislative frameworks that have to be attended to.
e) Specific actions may have to be suggested to address shortcomings so as to promote the efficacy of SPLUMA in an urban land reform context.

1 5 Research methodology

The discussion will centre on a critical analysis of SPLUMA. To that end, a literature review will be undertaken. Primary sources, such as case law, will be consulted. This will aid the understanding of the reasons behind and processes leading up to the enactment of the Spatial Planning and Land Use Management Act in 2015. Reliance is also placed on relevant South African policy documents and legislation to gain additional insight into the working of SPLUMA.

This will not be an empirical study. Secondary sources such as journal articles and academic books, from both local and international authors, will be consulted for context on planning and land reform issues related to the Act. Where relevant and necessary, international instruments may also be included, as well as foreign legislation and policy. However, this will not be a comparative study, due to space constraints and the unique history of spatial development in South Africa specifically. Accordingly, the focus will mostly be on primary and secondary South African sources.

1 6 Overview of chapters

1 6 1 Chapter 1: Introduction

In this chapter, the main problem statement as well as the reason for the study is set out. This chapter contains the main research question and the overarching and supplementary aims of the study, the foundational hypotheses, the research methodology employed, as well as an overview of chapters.

1 6 2 Chapter 2: SPLUMA in context

This chapter is aimed at contextualising SPLUMA in light of historical and constitutional considerations. This chapter also connects to the constitutional investigation in the fourth chapter. In this chapter, the historical link between land reform and spatial justice will be set out and the history of spatial injustices that gave rise to the need for land reform in South Africa will be explored in particular. In this light the extent to which land use planning and management measures were used by the colonial and apartheid regimes will also be considered briefly.

Also linked to the contextualisation of SPLUMA in an historical sense are the measures that preceded it. Accordingly, some discussion of developments that led to

the enactment of SPLUMA is also warranted. This includes a discussion of the Development Facilitation Act (the "DFA"), as well as a discussion of the Bills that preceded SPLUMA.

1 6 3 Chapter 3: Spatial justice in urban South Africa with a specific focus on informal settlements

In this chapter, the focus is on spatial justice as a notion which is included in several South African policy documents and in SPLUMA. The notion as it has become to be understood in relation to the concept of the right to the city will be explored specifically. SPLUMA forms an integral part of this chapter, resulting in the principles, concepts, tools and mechanisms of the Act being discussed in detail.

1 6 4 Chapter 4: An evaluation of SPLUMA's ability to promote spatial justice in an urban land reform context

Given the background provided in the earlier chapters, this chapter shifts from general considerations to focus specifically on SPLUMA's ability to indeed promote spatial justice in an urban land reform context. Following a general introduction and given the focus on informal settlement specifically, the importance of public participation in planning is canvassed in detail. The link between promoting spatial justice as a development principle in SPLUMA and public participation is forthwith set out and investigated.

Forming part of evaluating whether SPLUMA is able to promote spatial justice is the consideration of the Constitution and the values enshrined therein. Given the importance of land reform for purposes of this study, SPLUMA is specifically also evaluated in light of section 25 of the Constitution, the property clause.

1 6 5 Chapter 5: Conclusion and recommendations

The thesis is concluded in the fifth and final chapter, containing conclusions and recommendations. The findings in the separate chapters are also summarised in this chapter, before an answer to the main and overarching research question is dealt with specifically.

Chapter 2: SPLUMA in context

2 1 Introduction

Planning and land use management[94] law has always been influenced and guided by political ideology.[95] In the past, planning law and land use mechanisms were often implemented in such a way as to promote racial and spatial segregation.[96] A consequence of the concentration of rights to land in one chosen group was that economic and social power also vested in this group, creating inequality at various levels.[97] Very little has changed in terms of this inequality and the eradication of segregation. Moreover, new forms of segregation have been introduced in the post-apartheid era.[98]

In short, the fragmentative[99] approach to planning, linked to the racial dimension, contributed to the impetus to introduce new legislation with the aim of regulating land and land use in a uniform, but also equitable manner. The Spatial Planning and Land Use Management Act ("SPLUMA"),[100] discussed in greater detail below, was enacted to address these issues.[101]

One development principle in SPLUMA that shows specific promise to promote equitable access to land in both urban and rural contexts is the principle of spatial justice.[102] However, there are questions about the efficacy of the legislation aimed at providing solutions for the fragmentative and justice challenges, among the other issues that planning law in South Africa currently faces.[103] Accordingly, it must be

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[94] Land use management deals with the accommodation of changes to land use and include procedures such as the removal of restrictions, the removal or amendment of restrictive conditions and the granting of consent uses or departures. J van Wyk *Planning Law* 2 ed (2012) 57.
[95] J van Wyk *Planning Law* 2 ed (2012) 55.
[96] J van Wyk *Planning Law* 2 ed (2012) 16.
[97] J van Wyk *Planning Law* 2 ed (2012) 16. See also S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) in general.
[98] S Mini "Urban Transformation for Sustainability and Social Justice in Urban Peripheries: New Forms of Urban Segregation in Post-apartheid Cities" in D Donoghue (ed) *Urban Transformations: Cities, Peripheries and Systems* (2014) 161.
[99] JM Pienaar *Land Reform* (2014) 297.
[100] 16 of 2013.
[101] Proc no 26 *Government Gazette* 38828 (27 May 2015). Surrounding the issue of transitional provisions, refer to *Shelton and Another v Eastern Cape Development Tribunal* [2016] ZASCA 125 (16 September 2016) *SAFLII* <http://www.saflii.org/za/cases/ZASCA/2016/125.html> (accessed 04-09-2019).
[102] The principle is set out in s 7(a) of SPLUMA.
[103] P Murray "Zoning matters: A 'SPLUMA' score-card one year on" (2016) 569 *De Rebus* 26.

evaluated whether SPLUMA truly has the potential to promote spatial justice in general, but specifically in the urban context, given land reform imperatives.

Chapter 2 aims to build on the brief introduction to the concept of spatial justice set out in Chapter 1, in particular by considering historical spatial injustices. This Chapter additionally contains a discussion of SPLUMA and the framework within which SPLUMA functions. This discussion paves the way for an evaluation of whether spatial justice may be achieved through SPLUMA in a specific urban land reform context, as well as an evaluation of whether SPLUMA is in line with the Constitution of the Republic of South Africa, 1996 (the "Constitution"), dealt with in Chapter 4.

2 2 Historical spatial injustices in South Africa

2 2 1 Introduction

The urgent need for land reform in South Africa is a consequence of the extent of the hardship and dispossession suffered by non-white South Africans as a result of *inter alia* spatial displacement and severe socio-economic marginalisation.[104] In this regard, Terreblanche explains:

> "South Africa's history over the past 350 years is an unsavoury tale of intergroup conflict, violence, warfare, and plunder… One of the clearest patterns is that, during the long period of European colonialism and imperialism, the colonial masters were mostly the victors in group conflicts, and the indigenous population groups mostly the losers."[105]

The post-colonial period also saw the "local whites" conquering and enriching themselves at the cost of the indigenous people.[106] They did so in three ways:

> "…firstly, by creating political and economic power structures that put them in a privileged and entrenched position *vis-à-vis* the indigenous population groups; secondly, by *depriving*

[104] M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation Stellenbosch University (2017) 41. *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 1 SA 500 (CC) para 41.
[105] S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 6.
[106] S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 6.

indigenous people of land,[107] surface water, and cattle; and thirdly, by reducing slaves and indigenous people to different forms of unfree and exploitable labour."[108]

Historically, access to land was restricted and then, where access was possible, the kind of rights granted was also insecure.[109] From early settlement,[110] but significantly from the post-1910 period, specific legislative and other measures were introduced that restricted the use, occupation and ownership rights of black people in particular.[111] This legal structure paved the way for later legislative measures during apartheid, which profoundly entrenched the dispossession and marginalisation that black people experienced.[112]

The three pillars of apartheid, which built on the foundations of the post-1910 period, consisted of influx control measures,[113] group areas legislation[114] and measures for the prevention of illegal squatting.[115] Consequently, there were specific legislative developments which aimed to regulate the movement of black people between urban and rural areas, as well as where they settled and, finally, there were measures

[107] Terreblanche cites the Native Land Act 27 of 1913, later renamed the Black Land Act, as a particularly pertinent example of how the property class deprived the indigenous people of their land in an attempt to render them poor in order to increase the supply of unfree black labour. S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 7. Feinstein explains that the conquest and dispossession started during the early days of white settlement in the Cape. CH Feinstein *An Economic History of South Africa* (2005) 22-46. See also JM Pienaar *Land Reform* (2014) 52-136 for a summary of the historical context detailing the need for the all-encompassing land reform programme.

[108] S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 6 (own emphasis). Terreblanche contends that South African history may be viewed in terms of any of three perspectives: the first relating to white political and economic domination; the second, relating to land deprivation; and the third, relating to unfree black labour.

[109] L Thompson *A History of South Africa* 4 ed (2014) 163.

[110] Officially since 1652 with the permanent settlement of the Cape – see S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 154-155. Terreblanche explains that the colonial process of land deprivation lasted for more than 250 years, with many bloody conflicts. There were very few instances in which indigenous people were allowed to own land at this stage.

[111] M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation Stellenbosch University (2017) 36.

[112] M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation Stellenbosch University (2017) 36.

[113] Influx control was a mechanism by which the movement to and from urban and rural areas was regulated. This mechanism had already existed by the time apartheid commenced in 1948. Examples of legislation which sought to control the influx into urban areas include the Natives (Urban Areas) Act 21 of 1923 and the Natives (Urban Areas) Consolidation Act 25 of 1945, discussed below at 2 2 2 2. These measures became more stringent during the apartheid years. JM Pienaar *Land Reform* (2014) 105-106.

[114] Group areas legislation was enacted from the 1950s, which demarcated separate areas for human settlement. See, for example, the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966. This approach meant that black people in South Africa were completely limited in where they could acquire immovable property or settle. JM Pienaar *Land Reform* (2014) 107.

[115] JM Pienaar "'Unlawful Occupier' in Perspective: History, Legislation and Case Law" in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309 310-313.

designed to regulate the unlawful occupation of land.[116] Combined, the impact of all of these discriminatory measures regarding land and immovable property in particular was devastating.[117]

2 2 2 The 20th century colonial years: 1910–1948

Various racial measures were relevant in relation to urban areas. In this regard the Natives (Urban Areas) Act[118] formed part of influx control measures that regulated movement of black persons from rural areas to urban areas.[119] From the start of the twentieth century, black people in urban areas resided in "locations".[120] In terms of this Act, municipalities could proclaim certain areas "white-only" and relocate black persons staying there to these locations or townships.[121] Significantly, this Act laid the foundation for the Group Areas Act,[122] another racial Act, embodying the second pillar of apartheid, which obliged municipalities to enforce racial zoning.[123]

The Natives (Urban Areas) Act[124] and later amendments employed the pass system to restrict the number of black people who were settled in urban areas as well as their movement to and from these areas.[125] This way influx control measures were put in place, with important spatial justice implications. In line with the Native (Urban Areas) Act[126] and the Natives (Urban Areas) Consolidation Act[127] spatial planning would be race-based and black people would only be able to occupy certain urban areas for a limited period of time, linked to various conditions.[128]

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[116] JM Pienaar *Land Reform* (2014) 104.
[117] S Dubow *Apartheid, 1948-1994* (2014) 59. See also JG Fairweather *A Common Hunger: Land Rights in Canada and South Africa* (2006) 160-166 for a discussion of the legacies of dispossession in South Africa. See also NL Clark & WH Worger *South Africa: The Rise and Fall of Apartheid* 2 ed (2011); L Ntsebeza & R Hall *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007); S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002).
[118] 20 of 1923.
[119] TW Bennett "African Land – A History of Dispossession" in R Zimmerman (ed) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 82.
[120] J van Wyk *Planning Law* 2 ed (2012) 48.
[121] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.
[122] 41 of 1950.
[123] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.
[124] 20 of 1923.
[125] CH Feinstein *An Economic History of South Africa* (2005) 58. In this regard Feinstein contends that the pass laws also aided commercial farms to cope with the increasing demand for labour.
[126] 20 of 1923.
[127] 29 of 1945.
[128] JM Pienaar *Land Reform* (2014) 105.

The Black Administration Act,[129] passed in 1927 and commencing in 1929, arguably had the most far-reaching impact on the every-day lives of black South Africans and also had an impact in urban areas. It effectively formed the basis of the racial grid of measures that would follow systematically in successive decades, with long-lasting effects.[130] Section 1 of the Act appointed the Governor-General (a position later transformed into that of State President) as the "supreme chief" of all Africans and in terms of section 5 of the Act, it was within his power to order the removal of a whole black community.[131]

This racially restrictive approach was not limited to land-related measures only. Seemingly unrelated Acts, such as the Public Health Act[132] and the Housing Act,[133] were also used to advance the objectives of the government under the guise of public health and safety.[134] The combined results of all of these measures were racial and spatial segregation that impacted on land control at an overarching level, effectively permeating all rural and urban areas in South Africa.

It is clear that various legislative measures enacted between 1910 and 1948 established and extended the basis for separate land use and planning measures, for different races. This approach had a serious and enduring effect on land use and planning measures in South Africa. These measures would only become more stringent in the apartheid years.[135]

2 2 3 The apartheid years: 1948–1994

2 2 3 1 Introduction

The term "apartheid" is a neologism which translates to "apartness" or "separateness", which not only refers to physical and social apartness, but also to a kind of "moral or

[129] 38 of 1927.
[130] TW Bennett "African Land – A History of Dispossession" in R Zimmerman (ed) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 82. See also *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 1 SA 500 (CC) in general.
[131] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 1 SA 500 (CC) para 41.
[132] 36 of 1919.
[133] 35 of 1920.
[134] S Parnell "Creating racial privilege: the origins of the South African public health and town planning legislation" (1993) 19 *Journal of Southern African Studies* 471 471; P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.
[135] J van Wyk *Planning Law* 2 ed (2012) 31; S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002) 312.

spiritual imperative".[136] Institutional racial segregation had been government policy since the inception of the Union of South Africa in 1910.[137] However, during apartheid, rigid control was exercised over all black South Africans as apartheid measures increased the scale and scope of all measures that had preceded it.[138]

The scope was all-encompassing as every dimension of daily existence was impacted on. Significant measures introduced in the apartheid era which related to land and planning specifically included the first Group Areas Act,[139] and later amendments thereof,[140] as well as the Community Development Act.[141] These Acts built on the foundation laid by the 1913 and 1936 Land Acts.[142] Also of critical importance concerning the issue of spatial justice were the measures that were promulgated to regulate unlawful occupation of land.

2 2 3 2 A grid of measures regulating relocations and unlawful occupation of land

In 1950, the first Group Areas Act[143] was promulgated. In terms of this Act and its subsequent amendments, government was empowered to segregate the people of South Africa based on their racial background.[144] The approach followed in the Group areas legislation was founded on the Population Registration Act[145] in terms of which different racial categories were set out. A multitude of consequences flowed from such racial categorisation, including where such a person could settle and reside. In this regard Thompson explains that the effect of this legislation was that certain areas were zoned for white occupation and the black people who were settled there were moved, including to the homelands, which led to overcrowding in the homelands.[146] Even

[136] S Dubow *Apartheid, 1948-1994* (2014) 10.
[137] S Dubow *Apartheid, 1948-1994* (2014) 10-11. See also S Dubow *Racial Segregation and the Origins of Apartheid in South Africa* (1989).
[138] JM Pienaar *Land Reform* (2014) 134; L Thompson *A History of South Africa* 4 ed (2014) 193.
[139] 41 of 1950.
[140] 36 of 1966.
[141] 3 of 1966.
[142] 27 of 1913 and 18 of 1936. See also J van Wyk *Planning Law* 2 ed (2012) 43; S Dubow *Apartheid, 1948-1994* (2014) 11.
[143] 41 of 1950.
[144] I Omar "The Group Areas Act: A historical and legal review" (1989) *De Rebus* 516 519.
[145] 30 of 1950.
[146] L Thompson *A History of South Africa* 4 ed (2014) 194.

though the government professed that the removals were voluntary, they clearly were not.[147]

It followed that, after the various group areas were declared, the occupation of such areas had to be regulated, especially where occupation of a particular area was in conflict with the group designation and thus unlawful. Accordingly, very soon after the first Group Areas Act[148] was promulgated, the Prevention of Illegal Squatting Act ("PISA")[149] commenced, which rendered it an offence to unlawfully occupy or squat on land, be it on public or private land.[150]

During the 1960s and the 1970s, the Native Laws Amendment Act of 1964,[151] which had incorporated suggestions from the 1961 Nel Commission,[152] was also used to remove black people from farms.[153] The government's undertaking to resettle the excess black people in homelands hampered the developmental potential of the black people already in homelands.[154] The effect of this spatial segregation on the distribution of land is still felt today and it is responsible for various inequalities.[155]

2 2 4 Conclusion

The law was instrumental in the furtherance of racial segregation in both rural and urban contexts as well as having a detrimental impact on the general development of black South Africans.[156] Land dispossessions occurred throughout the colonial regime, and gained momentum from the mid- to end- 1900s when black persons were

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147 L Thompson *A History of South Africa* 4 ed (2014) 194.
148 41 of 1950.
149 52 of 1951.
150 JM Pienaar "'Unlawful Occupier' in Perspective: History, Legislation and Case Law" in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309 312. See also *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 60.
151 42 of 1964.
152 MC De Wet Nel was the Minister of Bantu Administration and Development. Laura Evans explains that, in 1961, the Nel Commission documented the perceived failures of existing measures of labour regulation in the countryside and recommended the imminent abolition of the labour tenant system in order to extend greater state control over farm workers. L Evans *Survival in the "Dumping Grounds": A Social History of Apartheid Relocation* (2019) 79. See also generally M Morris *The State and the Development of Capitalist Social Relations in the South African Countryside: a process of class struggle* PhD thesis University of Sussex (1979).
153 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 60.
154 C Alden & W Anseeuw *Land, Liberation and Compromise in Southern Africa* (2009) 78.
155 C Alden & W Anseeuw *Land, Liberation and Compromise in Southern Africa* (2009) 78.
156 S Berrisford "Unravelling apartheid spatial planning legislation in South Africa: A case study" (2011) 22 *Urban Forum* 247 249.

increasingly subjected to land ownership restriction.[157] Following the commencement of the Black Land Act in 1913 a grid of racially-based land measures was systematically introduced in South Africa, impacting on both urban and rural contexts.

Apart from having limited access to land in principle and being restricted in where persons could settle, when black persons were able to occupy houses in particular areas, insecure tenure invariably prevailed.[158] Accordingly, in urban and peri-urban areas access to land was not only restricted, but actual settlement was also regulated rigidly.

Part-and-parcel of this approach was the introduction of parallel systems for land use, planning and development.[159] These parallel systems would in future lead to conflict and raise matters linked to spatial justice specifically.[160] Hence; different land control forms under different measures at different times – all contributed to complexity and fragmentation. The measures implemented to restrict and segregate certain racial groups as well as the unfair allocation of resources contributed to and resulted in spatial injustices.[161] Clearly, the consequences of a lack of what has been termed "spatial justice" are far-reaching and extend beyond land-access concerns only.

Having established the litany of problems necessitating the promotion of spatial justice, the next section considers the legislative measure introduced to address many of the issues.

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[157] S Berrisford "Unravelling apartheid spatial planning legislation in South Africa: A case study" (2011) 22 *Urban Forum* 247 255.

[158] *Tongoane v The Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 16.

[159] J van Wyk *Planning Law* 2 ed (2012) 26.

[160] In the case of *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC) the court declared chapters V and VI of the Development Facilitation Act 67 of 1995 invalid. These problematic chapters provided for parallel planning measures and contained procedures for land development in urban as well as rural areas.

[161] In P Marcuse "Spatial justice: Derivative but causal of social injustice" (2009) 1 *Justice Spatiale/ Spatial Justice* 1 3, Marcuse suggests that there are two fundamental forms of spatial injustice:

> "A. The involuntary confinement of any group to a limited space – segregation, ghettoisation – the unfreedom argument. B. The allocation of resources unequally over space – the unfair resources argument."

2 3 The Spatial Planning and Land Use Management Act 16 of 2013

2 3 1 Introduction

The core of this thesis revolves around an Act introduced many years after the formal end of apartheid. However, the road to enactment was not without its challenges. The journey started in May 1994, when the new democratic government was faced with a planning system that had been used to advance the economic goals and promote the ideology of the preceding colonial and apartheid administrations.[162] It was clear that this fragmented planning system had to be replaced with "one equal planning system for all."[163]

The ultimate enactment of SPLUMA marks the end of a long process that started in the last days of apartheid, culminating in a new spatial planning and land use management system. SPLUMA came into effect on 1 July 2015 and provides for a national framework planning system.[164] SPLUMA applies throughout South Africa[165] and is specifically aimed at avoiding or discouraging parallel planning and land use management systems.[166] Addressing prevailing fragmentation and preventing future fragmentation were thus from the outset important considerations.

A critical principle in SPLUMA is spatial justice, contained in section 7(a). In order to ascertain whether SPLUMA will be able to promote spatial justice, it is necessary to consider the surrounding policy documents as well as the process that led to the enactment of SPLUMA.

2 3 2 An overview of the challenges giving rise to the need for the promulgation of SPLUMA

2 3 2 1 Policy dimension

A number of policy documents set out the need for a new, integrated system of planning. In the 1999 *Green Paper on Development and Planning*,[167] it was emphasised that the outdated planning system was fragmented across scales, race

[162] M Oranje & S Berrisford "Planning Law Reform and Change in Post-apartheid South Africa" in T Hartmann & B Needham (eds) *Planning by Law and Property Rights Reconsidered* (2012) 55 56.
[163] M Oranje & S Berrisford "Planning Law Reform and Change in Post-apartheid South Africa" in T Hartmann & B Needham (eds) *Planning by Law and Property Rights Reconsidered* (2012) 55 58.
[164] Preamble of SPLUMA.
[165] SPLUMA s 2(1).
[166] SPLUMA s 2(2).
[167] National Development and Planning Commission G*reen Paper on Development and Planning* 4/99.

groups, ethnic lines, provinces, jurisdictional boundaries, sectoral uses and in terms of jurisdictional instruments.[168]

In addition to fragmentation, the *White Paper on Spatial Planning and Land Use Management*, published in 2001, identified challenges linked to the inherited planning systems, including the enforcement of rights granted under pre-constitutional measures.[169] Moreover, a number of other problems have come to light, such as conflict between the inherited schemes and new plans for planning-related measures and conflict between overlapping planning permission requirements and environmental impact requirements.[170]

The Communal Land Tenure Policy of 2013 also identified urgent problems related to land use planning and management, specifically the lack of spatial planning measures and land use zoning in former homeland areas.[171] In these areas, the impact of traditional leadership constructs, overcrowding and absent or outdated planning and land use measures were especially problematic. However, as the focus in this thesis is on urban areas, these problems will not be discussed in greater detail.

Finally, the National Development Plan of 2012 (the "NDP") contends that the presence of these challenges related to spatial transformation do not necessarily reflect ineffective policy, but rather a lack of institutional capacity and instruments for implementation.[172] In this regard, SPLUMA, set out in more detail below, could be the long-awaited instrument with the potential to address the multitude of challenges set out here.

2 3 2 2 Case law

In 2001, in *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others*[173] the pitfalls of a fragmented planning system which leads to inconsistencies and conflict between

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[168] See para 2.1.2.1. of the 1999 *Green Paper on Development and Planning*.
[169] *Wise Land Use: White Paper on Spatial Planning, Land Use Management and Land Development GG* 22473 of 20 July 2001 6. Other issues included the long approval times, as well as the weak enforcement of rights and focus on control in the process, rather than facilitation. See also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC) para 30.
[170] *Wise Land Use: White Paper on Spatial Planning, Land Use Management and Land Development GG* 22473 of 20 July 2001 6.
[171] RSA *Communal Land Tenure Policy* (2013) 29.
[172] National Planning Commission *National Development Plan: Vision for 2030* (2012) 238.
[173] 2001 4 SA 294 (C) 329C-E.

different levels of government, were described. In the *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[174] the Constitutional Court echoed these sentiments. It is clear that fragmentation in the planning system was a formidable problem that needed to be addressed expediently and effectively.

2 3 3 The journey to the enactment of SPLUMA

2 3 3 1 The first post-1994 interventions

Shortly after the commencement of the constitutional democracy, the Reconstruction and Development Plan of 1994 (the "RDP") was introduced. It was deemed to have progressive land reform objectives.[175] The RDP announced the start of South Africa's land reform programme and it sought:

> "to mobilise all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future."[176]

It was an important policy framework and it set the tone for the various policy documents and legislation that followed, giving effect to, among others, the property clause (section 25 of the Constitution) and the right to access to adequate housing (section 26 of the Constitution). After the RDP, the 1995 Urban Development Strategy expressed the goals of urban transformation specifically.[177] As far as planning law is concerned, it has been contended that planning law reform was not supported by the government's post-RDP view on policy.[178]

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[174] 2010 6 SA 182 (CC) para 33. See also *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* 2011 4 All SA 270 (WCC) para 25.

[175] J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 32.

[176] Reconstruction and Development Plan of 1994 4.

[177] S Mini "Urban Transformation for Sustainability and Social Justice in Urban Peripheries: New Forms of Urban Segregation in Post-apartheid Cities" in D Donoghue (ed) *Urban Transformations: Cities, Peripheries and Systems* (2014) 161 161.

[178] M Oranje & S Berrisford "Planning Law Reform and Change in Post-apartheid South Africa" in T Hartmann & B Needham (eds) *Planning by Law and Property Rights Reconsidered* (2012) 55 64. Oranje and Berrisford explain that "the post-apartheid State had, over a period of less than four years after 1994, moved away from its initial discourse of reconstruction and development, to one of '(1) not rocking the monetary policy-boat', (2) balancing the books, (3) keeping the 'international community' content, and (4) steering clear of what were perceived to be 'risky endeavours'."

2 3 3 2 The role and relevance of the Development Facilitation Act 67 of 1995

SPLUMA's predecessor, the Development Facilitation Act (the "DFA")[179] offered a reconceptualisation of planning.[180] It was introduced to address the fragmentation issues prevalent in planning law by unifying the procedures for land development.[181] The DFA had as its goal the eradication of legislative and procedural obstacles which were hindering land development[182] and it contained specific progressive principles relating to land development and land development objectives ("LDOs").[183] However, LDOs did not work well in practice, as Van Wyk explains,[184] and there was a need for a more extensive instrument to regulate and oversee the actions of local authorities.[185]

The DFA also made provision for a provincial tribunal with the power to make decisions on land development applications.[186] This enabled relevant parties to circumvent certain impediments which were the result of inefficient systems in traditional decision-

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[179] 67 of 1995.

[180] J van Wyk *Planning Law* 2 ed (2012) 269.

[181] JM Pienaar "Planning, informal settlement and housing in South Africa: The Development Facilitation Act in view of Latin American and African developments" (2002) 35 *CILSA* 1 2. At first, the DFA was viewed in the context of land reform. See *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SEC) 1084C and *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 3 SA 1151 (CC) para 43.

[182] R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 61. See also the long title of the DFA which sets out its purpose:

> "To introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land; and in so doing to lay down general principles governing land development throughout the Republic; to provide for the establishment of a Development and Planning Commission for the purpose of advising the government on policy and laws concerning land development at national and provincial levels; to provide for the establishment in the provinces of development tribunals which have the power to make decisions and resolve conflicts in respect of land development projects; to facilitate the formulation and implementation of land development objectives by reference to which the performance of local government bodies in achieving such objectives may be measured; to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses; to promote security of tenure while ensuring that end-user finance in the form of subsidies and loans becomes available as early as possible during the land development process; and to provide for matters connected therewith."

[183] M Oranje & S Berrisford "Planning Law Reform and Change in Post-apartheid South Africa" in T Hartmann & B Needham (eds) *Planning by Law and Property Rights Reconsidered* (2012) 55 58.

[184] J van Wyk *Planning Law* 2 ed (2012) 269.

[185] P Harrison "Integrated Development Plans and Third Way Politics" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and delivery: Urban policy in South Africa* (2006) 186 195. LDOs would ultimately be replaced by Integrated Development Plans.

[186] R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 61.

making processes.[187] Critically, provincial tribunals were empowered to override apartheid-era laws.[188]

The DFA, which originated in the National Housing Forum, was initially intended to be a short-term solution only, as the underlying idea was that the planning system as a whole ought to be re-conceptualised and re-developed.[189] Accordingly, the DFA was promulgated to commence the process of bringing planning law in line with the ideals of a democratic South Africa. At that time the DFA was greatly influenced by the value-driven interim Constitution.[190]

Chapter 1 of the DFA contained general principles for land development and conflict resolution. Section 3 of the DFA set out the general principles for land development specifically. These principles are pertinent in the context of the discussion and are set out in section 3(1)(a)-(m) of the DFA. Van Wyk succinctly summarises the core of these principles as they are relevant in a planning context:

(i) "to apply policy, administrative practice and laws in relation to urban and rural land development and to facilitate the development of formal and informal, existing and new settlements;
(ii) to discourage the illegal occupation of land, with due recognition of informal land development processes;
(iii) to promote efficient and integrated land development taking into account social, economic, institutional and physical aspects of land development;
(iv) to promote the availability of residential and employment opportunities in close proximity to one another;
(v) to optimise the use of existing resources, including those relating to agriculture, land, minerals, bulk infrastructure, roads, transportation and social facilities;
(vi) to promote a diverse combination of land uses, also at the level of individual erven or subdivisions of land;
(vii) to discourage urban sprawl and to develop more compact towns and cities; and
(viii) to encourage environmentally sustainable land development practices."[191]

[187] R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 61.
[188] R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 61.
[189] *White Paper on South African Land Policy*, 1997 110.
[190] J van Wyk *Planning Law* 2 ed (2012) 269.
[191] J van Wyk *Planning Law* 2 ed (2012) 92.

However, while the DFA did introduce additions such as development principles and strategic municipal planning taking the form of land development objectives,[192] it did not significantly alter the planning scene.[193] Chapters V and VI of the DFA were ultimately declared unconstitutional in a 2010 case.[194] This is discussed in greater detail under the next heading. Still, the enactment of the DFA was an important step towards the enactment of SPLUMA.

2 3 3 3 An overview of developments in the period: 1996 to 2010

The DFA had scarcely been implemented when the 1996 Local Government Transition Act Second Amendment Act[195] was enacted. The purpose of this Act was to supply "interim measures for local government during the transformation process".[196] In 1997 Development Tribunals were introduced in line with the DFA and LDOs were prepared, as required, by municipalities.[197] Soon, the new Municipal Systems Act[198] prescribed the introduction of Integrated Development Plans.[199]

In 2001 the *White Paper on Spatial Planning and Land Use Management: Wise Land Use* was introduced.[200] The *White Paper* set out the main elements of the new land use system, which included specific principles, land use regulators, local spatial planning rooted in integrated development planning, as well as a uniform set of procedures for national spatial planning frameworks.[201] These components were included in the 2001 draft Land Use Management Bill.[202] In this *White Paper* Spatial Development Frameworks ("SDFs") were proposed as the primary mechanism to be

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[192] J van Wyk *Planning Law* 2 ed (2012) 269.
[193] V Nel "A better zoning system for South Africa?" (2016) 55 *Land Use Policy* 257 257.
[194] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC). R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 61-62.
[195] 97 of 1996. This Act amended the Local Government Transition Act 203 of 1993.
[196] M Oranje & S Berrisford "Planning Law Reform and Change in Post-apartheid South Africa" in T Hartmann & B Needham (eds) *Planning by Law and Property Rights Reconsidered* (2012) 55 59.
[197] S Berrisford "Unravelling apartheid spatial planning legislation in South Africa: A case study" (2011) 22 *Urban Forum* 247 250.
[198] 32 of 2000.
[199] S Berrisford "Unravelling apartheid spatial planning legislation in South Africa: A case study" (2011) 22 *Urban Forum* 247 250.
[200] *Wise Land Use: White Paper on Spatial Planning, Land Use Management and Land Development GG* 22473 of 20 July 2001.
[201] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 65.
[202] J van Wyk *Planning Law* 2 ed (2012) 4.

used for spatial planning. The 2001 *White Paper* was followed by the publication of the first Land Use Management Bill in 2001.[203]

In 2003 the government introduced the National Spatial Development Perspective ("NSDP").[204] However, the NSDP focused more on economic development than on planning.[205] One year later, in 2004, the Breaking New Ground: A Comprehensive Policy on Sustainable Human Settlement ("BNG") was announced.

Following the above developments, a new Land Use Management Bill was introduced in 2008.[206]

A critical development that impacted directly on the eventual promulgation of SPLUMA occurred in 2010 when the judgment of *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[207] was handed down. The Constitutional Court found that Chapters 5 and 6 of the DFA were invalid and the invalidity was suspended for a period of two years.[208] The idea was that a new overarching land use planning and management measure had to be drafted within the two-year-period. This development provided the necessary impetus to address, finally, the historical, prevailing and new land use planning and management challenges at national level. It was in this specific context that SPLUMA emerged.

2 3 4 Constitutional and policy framework

2 3 4 1 The Constitution

Given the historical background which underlined the necessity for attending to spatial justice, as well as the particular developments that eventually resulted in the promulgation of SPLUMA, the final part of the contextualisation of SPLUMA necessitates some discussion of the constitutional and legislative framework within which it operates.

Being an important and necessary mechanism to effect spatial justice, it is impossible for SPLUMA to function in isolation. Instead, for SPLUMA to be effective, it has to

[203] General Notice 1658 in *Government Gazette* 22473 of 20 July 2001.
[204] 2003-03.
[205] J van Wyk *Planning Law* 2 ed (2012) 4.
[206] B27-2008.
[207] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC).
[208] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC).

function in conjunction with relevant surrounding policy directives and legislation. Moreover, SPLUMA must be viewed against the backdrop of the Constitution and the rights enshrined therein, such as the right to equality,[209] the right to dignity,[210] the right to have access to adequate housing[211] and property rights as set out in section 25, especially those subsections that contain land reform-related provisions.[212]

In terms of section 7(2) of the Constitution, the state is obligated to "respect, protect, promote and fulfil the rights in the Bill of Rights." In this context the duty exists to protect and promote dignity – which impacts on land rights and tenure security,[213] as well as the rights of landowners.[214] Conflicting rights therefore may emerge: on the one hand those in need of land access and tenure security in line with the promotion of spatial justice; while at the same time vested interests of landowners whose property rights may be threatened in the pursuit of spatial justice, on the other hand.

Various constitutional issues duly become relevant where SPLUMA is concerned. Broadly, procedural matters and substantive matters emerge. With regard to procedural matters, it is necessary to determine whether the correct processes were followed in SPLUMA's long road to becoming legislation. Concerning substantive matters, it has to be determined whether the values, norms and principles contained in SPLUMA and how they are activated in practice, are in line with the property clause, specifically section 25(1) and (2) – which deal with the deprivation and expropriation of property rights; and section 25(5) and (6)[215] – which deal with broadening access to land and promoting more secure tenure, respectively.

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[209] S 9.
[210] S 10.
[211] S 26.
[212] S 25(5)-(7) of the Constitution is set out below:
"(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."
[213] In *Daniels v Scribante* 2017 4 SA 341 (CC) para 2, Judge Madlanga emphasised the inextricable link between human dignity and security of tenure.
[214] J van Wyk *Planning Law* 2 ed (2012) 212.
[215] Read with s 25(8).

2 3 4 2 National and Policy documents

It is critical to contextualise SPLUMA within the spectrum of national and policy documents. In this regard, the NDP is a critical policy document. It recognises the urgent need for spatial transformation in South African cities.[216] It furthermore specifically suggests that public participation is necessary to achieve change and long-term transformation.[217] To some extent the preamble to SPLUMA reflects the sentiments expressed in the NDP.[218]

Moreover, the Service Delivery and Budget Implementation Plan,[219] introduced in terms of the Local Government: Municipal Finance Management Act[220] and the Built Environment Performance Plan,[221] introduced in terms of the annual Division of Revenue Act[222] are also relevant. These are integral as municipalities will be required to implement their Spatial Development Frameworks in terms of chapter 4 of SPLUMA.

Other relevant policy documents include the New Growth Path 2012, which focuses on the creation of jobs and opportunities and the elimination of poverty and inequality[223] and the Medium Term Strategic Framework 2014-2019.[224] The Medium Term Strategic Framework 2014-2019 sets out the government's strategic plan for its electoral term, and it includes its commitment to the implementation of the NDP.[225]

2 3 4 3 Land-related documents and legislation

SPLUMA must also be considered in light of specific land-related documents and legislation. In this broad category, land use planning and management, as well as land reform measures are relevant. Of particular importance for this study specifically, is the alignment of SPLUMA with the myriad of land reform policies and legislative measures.

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[216] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[217] National Planning Commission *National Development Plan: Vision for 2030* (2012) 253.
[218] Preamble to SPLUMA.
[219] This plan is introduced every year.
[220] 56 of 2003.
[221] This plan is introduced every year.
[222] This Act is introduced every year.
[223] Economic Development Department *New Growth Path Framework* (2012) Executive Summary. This framework contains an industrial policy and a rural development policy under 3.2.2., which are particularly relevant for this discussion as it impacts on urban areas as well.
[224] J Kimberly *The nature, scope and purpose of spatial planning in South Africa* MPhil Thesis University of Cape Town (2015) 25.
[225] Government of the Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014) Executive Summary.

The 1997 *White Paper on Land Reform* contained a number of issues relating to access to three sub-programmes constituting redistribution of land, tenure reform and restitution.[226] In terms of its land redistribution programme, it also indicated that priority would be given to the vulnerable portions of society, which includes measures to deal with their tenure.[227] Finally, the 1997 *White Paper on Land Reform* concludes by stating the importance of a solid land policy for the promotion of "peace, reconciliation and stability, without which economic growth and secure livelihoods cannot be achieved."[228] There is evidently a definite link between effective land reform programmes and the alleviation of poverty.[229]

The 2011 *Green Paper on Land Reform* contained specific principles under section 4.1, namely (a) de-racialising the rural economy; (b) democratic and equitable land allocation and use across race, gender and class; and (c) sustained production discipline for food security.[230] The Green Paper lists social cohesion and development as long-term goals of land reform in section 4.2.[231]

More recent developments within the context of land reform that could impact on the issue of spatial justice include the Property Valuation Act[232] and the review of section 25, the property clause,[233] coupled with developments linked to expropriation, including the possible enactment of a new Expropriation Act.[234]

The question is accordingly whether the objects and development principles contained in SPLUMA are indeed in line with the greater aim of spatial transformation in South Africa, as reflected in relevant policy documents briefly mentioned above.

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[226] These included "how to respond appropriately to the widely differing needs and aspirations of people for land, in both urban and rural areas, in a manner that is both equitable and affordable, and at the same time contribute to poverty alleviation and to national economic growth; how to address the urgent and immediate cases of landlessness and homelessness which often result in land invasions; and how to make available commonage for poor residents of rural towns who wish to supplement their incomes." *White Paper on South African Land Policy* (1997) 10.
[227] *White Paper on South African Land Policy* (1997) 11.
[228] *White Paper on South African Land Policy* (1997) 21.
[229] *White Paper on South African Land Policy* (1997) 21.
[230] *Green Paper on Land Reform* (2011) 4.
[231] *Green Paper on Land Reform* (2011) 4.
[232] 17 of 2014.
[233] See T Ngcukaitobi & M Bishop *The Constitutionality of Expropriation Without Compensation*" (2018) Presented at the Constitutional Court Review IX Conference held at the Human Rights Room, Old Fort, Constitution Hill, Braamfontein, Johannesburg (2-08-2018) and JM Pienaar "Land Reform" (2018) 4 *Juta's Quarterly Review of South African Law* 1.2. for a discussion of the Expropriation Bill.
[234] Expropriation Bill of 2019 published for comment on 21 December 2018.

2 4 Conclusion

Historically, planning law and land use mechanisms were often used in South Africa as tools of the apartheid government to effect racial and spatial segregation.[235] Planning law was also used to control the development of land.[236] The effect was the formation of two separate planning and land control systems that developed differently, in parallel – one for the white population and one for the black population.[237] Urban and rural development approaches followed suit.[238] Due to various considerations[239] it is argued that settlement patterns in both urban and rural areas have remained largely unchanged.[240] Accordingly, South African cities remain fragmented and the legacy of apartheid is still visible.[241] This is also true where rural areas are concerned. However, due to the particular focus and scope of this study, rural contexts and the prevalence of spatial injustice there will not be explored in greater depth.[242]

The promotion of spatial justice is critical. It is believed that planning law and corresponding initiatives can strongly promote societal transformation.[243] Consequently, just as planning law was used as a tool in the apartheid regime to advance that racially-inspired ideological agenda, it can also play a role in the promotion of spatial transformation and spatial justice in South Africa today.

Not only is the addressing of spatial justice critical; so too is the examination of legislative measures promulgated to promote spatial justice. In this chapter the reasons for developing legislation intended to redress spatial injustice were set out in detail, embodying the systematic development of the three pillars of apartheid specifically. The particular developments, case law as well as policy documents that culminated in the promulgation of SPLUMA were also set out. Apart from the historical

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[235] J van Wyk *Planning Law* 2 ed (2012) 16.
[236] J van Wyk *Planning Law* 2 ed (2012) 22.
[237] J van Wyk *Planning Law* 2 ed (2012) 26.
[238] JM Pienaar *Land Reform* (2014) 297.
[239] See generally MT Myambo *Reversing Urban Inequality in Johannesburg* (2019) and M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011).
[240] JM Pienaar "'Unlawful Occupier' in Perspective: History, Legislation and Case Law" in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309 326.
[241] E Pieterse "Recasting urban integration and fragmentation in post-apartheid South Africa" (2004) 5 *Development Update* 81 81.
[242] See for more detail regarding rural contexts JM Pienaar *Land Reform* (2014) 153.
[243] M Oranje & S Berrisford "Planning Law Reform and Change in Post-apartheid South Africa" in T Hartmann & B Needham (eds) *Planning by Law and Property Rights Reconsidered* (2012) 55 55.

background, the contextualisation of SPLUMA warranted a brief exposition of how SPLUMA is undergirded by the Constitution on the one hand and interacts with national policy and legislative measures on the other.

Considering the main focus of this study, namely whether the primary measure that was put in place to address the prevalence of spatial injustice, SPLUMA, has the potential to actually do so, the next chapter explores spatial justice in urban South Africa specifically. To that end the foundation is laid for evaluating whether SPLUMA is effective in promoting spatial justice in an urban land reform context, in Chapter 4 below.

Chapter 3: Spatial justice in urban South Africa with a specific focus on informal settlements

3 1 Introduction

In the first chapter, the nature and purpose of the study was introduced. The sequence of chapters and their respective content were outlined and the research questions and hypotheses were set out. In the second chapter, the context within which the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA") was developed and ultimately promulgated was set out. Some contemporary challenges relating to spatial justice issues in urban areas were also highlighted briefly. In this regard relevant statutes and policies that have had a bearing on urban land reform that preceded SPLUMA were identified and briefly elaborated on. While the notion of spatial justice as a key development principle in SPLUMA was introduced briefly in Chapter 1 of this study, its relevance within the urban context itself was not investigated fully.

Following on the foundational chapters, the spatial focus of this discussion is on the urban context, specifically informal settlements in South Africa. This thesis aims to advance the conversation on how to better address the problems resulting from spatial injustices, both historic and present, specifically as they occur in the context of informal settlements. This is necessary, because although spatial justice in an urban context has been studied relatively extensively in the global North,[244] it has arguably not been

[244] There have been a number of prominent thinkers who have contributed to the spatial justice discourse, but in the context of cities of the global North. See the work of Edward Soja, a Distinguished Professor of Urban Planning at UCLA, such as *Seeking Spatial Justice* (2010), a work which focuses on the realisation of spatial justice in Los Angeles. See furthermore specifically David Harvey's *Social Justice and the City* (2009); D Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012) and M Purcell *Recapturing Democracy: Neoliberalization and the Struggle for Alternative Urban Futures* (2008). See also the work of the French Marxist urban sociologist and philosopher Henri Lefebvre, such as *The Production of Space* (1974), which takes as its starting point the political climate and situation in urban France and provides a good philosophical discussion of the relationship between space and social relations and how they influence each other. Henri Lefebvre famously introduced the notion of the right to the city and many of underlying ideas of the notion of spatial justice can be reconciled with the concept of the right to the city as introduced by Lefebvre and developed by modern-day scholars such as Purcell, Harvey and Soja.

studied well enough in the global South,[245] specifically where land reform imperatives require specific access to land and tenure security.

Linked herewith is the endeavour to ascertain what an approach to urban land reform informed by a spatial justice perspective as embodied in SPLUMA might add to the discourse on governmental upgrading initiatives, as well as other urban land reform measures specifically aimed at the regulation of informal settlement areas in South Africa, in a manner that is reconcilable with the notion of spatial justice.

In the context of urban land reform measures implemented in informal settlements, Marie Huchzermeyer argues that, even though there have been significant developments in the law in general from the era preceding the end of apartheid, there has been little change in terms of how the South African state practically manages or regulates informal settlements.[246] Other authors have asserted that overlooking spatial justice issues, specifically in developing countries (more often than not those countries are located in the global South) has led to the intensification of poverty, the marginalisation of vulnerable groups as well as numerous environmental issues.[247]

It is in this light that this chapter consists of three main sections: the first section dealing with a theoretical exploration of the notion of spatial justice, the second part highlighting spatial justice dimensions of critical policy documents and the third part focusing on spatial justice in SPLUMA in particular. In the first section of this chapter, spatial justice as it could be applied in the context of informal settlements is set out. The discussion commences with a theoretical exploration of the basis of the notion of spatial justice, including an exposition of how spatial justice is understood in an urban land reform context. The relevant ideas that form part of the spatial justice discourse are briefly explained, as well as the relationship between law and space, insofar as it is necessary for an understanding of spatial justice in a South African urban land reform context.

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[245] South Africa is located in the global South. MJ Murray "Afterword" in TR Samara, S He & G Chen (eds) *Locating Right to the City in the Global South* (2013) 285 288. See furthermore V Watson "The usefulness of normative planning theories in the context of Sub-Saharan Africa" (2002) 1 *Planning Theory* 27-52 and A Roy "The location of practice" (2007) 24 *Development Southern Africa* 623-628. See also E Pieterse *City Futures: Confronting the Crisis of Urban Development* (2008).

[246] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 112.

[247] MR Hafeznia & MG Hajat "Conceptualization of spatial justice in political geography" (2016) 11 *Geopolitics Quarterly* 32-60.

The chapter thereafter considers the relevant provisions of the National Development Plan ("NDP") and the Integrated Urban Development Framework ("IUDF") specifically, finally focusing on the reference to spatial justice in SPLUMA. This is done so as to, ultimately, in the next chapter ascertain whether these measures can potentially address the spatial justice concerns in an urban land reform context.

Chapter 4 will build on and expand on this chapter's discussion by evaluating the designated tools and mechanisms set out in SPLUMA to promote spatial justice in order to determine their suitability for the furthering of the agenda of spatial justice in South African urban areas, with specific focus on informal settlements. This is approached in light of the land reform programme with respect to broadening access to land and improving security of tenure specifically. The chapter will also contain some recommendations on how the challenges of spatial injustices in the context of informal settlements may be addressed. The discussion is concluded in the fifth and final chapter.

3 2 Connecting spatial justice to the urban South African context

3 2 1 Introducing the notion of spatial justice

As explained, the focus of this chapter is on the development principle of spatial justice, as it is contained in SPLUMA. By placing both the notion of spatial justice as well as the urban land reform context wherein it is aimed to be achieved (as set out in policy documents) in context, this chapter aims to provide a deeper understanding of spatial justice as it is set out in section 7(a) of SPLUMA.

By way of introduction to his discussion on the topic of spatial justice, Alan Mabin asks: "Is it possible to contribute in durable ways to social justice through the construction and organisation of space?"[248] Other questions that become relevant in the spatial justice discussion could include: What is the difference between the right to the city movement and spatial justice? And: What would spatial justice look like in the context of informal settlements in South Africa?

[248] A Mabin "Spatial Justice as Viewed from Gauteng" in S Fol, S Lehman-Frisch & M Morange (eds) *Ségrégation et Justice Spatiale* (2013) 335 335.

The last few decades have seen an increase in the engagement on an international level with ideas related to law, justice and space, culminating in important research such as that of Sarah Keenan, who has examined the relationship between law, space and property as a notion of belonging.[249] The relationship between law, space and property has also been explored in a South African context.[250]

The potential value of the notion of spatial justice to combat historical spatial injustices has been hinted at.[251] In this regard, Marie Huchzermeyer has critically suggested that ideas developed by Lefebvre, discussed below, should inform post-apartheid planning goals and ideals, which would necessarily take us beyond simple notions of distributive justice[252] and which effectively may promote spatial justice in an urban land reform context.

3 2 2 The theoretical development of the notion of spatial justice

3 2 2 1 Origin of the term "spatial justice"

As explained, the initial introduction to the notion of spatial justice in Chapter 1 was brief, to the extent that it was relevant to contextualise the research problem. Being such a complex concept, much more unpacking is required. This section is aimed at providing a better theoretical understanding of the development of the notion of spatial justice, which in turn, is critical for understanding the greater spatial justice discussion.

From the outset it is important to note that the notion of spatial justice is not a wholly new idea. Although the notion of spatial justice has only recently again started to receive attention in academic circles, spatial justice expert and urban planning academic Edward Soja contends that the basic notion of spatial justice has existed

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[249] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015).
[250] See I de Villiers "Spatial justice, relationality and the right to family life: A discussion of *Hattingh v Juta* 2013 3 SA 275 (CC)" (2017) 28 *Stellenbosch Law Review* 487 497. Recently, for example, De Villiers, in a South African land reform context, has argued, in line with prominent spatial justice theorists, such as Andreas Philippopoulos-Mihalopoulos and Edward Soja, as will be discussed below, that the "spatial" element of spatial justice does not regard space in terms of "geographical location or physical place only" but that space is also that which is produced by and that which produces social relationships. This understanding of the interaction between the social and the spatial underpins all discussions on spatial justice. See also generally J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349.
[251] See Chapter 2 2 for a discussion of historical spatial injustices.
[252] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 65.

since the time of the Greek *polis* ("city-state").[253] Whether it has been termed "spatial justice" or not, some permutation of this notion has existed for as long as cities have..[254]

A notable contribution to the spatial justice discussion was made by South African geographer GH Pirie in an article that was published in 1983.[255] In this regard, Soja notes that Pirie was one of the few authors to use the term "spatial justice" before the year 2000.[256] In his article *On Spatial Justice*, Pirie reflected on the possibility of constructing a notion of spatial justice that would draw from the concepts of social justice and territorial social justice.[257] Pirie also drew a distinction between legalistic or formal juridical conceptions of justice and social or distributive justice.[258]

Pirie relied on the work of David Harvey[259] and his studies on social justice and how it is manifested (or not) in spaces.[260] Soja explains that Harvey's arguments in this regard centred on a critique of the demands of capital accumulation and their formulation of unjust geographies.[261] Pirie ultimately concluded that spatial justice, as the application of justice to notions of space as socially constructed, would constitute a "radical assault" on liberal distributive concerns, but that it was nonetheless worthy of investigation and further study.[262]

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[253] E Soja *Seeking Spatial Justice* (2010) 79-80.
[254] E Soja *Seeking Spatial Justice* (2010) 80. He argues that the city, the state, society and space were interconnected in the *polis* and have remained so intricately connected in modern times.
[255] GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465-473.
[256] E Soja *Seeking Spatial Justice* (2010) 26.
[257] GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465 465.
[258] GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465 465. For purposes of this thesis it is not necessary to discuss this distinction in more detail.
[259] Specifically David Harvey's book *Social Justice and the* City (2009). Harvey was very influential in the development of a new field of Marxist geography. E Soja *Seeking Spatial Justice* (2010) 82.
[260] GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465 465. Pirie laments that Harvey quickly abandoned his study of so-called "territorial social justice" in order to study social justice "...as something contingent upon the social processes operating in society as a whole". D Harvey *Social Justice and the City* (2009) 15. Pirie explains that this withdrawal preceded a decline in research into territorial social justice. GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465 465. Soja similarly comments that Harvey's conception of territorial justice inspired spatial thinking about justice, but that he (and those who followed his thinking) abandoned his liberal view on social justice and the city in favour of a socialist critique. E Soja *Seeking Spatial Justice* (2010) 82. However, despite the decline in research in the field of territorial social justice, the concept and its effect on the notion of spatial justice has survived. GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465 465.
[261] E Soja *Seeking Spatial Justice* (2010) 82. See also the following works by Harvey in this regard: D Harvey *Spaces of Global Capitalism: A Theory of Uneven Geographical Development* (2006); D Harvey *A Brief History of Neoliberalism* (2005); D Harvey *Social Justice and the City* (2009) as well as D Harvey "The geography of capitalist accumulation: A reconstruction of Marxist theory" (1975) 7 *Antipode* 9-21.
[262] GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465 472.

It is clear that at this stage already, spatial justice, as conceived by Pirie, built on the ideas of, among others, David Harvey, transcended the notions of distributive justice as well as the traditional conceptions of territorial social justice.[263] This focus on spatial aspects of justice as separate from notions such as distributive[264] or territorial justice links to the pivotal spatial turn in law, discussed under the next heading.

3 2 2 2 The relevance of the spatial turn in law

Before the notion of spatial justice is discussed in greater depth, it is necessary to explain what the spatial turn was and how it has contributed to the understanding of spatial justice. The relationship between the spatial turn and spatial justice is, simply put, that the focus on spatial aspects of justice is a manifestation of what has been termed the "spatial turn", which refers to a remarkable dispersion of critical spatial thinking in a wide range of disciplines, including law.[265]

In the area of the spatial turn, Doreen Massey's work has been highly influential.[266] She has examined the spatial turn in the humanities and social sciences and with it new perspectives and understanding of space and the role of space.[267] She has taken it as glaringly self-evident that space is political.[268] In her book "*For Space"*, she puts forth three propositions in support of her alternative conception of space: firstly, that space is the result of interrelations and it is produced by interactions; secondly, that space is "the sphere of the possibility of the existence of multiplicity in the sense of contemporaneous plurality...as the sphere therefore of coexisting heterogeneity"; and thirdly, that space is continually being made and remade.[269]

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[263] GH Pirie "On spatial justice" (1983) 15 *Environment and Planning* 465 471. Soja explains that the reference to territorial justice was first made by a Welsh social planner, Bleddyn Davies, in a book published in 1968, which was titled *Social Needs and Resources in Local Services.* In terms of the initial understanding of territorial justice, it was a normative goal for planners which incorporated a consideration of social needs. It was referred to by some, predominantly British, social planners and policy makers, but was not expanded further, at least not in the context of the planning profession. E Soja *Seeking Spatial Justice* (2010) 81.

[264] Olsaretti briefly explains that "…distributive justice is justice in the distribution of benefits and burdens to individuals, or consists in the balancing of the competing claims persons make on the benefits that are up for distribution." S Olsaretti "Introduction: The Idea of Distributive Justice" in S Olsaretti (ed) *The Oxford Handbook of Distributive Justice* (2018).

[265] E Soja *Seeking Spatial Justice* (2010) 13. See also A Philippopoulos-Mihalopoulos "Law's spatial turn: Geography, justice and a certain fear of space (2010) 7 *Law, Culture and Humanities* 189-204.

[266] See specifically D Massey *For Space* (2005).

[267] D Massey *For Space* (2005).

[268] D Massey *For Space* (2005) 9.

[269] In D Massey *For Space* (2005) at 9 she refers to space as "a simultaneity of stories-so-far".

Significantly, the spatial turn translated into a property law context concerns a shift in focus from the subjects to the spaces that the subjects inhabit.[270] This focus on the spaces that people live in, as well as the connection between the spatial turn and legal geography, is explained more thoroughly in the following sections.[271] In short, however, it is sufficient to say that the notion of spatial justice follows the so-called spatial turn in law and describes the relationship between law and space,[272] which is discussed in more detail below.

3 2 2 3 The role of legal geography

The previous two sections briefly dealt with one of the first uses of the notion of spatial justice and the spatial turn in law as a precursor to spatial justice. These expositions provide the introduction to the part of the discussion which will elucidate some of the basic notions relating to legal geography. This will be followed by a section on space and law which will lay the basis for discussions on the right to the city and spatial justice as it may be applied in a South African urban land reform context, specifically in relation to informal settlements.

To start, the area of study known as legal geography forms part of the spatial turn in law, as, to some degree, legal geography was a precursor to the spatial turn in law.[273] Legal geography aims to put law in context and, similar to critical legal theories, questions law's pretensions of universality and neutrality.[274] Keenan argues that legal geography places law in context by showing how space is an indispensable tool for the functioning of the law.[275] She additionally argues that legal geography identifies how the law's understanding of space privileges certain social structures.[276]

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[270] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 6.
[271] Starting at 3 2 2 3.
[272] I de Villiers "Spatial justice, relationality and the right to family life: A discussion of *Hattingh v Juta* 2013 3 SA 275 (CC)" (2017) 28 *Stellenbosch Law Review* 487 487.
[273] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 17.
[274] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 23.
[275] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 23. Keenan explains:

> "While feminist, queer, critical race and other critiques also effectively challenge law's universalism, legal geography makes its critique through an analytical focus on law's spatiality."

S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 18.
[276] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 24. Legal geography demonstrates how law produces and is "enforced by conceptual and material spaces rather than through the actions of police, judges and other government agents". S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 17.

The value of legal geography lies in the role it plays in revealing the underlying spatial frameworks that inform legal decisions and processes, which are necessarily brimming with social significance and which are more protective of particular social identities and practices.[277] Because of this, legal geography necessarily challenges liberal conceptions of the law as "universal and even-handed" towards all legal subjects in its dispensation of justice.[278]

Nicholas Blomley too has notably described law as being by and large "anti-geographical and hostile to space", because it relies on ideological foundations or notions such as neutrality and universality.[279] Sarah Keenan explains that references to ideas of universality and neutrality permeate and ground the law, with "notions such as the 'reasonable person' and the 'standard of objectivity'", and that these principles are employed in the justification of legal authority.[280] In this regard, Keenan critically demonstrates that law is inherently not self-reflective or self-critical, because it restricts itself "to its own forms of knowledge".[281]

This, then, is where law is distinguished from geography: geography places emphasis on the spatial, based on the assumption that it is imbued with meaning, which contrasts with law's lack of context.[282]

In conclusion, Keenan asserts that legal geography analyses the "sociality of space" and that it demonstrates the interconnectedness and intertwinedness of law, space and identity and how they influence each other.[283] This understanding of the interrelationship between law and space, as proposed by the legal geography discipline, leads to the logical conclusion that space is not a passive backdrop to acts carried out by subjects, but rather that space necessarily constitutes a part of the action[284] and contradicts traditional beliefs held about the universality and neutrality of the application of the law, as is set out above. With this understanding of the

[277] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 17.
[278] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 17.
[279] N Blomley *Law, Space and the Geographies of Power* (1994) 9.
[280] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 15. She argues that "law in liberal democracies derives its legitimacy from these principles." She furthermore explains that "as the monopoly holder of legitimate violence in society, law distinguishes itself from arbitrary violence and lawlessness through its claims to universality and rationality." at 21.
[281] 22.
[282] 23.
[283] 17.
[284] 7.

interrelationship between law and space, the discussion turns to spatial justice as an often-overlooked part of legal academic study.

3 2 3 Space and law theorised

3 2 3 1 Introduction and criticism

Spatial justice finds itself between space and law, Philippopoulos-Mihalopoulos asserts.[285] De Villiers too believes that spatial justice does not fully belong to either law or space.[286] Connected to this, Philippopoulos-Mihalopoulos has criticised the historic lack of theorisation of the interrelationship of law and space and has argued that law has, in fact, been "despatialised".[287] Rather than engaging with space, law has turned away from space, he contends.[288] He is critical of the ostensible approach followed in law of "add space and stir".[289] This general disregard for the significance of space in law, alluded to above, may have some effect on the efficacy of the notion of spatial justice as a tool or development principle contained in legislation, such as SPLUMA, in the context of urban land reform.

Philippopoulos-Mihalopoulos contends that spatial justice must be seen as different and separate from the "temporal or social" conceptualisations of justice.[290] Spatial justice should focus on "simultaneity and embodiment", which echoes Massey's ideas about the superior approach to space, as set out above.[291] De Villiers argues that this despatialised approach in law to space relegates space to be just another social factor and reduces the notion of spatial justice to a form of distributive justice that merely amounts to social justice in space.[292] The potential of spatial justice is accordingly lessened when law follows a despatialised approach in dealing with matters which may relate to justice.

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[285] A Philippopoulos-Mihalopoulos "Law's spatial turn: Geography, justice and a certain fear of space (2010) 7 *Law, Culture and Humanities* 187 195.
[286] I de Villiers "The lawyer as mapmaker and the spatial turn in jurisprudence" (2014) 3 *Acta Academica* 25 30-31. "Understood this way, spatial justice is a radical conception and not merely a linguistic endeavour or an attempt at geographical grounding."
[287] A Philippopoulos-Mihalopoulos "Law's spatial turn: Geography, justice and a certain fear of space (2010) 7 *Law, Culture and Humanities* 187 188.
[288] 188.
[289] 192.
[290] 197.
[291] See 3 2 2 2.
[292] I de Villiers "The lawyer as mapmaker and the spatial turn in jurisprudence" (2014) 3 *Acta Academica* 25 30.

De Villiers moreover explains that spatial justice must necessarily be more than social justice in spaces.[293] She uses the case of *Hattingh v Juta*[294] to demonstrate the use and potential of a spatial justice perspective in taking power and social relationships that formed the spatial justice issues in the case into account when deciding property-related matters (even if these relationships were not taken into account in the judgment).[295]

It is evident that the notion of spatial justice is very relevant in a South African context, especially regarding land reform matters. However, as has been stated, a measure of the value of the notion could be lost due to the lack of theorisation of the relationship between law and space, as informed by ideas stemming from the field of legal geography following the spatial turn in law specifically.

3 2 3 2 Conclusion of discussion on law and space

In conclusion, Keenan challenges the notion that law is universal and neutral, based on her assumption that the space in which law operates is not a blank background, but rather an essential channel through which it functions.[296] This understanding of space in relation to law, taking into account the role of legal geography and the spatial turn in law as it has been argued in the preceding sections, suitably sets the scene for the discussion on spatial justice in a contemporary context and in relation to the notion of the right to the city.

3 2 4 Spatial justice and the "right to the city"

3 2 4 1 Introduction to the ideas of Henri Lefebvre on the right to the city

As was established above, Soja credits the spatial turn in law for the renewed interest in the notion of spatial justice, which has many things in common with Lefebvre's notion of the right to the city.[297] The overlaps and distinctions between the two concepts form the core of this discussion. To start, there is compelling pressure to reduce space to its abstract property value and to exchange spaces solely in manners

[293] I de Villiers "Spatial justice, relationality and the right to family life: A discussion of *Hattingh v Juta* 2013 3 SA 275 (CC)" (2017) 28 *Stellenbosch Law Review* 487 495.
[294] 2013 3 SA 275 (CC).
[295] I de Villiers "Spatial justice, relationality and the right to family life: A discussion of *Hattingh v Juta* 2013 3 SA 275 (CC)" (2017) 28 *Stellenbosch Law Review* 487 502.
[296] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 23.
[297] See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012).

that are permitted and encouraged by the market.[298] There are also a number of other challenges related to fragmentation and other spatial justice issues.[299] It is in this context that the right to the city movement and its potential for informal settlements becomes especially important.[300] The discussion accordingly turns now to the work introduced fifty years ago by French Marxist philosopher and sociologist, Henri Lefebvre, and specifically to his ideas on the right to the city[301] and how the notion of the right to the city connects to the notion of spatial justice, which is contained in a number of South African policy documents[302] as well as in SPLUMA.[303]

3 2 4 2 Lefebvre's right to the city

To start, the notion of the right to the city, as introduced by Lefebvre, and the focus on the city in the quest for rights, is contrasted with the many years in which citizenship and human rights were defined by the national state.[304] Lefebvre conceived of citizenship as being a contract between the state and its citizens and believed that this contract should be developed to include, at the time of his writing, "new" rights, such as the right to information, the right to culture, the right to identity within difference (and equality), the right to self-management, the right to services and a right to the city.[305]

He believed that "a renewal of political life" had to take place and that part of that renewal was to be a struggle for a right to the city.[306] Purcell explains that Lefebvre conceived of this new contract between the state and civil society as needing constant struggle and radical action from all people in society so that they may take back power from the state with the ultimate goal of absorbing the state.[307]

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[298] M Fawaz "Towards the Right to the City" in TR Samara, S He & G Chen (eds) *Locating Right to the City in the Global South* (2013) 23 33.
[299] Chapter 2 2.
[300] See M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation Stellenbosch (2017) 244-252.
[301] For the contemporary relevance of Lefebvre's ideas on the right to the city, see M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant (2002) 58 *GeoJournal* 99-108. See also D Harvey "The right to the city" (2008) 53 *New Left Review* 23-40. See M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation (2017) 60-121 for the application of the right to the city in a South African context.
[302] See, for example, the NDP and the 2016 IUDF.
[303] S 7(a).
[304] E Soja *Seeking Spatial Justice* (2010) 96.
[305] H Lefebvre *Key Writings* (2003) 250-253.
[306] H Lefebvre *Key Writings* (2003) 253.
[307] M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 146.

Capitalist industrialisation of cities has sought to reduce every part of the city to a commodity and consequently to promote the supremacy of exchange value.[308] Purcell explains that the city is effectively cut up into different parts by the private property system and that private property rights supersede all other claims to spaces in a city.[309] Consequently, spaces are produced to satisfy the needs of property owners.[310]

Lefebvre's notion of the right to the city challenges the foundation of the city. Soja explains that Lefebvre's right to the city encompasses rights and law.[311] In Lefebvre's *Writings on Cities*, Lefebvre contends that the right to the city contains a right to the *oeuvre*, a right to participation and a right to appropriation.[312]

Purcell briefly summarises the main tenets of Lefebvre's notion of the right to the city to encompass the right to appropriate, which refers, quite simply, to be present in a physical space.[313] Lefebvre conceived of property rights as *de facto* expropriation of what should rightfully belong to urban residents and encouraged them to appropriate these public spaces.[314] Purcell explains that the right to the city encompasses residents of urban areas taking back ("appropriating") urban space for themselves.[315]

3 2 4 3 The right to the city in a general contemporary context

The concept of a right to the city seems to have been all but forgotten after it was first introduced by Lefebvre in the 1960s,[316] but it has recently been rediscovered and brought back into academic discourse.[317] At a global scale, significant role-players in

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[308] See also M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 149. Purcell stresses that the hegemony of neoliberalism exacerbates this focus on the primacy of the exchange value in a system that depends on private property rights.
[309] M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 149.
[310] M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 149.
[311] E Soja *Seeking Spatial Justice* (2010) 99.
[312] H Lefebvre *Writings on Cities* (1996) 174.
[313] M Purcell *Recapturing Democracy: Neoliberalization and the Struggle for Alternative Urban Futures* (2008) 94.
[314] H Lefebvre *Writings on Cities* (1996) 129.
[315] M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 149.
[316] See Lefebvre *Writings on Cities* (1996).
[317] See, for example, M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99-108. See also the role of UN-HABITAT and UNESCO in the promotion of the right to the city as part of their mission to promote human rights. Purcell explains that their goal in the promotion of the right to the city is to stimulate the development of urban policies that advance justice, sustainability and inclusion in cities. M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141.

this revival include Harvey,[318] Soja[319] and Purcell[320] and as will become clear in this discussion, the main tenets of the right to the city are applicable to the idea of spatial justice as well.[321] The right to the city is invoked in policy, academia and often by activists.[322] Soja identifies the World Charter for the Right to the City, which was introduced in 2004, as well as the Social Forum of the Americas and the World Urban Forum as the catalysts for new global research into and focus on the notion of the right to the city.[323] At a national scale, academics such as Marie Huchzermeyer have been instrumental in situating the right to the city discussion in the urban South African context.[324]

Moreover, as was stated above, the concept of the right to the city is not limited to academia, but has been embraced and incorporated by various social movements,

[318] See D Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012).
[319] E Soja *Seeking Spatial Justice* (2010).
[320] See M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99-108. See also M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141-154.
[321] Soja argues that the two concepts (the right to the city and spatial justice) are so often used interchangeably, that it is very difficult to distinguish the one from the other. E Soja *Seeking Spatial Justice* (2010) 96.
[322] M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 141.
[323] E Soja *Seeking Spatial Justice* (2010) 106. See also other charters with the specific aim of setting out the right to the city, for example the European Charter for Human Rights in the City and the Montreal Charter of Rights and Responsibilities. Purcell emphasises that Brazil has in fact included the right to the city in the City Statute, a national law. M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141. For more information about the City Statute, see E Fernandes "Updating the Declaration of the Rights of Citizens in Latin America: Constructing the "right to the city" in Brazil" in UNESCO (ed) *International Public Debates: Urban Policies and the Right to the City* (2006) 40-53.
[324] See M Huchzermeyer "Invoking Lefebvre's 'right to the city' in South Africa today: A response to Walsh" (2014) 18 *City* 41-49, wherein she contends that Abahlali baseMjondolo (which translates to shack dwellers') Movement invokes the Lefebvrian notion of the right to the city. See also, more recently M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation Stellenbosch University (2017). See furthermore a pamphlet released by the Isandla Institute in 2011 which was the result of dialogues facilitated by the Informal Settlements Network (ISN) surrounding the issue of the realisation of a Right to the City in South Africa.

such as Abahlali baseMjondolo in South Africa.[325] Purcell stresses the value of the notion of the right to the city, in line with Lefebvre's conception of the notion,[326] in which the users of urban space play a critical role in the production of space.[327] This is where social movements become pivotal.

David Harvey argues that the right to the city is more than the right of a single person or a group of people to the city's resources; it is a right of the residents of the city to mould the city to their liking.[328] He argues that it is necessary for the residents to assert control in a radical manner over the power to shape the "processes of urbanisation."[329]

Soja moreover explains that the notion of the right to the city, as set out by Henri Lefebvre, seeks to re-establish "the urban foundations of seeking justice, democracy and citizen's rights".[330] The right to the city is concerned with the promotion of true public participation and democratic decision-making.[331] Urban residents therefore have to be involved in decision-making processes that affect the production of urban space.[332]

However, some academics are of the opinion that the original radical notion of Lefebvre, wherein residents manage urban spaces for themselves, beyond the reach

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[325] See M Mayer "The "Right to the City" in Urban Social Movements" in N Brenner, P Marcuse & M Mayer (eds) *Cities for People Not for Profit: Critical Urban Theory and the Right to the City* (2012) 63-85 on the role and power of the right to the city in grassroots urban movements. The Abahlali baseMjondolo is described as "…the largest organisation of the militant poor in post-apartheid South Africa." Critically, the movement demands "Land & Housing in the City", however, its cause has included putting an end to forced removals and promoting access to education as well as the provision of basic services. The movement has encountered significant resistance in the form of police assaults as well as forms of intimidation. However, it remains a strong platform for shack dwellers in, specifically, stopping evictions in certain settlements and forcing government officials to engage with these communities. The focus is on the promotion of "bottom up popular democracy", which is a manifestation of the principles of the right to the city. "A Short History of Abahlali baseMjondolo, the Durban Shack Dwellers' Movement" (October 2006) *Abhalali baseMjondolo* <http://abahlali.org/a-short-history-of-abahlali-basemjondolo-the-durban-shack-dwellers-movement/> (accessed 04-03-2019).

[326] See H Lefebvre "The Right to the City" in E Kofman & E Lebas (trans & eds) *Writings on Cities: Henri Lefebvre* (1996) 147-159.

[327] M Purcell *Recapturing democracy: Neoliberalization and the struggle for alternative urban futures* (2008) 94.

[328] D Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012) 4.

[329] D Harvey *Rebel Cities: From the Right to the City to the Urban Revolution* (2012) 5.

[330] E Soja *Seeking Spatial Justice* (2010) 96.

[331] JI Muller *Making Great Places through the Right to the City: A South African Perspective* Paper presented at the Planning Africa 2014 – Making Great Places Conference in Durban, South Africa (22-10-2014) 286.

[332] JI Muller *Making Great Places through the Right to the City: A South African Perspective* Paper presented at the Planning Africa 2014 – Making Great Places Conference in Durban, South Africa (22-10-2014) 284.

of the state and capitalism, is often watered down.[333] Soja cautions against viewing the notion of the right to the city as an alternative way of thinking about human rights generally, or deciding that the notion merely encompasses a call for more democratic planning practices, such as public participation, and public policy.[334] He contends that Lefebvre's assertive spatial approach as well as the concept of consequential geographies, explored above, which are critical to Lefebvre's notion of the right to the city, are often ignored.[335]

In this inferior approach, Lefebvre's original radical political objectives are ignored or attenuated.[336] Keeping this warning in mind, the next section considers the right to the city in South African informal settlements.

3 2 4 4 The right to the city in the context of South African informal settlements

Soja contends that Lefebvre's work on the right to the city shifted the focus to the city as "a potent battleground for struggles seeking greater democracy, equality and justice."[337] Soja echoes Lefebvre's beliefs, as set out in the passages above, when he explains that the search for the right to the city is an ongoing endeavour and is

[333] See specifically M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141-154. See also his discussion on the right to the city in M Purcell *Recapturing Democracy: Neoliberalization and the Struggle for Alternative Urban Futures* (2008) 90-91 wherein Purcell argues against the lack of depth in which the concept of the right to the city is invoked by academics as well as the lack of engagement with the concept and its relation to other urban rights. He argues that this superficial treatment of the concept could lead to it eventually being abandoned altogether and its value for urban renewal and transformation being lost. He therefore sets out his conception of the right to the city while drawing heavily from Lefebvre's original work on the notion. Purcell explains that the contemporary view of the right to the city more often than not articulates the notion of the right to the city in the framework of a liberal democracy, which, drawing from the work of John Locke on the state, means a type of nation-state in which people have little democratic control over elections, laws and state institutions. In terms of this conception of democracy, value is placed on individual liberty and this liberty is protected by a strong distinction between the private and public spheres and measures intended to protect individuals from infringements on their liberty. In this framework, a right to the city is necessarily reduced to another right to be protected from infringement by the state or fellow citizens. In this conception, the emphasis is placed on the state, because without the intervention of the state, the right to the city cannot be guaranteed. Purcell argues that Lefebvre advocated for an approach to realising a right to the city that transcends the state and capitalism and is therefore not entirely compatible with many modern conceptualisations of the notion of the right to the city. M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 142.

[334] E Soja *Seeking Spatial Justice* (2010) 107.

[335] E Soja *Seeking Spatial Justice* (2010) 107.

[336] E Soja *Seeking Spatial Justice* (2010) 107.

[337] E Soja *Seeking Spatial Justice* (2010) 96.

necessarily radical in its attempts to reappropriate spaces,[338] which Lefebvre explained act as a means of control, domination and power.[339]

The notion of a right to the city is particularly relevant in a contemporary context in South African informal settlements.[340] In this regard, it has been argued that the mere existence of informal settlements has been viewed by some scholars as the manifestation of the right to the city.[341]

In a South African context, Marie Huchzermeyer contends that with regard to the prevalent policy approach to the city of neoliberal competitiveness, there is little hope for the future of the city.[342] This is, she argues, because cities will never reach the end goal and rather indefinitely keep pushing, struggling to keep up, in response to what competitors do in other spaces.[343]

At its core, the right to the city movement challenges the hegemony of the competitive city.[344] It is argued that cities across the world are exclusionary and that *"la mondialisation de l'urbain*"[345] has brought with it many socio-spatial barriers and that these barriers may almost be likened to the formation of "micro-states".[346]

Huchzermeyer explains that a right to the city "requires a global struggle with finance capital" and that this is a challenge not easily undertaken by shack dwellers movements.[347] She argues that it is not enough to simply add a right to the city to the existing urban agenda. Moreover, it is necessary to oust the urban competitiveness

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[338] E Soja *Seeking Spatial Justice* (2010) 96.
[339] H Lefebvre *The Production of Space* (1991) 26.
[340] See M Strauss *A Right to the City for South Africa's Urban Poor* LLD Dissertation (2017) 60-121.
[341] M Fawaz "Towards the Right to the City" in TR Samara, S He & G Chen (eds) *Locating Right to the City in the Global South* (2013) 23 32. It is argued that informal settlements in this regard are "neighbourhoods where dwellers are producing their living quarters in ways that challenge the dominant (state-sanctioned and market-dictated) modes of spatial production." Furthermore, that "[t]hrough processes of land acquisition, building construction, servicing and/or exchange, they challenge and reshape the existing norms in which space is produced elsewhere in the same cities within the capitalist order."
[342] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 63. See also M Huchzermeyer "Challenges facing people-driven development in the context of a strong, delivery-oriented state: Joe Slovo Village, Port Elizabeth" (2006) 17 *Urban Forum* 25-53.
[343] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 64.
[344] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 47-68.
[345] This translates to "the globalisation of the urban".
[346] L Costes "Néolibéralisation et évolution du « droit à la ville »" (2014) 6 *Justice Spatiale/ Spatial Justice* 1 2.
[347] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 67.

agenda before the right to the city may be promoted.[348] This is why it is argued that spatial justice challenges in informal settlement areas,[349] such as access to shelter, cannot sufficiently be addressed by using the market and market-based tools, as is often advised by international organisations, such as the World Bank.[350]

3 2 4 5 The right to the city in summary

Purcell argues that Lefebvre's notion of a right to the city, to be included in the "new contract" between the state and citizens, as explained above, is necessarily revolutionary as it adds, according to Lefebvre, a "deeply spatial understanding of politics, and in particular an understanding of politics that places urban space at the very centre of its vision."[351] In this line, Lefebvre significantly contended that any production of urban space will necessarily reproduce the social relations in that space.[352] This is in line with the basic premise that underlies the notion of spatial justice, which is that spaces form social relations and that social relations produce certain spaces, as was discussed under the previous heading.

As was argued earlier in this section, work influenced by Lefebvre's thoughts warns that space cannot be seen to be abstract – merely an "exchangeable unit" – because it necessarily is the result of a distinct moment in history and geography and reflects specific "modes of production and reproduction, and is the determinant of the social and political possibilities."[353] The right to the city movement is valuable, because it can be a tool to repoliticise the housing discourse and denounce the market-based approach underlying land and land use management issues and because it shifts the focus to the social value that land holds.[354]

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[348] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 67.
[349] See Chapter 2 2.
[350] M Fawaz "Towards the Right to the City" in TR Samara, S He & G Chen (eds) *Locating Right to the City in the Global South* (2013) 23 33.
[351] M Purcell "Possible worlds: Henri Lefebvre and the right to the city" (2013) 36 *Journal of Urban Affairs* 141 148.
[352] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 102.
[353] M Fawaz "Towards the Right to the City" in TR Samara, S He & G Chen (eds) *Locating Right to the City in the Global South* (2013) 23 33.
[354] See in general N Blomley *Unsettling the City: Urban Land and the Politics of Property* (2004).

3 2 4 6 The right to the city and spatial justice

In conclusion, both the movement of the right to the city and the notion of spatial justice consider the relationship and interaction between inhabitants and the spaces that they inhabit. Both notions view space as political; not merely a background to the action but a tool through which the action is achieved. The right to the city is not just another right to be realised, but rather offers a radical reconception of the organisation of cities and the power dynamics which form the cities, in order to benefit the poor and marginalised in urban areas.

In the same way, the notion of spatial justice cannot be connected to a single right to be promoted in the current constitutional dispensation. It transcends distributive, social and territorial conceptions of justice. Rather, it offers a spatial justice perspective, or a spatially critical approach, which is necessarily subversive, through which rights and the application of justice should be viewed, once again with the goal of promoting justice and providing support to the poor and marginalised in urban areas.

3 2 5 Conclusion of the theoretical discussion of spatial justice

In summary, spatial justice encompasses more than distributive justice and it is more than social justice in spaces. As has become clear from the discussion, the comprehension of the notion of spatial justice is contingent on an understanding of the interdependence between law, politics and space. In the context of urban land reform imperatives, spatial justice entails, at the very least, the active promotion of better access to and use of land,[355] the inclusion of persons and areas previously excluded, such as informal settlements and the inhabitants thereof,[356] as well as access to secure tenure and the incremental upgrading of informal areas.[357]

The notion of spatial justice is reconcilable with the right to the city movement, as was explored above. The right to the city inherently homes in on the power relations in society and how it influences policymaking.[358] The notions of just and inclusive

[355] Especially in relation to disadvantaged communities. See SPLUMA s 7(a)(i) and s 25(5) of the Constitution and the references to the need to redress imbalances through the use of and access to land.
[356] See SPLUMA s 7(a)(ii).
[357] See SPLUMA s 7(a)(v) and s 25(6) of the Constitution, which relates to the upgrading of legally insecure tenure.
[358] JI Muller *Making Great Places through the Right to the City: A South African Perspective* Paper presented at the Planning Africa 2014 – Making Great Places Conference in Durban, South Africa (22-10-2014) 279.

development are entirely reconcilable with the concept of spatial justice. This statement echoes similar sentiments in the 2012 NDP, the IUDF as well as SPLUMA, as will be discussed in more detail below.[359] In the next section, therefore, the current policy approach in South Africa regarding issues of spatial justice in relation to urban land reform is explored, before the discussion turns to the notion of spatial justice as it is set out in SPLUMA and the chapter is concluded.

3 3 Relevant policy documents and SPLUMA

3 3 1 Introduction

Urban policy and urban planning influence the development of urban areas.[360] Urban policy is often the result of a tug-of-war between separate interest groups that make up a specific society, such as the state and capital in its different forms.[361] Accordingly, it can be said that political and economic goals and mandates directly influence urban policy.[362]

As explained, after apartheid the planning law system shifted, slowly, in line with certain pieces of policy.[363] The first significant post-1994 policy document was the 1994 Reconstruction and Development Programme, thereby laying the foundation for future policy documents, including the 1997 Urban Development Framework ("UDF").

However, by 2009 Turok and Parnell lamented the lack of a national urban policy to deal with urbanisation and tackle the issue of urban land reform, as well as related issues, such as urban poverty and informality.[364] Since then there have been a number of developments in regard to urban policy, notably the introduction of the 2016 IUDF.[365]

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[359] 3 3 and 3 4.
[360] U Pillay "Urban policy in post-apartheid South Africa: Context, evolution and future directions" (2008) 19 *Urban Forum* 109 109.
[361] U Pillay "Urban policy in post-apartheid South Africa: Context, evolution and future directions" (2008) 19 *Urban Forum* 109 110.
[362] U Pillay "Urban policy in post-apartheid South Africa: Context, evolution and future directions" (2008) 19 *Urban Forum* 109 110.
[363] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 72.
[364] I Turok & S Parnell "Reshaping cities, rebuilding nations: The role of national urban policies" (2009) 20 *Urban Forum* 157-174.
[365] See also J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 32. In terms of the RDP, the democratisation of the country was critically important. J van Wyk *Planning Law* 2 ed (2012) 17.

Although there has been a spectrum of policy developments post-1994 in relation to urban contexts, the question remains to what extent these developments and documents embody or refer to spatial justice, given the theoretical exposition above. While various policies may refer to urban contexts in a general manner, this section is focused only on the main policy documents, specifically the 2012 NDP[366] – in particular Chapter 8 and Chapter 15, because of its national importance and the 2016 IUDF,[367] as it is aimed at urban contexts specifically. In light of the policy discussion, the focus thereafter shifts to SPLUMA, the core legislative measure.[368]

3 3 2 *The NDP*

3 3 2 1 Introduction

The first policy document to be discussed in greater depth is the 2012 NDP, as it focuses on the transformation of human settlements, with specific reference to the notion of spatial justice, among other important goals for post-apartheid South Africa. The discussion focuses on Chapter 8, with a brief reference to Chapter 15.[369] The NDP provides the following point of departure:

> "Where people live and work matters. Apartheid planning consigned the majority of South Africans to places far away from work, where services could not be sustained, and where it was difficult to access the benefits of society and participate in the economy. A great deal of progress has been made since 1994, but South Africa is far from achieving the RDP goals of "breaking down apartheid geography through land reform, more compact cities, decent public transport and the development of industries and services that use local resources and/or meet local needs"."[370]

The NDP is, in essence, a plan for the elimination of poverty and reduction of inequality in South Africa by 2030.[371] It contends that South Africa is a very unequal country, which is divided in terms of race, age and gender, with young people and women in particular still not benefiting from equal opportunities.[372] For these reasons, the NDP

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[366] National Planning Commission *National Development Plan: Vision for 2030* (2012).
[367] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016).
[368] 16 of 2013.
[369] Chapter 8 of the NDP relates to human settlements. Chapter 15 of the NDP is about nation building and social cohesion.
[370] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[371] National Planning Commission *National Development Plan: Vision for 2030* (2012) 1.
[372] National Planning Commission *National Development Plan: Vision for 2030* (2012) 1.

argues that young people should have access to improved education and economic opportunities and that special attention must be given to the elimination of gender inequality.[373] The NDP explains that there is a constitutional mandate to address the abovementioned issues and that South Africa is not currently on a path to eradicating poverty and minimising inequality.[374]

It has a vision of a South Africa wherein individuals experience freedom as well as a connection to others and where opportunity is not limited to those who were born into the right circumstances, but is in fact determined by their natural ability, their education and hard work.[375] It will only be possible to bring this vision to life if the economy has been transformed and the country's capabilities have been built.[376]

It is therefore imperative that progress is made at a rapid pace, with more action being taken and improved implementation of strategies, which necessarily, according to the NDP, relies on active citizenship and strong leadership in relation to development matters. A "capable and developmental state" which is empowered to take remedial action regarding our historical injustices, is integral.[377]

It sets out the goals that by 2030, a greater part of the population should live closer to where they work and that the transport they use to get to and from work should be "safe, reliable and energy efficient."[378] In order to achieve these goals, certain changes need to be made, which include measures introduced to prohibit the further development of housing in areas far from the centre of the city and instead, promote higher urban densities, in order to minimise urban sprawl.[379]

In this regard, the NDP contains proposals which aim to build and regenerate urban areas by firstly deciding on new norms and a national spatial framework.[380]

The NDP explains:

[373] National Planning Commission *National Development Plan: Vision for 2030* (2012) 24.
[374] National Planning Commission *National Development Plan: Vision for 2030* (2012) 1.
[375] National Planning Commission *National Development Plan: Vision for 2030* (2012) 24.
[376] National Planning Commission *National Development Plan: Vision for 2030* (2012) 24.
[377] National Planning Commission *National Development Plan: Vision for 2030* (2012) 1.
[378] National Planning Commission *National Development Plan: Vision for 2030* (2012) 47.
[379] National Planning Commission *National Development Plan: Vision for 2030* (2012) 47.
[380] National Planning Commission *National Development Plan: Vision for 2030* (2012) 47.

> "To accelerate progress, deepen democracy and build a more inclusive society, South Africa must translate political emancipation into economic wellbeing for all. It is up to all South Africans to fix the future, starting today."[381]

From the introductory section above it is clear that the citizen's role in its own development is underlined in the NDP. The focus is on the promotion of democracy and, under that goal, the promotion of a more inclusive society. This, in turn, is directly connected to the notion of spatial justice, as discussed above and set out in the NDP and, as will become clear, the IUDF and SPLUMA.

3 3 2 2 NDP Chapter 8: Human settlements

3 3 2 2 1 Introduction

Chapter 8 relates to the transformation of human settlements and the national space economy.[382] In it, some key points are identified, which include a reference to the need to "respond systematically to entrenched spatial patterns across all geographic scales that exacerbate social inequality and economic inefficiency."[383]

To start, the Chapter identifies the imperative for the state to review its housing policies in order to progressively realise constitutional housing rights, so that delivery of housing may be used to restructure towns and cities and in so doing, also support the livelihood prospects of the households located in these areas.[384] The Chapter encourages citizens to be active in spatial development and underlines the "introduction of social compacts from neighbourhood to city level".[385] This emphasis on citizen participation in forming their environment can be seen to be in line with the notion of the right to the city and connected to the principle of spatial justice, as explained above.[386]

Chapter 8 also identifies a need to empower development potential and promote economic growth. This is to be achieved by means of building infrastructure, or

[381] National Planning Commission *National Development Plan: Vision for 2030* (2012) 24.
[382] National Planning Commission *National Development Plan: Vision for 2030* (2012) 259.
[383] National Planning Commission *National Development Plan: Vision for 2030* (2012) 259.
[384] National Planning Commission *National Development Plan: Vision for 2030* (2012) 259.
[385] National Planning Commission *National Development Plan: Vision for 2030* (2012) 259.
[386] See 3 2.

improving existing infrastructure, building skills and improving innovation capacity and governance.[387]

Finally, the Chapter highlights that South Africa will introduce a national spatial framework which will address the issues with the local system of integrated development planning and also contribute to the planning capabilities of municipalities and the different spheres of government.[388] As will become clear from the next part of the discussion, which centres on SPLUMA, SPLUMA has particular provisions that are aimed to address these issues.

This relates to the fact that, at the time of compiling the NDP, South Africa was in need of a spatial vision to inform development policy, which would address, as priority, the inherited spatial divisions.[389] The NDP argues that South Africa's spatial organisation is maintaining exclusions and aggravating economic and logistical inefficiencies.[390] Spatial disparity was accordingly identified as the biggest challenge for a national spatial framework in South Africa.[391]

Significantly, the Chapter places emphasis on the context (i.e. southern African subregion) of the human settlements, be they in rural or urban areas, as well as the differences between the various areas.[392] This means that solutions to problems prevalent in an informal settlement context need to be tailor-made to suit the area in question. Accordingly, blanket or "one-size-fits-all" approaches would not be possible at all.

3 3 2 2 2 NDP Chapter 8: Spatial transformation challenges

The exposition of challenges set out in Chapter 8 feeds into the greater discussion on spatial transformation and ultimately the notion of spatial justice as it is set out in the NDP, as well as in SPLUMA.

Firstly, the NDP acknowledges that the colonial and apartheid legacies are still visible in the way that space is structured across different scales and that the transformation

[387] National Planning Commission *National Development Plan: Vision for 2030* (2012) 277.
[388] National Planning Commission *National Development Plan: Vision for 2030* (2012) 259.
[389] National Planning Commission *National Development Plan: Vision for 2030* (2012) 277. See also the preamble to SPLUMA.
[390] National Planning Commission *National Development Plan: Vision for 2030* (2012) 277. See also the general discussion in Chapter 2.
[391] National Planning Commission *National Development Plan: Vision for 2030* (2012) 278. See also the SPLUMA preamble. See also J van Wyk *Planning Law* 2 ed (2012) 16-54.
[392] National Planning Commission *National Development Plan: Vision for 2030* (2012) 259.

of human settlements and the spaces in which they operate is a long term project.[393] It identifies the presence of powerful stakeholders that are actively sustaining the prevailing spatial *status quo* as a problem.[394] Furthermore, the current investment in fixed assets necessarily has the implication that spatial transformation will be a slow process.[395] Still, the NDP encourages audacious steps to challenge the current spatial trajectory with the goal of ultimately improving the lives of ordinary citizens.[396] The NDP calls for this progression to start summarily to address the patterns of segregation that have persisted into the post-apartheid era.[397]

South Africa has to reconsider its approach to its urban areas in order to effectively deal with prevailing and future problems.[398] The challenges in question include the prevalence of social exclusion, environmental issues, economic wastefulness, logistical impediments and infrastructure issues.[399] Moreover, it identifies job creation, which is linked to sustainable livelihoods and the setting up of well-operating human settlements, as critically important.[400]

As was mentioned earlier in the discussion, the NDP stresses that the South African spatial situation has to be understood in the context within which it exists and that urban areas in South Africa are located in the southern African subregion.[401] The South African history of colonialism and apartheid and the aftermath cannot be ignored. Some of the challenges South African urban areas specifically face include the fact that many people live in poverty traps and that a considerable number of households are dependent on social grants.[402] Additionally, the cost of maintaining infrastructure is high and transport is expensive.[403]

The NDP underlines a holistic approach in order to address the broad spectrum of problems. While the spectrum necessitates incorporating economic aspects,

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[393] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[394] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[395] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[396] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[397] National Planning Commission *National Development Plan: Vision for 2030* (2012) 260. Refer to Chapter 2 2 for the discussion on the relevant discriminatory measures that were introduced in the pre-1994 years. See also G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD Stellenbosch (2011) and JM Pienaar *Land Reform* (2014) 659-811.
[398] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284.
[399] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284.
[400] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284.
[401] National Planning Commission *National Development Plan: Vision for 2030* (2012) 261.
[402] National Planning Commission *National Development Plan: Vision for 2030* (2012) 261.
[403] National Planning Commission *National Development Plan: Vision for 2030* (2012) 261.

institutional amendments, better investment in infrastructure and, critically, changes to land management systems,[404] all these issues – while critical – cannot be addressed in a study like the current one. In this light the focus shifts to what is contained in the NDP in relation to spatial transformation and informal settlements in South Africa, the main focus of this investigation.

3 3 2 2 3 The NDP and informal settlements

As the focus of this thesis is on spatial justice issues in the context of informal settlements, it is critically important to include what is stated in the NDP about the status of informal settlements in urban areas in South Africa. To start, the NDP notes that the distinction between rural and urban is, to a degree, artificial, due to the effect of apartheid policies that facilitated forced removals and restricted migration, which led to a marked increase in settlement in rural areas and circular migration between urban and rural areas.[405] The combined impact of the three pillars of apartheid, set out in Chapter 2 above,[406] should not be forgotten either. To this effect, the NDP acknowledges the role that rural areas have in urbanisation.[407] As a result, the NDP states that the settlement situation in South Africa necessitates an integrated approach.[408] This statement echoes the reference to "interconnected interventions" and a holistic approach as set out above.[409]

According to the NDP, informal settlements provide a means of access into cities or towns for new migrants and the urban poor.[410] However, these informal settlements are also identified as areas where residents are very vulnerable, physically and socially.[411] Accordingly, while informal settlement is often the only viable gateway to the city, it is fraught with challenges and instability. The NDP asserts that upgrades

[404] National Planning Commission *National Development Plan: Vision for 2030* (2012) 263.
[405] National Planning Commission *National Development Plan: Vision for 2030* (2012) 263. See JM Pienaar *Land Reform* (2014) 105-106 for a discussion of the influx control measures which were implemented before and during the apartheid years. At 824, Pienaar underlines that the focus has been on rural land reform, despite the urgent need for urban land reform. This is particularly clear when looking at access to land tenure options in urban and peri-urban areas, as well as, consequently, unlawful occupation. She underlines that rural development has the potential of restricting or lessening the flow of people into urban areas and therefore it is still important to consider rural areas, however urban tenure and access issues must be addressed without delay.
[406] At 2 2.
[407] National Planning Commission *National Development Plan: Vision for 2030* (2012) 263.
[408] National Planning Commission *National Development Plan: Vision for 2030* (2012) 263.
[409] At 3 2 2 2 2.
[410] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273.
[411] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273.

should ideally occur *in situ* and that in cases where that is not possible, there should be as little disruption as possible to the communities that live in the informal settlements.[412]

The Plan is critical of the fact that most provinces and local authorities follow established approaches to land development and that decisions relating to where upgrading ultimately does occur are often controversial.[413] Additionally, according to the NDP there are questions about the effectiveness of these upgrading projects and there is a need to evaluate the process and results of upgrading.[414] In this regard, SPLUMA could potentially be a helpful tool to either promote upgrading initiatives, or to evaluate the results.

The NDP correctly emphasises that informal settlements are not homogenous and that there are many differences in their histories, the social structures contained in them as well as the degree of vulnerability experienced by the residents and, consequently, that solutions should be designed that are cognisant of these differences.[415] Again, the tailor-made approach is underscored. In the next chapter it will be evaluated whether the measures introduced to address these challenges in SPLUMA take the differences into account.

3 3 2 2 4 Spatial policy, spatial development and the NDP: The principle of spatial justice in the context of informal settlements

Having set out the main spatial concerns for informal settlements in South Africa, as contained in the NDP, this discussion explores the notion of spatial development and specifically of spatial justice in the context of informal settlements, as set out in the NDP. The NDP sets out clear principles for South African spatial development and stipulates that all spatial development is required to follow certain normative

[412] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273.
[413] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273. See also, for example, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR (CC), a case in which approximately 20 000 occupiers of the Joe Slovo settlement appealed to the Constitutional Court for a setting aside of an order for their eviction that had been granted by the High Court. Critically, after a lengthy litigation process, the informal settlement was granted another chance for an *in situ* upgrade, rather than the eviction which was originally sought.
[414] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273.
[415] National Planning Commission *National Development Plan: Vision for 2030* (2012) 273.

principles[416] and state how it would comply with the requirements of these principles, which include the principle of:

> "Spatial justice. The historical policy of confining particular groups to limited space, as in ghettoisation and segregation, and the unfair allocation of public resources between areas, must be reversed to ensure that the needs of the poor are addressed first rather than last."[417]

The NDP asserts that the development of a national spatial framework as well as continuing spatial management has to be underwritten by an integrated national system of spatial data infrastructure.[418] Critically, it calls for an acknowledgement of the significant differences in informal settlements.[419] Consequently, it is argued that plans or schemes aimed at addressing problems in towns and cities need to be made to fit the circumstances of the urban area in question.[420]

The NDP declares that the state should not be a direct housing provider "of last resort", but rather facilitate, in principle, the provision of adequate shelter and better access to a diverse range of housing options.[421] It places emphasis on the importance of accommodating social diversity in the direction of investments into the built environment.[422] The NDP argues for an understanding of the 2016 IUDF that considers the land as having a social and an environmental function, rather than the view that land is (only) a valuable marketable commodity.[423]

It is also argued that the spatial transformation of urban areas must be facilitated by public transport investment.[424] The NDP calls for the alignment of the housing programme with other public investment schemes to promote the more optimal

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[416] See SPLUMA ss 3 and 7 in comparison.
[417] National Planning Commission *National Development Plan: Vision for 2030* (2012) 277. This principle corresponds to s 7(a) of SPLUMA, although there are subtle differences in the focus of the separate principles. The other overarching spatial development principles identified in the NDP include the principles of sustainability, spatial resilience, spatial quality and spatial efficiency. For purposes of this discussion, however, the focus is on the spatial development principle of spatial justice.
[418] National Planning Commission *National Development Plan: Vision for 2030* (2012) 278.
[419] National Planning Commission *National Development Plan: Vision for 2030* (2012) 279. It calls this principle "spatial differentiation".
[420] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284.
[421] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284.
[422] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284.
[423] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284.
[424] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.

operation of urban areas in South Africa.[425] Children and youth should be prioritised in urban development.[426]

The NDP calls for the recognition of the role that informal settlements play and continue to play in the country and underlines the necessity of updating the national programme for the upgrading of informal settlements in various ways, which include the assessment and consideration of informal settlements.[427] It also asserts that the programme for upgrading should include mechanisms that would enable the recognition of rights of residence and also facilitate the incremental upgrade of tenure rights.[428] The NDP recognises the necessity of minimum health and safety standards in informal settlements which should be raised progressively as the informal settlements are integrated into the main urban areas.[429] Funds should not only be diverted to housing, but also to the building and upkeep of community facilities, public infrastructure and public spaces.[430] Again, an integrated approach is called for.

Under the heading of rural spatial development, the NDP contends that it is necessary to develop instruments to deal with dense settlement development that does not occur in formal urban areas and to develop strategies that would support the developmental role of small towns.[431] Spatial coordination is also identified as an important goal.[432] Finally, the NDP calls for the revision of the land reform programme to integrate the spatial dimension.[433]

3 3 2 2 5 The NDP's instruments and suggestions for spatial transformation and the promotion of spatial justice in informal settlements

The NDP has some recommendations regarding instruments to be used for the promotion of spatial transformation in South African cities. Critically, it contends that many of the essential features of the spatial vision as discussed above were accepted and noted in 1994 already, although there has been a measure of revision and

[425] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285. See also in general J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26.
[426] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[427] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[428] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[429] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[430] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[431] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[432] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[433] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.

adjustment of that vision.[434] The difficulty, it is stated in the NDP, arises not in the outlining or definition of the spatial ideal, but in the implementation and introduction of "meaningful spatial outcomes".[435]

With specific reference to planning measures, particular instruments such as the Integrated Development Plans ("IDPs") compiled with spatial development frameworks ("SDFs") were introduced, as well as housing subsidies and mechanisms to fund infrastructure projects.[436]

Briefly, IDPs were defined as "plan[s] aimed at the integrated development and management of the area of jurisdiction of a municipality."[437] SDFs take a number of forms and must be drawn up by municipalities either in the form of a non-regulatory framework or in the form of a core element of an IDP.[438]

The NDP introduces a substantive spatial vision for urban areas, which states that urban sprawl, identified as a serious hindrance, has to be kept in check and even reversed by introducing and promoting more dense forms of land development and usage.[439] Coupled herewith, the Plan stresses an approach to land and housing in relation to the increased densities that would not cause hardship for the poor.[440] In this regard the NDP suggests the implementation of inclusionary housing policies which would require using land currently owned by the state for affordable housing strategies as well as the introduction of land value-capture instruments.[441]

The NDP recommends that special incentives and subsidies be introduced which would make large-scale, high-density housing affordable in well-located areas in inner cities.[442] It also highlights the need to construct suitable infrastructure and introduce services in areas where sustainable human settlement is not currently possible.[443]

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[434] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[435] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[436] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[437] Ss 33(1) and 10B of the Local Government Transition Act Second Amendment Act 97 of 1996. See also Van Wyk *Planning Law* 2 ed (2012) 270-274 for more information on IDPs.
[438] Van Wyk *Planning Law* 2 ed (2012) 274. See Van Wyk *Planning Law* 2 ed (2012) 274-276 generally for more information on SDFs.
[439] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[440] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[441] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[442] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[443] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.

It also contends that new urban development and infrastructure investments need to be designed with the routes of mass transit around economic centres in mind.[444] This links to another facet of the spatial vision in the NDP, which states that the areas of settlement that contain large numbers of the urban poor population should be spatially connected to the main city centre by investment in the building of transport infrastructure.[445]

The NDP moreover raises a point about the necessity of improving social infrastructure.[446] In the NDP, it is also contended that an essential part of the spatial vision for cities is the inclusion of economic hubs to support a range of economic activities in historically disadvantaged areas.[447]

The NDP acknowledges that informal settlements serve to supply poor people with access to urban land that is inexpensive and that, for this reason, upgrading of well-located informal settlements *in situ* is imperative.[448] However, the development of new townships is not desirable and should be avoided by integrating races and income groups in new housing developments in existing suburbs.[449] Finally, the NDP suggests a renewed focus on the planning of high-quality urban public space.[450]

Concerning the reform of the planning system as a whole, the NDP contains a number of suggestions or recommendations, with the aim of eradicating administrative inefficiencies, among other goals.[451] Firstly, the NDP suggests that municipal and provincial plans (which include IDPs as well as their spatial development framework components) are to be included in spatial contracts, which would then be enforceable and binding across national, provincial and local government.[452]

Furthermore, the NDP suggests the development and introduction of plans that would transcend municipal and provincial boundaries, and in so doing advance collaboration between the different relevant authorities.[453] It also recommends that municipalities have clearly defined spatial restructuring strategies that are connected to instruments

[444] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[445] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[446] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[447] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285-286.
[448] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[449] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[450] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[451] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[452] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[453] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.

for the carrying out of these strategies.[454] It advises that, in cases where it is deemed necessary, certain tools should be developed that would enable municipalities to "make critical interventions to redress past social segregation."[455] The enforcement of local planning and building control is also to be bolstered.[456] Critically, the NDP suggests that plans or facets of plans should be developed in such a way that they grapple with the issues faced by children and youth and also provide a platform for them to voice their concerns.[457]

The NDP also suggests that instruments used in land use management, such as land-use zoning, which is used by municipalities, must be reconfigured to facilitate the reaching of spatial goals, such as the introduction of the social value of land imperatives as well as certain financial tools to accomplish spatial goals.[458]

Moreover, the NDP calls for an urgent review of the grant and subsidy regime that is currently in place for housing and recommends the introduction of mechanisms that would enable land markets to work for the poor.[459] It suggests a way to solve the omnipresent problem of funding when it comes to implementing much needed spatial restructuring by advising the introduction of a consolidated national spatial restructuring fund that would fulfil certain functions.[460] Finally, the NDP recommends the development of an enabling legal and institutional framework that would stretch

[454] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[455] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[456] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[457] National Planning Commission *National Development Plan: Vision for 2030* (2012) 286.
[458] National Planning Commission *National Development Plan: Vision for 2030* (2012) 284 and 286. Other recommendations include that the link between public transportation and land use management should be bolstered by furthering compact mixed-use development.
[459] National Planning Commission *National Development Plan: Vision for 2030* (2012) 287-288. Such as requiring municipalities to improve their understanding of local sub-markets by investigating the way poor people access land, accommodation and business opportunities. Other suggestions include the development of ways to support and regularise these processes so that the costs of accessing and trading land for housing and small enterprises may be reduced. Critically, the NDP states that municipalities should have clearly outlined strategies as well as take care to allocate budgets which would facilitate the opening up of well-located, affordable land for new development. Furthermore, the NDP calls for municipalities to identify where existing settlements are that are not formally recognised and assess the possibility of upgrading and giving legal recognition to these settlements. In relation to making land markets work better for the poor, the NDP requires that all state-funded houses that have been transferred to beneficiaries, must have clear property rights attached. Finally, the NDP states that the eight-year sales restriction on state-provided houses should be reviewed, in order to "find the correct balance between protecting property rights of vulnerable individuals and allowing for greater flexibility and locational choice."
[460] National Planning Commission *National Development Plan: Vision for 2030* (2012) 288. The NDP also proposes that a set of instruments be introduced that would support the transition to sustainability with certain goals.

across the different spheres of government with the aim of facilitating the introduction of value-capture instruments by municipalities with the requisite capacity.[461]

Land value capture has the potential to be a powerful catalyst in the transformation of how cities function and are managed.[462] It is explained that, in suitable cases:

> "city-makers must challenge the sovereignty of individual property rights and use the instruments at their disposal in bold and creative ways, to enable land to fulfil a social function. Densification and mixed-use/mixed-income development, on vacant or underused parcels of land within the city, preferably around quality public transport interchanges, offer exciting possibilities to transform the current patterns of low-density urban sprawl. Legislative and other mechanisms are available to facilitate this densification and could be scaled up."[463]

There are a number of pieces of legislation which impact municipal finance exclusively, such as the Municipal Property Rates Amendment Act,[464] which allows municipalities to apply land value capture.[465] However, there are also pieces of sector legislation which may have an impact on the application of value capture mechanisms, such as the National Land Transport Act[466] and SPLUMA.[467]

It is argued that striving towards the "progressive intention" of both the property clause contained in the Constitution of the Republic of South Africa,1996 (the "Constitution") as well as SPLUMA, is necessary in order to facilitate the most advantageous use of policies and instruments that already exist.[468] However, it is suggested that a need exists to introduce a more audacious legal instrument in the longer term, which would provide practical guidance to municipalities on how to implement the social function of land.[469]

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[461] National Planning Commission *National Development Plan: Vision for 2030* (2012) 289.
[462] South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 5.
[463] South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 5.
[464] 29 of 2014.
[465] South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 5. Other instruments include the Urban Development Zones and the Neighbourhood Development Partnership Programmes.
[466] 5 of 2009.
[467] 16 of 2013.
[468] South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 5.
[469] South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 5. Other suggestions include a drive to improve integration between policies and their related funding instruments, as well as greater integration between transport planning and land-use planning and management. Finally, there is a need for political will to deal with "vested interests wanting to maintain the status quo".

The NDP proposes that spatial compacts be introduced which would facilitate the mediation of spatial conflicts.[470] The development of these spatial compacts, as well as citizens active in the domain of spatial development, should be incentivised and offered sufficient support.[471] There is also a focus in the NDP on dialogue forums which have to include people from distinct national and cultural backgrounds as well as revived focus on the People's Housing Process.[472]

The NDP sums up what is needed in terms of spatial solutions as follows:

> "The message needs to be sent out that people's own efforts are important, and the state must assist with the resources needed for poor communities and civil society to participate in spatial governance."[473]

3 3 2 2 6 NDP Chapter 8 conclusion

In conclusion, the NDP concedes that the process of transformation of spaces in South Africa, including in informal settlements, is complex, as a result of the historical background, our diversity, as well as the often competing interests of different stakeholders.[474] The NDP contains a substantive spatial vision for our towns and cities, which includes a vision of compact cities and towns.[475] It emphasises that urban sprawl must be kept in check, ideally pulled back, and that more dense forms of development with regard to land usage, the cost of infrastructure and the protection of the environment must be promoted.[476] Consequently, the promotion of spatial transformation and the achievement of spatial justice in South Africa is particularly challenging and these challenges need to be addressed with the proper tools and instruments.

It contains suggestions and recommendations which combine a strong vision and sensible, practical changes which are to be slowly introduced and built upon.[477] The

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[470] National Planning Commission *National Development Plan: Vision for 2030* (2012) 291. The NDP does not define spatial compacts.
[471] National Planning Commission *National Development Plan: Vision for 2030* (2012) 291. In this regard it is argued that citizens should take charge of the neighbourhood vision and that there should be youth planning processes as well as public programmes which are well-suited to the specific community building needs.
[472] National Planning Commission *National Development Plan: Vision for 2030* (2012) 291.
[473] National Planning Commission *National Development Plan: Vision for 2030* (2012) 291. This would require municipalities to supply sufficient information of local areas and provide support for citizen training in spatial competencies.
[474] National Planning Commission *National Development Plan: Vision for 2030* (2012) 279.
[475] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[476] National Planning Commission *National Development Plan: Vision for 2030* (2012) 285.
[477] National Planning Commission *National Development Plan: Vision for 2030* (2012) 292.

tools used for spatial development and governance, as well as capacity, are emphasised.[478] In this regard, it is argued that active citizenship is a crucial component for the development of spatial systems and tools and places an obligation on the government to facilitate citizen involvement in the making of decisions which impact on their communities.[479]

In order to be effective, efforts to promote spatial transformation must be supported by "strong policies, consistent implementation and political will."[480] The NDP contends that spatial transformation will not happen overnight, as a result of investments in fixed assets, such as infrastructure and housing.[481] Where there is little pressure for development, spatial transformation will happen very slowly, whereas areas with an in-migration of population may experience change slightly faster.[482]

The NDP stresses the value of spatial transformation when it states that changes implemented with regard to development patterns today will be to the advantage of the next generations, in relation to "job and livelihood prospects for the poor".[483]

3 3 2 3 NDP Chapter 15: Transforming society and uniting the country

Chapter 15 of the NDP relates to the transformation of society and the unification of the country. The themes contained in this chapter reflect the overall themes of the NDP and it is fitting to refer to some of the main tenets of the chapter.

From the outset this chapter emphasises the need for active citizenship and leadership in South Africa.[484] Chapter 15 acknowledges that South Africa has made notable leaps forward regarding access to services such as housing and education post-1994, but, once again, that society is still divided and that a number of schools, suburbs and places of worship are not yet integrated.[485]

The NDP asserts that South Africa must create a more equal society where opportunity is not dependent on race, gender, religion or class and that measures introduced to redress injustices of the past must be bolstered and supported.[486] The

[478] National Planning Commission *National Development Plan: Vision for 2030* (2012) 292.
[479] National Planning Commission *National Development Plan: Vision for 2030* (2012) 292.
[480] National Planning Commission *National Development Plan: Vision for 2030* (2012) 292.
[481] National Planning Commission *National Development Plan: Vision for 2030* (2012) 292.
[482] National Planning Commission *National Development Plan: Vision for 2030* (2012) 292.
[483] National Planning Commission *National Development Plan: Vision for 2030* (2012) 292.
[484] National Planning Commission *National Development Plan: Vision for 2030* (2012) 457.
[485] National Planning Commission *National Development Plan: Vision for 2030* (2012) 458.
[486] National Planning Commission *National Development Plan: Vision for 2030* (2012) 458.

NDP criticises our unequal economy and contends that the privilege and advantages related to, specifically, race, class, space and gender have not been sufficiently addressed.[487]

The NDP contends that in cases where access to opportunity is restricted based on, for example, race or gender for a significant amount of time, this leads to a particular distribution of capital, be it financial, human or even social capital, that will necessarily lead to greater inequality of opportunity, regardless of whether the legal measures used to entrench this inequality have been removed.[488] Therefore, it is argued that access to opportunity in South Africa is still determined by race, gender, class, linguistic background and geographic location.[489] In the case of South Africa, where class overlaps with race, it results in a social situation which is unjust.[490]

Evidently, transformation is about confronting the legacy of apartheid and promoting equal access to opportunities, building the country's capabilities, as well as realising the vision for the country as non-racist, non-sexist, democratic and prosperous, as provided in the Constitution.[491]

3 3 2 4 NDP: Conclusion

The NDP stresses that national development does not follow a linear trajectory and that a multifaceted framework is needed to facilitate development, wherein one sphere of development will support the promotion of development in others.[492] One of the areas which has to be focused on, as was mentioned earlier, is the empowerment of the youth and the development of opportunities for them, which is why the NDP applies a "youth lens" regarding its proposals.[493]

Therefore, the NDP is a holistic strategic framework that seeks to address the issues of poverty and inequality based on six interrelated prime concerns.[494] In the NDP, it is

[487] National Planning Commission *National Development Plan: Vision for 2030* (2012) 458.
[488] National Planning Commission *National Development Plan: Vision for 2030* (2012) 458.
[489] National Planning Commission *National Development Plan: Vision for 2030* (2012) 458.
[490] National Planning Commission *National Development Plan: Vision for 2030* (2012) 458.
[491] National Planning Commission *National Development Plan: Vision for 2030* (2012) 478.
[492] National Planning Commission *National Development Plan: Vision for 2030* (2012) 25.
[493] National Planning Commission *National Development Plan: Vision for 2030* (2012) 30.
[494] National Planning Commission *National Development Plan: Vision for 2030* (2012) 35. The six priorities are: 1. Uniting South Africans around a common programme; 2. Citizens active in their own development; 3. Faster and more inclusive economic growth; 4. Building capabilities; 5. A capable and developmental state; and 6. Leadership and responsibility throughout society. See National Planning Commission *National Development Plan: Vision for 2030* (2012) 35-58 for more detail on these priorities.

argued that South African citizens are relatively active in their participation in affairs of governance, but that the government has inadvertently minimised the incentive for citizens to directly participate in their development.[495] There is consequently a duty on the state, contends the NDP, to aggressively support citizen engagement.[496]

The NDP contends that all the components of society and government, specifically including the legislature and the judiciary, are obliged to guarantee that the benefits of development are distributed to the poorest of the poor and marginalised members of the community and that the powerful elements of society must guard against promoting their interests at the cost of the well-being of these communities.[497] Although legislation already makes provision for citizen participation in governance matters other than by way of participating in elections, such as participation in the drafting of local government plans, the distance between government and its citizens is still too great and frustration with this gap (and communities not being listened to sincerely) often manifests in the form of violent protests.[498]

Accordingly, the NDP suggests that more attention should be focused on the fact that citizens are, to a degree, responsible for their own development.[499] This is a theme that resonates throughout the NDP. It emphasises the importance of spatial transformation and the role that it can play in mitigating poverty and inequality. It acknowledges that "where people live and work matters" and that the reform of the planning system has not adequately addressed the apartheid spatial legacy.[500] The NDP tracks the spatial development in urban and rural areas and proposes strategies and plans to deal with the spatial patterns that entrench inequality and exacerbate inefficiency.[501]

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[495] National Planning Commission *National Development Plan: Vision for 2030* (2012) 37. The NDP does not elaborate on this further.

[496] National Planning Commission *National Development Plan: Vision for 2030* (2012) 37. The NDP explains:

> "Active citizenry and social activism is necessary for democracy and development to flourish. The state cannot merely act on behalf of the people – it has to act with the people, working together with other institutions to provide opportunities for the advancement of all communities."

[497] National Planning Commission *National Development Plan: Vision for 2030* (2012) 37.

[498] National Planning Commission *National Development Plan: Vision for 2030* (2012) 37.

[499] National Planning Commission *National Development Plan: Vision for 2030* (2012) 37.

[500] National Planning Commission *National Development Plan: Vision for 2030* (2012) 1.

[501] National Planning Commission *National Development Plan: Vision for 2030* (2012) 1.

The NDP invokes the Constitution,[502] as a "national compact", when it states that "everyone is equal before the law and has the right to equal protection and benefit from the law"[503] and cites the Constitution as authority for the fact that the legislature is allowed to pass laws that are beneficial to historically disadvantaged groups.[504]

The NDP consequently stresses the importance of the capability development of previously disadvantaged peoples and communities.[505] It explains that equal opportunity, in relation to the promotion of inclusion and redress, is about minimising the effect of circumstances such as gender, place of birth or race.[506] The NDP states that apartheid restricted opportunities available for many South Africans as well as their material participation in the economy.[507] Consequently, wealth was accumulated by a racial minority and many communities remained un- and underdeveloped.[508] For these reasons, the NDP contends that the current economic structure is still exclusionary and largely untransformed.[509]

In terms of strategies to promote inclusion, the NDP proposes a number of solutions, which include a focus on the reversal of apartheid geographies through the institution of new spatial norms and standards.[510] These norms and standards significantly focus on the densification of cities, as discussed, the improvement of transport, the upgrading of informal settlements, the creation of jobs near where people live and the fixing of housing market gaps.[511]

It moreover stresses the importance of active citizenship and participatory governance, as central pillars of the post-apartheid political dispensation.[512] The NDP also encourages government to engage with citizens in their own forums, rather than

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[502] Specifically Chapter 2 of the Constitution, containing the Bill of Rights.
[503] National Planning Commission *National Development Plan: Vision for 2030* (2012) 460.
[504] National Planning Commission *National Development Plan: Vision for 2030* (2012) 460.
[505] National Planning Commission *National Development Plan: Vision for 2030* (2012) 460.
[506] National Planning Commission *National Development Plan: Vision for 2030* (2012) 464.
[507] National Planning Commission *National Development Plan: Vision for 2030* (2012) 464.
[508] National Planning Commission *National Development Plan: Vision for 2030* (2012) 464.
[509] National Planning Commission *National Development Plan: Vision for 2030* (2012) 464. The NDP explains that young people, women, people living in rural areas as well as disabled people are the groups most often excluded.
[510] National Planning Commission *National Development Plan: Vision for 2030* (2012) 465.
[511] National Planning Commission *National Development Plan: Vision for 2030* (2012) 465. Some other proposals relating to inclusion in the NDP, which are not important for this discussion, are the improvement of social security, the promotion of economic growth and employment and the implementation of a rural development strategy.
[512] National Planning Commission *National Development Plan: Vision for 2030* (2012) 474.

in forums created by the government.[513] The NDP contends that citizen participation is indispensable in bringing about transformation and that it necessitates exceptional leadership, specifically of community leaders and other public figures.[514]

The NDP states that transformation of our country is only possible through the reduction of poverty and inequality by promoting opportunities for all.[515] Transformation, it contends, is about promoting social justice and the redressing of historical inequities.[516] This clearly resonates with a land reform programme that is essentially crafted to redress historical inequities.

In summary, the NDP pays special attention to the need to reverse the spatial effects of apartheid when it underlines that very limited progress has been made in addressing extant spatial inequalities since the end of apartheid.[517] These considerations are perfectly aligned with the promulgation of SPLUMA on the one hand and the pursuit of spatial justice, on the other. The NDP notes that, in some cases, policies introduced after 1994 have in fact entrenched the spatial divides by locating low-income housing on the periphery of urban areas.[518]

Spatial transformation is a long-term undertaking which necessitates significant reforms and political will.[519] It is important that spatial transformation does indeed take place, because of the great social, environmental and financial burdens the current spatial divisions place on our country. It is in this light that the National Planning Commission, in compiling the NDP, put forth a national focus on spatial transformation that would transcend all geographic scales.[520]

3 3 3 The 2016 IUDF

3 3 3 1 Introduction

The 2016 IUDF is the next important policy document with a bearing on urban areas in South Africa that specifically mentions the notion of spatial justice.[521] The 2016 IUDF

[513] National Planning Commission *National Development Plan: Vision for 2030* (2012) 474.
[514] National Planning Commission *National Development Plan: Vision for 2030* (2012) 474.
[515] National Planning Commission *National Development Plan: Vision for 2030* (2012) 465.
[516] National Planning Commission *National Development Plan: Vision for 2030* (2012) 465.
[517] National Planning Commission *National Development Plan: Vision for 2030* (2012) 46.
[518] National Planning Commission *National Development Plan: Vision for 2030* (2012) 47.
[519] National Planning Commission *National Development Plan: Vision for 2030* (2012) 47.
[520] National Planning Commission *National Development Plan: Vision for 2030* (2012) 47.
[521] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 43.

was prepared by the Department of Cooperative Governance and Traditional Affairs.[522] It was prepared in response to urbanisation trends and the mandate in the NDP that there should be an urban development policy that considers the increase in urbanisation.[523]

In the 2016 IUDF the following challenges related to spatial transformation are broadly identified:

> "...the inefficient structure of urban and metropolitan areas, which is characterised by fragmented residential settlement patterns, underdeveloped business areas in townships and long travel times between home and work."[524]

The crucial outcome of the IUDF is spatial transformation.[525] It aims to respond to the need for an effective urban strategy to deal with the rapid urbanisation in our country's cities and towns.[526] The IUDF:

> "aims to guide the development of inclusive, resilient and liveable urban settlements, while directly addressing the unique conditions and challenges facing South Africa's cities and towns."[527]

The IUDF also follows the NDP, specifically Chapter 8 of the NDP, which covers the transformation of human settlements and the national space economy, as set out above.[528]

The IUDF focuses on spatial issues and is a critical policy document for the promotion of spatial transformation and spatial justice in urban areas in South Africa. To this effect, there are four strategic goals: Spatial integration (to forge new spatial forms in settlement, transport, social and economic areas); inclusion and access (to ensure people have access to social and economic services, opportunities and choices);

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[522] Formerly the Department of Provincial and Local Government.
[523] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 4.
[524] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) Preface.
[525] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) Foreword.
[526] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) Preface.
[527] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 43 Executive Summary.
[528] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 7.

growth (to harness urban dynamism for inclusive, sustainable economic growth and development); and governance (to enhance the capacity of the state and its citizens to work together) to achieve spatial and social integration.[529] It is explained that:

> "[a]t the core of effective urban planning is strategic spatial planning, which promotes spatial justice, spatial quality, spatial efficiency, spatial sustainability and spatial resilience."[530]

3 3 3 2 Spatial transformation challenges as identified in the IUDF

In terms of the 2016 IUDF, there are four main factors that are maintaining and entrenching current problematic social, economic and spatial patterns in South Africa's urban areas:

> "(1) Existing property markets and land use; (2) unsustainable infrastructure networks and consumptions patterns; (3) continued segregated urban settlements; and (4) unequal income levels and access to services."[531]

Perhaps the most important factor is the first, which relates to the role of property markets and land use. According to the IUDF, the existing property and land-use conditions are limiting access to urban opportunities and are entrenching the urban sprawl so prevalent in South Africa's urban areas.[532] The Framework concedes that growth has a role to play in terms of rates income for municipalities, but that it still does not address the problem of providing "well-located, affordable housing and decent shelter for all."[533] Given the main focus of this thesis, the second factor identified is not

[529] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) Executive Summary.
[530] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 43.
[531] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 22.
[532] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 22.
[533] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 22.

as important for this discussion.[534] The 2016 IUDF also identifies high inequality in income levels and access to services as challenges.[535]

Urban areas in South Africa are still characterised by profound class-based segregation.[536] The 2016 IUDF states that South Africa's urban areas are haunted by our history of racial segregation and exclusion from social and economic opportunities.[537] Consequently, South African cities and towns are typified by low density sprawl, long distances between home and work and racial and class separations.[538]

In the 2016 IUDF it is stated that: "[c]ompact, connected, integrated and inclusive cities promote efficient services, systems and resource use".[539] It is asserted that there exists a necessity to "develop and strengthen instruments" which would lead to the creation of compact, connected cities.[540]

3 3 3 3 The IUDF's tools and instruments for spatial transformation

In response to the concerns set out in the previous section, the 2016 IUDF recognises the need to expand the instruments for spatial intervention in the longer term in order to promote its goals.[541] Municipalities are identified as key players in the development

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[534] In relation to unsustainable infrastructure networks and consumption patterns, the IUDF explains it in the following way: "South African urban areas are profoundly resource intensive, highly polluted and wasteful. The spatial form of South African cities, dependency on cars and suburban-lifestyle aspirations (across classes) produce an extremely resource-intensive and inefficient form of settlement. This, combined with a coal-based and pollution-heavy energy system, is a recipe for unsustainable urban development and, arguably, is in direct contravention of Chapter 2 Bill of Rights constitutional provisions on the right to a healthy environment." Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 23.

[535] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 23.

> "The high levels of inequality in income and access to services and opportunities are a legacy of apartheid education and the (migrant) employment system. Since 1994, income inequality has remained stubbornly high, as a result of very high unemployment and the growing wage gap between skilled and unskilled labour. This inequality reinforces economic marginalisation and produces spatial poverty traps."

[536] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 22.

[537] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 22.

[538] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 22.

[539] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 48.

[540] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 48.

[541] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 49.

of strategies that would promote long-term growth, SDFs and IDPs, which are to inform role-players' investments.[542] The IUDF recognises the need for cooperation between the private sector and state-owned entities ("SOEs").[543]

It identifies the need for interventions that will lead to "inclusive, resilient and liveable cities and towns."[544] The IUDF explains these ideals for urban spaces by setting out that these urban areas:

> "(1) Will encourage inclusive growth, social cohesion and good governance; protect civic rights and vulnerable populations, enabling their contributions to growth and development, and place local participation and ownership at the centre of city development.
>
> (2) Have growing, innovative economies that create jobs, support diverse livelihoods and activities, respond to social developments, and can anticipate and adapt successfully to challenging conditions.
>
> (3) Are safe, caring and creative, shaped by citizens and government; celebrate diversity; provide universal access to social and other services; and contain accessible public green spaces and affordable housing."[545]

South Africa has a broad spectrum of legislation, policies and strategies that aim to direct integrated planning, not all of which are important for this study. Some of the measures include the 1998 *White Paper on Local Government*,[546] the Municipal Systems Act,[547] the National Environmental Management Act ("NEMA")[548] and SPLUMA.[549] These measures provide principles for the integration and alignment of government plans generally, such as SDFs, IDPs, Built Environment Performance Plans ("BEPPs"), as well as certain growth and development strategies and sectoral plans.[550]

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[542] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 50.
[543] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 50. It also identifies other stakeholders, such as professional bodies and academic and research institutions.
[544] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 21.
[545] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 21.
[546] 1998 *White Paper on Local Government.*
[547] 32 of 2000.
[548] 107 of 1998, amended by 25 of 2015.
[549] 16 of 2013.
[550] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 43.

In spite of these progressive pieces of legislation and policies, spatial fragmentation and its attendant inefficiencies still exist, and it is argued that integrated planning is unable to reach its developmental goals because of competing sectoral policies.[551]

Municipalities make use of certain levers to contend with urban transformation, which include long term development strategies, such as Tshwane 2055.[552] They also make use of long term regional SDFs and strategies, IDPs and BEPPS (specifically regarding transport, infrastructure investments and human settlements) as well as other service sector plans that are not contained in the IDP.[553]

The IUDF explains that municipalities have also introduced measures that aim to provide assistance to informal and small businesses in suitably situated spaces.[554] In South Africa, outcome-based planning is aimed at ensuring that government plans lead to tangible improvement in the lives of South Africans. It does so by turning plans into implementation frameworks and agreements.[555] This arguably creates the opportunity for spatial targeting to be prioritised, as well as the sequencing of infrastructure investments. In this regard, BEPPs are identified as a critically important tool to guarantee that cities achieve spatial integration, a reduction in poverty as well as general economic growth by means of "better alignment and integration within the intergovernmental system".[556]

In this regard, the IUDF identifies specific challenges, such as ineffective planning and coordination within government as well as between government and the private

[551] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 44.
[552] The City of Tshwane *Tshwane Vision 2055: Remaking South Africa's Capital City* (2012). Available online: <http://www.gis.tshwane.gov.za/Documents/Online%20version-%20CoT%202055%20vision%5Bsmallpdf.com%5D.pdf> (accessed 04-09-2019).
[553] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 44.
[554] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 44.
[555] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 44.
[556] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 44.

sector.[557] The different spheres of government do not cooperate efficiently, leading to uncertainty and unnecessary expenses.[558]

The 2016 IUDF specifically refers to SPLUMA and explains that SPLUMA makes provision for "inclusive, developmental, equitable and efficient spatial planning by different spheres of government."[559] It furthermore states that spatial development frameworks should be guided by long-term growth and development plans and supply a "coherent and common" ideal for municipal spaces and regions.[560]

The IUDF contends that land-use and planning schemes should be used to bring about "compact, integrated and connected cities and regions."[561] Moreover, the SDFs should be bolstered by sectoral and precinct planning.[562] In this regard, it is argued that there is a pressing need for government to create the capacity to "develop, align and integrate spatial and sectoral plans in line with the vision outlined in the Act."[563] It is critical that municipal planning departments have the capacity and funds necessary to perform their functions and plan and cooperate with other stakeholders to view and evaluate the progression of plans.[564]

3 3 3 4 Conclusion

In summary, the IUDF sets out the main challenges for spatial transformation in South African cities, which echo the concerns set out in the NDP and elsewhere in this thesis.[565] It highlights the role of stakeholders and participants, such as the municipality, the private sector as well as SOEs in the promotion of spatial justice and spatial transformation. The IUDF also emphasises the need for the different

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[557] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 44. "Vertical alignment refers to alignment across spheres of government and SOEs, while horizontal alignment refers to alignment across government departments within a sphere."
[558] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 47.
[559] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 47.
[560] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 47.
[561] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 48.
[562] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 48.
[563] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 48.
[564] Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework* (2016) 48.
[565] See Chapter 2 2.

stakeholders to cooperate. It elaborates on the importance and potential of relevant tools and instruments as contained in policy and legislation, such as SPLUMA, which aims to combat the issues of fragmentation and inefficiency. Finally, it suggests ways in which planning could be more efficient, inclusive and effective at promoting resilient environments.

3 4 Spatial justice as set out in SPLUMA

3 4 1 Introduction

The sections above have placed the discussion on informal settlements, as well as the notion of spatial justice, in context by identifying the most important South African policy documents in which the notion has appeared to date. SPLUMA operates within the policy framework set out above. The discussion now turns to the particular provisions of SPLUMA that relate to spatial justice within a South African urban context.

In Chapter 2 above, the necessity of a legislative measure like SPLUMA and its role within the national spatial development framework were introduced.[566] The long process to the enactment of SPLUMA, as well as the challenges that gave rise to the need for such a framework Act were accordingly discussed. The content of the Act, but more specifically the notion of spatial justice as it is encapsulated in SPLUMA, is now the focus of attention. The point of departure is the preamble to SPLUMA, which, to some extent, already reflects the sentiments expressed in the NDP, as set out above.[567] The preamble states that:

> "…many South Africans continue to live and work in places defined and influenced by past spatial planning and land use laws and practices which were based on racial inequality, segregation and unsustainable settlement patterns. Moreover, the continued existence and operation of multiple laws at national and provincial spheres of government in addition to the laws applicable in the previous homelands and self-governing territories have created fragmentation, duplication and unfair discrimination."[568]

[566] See Chapter 2 3.
[567] 3 3 2.
[568] Preamble to SPLUMA.

The Act's aims are also reflected in the preamble, including that planning should be "inclusive, developmental, equitable and efficient."[569] The preamble references a number of sections of the Bill of Rights, including the protection of property rights[570] and the right to access to adequate housing[571] which "includes an equitable spatial pattern and sustainable human settlements".[572] SPLUMA then puts these references to the Bill of Rights in a practical context by introducing specific development principles[573] that all spatial planning, land development and land use management endeavours are subjected to.

3 4 2 SPLUMA Chapter 1: Introductory provisions

SPLUMA applies throughout South Africa[574] and is specifically aimed at avoiding or discouraging parallel planning and land use management systems.[575] These provisions can be seen to combat the prevalence of fragmentation in terms of spatial planning and land use management instruments that have been applicable before the promulgation of SPLUMA.[576]

The objects of the Act, as set out in section 3 of SPLUMA, are to:

> "(a) provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic;
>
> (b) ensure that the system of spatial planning and land use management promotes social and economic inclusion;
>
> (c) provide for development principles and norms and standards;
>
> (d) provide for sustainable and efficient use of land;
>
> (e) provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government; and

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[569] Preamble to SPLUMA.
[570] S 25 of the Constitution.
[571] S 26 of the Constitution.
[572] Preamble to SPLUMA.
[573] S 7 of SPLUMA.
[574] SPLUMA s 2(1) states:
"This Act applies to the entire area of the Republic and is legislation enacted in terms of –
(a) section 155(7) of the Constitution insofar as it regulates municipal planning; and
(b) section 44(2) of the Constitution insofar as it regulates provincial planning."
[575] SPLUMA s 2(2) states: "Except as provided for in this Act, no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development inconsistent with the provisions of this Act."
[576] See Chapter 2 4.

(f) redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems."

The first object, as set out under section 3(a), once again refers to the challenge of fragmentation in the context of the separate systems of spatial planning that were in use before and after 1994, until the introduction of SPLUMA.

The second object, under section 3(b), acknowledges the role and potential of the system of spatial planning and land use management to promote social and economic inclusion. The apartheid era specifically was characterised by social and economic exclusions, as was set out in Chapter 2 above.[577] Even after the end of formal apartheid, certain economic and social inequalities persist,[578] giving rise to the need to address the legacy of spatial injustices through legislative and other means, including SPLUMA.[579]

The third object of the Act, section 3(c), confirms that there will be specific development principles, norms and standards that will be provided by the Act.[580] One of the development principles focuses on spatial justice, which is the focus of this discussion.[581] The development principles as well as the norms and standards are discussed below.[582]

The fourth object of the Act relates to the issue of sustainable land use.[583] This object ostensibly correlates with the second development principle, relating to spatial sustainability, listed under section 7(b) of SPLUMA.

The fifth object under section 3(e) emphasises the need to promote the goal of cooperative governance and intergovernmental relations among the three spheres of government. As has become clear from the discussion, there is an urgent need to improve such relations and connections.

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[577] Chapter 2 2 2.
[578] See S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002).
[579] The reference to the importance of combating social and economic exclusion is echoed in s 7 (a)(ii), the principle of spatial justice which emphasises the inclusion of previously excluded people and areas.
[580] The development principles and the norms and standards are listed under ss 7 and 8 of SPLUMA respectively.
[581] S 7(a) SPLUMA.
[582] At 3 4 3.
[583] SPLUMA s 3(d).

The final object, under section 3(f) once again links to the development principle of spatial justice, as set out in section 7(a) of the Act. It references the need to "redress the imbalances of the past", which is echoed by section 7(a)(i), which contains an exhortation to address the "past spatial and other development imbalances through improved access to and use of land".

Section 4 of SPLUMA sets out the components of the South African spatial planning system.[584] It confirms that the spatial planning system will operate on three levels: national, provincial and municipal and that the development principles, which include spatial justice, are crucial components of the spatial planning system. Furthermore, section 5 of SPLUMA sets out the different categories of spatial planning and what is required in terms of municipal,[585] provincial[586] and national[587] planning. The different requirements are set out very clearly.

3 4 3 SPLUMA Chapter 2: Development principles and norms and standards

3 4 3 1 The development principle of spatial justice

The focus of this discussion is on the development principle of spatial justice, which is set out in section 7(a) of SPLUMA. In terms of this principle:

> "(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 persons 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;

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[584] "4. The spatial planning system in the Republic consists of the following components:
(a) Spatial development frameworks to be prepared and adopted by national, provincial and municipal spheres of government;
(b) development principles, norms and standards that must guide spatial planning, land use management and land development;
(c) the management and facilitation of land use contemplated in Chapter 5 through the mechanism of land use schemes; and
(d) procedures and processes for the preparation, submission and consideration of land development applications and related processes as provided for in Chapter 6 and provincial legislation."

[585] SPLUMA s 5(1).

[586] SPLUMA s 5(2).

[587] SPLUMA s 5(3).

(iv) land use management systems must include all areas of a municipality and specifically 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 accommodate *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 land or property is affected by the outcome of the application."

Section 7(a)(ii) is significant, because it emphasises the inclusion of previously excluded people, socially or economically, in an informal context, or in areas characterised by widespread poverty and deprivation. In section 7(a)(iv) specific mention is once again made of the informal settlement context.

Section 7(a)(v) again specifically accentuates the necessity of incorporating provisions that accommodate access to secure tenure in land development procedures and procedures for the incremental upgrading of informal areas.

The Act defines the "incremental upgrading of informal areas" as:

"the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation, and may include any settlement or area under traditional tenure."[588]

3 4 3 2 SPLUMA and the application of the principle of spatial justice

Having set out and briefly discussed the main objects of the Act as well as the development principle of spatial justice, the discussion turns to the operation of these provisions in order to determine whether spatial justice may be realised by the mechanisms set out in SPLUMA. Spatial justice, as well as the other development principles:

"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;

[588] SPLUMA s 1.

> *(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."[589]

Municipalities are obliged to take spatial justice into account in determining land uses through spatial development frameworks and land schemes.[590] It is clear that spatial justice is a necessary consideration in decision-making on development applications, such as township establishment, amendments to land use schemes, removals of restrictive conditions, subdivisions and consolidations.[591]

3 4 3 3 The norms and standards

In terms of section 8(1) of SPLUMA, the Minister is required to prescribe norms and standards[592] for land use management and land development that are consistent with SPLUMA, the Promotion of Administrative Justice Act[593] and the Intergovernmental Relations Framework Act.[594] Critically, the norms and standards must "reflect the national policy, national policy priorities and programmes relating to land use management and land development."[595] The emphasis on intergovernmental cooperation is significant. It is also clear that the norms and standards have to be aligned with the relevant policy documents on a national level.

Moreover, the norms and standards must "promote social inclusion, spatial equity, desirable settlement, rural revitalisation, urban regeneration and sustainable development."[596] It is clear that these norms and standards have to be in line with the principle of spatial justice, as it is set out above. Specific references to the promotion

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[589] SPLUMA s 6.
[590] SPLUMA ss 12-22, 24.
[591] SPLUMA s 41.
[592] Although norms, standards and principles seem interconnected, there are differences. The main difference is that the norms and standards must be prescribed by the Minister, according to s 8(1) of SPLUMA, whereas the principles are already in existence, as set out in s 7 of SPLUMA.
[593] 3 of 2000.
[594] 38 of 2005.
[595] SPLUMA s 8(1)(a).
[596] SPLUMA s 8(1)(b).

of social inclusion, desirable settlement and spatial equity also reflect elements of section 7(a) of SPLUMA.

3 4 4 SPLUMA Chapter 3: Intergovernmental support

Intergovernmental cooperation is crucial for the development of transformative planning practice.[597] In the 2016 South African Cities Network ("SACN") Report, it is contended that a critical factor of the success of SPLUMA is the extent to which intergovernmental cooperation is taken seriously by all the spheres and sectors of government.[598]

Sections 9 – 11 set out the different support and monitoring functions of the separate spheres of government. Section 9 sets out the provisions relevant to national support and monitoring. Section 10 focuses on provincial support and monitoring, while section 11 contains provisions related to municipal differentiation.

In terms of section 9(1), the Minister is required to:

"(a)… within available resources, provide support and assistance in the performance of its land use management functions and related obligations to any-

(i) province as contemplated in section 125(3) of the Constitution; or

(ii) municipality as contemplated in section 154(1) of the Constitution…"

The Minister must also monitor compliance with the aforementioned development principles and norms and standards.[599]

The Minister is additionally required to monitor progress made by municipalities with the adoption or amendment of land use schemes[600] as well as the quality and effectiveness of municipal spatial development frameworks and other spatial planning and land use management tools and instruments.[601] Lastly, the Minister must monitor the capacity of provinces and municipalities to implement SPLUMA.[602]

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[597] P Harrison "Strategic Planning for Transformation in Post-apartheid Johannesburg, South Africa" in L Albrechts, A Balducci & J Hillier (eds) *Situated Practices of Strategic Planning: An International Perspective* (2017) 217 218.
[598] South African Cities Network *Report on the State of South African Cities* (2017) 1 66.
[599] SPLUMA s 9(1)(b)(i).
[600] SPLUMA s 9(1)(b)(ii).
[601] SPLUMA s 9(1)(b)(iii).
[602] SPLUMA s 9(1)(b)(iv).

Section 9(2) of SPLUMA provides that the national government must, in line with SPLUMA and the Intergovernmental Relations Framework Act,[603] develop mechanisms which would support and strengthen the capacity of provinces and municipalities to adopt and implement an effective spatial planning and land use management system. Critically, in terms of section 9(3), the Minister has a discretion, after consultation with organs of state in the provincial and local spheres of government, to prescribe procedures and to resolve and prevent conflicts or inconsistencies which may emerge from spatial plans, frameworks and policies of different spheres of government and between a spatial plan, framework and policies relating to land use of any other organ of state. Finally, in terms of section 9(4), the Minister is required, in the performance of a function in terms of this Chapter, to consult with any Minister responsible for a national function affected by the performance of that function.

Section 10 of SPLUMA relates to provincial support and monitoring as part of the chapter regulating intergovernmental cooperation.[604] Under this section, provincial legislation which is consistent with SPLUMA and the Intergovernmental Relations Framework Act[605] may provide for a number of matters, such as (a) matters contained in Schedule 1 to SPLUMA;[606] (b) matters of provincial interest; (c) remedial measures in the event of the inability or failure of a municipality to comply with an obligation in terms of this Act or provincial legislation; or (d) matters not specifically dealt with in SPLUMA.[607]

Moreover, section 10(2) of SPLUMA makes provision for provincial legislation which is not inconsistent with the provisions of SPLUMA, which may provide for structures and procedures which are different from those provided for in SPLUMA in respect of

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[603] 13 of 2005.
[604] Ch 3 of SPLUMA.
[605] 13 of 2005.
[606] Sch 1 of SPLUMA sets out matters to be addressed in provincial legislation regulating land development, land use management, township establishment, spatial planning, subdivision of land, consolidation of land, the removal of restrictions and other matters, which include, but is not limited to:
(a) The provision of a uniform set of land use zones to be used by municipalities in land use schemes;
(b) The prescribing of provisions to deal with the use of existing buildings and the submission of building plans in terms of schemes pre-dating the adoption of a land use scheme in terms of this Act; and
(c) The prescribing of provisions for the review of land use schemes by municipalities, including public consultation and the preparation of a review report.
[607] SPLUMA s 10(1).

a province. Section 10(3) of SPLUMA sets out the competences of a Premier, which are subject to the Constitution and any other law regulating provincial supervision and the monitoring of municipalities in the province.

Section 11 of SPLUMA contains provisions related to municipal differentiation. Section 11(1) contends that, in the development and application of measures to monitor and support the performance of the functions of municipalities in terms of SPLUMA and other legislation relating to spatial planning, land development and land use management, the national government and provincial governments must take into account the unique circumstances of each municipality. These unique circumstances may be determined on the basis of specifically identified criteria, which are set out in section 11(2) of SPLUMA.

3 4 5 SPLUMA Chapter 4: SDFs

3 4 5 1 Introduction to the SDF provisions in SPLUMA

The next part of the discussion considers the role of SDFs in SPLUMA. By way of introduction to this section, some explanation of the role and function of SDFs, as an important part of Integrated Development Plans (IDPs) follows.[608] SDFs exist in a variety of forms and SPLUMA sets out detailed content of SDFs at national, provincial, regional and local levels: Part A of Chapter 4 in SPLUMA relates to the preparation of SDFs while Parts B and C relate to the preparation and content of the national SDFs and preparation, content and legal effect of the provincial SDFs respectively. Part D relates to the preparation and content of regional SDFs. Finally, Part E contains provisions to regulate the preparation and content of municipal SDFs.

3 4 5 2 SDFs in context

To start, it is important to note that SDFs, in terms of SPLUMA, are an integral part of the South African spatial planning system.[609] In terms of SPLUMA section 4(a), these SDFs must be prepared and adopted by national, provincial and municipal spheres of government.[610] The other components of the South African planning systems are the development principles, norms and standards that have to guide spatial planning, land

[608] The next heading concerns land use management and this will be contrasted with spatial planning to explain the difference between the two components of planning.
[609] See SPLUMA s 4(a).
[610] See 3 4 5 1 of this discussion.

use management and land development, discussed under an earlier heading.[611] The following part of the discussion considers the role and function of SDFs in order to evaluate their efficacy as tools of transformation.

Van Wyk explains that SDFs are a comparatively new planning tool in South Africa.[612] Basically, SDFs were originally drawn up by municipalities as either a non-regulatory framework, or a core component of the IDP.[613] She explains that:

> "In a spatial planning context, the most important component of an IDP is a spatial development framework, which must include the provision of basic guidelines for a land use management system for a municipality."[614]

As explained, SPLUMA makes provision for four categories of SDF. Notably, an SDF must be prepared at regional level, in addition to the national, provincial and municipal SDFs. The national sphere is prohibited from interfering with the powers of the provincial and municipal spheres and it is required to consult with the other spheres in the drawing up of its national SDF. This is in line with the principle of separation of the functions of the different spheres as well as the principle of promoting intergovernmental cooperation.[615] This then connects to the previous heading and shows how SPLUMA's other sections underscore its goals of promoting intergovernmental cooperation and the separation of functions. Both these elements are critically important in the context of the new constitutional dispensation.

3 4 5 3 The contents of national, provincial and municipal SDFs

In terms of the contents of the SDFs of the separate spheres, it is significant that the national SDF is required to integrate and coordinate provincial and municipal SDFs, which necessarily means that provincial and municipal SDFs would be reflected in the national SDF.[616]

As has been discussed extensively previously,[617] apartheid land law and planning were characterised by exclusion. The principle of spatial justice, as set out in

[611] SPLUMA s 4(b).
[612] J van Wyk *Planning Law* 2 ed (2012) 270.
[613] In terms of s 26(e) of the Local Government: Municipal Systems Act 32 of 2000.
[614] J van Wyk *Planning Law* 2 ed (2012) 274.
[615] J van Wyk *Planning Law* 3 ed (forthcoming) 208. See also SPLUMA s 12(2)(a).
[616] SPLUMA s 14(c).
[617] See Chapter 2 2.

SPLUMA, aims to address the core causes and consequences of this exclusion.[618] Together with the spatial justice principle, there are a number of provisions in SPLUMA that are designed to expunge the spatial injustices of the past, such as SDFs.[619] Additionally, land use schemes, discussed below, are required to accommodate informal settlements, slums and areas not previously subject to a land use scheme, as well as provisions to promote the inclusion of affordable housing in residential land development.[620]

3 4 5 4 Spatial justice and SDFs

The next section considers SDFs and their role in the promotion of spatial justice. Jeannie van Wyk argues that the national SDF is particularly suitable to address the issue of the inclusion of certain areas by suggesting solutions with the goal of eradicating the issue of historical spatial imbalances.[621] She explains that suggestions could take the form of proposals which would outline how the profile of townships and informal settlements could be improved, or how areas formerly designated as "white areas" could become more accessible.[622] These solutions would not have to include so-called "remedial" action, as this type of action could conceivably be the burden of other sector departments.[623]

In section 7(a)(ii) of SPLUMA, SDFs as well as policies from all spheres of government are required to promote the inclusion of persons and areas that were previously excluded, with a focus on informal settlements, former homelands and areas characterised by widespread poverty and deprivation.

Section 12 of SPLUMA relates to the preparation of spatial development frameworks. In the preparation of these frameworks, there are a range of requirements that the national and provincial spheres as well as the municipalities must adhere to.[624] In this context a few requirements are significant in relation to spatial justice: Section 12(1)(h) specifically requires the national and provincial spheres of government and each municipality to prepare spatial development frameworks that:

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[618] J van Wyk *Planning Law* 3 ed (forthcoming) 223.
[619] See, for example, SPLUMA s 12(1)(i).
[620] J van Wyk *Planning Law* 3 ed (forthcoming) 211.
[621] J van Wyk *Planning Law* 3 ed (forthcoming) 211.
[622] J van Wyk *Planning Law* 3 ed (forthcoming) 211.
[623] J van Wyk *Planning Law* 3 ed (forthcoming) 211.
[624] SPLUMA s 12(1)(a)-(o).

> "include previously disadvantaged areas, areas under traditional leadership, rural areas, informal settlements, slums and land holdings of state-owned enterprises and government agencies and address their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere…"

It also requires spatial development frameworks that address historical spatial imbalances in development.[625]

It is clear that SPLUMA identifies SDFs as useful tools to promote the objectives of the Act, as set out in section 3 of SPLUMA, specifically in relation to the goals of inclusion and integration of previously disadvantaged areas. It is also possible that these SDFs may prove to be important instruments in the promotion of spatial justice in a land reform context.

In terms of section 12(3):

> "The national spatial development framework must contribute to and give spatial expression to national development policy and plans as well as integrate and give spatial expression to policies and plans emanating from the various sectors of national government, and may include any regional spatial development framework."

This subsection moreover cements the role of the SDFs, in this case the national SDF, in the promotion of certain policy goals, such as the promotion of spatial justice.[626] Similarly, section 12(4) requires a provincial SDF to contribute to and to express provincial development policy. Furthermore, in terms of section 14(5) this provincial SDF must "integrate and spatially express policies and plans emanating from the various sectors of the provincial and national spheres of government as they apply at the geographic scale of the province." SPLUMA aims to regulate both national and provincial development frameworks by requiring that both these spheres follow the prescribed development policies and spatial development frameworks.

Section 13 of SPLUMA regulates the preparation and content of the national spatial development framework. In terms of section 13(3)(a):

> "A national spatial development framework must take into account policies, plans and programmes of public bodies that impact on spatial planning, land development and land use management."

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[625] SPLUMA s 12(1)(i).
[626] Refer to the discussions on the IUDF and NDP above at 3 3.

Section 14 also requires the national spatial development framework to "give effect to the development principles and norms and standards set out in Chapter 2";[627] and to "give effect to relevant national policies, priorities, plans and legislation."[628]

Section 15 of SPLUMA relates to the provincial spatial development framework. In terms of section 15(2), a provincial spatial development framework must be consistent with the national spatial development framework. A provincial development framework must also "incorporate any spatial aspects of relevant national development strategies and programmes as they apply in the relevant province."[629]

In terms of section 17(2) of SPLUMA "[a]ll provincial development plans, projects and programmes must be consistent with the provincial spatial development framework." In terms of section 19 of SPLUMA, a regional spatial development framework must give effect to the development principles and applicable norms and standards set out in Chapter 2,[630] which includes the development principle of spatial justice. A regional spatial development framework must also "give effect to national and provincial policies, priorities, plans and planning legislation",[631] such as the 2012 NDP and the 2016 IUDF.

SPLUMA requires that the municipal spatial development framework has to be prepared in line with the particular municipality's integrated development plan, as is mandated by the Municipal Systems Act.[632] Especially at the municipal level, spatial development frameworks are critical.[633] However, the preparation or amendment of these municipal spatial development frameworks is by no means a simple undertaking. It requires the publication of notices in the *Provincial Gazette* as well as an invitation to the public to submit written representations and a consideration of these representations by the Municipal Council before the frameworks may be adopted or amended.[634]

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[627] SPLUMA s 14(a).
[628] SPLUMA s 14(b).
[629] SPLUMA s 16(f).
[630] SPLUMA s 19(a).
[631] SPLUMA s 19(b).
[632] SPLUMA s 20(2).
[633] The preparation and content of the municipal development framework is set out in ss 20 and 21 of SPLUMA.
[634] SPLUMA s 21(1)-(3).

SPLUMA sets out the content of the municipal spatial development framework in section 21. In terms of this section each municipal spatial development framework must give effect to the development principles and relevant norms and standards that are set out in Chapter 2 of SPLUMA.[635] Moreover, the municipal spatial development frameworks are required to provide spatial development plans for the short term (five years) and longer term (ten to twenty years).[636]

Connected to the development-related requirements, such as the short and the longer term spatial development vision, SPLUMA requires that the municipal spatial development framework must contain estimates of economic and employment tendencies in the municipality for the following five years.[637] The framework must also pinpoint and provide location requirements of engineering infrastructure and service provision for current and planned development requirements in the next five years.[638]

Furthermore, SPLUMA requires that spatial development frameworks identify significant places for development that need to be prioritised with regard to public and private investment.[639]

SPLUMA also stipulates what needs to form part of the spatial development frameworks in relation to issues of housing, such as, critically, an approximation of the quantified need for housing units from different socio-economic strata as well as the envisioned designated areas for and density of planned housing developments.[640] SPLUMA additionally requires that the municipal spatial development frameworks have to establish the specific areas in the municipality where a national or provincial inclusionary housing policy could be applicable,[641] as well as establish the specific areas where incremental upgrading approaches are appropriate.[642]

[635] SPLUMA s 21(a).
[636] SPLUMA s 21(b) and (c) respectively. SPLUMA also requires that municipal spatial development frameworks should provide the estimated population growth for the next five years. SPLUMA s 21(e).
[637] SPLUMA s 21(g)
[638] SPLUMA s 21(h).
[639] SPLUMA s 21(d).
[640] SPLUMA s 21(f).
[641] SPLUMA s 21 (i).
[642] SPLUMA s 21 (k).

An additional requirement is the identification of areas where more comprehensive local plans have to be developed,[643] as well as areas where abridged land use development procedures could be appropriate.[644]

Significantly, section 21(m) of SPLUMA provides that the municipal spatial development frameworks should contain the spatial expression of the coordination of all the municipality departments' sectoral policies. This provision is an attempt to combat the historic lack of alignment and integration between the different sectors in a sphere of government, in this case at the municipal level. This provision therefore promotes intergovernmental cooperation.

SPLUMA sets out a number of requirements for municipal spatial development frameworks. It is clear that municipalities have a much greater role to play than in previous years in advancing the goals of SPLUMA.[645]

Part F of SPLUMA deals with the status of the spatial development frameworks. Section 22(1) of SPLUMA prohibits a Municipal Planning Tribunal, or any other authority with the necessary power to make a land development decision in terms of SPLUMA or other land development-related legislation, from making a decision which is in conflict with a municipal spatial development framework. The Tribunal may only deviate from the content of the spatial development framework "if site-specific circumstances justify a departure from the provisions of such municipal spatial development framework."[646] However, the "site-specific circumstances" are not set out in the Act.

In cases where a provincial spatial development framework is in conflict with a municipal spatial development framework, the Intergovernmental Relations Framework Act[647] requires that the Premier facilitate the resolution of conflict between the two spatial development frameworks so that they may be consistent with each

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[643] SPLUMA s 21(l)(i).
[644] SPLUMA s 21(l)(ii).
[645] See the *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC) case, in which the court found that the municipal government has the exclusive competence to do municipal planning.
[646] SPLUMA s 22(2). This provision is subject to s 42 of SPLUMA, which details the considerations the Municipal Planning Tribunal has to take into account when deciding an application. Significantly they include a reference to the development principles in Ch 2 of SPLUMA as well as a duty to take constitutional transformation imperatives into account. SPLUMA s 42(1)(a) and (c)(ii) respectively.
[647] 13 of 2005.

other.[648] This provision promotes intergovernmental cooperation, which is necessary as inconsistencies between provincial and municipal spatial development frameworks are bound to occur.

It becomes clear that spatial development frameworks are regarded as a particularly important spatial planning tool and that many aims set out in SPLUMA are meant to be achieved, at least partially, through the use of these spatial development frameworks. These SDFs are essentially the backbone of a new spatially justified approach to planning.

3 4 6 SPLUMA Chapter 5: Land use management

Van Wyk divides planning into two parts: land management planning and land development planning.[649] This division rests on two rights in the Bill of Rights, i.e. the property clause in section 25 and the right to just administrative action in section 33.[650] Land management planning includes zoning, which constitutes a legitimate deprivation on the use of land.[651] Accordingly, land use management as it is set out in SPLUMA and according to Van Wyk's division, can be linked to section 25 of the Constitution.

The second manner in which SPLUMA may promote spatial justice (other than by way of the various SDFs) is linked to its mechanisms to promote public participation. Land use schemes,[652] regulated by SPLUMA,[653] have replaced the old-order town planning schemes.[654] Van Wyk contends that the new purpose statement set out in SPLUMA may be set side by side with old-order legislation purpose statements in order to ascertain the purpose of a land use scheme.[655]

A land use scheme primarily has to determine the use and development of land in the applicable municipal area. In the *Maccsand (Pty) Ltd and Another v City of Cape Town*

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[648] SPLUMA s 22(3).
[649] J van Wyk *Planning Law* 3 ed (forthcoming) 1.
[650] J van Wyk *Planning Law* 3 ed (forthcoming) 1.
[651] J van Wyk *Planning Law* 3 ed (forthcoming) 9.
[652] Newer legislation refers to, for example, "zoning schemes" (Western Cape Land Use Planning Act 3 of 2014).
[653] S 26(1)(b).
[654] Which were enacted in terms of the old-order Ordinances of the different provinces. Town planning schemes determine the purpose for which each piece of land in a scheme may be used. J van Wyk *Planning Law* 2 ed (2012) 278.
[655] J van Wyk *Planning Law* 3 ed (forthcoming) 223.

and Others case[656] it was explained that the function of a zoning scheme is the determination of use rights and the provision of control over said rights and over the use of land in the jurisdictional area of a particular municipality.[657]

Chapter 5 of SPLUMA sets out all the provisions relevant to land use management. Section 23 of SPLUMA elaborates on the role of the executive authority in land use management. In this regard the duty rests on the executive authority in a municipality to provide general guidance in the development of land and other administrative processes related to the municipality's land use scheme.[658]

Significantly, the envisioned land scheme to be adopted in accordance with section 24(1) of SPLUMA must include areas that have not historically been subject to a land use scheme.[659] This is to ensure that uniform rules apply and that the fragmentation concerns that have been referred to throughout this discussion are not a hindrance. SPLUMA goes even further in its bid to eradicate fragmentation by requiring that land use schemes adopted in terms of SPLUMA should allow the incremental introduction of land use management and regulation "in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme."[660] Evidently there is inclusion of areas where planning previously occurred, but also incorporation of pockets of land which were previously excluded.

In line with the goal of promoting social and economic inclusion,[661] the land use schemes should contain provisions that promote the insertion of affordable housing in residential land development.[662]

Moreover, section 24(2)(b) requires a land use scheme to take into account any environmental management instrument as well as comply with environmental legislation generally. This once again affirms SPLUMA's commitment to promoting inter-sectoral cooperation and cooperation between different governmental departments and functionaries in order to promote the goals of SPLUMA, set out in

[656] *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 6 SA 633 (SCA) 68.
[657] J van Wyk *Planning Law* 3 ed (forthcoming) 223.
[658] SPLUMA s 23(1)(a). See also SPLUMA s 23(1)(b).
[659] SPLUMA s 24(2)(a).
[660] SPLUMA s 24(2)(c).
[661] SPLUMA s 3(b).
[662] SPLUMA s 24(2)(d).

section 3 of the Act. Overall, SPLUMA represents a much more holistic and all-encompassing approach to planning.

Critically, land use schemes should carry out the desired intent of the municipal spatial development frameworks and integrated development plans.[663] Section 25 of SPLUMA relates to the purpose and content of a land use scheme. A land use scheme must be consistent with and give effect to the municipal spatial development framework and promote economic growth;[664] and significantly provide for purposes of spatial justice and social inclusion.[665]

Section 28 of SPLUMA pertains to the amendment of a land use scheme and rezoning. In terms of section 28(1) a municipality is allowed to amend its land use scheme "by rezoning any land considered necessary by the municipality to achieve the development goals and objectives of the municipal spatial development framework."

3 4 7 SPLUMA Chapter 6: Land development management[666]

Chapter 6 of SPLUMA contains provisions relating to municipal land use planning,[667] as well as provisions that aim to regulate the functioning of Municipal Planning Tribunals.[668] In terms of municipal land use planning, section 33(1) of SPLUMA requires that all land development applications be submitted to a municipality as the authority of first instance, unless subsection (2) is applicable.[669]

Municipal Planning Tribunals play an important role, as is set out in SPLUMA. Section 35 of SPLUMA regulates the establishment of the Municipal Planning Tribunal. In terms of section 35(1) of SPLUMA, a municipality is required to establish a Municipal Planning Tribunal to determine land use and development applications within its municipal area.[670]

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[663] SPLUMA s 24(2)(g).
[664] SPLUMA s 25(1)(a).
[665] SPLUMA s 25(1)(b).
[666] Land development management consists of the procedures and decision-making processes involved in the determination of applications to change land use. These developments include the foundation and development of new townships and settlements, subdivision and consolidation of land, building, and the erection of security estates and gated communities. J van Wyk *Planning Law* 2 ed (2012) 57.
[667] SPLUMA Ch 6 Part A.
[668] SPLUMA Ch 6 Part B.
[669] S 33(2) holds: "Despite subsection (1), where an application or authorisation is required in terms of any other legislation for a related land use, such application must also be made or such authorisation must also be requested in terms of that legislation."
[670] However, in some cases such land use and land development applications may be determined by an official employed by the municipality. SPLUMA s 35(2).

In deciding an application, the Municipal Planning Tribunal is required to be guided by the development principles set out in Chapter 2, which includes the principle of spatial justice.[671] The Municipal Planning Tribunal is also required to take the respective rights of all affected as well as the constitutional transformation imperatives into account.[672] Furthermore, the Municipal Planning Tribunal must take note of the public interest.[673]

3 4 8 SPLUMA Chapter 7: General provisions

SPLUMA Chapter 7 contains general provisions. It sets out the requirements for regulations, which are to be consistent with the Act and may prescribe national norms and standards, policies and directives pertaining to spatial development planning, land use management and land development.[674]

The regulations required in terms of SPLUMA must be consistent with SPLUMA in prescribing the implementation measures required to give effect to the development principles contemplated in Chapter 2 of the Act.[675]

3 4 9 Schedules 1 and 3 of SPLUMA

Schedule 1 provides for a number of matters to be addressed in provincial legislation regulating land development, land use management, township establishment, spatial planning, subdivision of land, consolidation of land, the removal of restrictions and other matters related to provincial and municipal planning respectively. These matters include procedures in relation to the formalisation or incremental upgrading of informal settlement areas, including measures related to tenure, land use control and the provision of services to these areas.[676]

Schedule 3 provides for the repeal of previously problematic or inappropriate laws in their entirety, such as the Removal of Restrictions Act,[677] the Physical Planning

[671] SPLUMA s 42(1).
[672] SPLUMA s 42(1)(c)(iv) and (ii) respectively. The specific transformation-related duties are not further expanded on in this subsection.
[673] SPLUMA s 42(1)(c)(i).
[674] SPLUMA s 54(1)(b).
[675] SPLUMA s 54(1)(c).
[676] SPLUMA Sch1(g)(viii). Provinces are obligated to enact new legislation to address these issues.
[677] 84 of 1967.

Acts,[678] the Less Formal Township Establishment Act[679] and the Development Facilitation Act.[680]

3 4 10 Conclusion of SPLUMA and spatial justice

It is clear that an important development principle in SPLUMA, spatial justice, which is also contained in prominent policy documents applicable to the urban context, forms an integral part of the new spatial planning framework Act. Not only are the components of spatial justice, as it has to be understood in relation to planning measures, set out in detail,[681] but the elements contained in section 7(a) are also echoed in numerous other sections in SPLUMA which intend to guide the use of planning instruments.

From the outset, SPLUMA emphasises that planning should be "inclusive, developmental, equitable and efficient."[682] The fact that the Act applies throughout South Africa[683] is also an indication of the attempt to include previously excluded areas and correct the fragmentation resulting from past planning practices.

The objects of the Act also emphasise that the new system of spatial planning and land use management must promote social and economic inclusion,[684] redress the imbalances of the past and ensure that there is equity in the application of spatial development planning and land use management systems.[685] These objects in particular support the overall goal of achieving spatial justice.

SPLUMA furthermore addresses issues that could impact on the effective implementation of spatial justice, such as insufficient governmental support, by adding a chapter intended to provide for intergovernmental support.[686] The Act also sets out

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[678] 88 of 1967 and 125 of 1991.
[679] 113 of 1991.
[680] 67 of 1995.
[681] SPLUMA s 7(a)(i)-(vi).
[682] Preamble to SPLUMA.
[683] SPLUMA s 2(1) states:
"This Act applies to the entire area of the Republic and is legislation enacted in terms of –
(a) section 155(7) of the Constitution insofar as it regulates municipal planning; and
(b) section 44(2) of the Constitution insofar as it regulates provincial planning."
[684] SPLUMA s 3(c).
[685] SPLUMA s 3(f).
[686] SPLUMA Ch 3.

measures to regulate the preparation of spatial development frameworks,[687] which form a part of the spatial planning system in South Africa.[688]

In this discussion, SDFs have been contextualised as important parts of IDPs and an integral part of the South African spatial planning system.[689] SDFs are designed to eradicate the remnants of past spatial injustices.[690] Moreover, in the chapters which are intended to regulate land use management[691] and land development management,[692] there are numerous provisions that may promote spatial justice in an urban land reform context. In summary, SPLUMA contains many provisions that aim to promote spatial justice.[693]

3 5 Conclusion of chapter

As explained, space produces and is produced by social relationships, which are sometimes unequal. To understand space in this manner requires challenging the view that space is neutral or abstract. It requires recognition of the fact that space is political.

There are attempts to find methods of moving towards the goal of spatial justice and simultaneously to minimise the negative environmental burden of urban sprawl.[694] As has become clear from the discussion in Chapter 2,[695] urban policy during apartheid was inextricably linked to apartheid spatial planning, with legislation such as the Group Areas Act[696] having far-reaching effects in relation to segregation in cities in particular.[697] These concerns and challenges have remained, despite the demise of apartheid.

In order to understand the concept of spatial justice in an urban context better, this chapter has provided a theoretical foundation of the concept of spatial justice with

[687] SPLUMA Ch 4.
[688] SPLUMA s 4(a).
[689] See SPLUMA s 4(a).
[690] Refer again to SPLUMA s 12(1)(i).
[691] SPLUMA Ch 5. See 3 4 6 of the discussion.
[692] SPLUMA Ch 6. See 3 4 7 of the discussion.
[693] See chapter 4 for an evaluation of SPLUMA's measures to promote spatial justice in an urban land reform context.
[694] A Mabin "Spatial Justice as Viewed from Gauteng" in S Fol, S Lehman-Frisch & M Morange (eds) *Ségrégation et Justice Spatiale* (2013) 335 350.
[695] See Chapter 2 2.
[696] 41 of 1950.
[697] U Pillay "Urban policy in post-apartheid South Africa: Context, evolution and future directions" (2008) 19 *Urban Forum* 109 113.

reference to some of the leading authors in the field. By tracing the origins and development of the concept of spatial justice and by placing it next to the notion of the right to the city, this chapter has provided a deeper understanding of the concept and its value for challenging conventional understandings of the role of law in space. This was ultimately done in order to promote a vision of justice that is truly inclusive, as is embedded in SPLUMA,[698] and which is compatible with the Constitution.[699]

Having laid that foundation, the discussion turned to the most important policy documents and to whether these documents embodied or referred to spatial justice, having regard to the theoretical dimension, specifically the NDP of 2012 and the IUDF of 2016. As SPLUMA is the core measure, the focus then turned to this Act, specifically regarding its potential to promote inclusion and opportunities for all and thereby promote spatial justice in an urban context. Analysis in this chapter indicated a need for a holistic and comprehensive approach, based on a hierarchical set of frameworks and plans, all aligned to fit and work together. The question remains whether such an integrated approach would in theory as well as practice inevitably achieve spatial justice. Phrased differently: Would spatial justice, as it is set out in SPLUMA, with an understanding of the broader context within which the principle has developed and exists, be achieved in an urban land reform context through the use of SPLUMA? This question is explored in more detail forthwith.

[698] S 7(a).
[699] Specifically ss 25(5) and 25(6), but also the right to equality (s 9) and the right to dignity (s 10).

Chapter 4: An evaluation of SPLUMA's ability to promote spatial justice in an urban land reform context

4 1 Introduction

This study focuses on whether the provisions of the Spatial Planning and Land use Management Act 16 of 2013 ("SPLUMA") may be used to effectively promote spatial justice in an urban land reform context. To this end, it has been necessary to expand on certain concepts and contexts, such as the background against which SPLUMA was promulgated, as well as circumstances giving rise to the need for urban land reform, the latter being embedded in the Constitution of the Republic of South Africa, 1996 (the "Constitution").[700]

In the second chapter, the main challenges related to spatial injustices in informal settlements giving rise to the need for urban land reform were set out. The former legislative framework, which included measures to restrict movement, as well as a number of planning-focused pieces of legislation, were also expanded on.[701] It has become clear that the need for land reform, both rural and urban, as is envisioned in the Constitution,[702] is largely connected to the historic spatial injustices suffered by many South Africans.[703]

In the third chapter the notion of spatial justice as it has come to be understood, in relation to concepts such as the right to the city and as a notion adopted in prominent South African policy documents,[704] was explored. The alignment of particular policy documents and SPLUMA in relation to the potential of the concept of spatial justice in the context of informal settlements was also set out. This set the stage for the discussion of SPLUMA and how the tools and mechanisms embedded therein may be

[700] See JM Pienaar *Land Reform* (2014) 167-191.
[701] See Chapter 2 2. The three pillars of apartheid consisted of influx control measures, racial spatial measures (like group areas legislation) and measures for the prevention of illegal squatting. See JM Pienaar "'Unlawful Occupier' in Perspective: History, Legislation and Case Law" in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309 310-313.
[702] S 25(5)-(9).
[703] In this regard, Van Wyk and Oranje explain that both the new spatial planning system and the Bill of Rights in the Constitution can be seen to be responses to the colonial and apartheid legal planning regimes. J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365.
[704] The National Development Plan ("NDP") and the Integrated Urban Development Framework ("IUDF").

used to promote one of its development principles, spatial justice, especially in the context of urban land reform.

Building on the foundations laid in the earlier chapters, this chapter aims to provide an answer to the overarching question of the extent to which SPLUMA and the mechanisms and tools therein may promote spatial justice in an urban land reform context. In this discussion, it must be borne in mind that there is a definite link between the post-1994 spatial planning system, of which SPLUMA is an integral part, and the Constitution.[705] Therefore, it is necessary to consider the alignment between spatial planning measures and the Constitution, specifically the rights in the Bill of Rights,[706] and suggest some ways in which the alignment could be improved, if necessary.[707] This exercise is important as the alignment, or lack thereof, of SPLUMA and the Constitution, has implications for SPLUMA's efficacy.

The structure of the chapter is accordingly as follows: firstly, an evaluation of whether SPLUMA complies with section 25(1) of the Constitution, among other sections identified as relevant for this discussion; and secondly, some conclusions about SPLUMA's potential to promote spatial justice in the context of informal settlements, with regard to sections 25(5) and (6) of the Constitution specifically, which relate to improved access to land and tenure security respectively.

Inherently tied to the potential impact of SPLUMA, is local government. Accordingly, after the constitutional exploration, the role of local government as a crucial role player

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[705] See J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 357-358 which sets out the key features of the new spatial planning system to be a "complex mix of the pursuit of 'the diametric opposite of the earlier apartheid model', progressive social and economic objectives, neo-liberal persuasions and dominant international planning wisdoms..." See also J van Wyk *Planning Law* 2 ed (2012) 2-7, 581-586 for an exposition of the impact of the new constitutional dispensation on the development of planning law post 1994. See specifically 76-87 for a discussion of the far-reaching impact the introduction of the Constitution and specifically the Bill of Rights has had on planning law as a whole. Some rights in the Bill of Rights apply directly, while others apply indirectly to planning law, Van Wyk explains. This forms a large part of the discussion that follows. Van Wyk also highlights the inherent tension between certain rights in the Bill of Rights, specifically between s 25(1) (property) and s 26(1) (housing). J van Wyk *Planning Law* 2 ed (2012) 86. It is therefore clear that balancing the rights enshrined in the Bill of Rights is often challenging. Furthermore, constitutional rights do not function in isolation. See S Liebenberg & B Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution" (2007) 23 *SAJHR* 335-361 as well in this regard.

[706] Such as the rights to equality (s 9), dignity (s 10), environment (s 24), property (s 25), housing (s 26) and possibly also water (s 27).

[707] Van Wyk and Oranje explain that "the spatial planning system needs the backing and support of the Bill of Rights" as much as the Bill of Rights needs to be in line with the spatial planning system. J Van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365.

in the implementation of planning measures is considered.[708] In this regard, there are a number of challenges for local government in the planning sphere, which may impact on the efficacy of SPLUMA to promote spatial justice in a land reform context.[709] There are also other issues which may limit the potential of SPLUMA to promote spatial justice in the context of informal settlements. These challenges are briefly set out before conclusions as to the efficacy of SPLUMA are drawn and the chapter is concluded.

4 2 The alignment between SPLUMA, land reform measures and the Constitution

4 2 1 Introduction

As was alluded to at the start of this chapter, a central question of this thesis relates to the alignment between SPLUMA, land reform measures and the Constitution. Van Wyk and Oranje set out the link between the start of the new constitutional dispensation and the redesign of the South African spatial planning system, of which the enactment of SPLUMA is an integral part, in the following way:

> "The peaceful transition to democracy of South Africa in 1994 not only brought an end to a universally condemned draconian system of government, but also spurred the prospect of achieving something truly remarkable in the 'new' country in the years to come. In the immediate afterglow of the miracle, the country not only adopted a much-envied progressive Constitution with an equally admired Bill of Rights, but also embarked on a process of remaking its colonially inspired and tainted spatial planning system."[710]

[708] Van Wyk emphasises the role of municipalities, along with other organs of state, in the progressive realisation of fundamental rights contained in ss 25 and 26 of the Constitution. J van Wyk *Planning Law* 2 ed (2012) 595.

[709] Van Wyk argues that local government is generally unsuccessful in fulfilling their developmental duties. J van Wyk *Planning Law* 2 ed (2012) 593-596. See, for example, *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others* 2001 4 SA 294 (C); *Van Rensburg and Another NNO v Nelson Mandela Metropolitan Municipality and Others* 2008 2 SA 8 (SE) and *Walele v City of Cape Town and Others* 2008 6 SA 129 (CC).

[710] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 350.

The Constitution is a transformative[711] document and it is imperative that all legislation be interpreted through this prism.[712] It is in this context that SPLUMA's provisions are considered, given constitutional obligations and mandates. Of relevance here are the founding provisions of the Constitution, as well as particular rights in the Bill of Rights that are of specific importance to spatial justice, including the sections intended to guide the actions of local government, which plays a critical role in planning.[713]

4 2 2 Founding provisions

Section 7(1) of the Constitution states that the Bill of Rights acts as an instrument which "enshrines the rights of all the people in our country and affirms the democratic values of human dignity, equality and freedom". Furthermore, section 39 of the Constitution contends that all the rights in the Bill of Rights must be interpreted so as to promote the constitutional vision of the creation of an "open and democratic society based on human dignity, equality and freedom". Finally, section 36 of the Constitution states that the rights may only be limited to the extent that it is justifiable in such a society. Accordingly, SPLUMA must be interpreted and applied in terms of these mandates, which are in line with the promotion of the principle of spatial justice as it is set out in section 7(a) of SPLUMA.

Due regard must be had to section 33 of the Constitution, pertaining to administrative justice, as embodied in the Promotion of Administrative Justice Act ("PAJA").[714] In this context, decisions which are taken by organs of state in terms of land legislation may constitute "administrative action" for purposes of PAJA and may be reviewable in terms of section 7 of PAJA.[715]

Van Wyk and Oranje also point to a "mini bill of rights" contained in sections 152 and 153 of the Constitution, relating to the role of local government.[716] Moreover, they

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[711] KE Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146-188.
[712] AJ van der Walt "Transformative constitutionalism and the development of South African property law" 2005 *TSAR* 655-689; 2006 *TSAR* 1-31. See also *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 157. For more on transformative constitutionalism, see D Moseneke "The fourth Bram Fischer memorial lecture: Transformative adjudication" (2002) 18 *SAJHR* 309-319; M Pieterse "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *SAPL* 155-166.
[713] S 25.
[714] 3 of 2000. See generally C Hoexter *Administrative Law in South Africa* 2 ed (2012).
[715] See J van Wyk *Planning Law* 2 ed (2012) 166-180 for an exposition on the main principles of the right to administrative action which are applicable in a planning context.
[716] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 354.

argue that section 195 of the Constitution contains another "mini bill of rights", which pertains to the significance of the role of public administration in planning matters.[717] Finally, critically, Van Wyk and Oranje highlight the necessity of including property and housing rights in the Bill of Rights, in the context of the country's history.[718]

While the founding provisions of the Constitution are direction-giving for purposes of this discussion, it is critical to focus in particular on rights in the Bill of Rights that are pertinent to the concept of "spatial justice" as embodied in SPLUMA. To that end the next section focuses on the rights to equality, dignity, the property clause, as well as some provisions relevant for developmental government purposes.

4 2 3 The rights to equality and dignity

4 2 3 1 The right to equality as set out in the Constitution

Van Wyk and Oranje explain that in the investigation of the compatibility of the Bill of Rights with the new spatial planning system, exemplified by SPLUMA, the nature of the right being discussed must be taken into account.[719] In this regard, it is contended that rights, such as the rights to equality and human dignity, set out in more detail below, are normative in nature and their impact can hardly be quantifiably determined.[720] This provides some difficulty for the evaluation of the achievement or non-achievement of these rights in relation to the planning system.[721] However, despite the aforementioned difficulties, some attempt to understand the alignment (or lack thereof) between SPLUMA and the Bill of Rights, specifically focusing on the land reform programme, will be embarked on in the next section.

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[717] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 354.
[718] Ss 25 and 26 of the Constitution. J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 364.
[719] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366.
[720] Van Wyk and Oranje contrast these rights with the right of access to adequate housing, which is easier to quantify. J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366.
[721] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366. They explain that this situation "...makes the meaningful determination of the role and place of each of the rights vis-a-vis the planning system difficult, especially where the terrain is a novel one."

As explained, the Bill of Rights requires viewing all aspects of law through a transformative lens.[722] Central to the Bill of Rights are the rights to equality[723] and human dignity,[724] and the transformative lens means that these rights have to be borne in mind in the application of the law.[725] The right to equality is critically important because of the historic inequality in South Africa.[726] Van Wyk explained that the constitutional right to equality required that old order planning legislation, based on racial spatial planning, had to be replaced with new legislation that would be in line with the constitutional conception of equality.[727]

4 2 3 2 The right to human dignity as set out in the Constitution

Another relevant right is the right to human dignity.[728] This right is integrally connected to the promotion of spatial justice in the context of urban land reform measures. In *Carmichele v Minister of Safety and Security*[729] it was explained that human dignity is an integral part of the "objective, normative value system" as set out in the Constitution, which states that the Republic of South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms".[730] Speaking on the relation of the right to dignity to the right to life, O'Regan J explained that:

> "[t]he importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and

[722] AJ van der Walt "Transformative constitutionalism and the development of South African property law" 2005 *TSAR* 655-689; 2006 *TSAR* 1-31.
[723] S 9 of the Constitution.
[724] S 10 of the Constitution.
[725] See *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 157. For more on transformative constitutionalism, see: KE Klare "Legal culture and transformative constitutionalism" (1998) 14 *SAJHR* 146-188; D Moseneke "The fourth Bram Fischer memorial lecture: Transformative adjudication" (2002) 18 *SAJHR* 309-319; M Pieterse "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *SAPL* 155-166; S Liebenberg "Needs, rights and transformation: Adjudicating social rights" (2006) 1 *Stell LR* 1-36; AJ van der Walt "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1-47. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 262 and *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 142.
[726] S Terreblanche *A History of Inequality in South Africa: 1652-2002* (2002).
[727] J van Wyk *Planning Law* 2 ed (2012) 583.
[728] S 10 of the Constitution sets out the right to human dignity: "Everyone has inherent dignity and the right to have their dignity respected and protected." See also S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1-31; A Chaskalson "Human dignity as a foundational value of our constitutional order" (2000) 16 *SAJHR* 193-205.
[729] 2001 4 SA 938 (CC) para 56.
[730] S 1 of the Constitution.

> concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]."[731]

The right to dignity is evidently relevant in a number of contexts. In the case of *Port Elizabeth Municipality v Various Occupiers*[732] it was confirmed that the forcible eviction of people from their homes and the demolition of their homes without an order of court was an infringement of their right to human dignity.[733] In the case of *Daniels v Scribante*[734] as well, the inextricable link between human dignity and security of tenure was emphasised. Although the *Daniels v Scribante*[735] case did not deal with urban contexts, which is the focus of this study, it remains relevant and ground-breaking, for a number of reasons, including the fact that:

> "this judgment highlighted unequivocally the link between redress – as a consequence of historical imbalances, access to housing and tenure security – and human dignity."[736]

The judgment is also relevant as it draws attention to the function of the concept of property in South Africa and the urgent need to reconsider and reimagine ownership, considering relevant requirements.[737] In *Daniels* it was highlighted that human dignity had to be restored in the same way that the historical "poor white" problem had been dealt with in previous years.[738] To some extent that redress was also tied to spatial justice. In the context of land reform, the urgency of dealing with tenure, and related issues – including the link with dignity – was underlined.[739]

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[731] *S v Makwanyane* 1995 3 SA 391 (CC) para 328.
[732] 2005 1 SA 217 (CC) para 11.
[733] See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 3 SA 454 (CC) para 231.
[734] 2017 4 SA 341 (CC) para 2. Madlanga J underlined that "[t]here can be no true security of tenure under conditions devoid of human dignity."
[735] 2017 4 SA 341 (CC).
[736] JM Pienaar, E Johnson & W du Plessis "Land matters and rural development: 2017(1)" (2018) 33 *SAPL* 1 18. It is furthermore contended that "[t]he Afrikaans version is a poignant, beautifully written judgment that underscores and acknowledges the injustices of the past – in general, but also specifically with regard to farm land, rural areas and the class and racial distinctions that evolved in these arenas. It was in this context that human dignity was crucial…" JM Pienaar, E Johnson & W du Plessis "Land matters and rural development: 2017(1)" (2018) 33 *SAPL* 1 23.
[737] JM Pienaar, E Johnson & W du Plessis "Land matters and rural development: 2017(1)" (2018) 33 *SAPL* 1 23.
[738] JM Pienaar, E Johnson & W du Plessis "Land matters and rural development: 2017(1)" (2018) 33 *SAPL* 1 23. See para 70 of the *Daniels v Scribante* judgment.
[739] JM Pienaar, E Johnson & W du Plessis "Land matters and rural development: 2017(1)" (2018) 33 *SAPL* 1 39.

The right to human dignity, as enshrined in the Constitution, is linked to other important rights, such as those contained in sections 9 (equality), already alluded to above, as well as to 25(6), relating to security of tenure, and 26 (access to adequate housing).[740]

Van Wyk explains simply that the planning of land use has to support the poor by tending to their housing and living conditions and that informal settlement areas have to be incorporated into all spatial plans.[741] In this way, the human dignity of those living in informal settlement areas is considered and promoted. SPLUMA, in its development principles, broadly incorporates previously disadvantaged communities and informal settlements.[742] It is consequently clear that the spatial justice development principle, as set out in SPLUMA, is in line with the constitutional principle of human dignity at an overarching level.

4 2 4 Section 25 of the Constitution: The property clause

4 2 4 1 Introduction to the property clause

Having briefly set out SPLUMA's spatial justice principle in relation to the rights of equality and human dignity as enshrined in the Constitution, the discussion turns to a critical section in the Constitution for purposes of this discussion: the property clause.

To place the property clause and the land reform programme in context, a brief exposition of the development of the land reform programme as it is currently embedded in the Constitution follows, before the focus is placed on two parts of the land reform programme, specifically: redistribution[743] (i.e. the promotion of access to land) and security of tenure,[744] in order to ascertain whether SPLUMA may promote spatial justice in the context of these two land reform programmes in particular.

[740] See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 268-316; M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428.
[741] J van Wyk *Planning Law* 2 ed (2012) 583.
[742] See SPLUMA s 7(a)(iv) and (v).
[743] S 25(5) of the Constitution.
[744] S 25(6) of the Constitution.

4 2 4 2 A brief overview of the development of land reform

Land reform has broadly been defined as "the redistribution of property rights in agricultural land".[745] It is furthermore argued that "[l]and reform performs an important symbolic function in the 'new' South Africa as tangible evidence of a nation addressing historical injustice as part of a wider process of nation-building."[746] The desperate demand for land is clear in the context of numerous land occupations in urban and rural areas.[747]

In the past, oppressive land control measures were implemented against poverty-stricken urban and rural communities in South Africa, which created and intensified inequality at various levels.[748] It is argued that this inequality has not sufficiently been addressed and has in fact been preserved by a Constitution which protects private property and in so doing slows down the redistribution of land.[749]

The mere abolition of past racially discriminatory measures is consequently not sufficient to promote equality in the distribution of and access to land.[750] In light of these considerations, the government decided to introduce measures to rectify the spatial inequality.[751] The land reform programmes are especially relevant here. The development of land reform in South Africa is broadly divided into two phases: the exploratory phase (or the first phase) and the second, all-encompassing phase.[752] Pienaar explains that the publication of the *White Paper on Land Reform (the "White Paper")*,[753] as well as corresponding legislation in 1991, officially mark the start of the first, or exploratory, phase of land reform.[754]

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[745] H Bernstein "Agrarian Questions of Capital and Labour: Some Theory About Land Reform (and Periodisation)" in R Hall & L Ntsebeza (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 27 27.
[746] R Hall "A political economy of land reform in South Africa" (2004) *Review of African Political Economy* 213 214.
[747] R Hall "A political economy of land reform in South Africa" (2004) *Review of African Political Economy* 213 222.
[748] See in general JM Pienaar "'Unlawful Occupier' in Perspective: History, Legislation and Case Law" in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 309-329.
[749] S Moyo "The Land Question in Southern Africa: A Comparative Review" in R Hall & L Ntsebeza (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 60 60. See generally R Hall "A political economy of land reform in South Africa" (2004) *Review of African Political Economy* 213-227.
[750] R Hall & L Ntsebeza "Introduction" in R Hall & L Ntsebeza (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2007) 1 11.
[751] C Alden & W Anseeuw *Land, Liberation and Compromise in Southern Africa* (2009) 92.
[752] See JM Pienaar *Land Reform* (2014) 153-166 for a discussion of the two phases of land reform.
[753] WP B-91.
[754] JM Pienaar *Land Reform* (2014) 154.

The *White Paper* set out three policy goals: the broadening of access to land for the whole population, the upgrading of the quality and security of land titles, and the utilisation of land as a national asset.[755] Pienaar underlines that a point of departure of the *White Paper* was that access to land is a basic human right.[756] However, the exploratory land reform phase was by no means all-encompassing or far-sighted; rather, the material provisions designed for tenure reform, redistribution and restitution in this phase were inherently restricted.[757]

The second phase of land reform is characterised by both the constitutional embeddedness[758] thereof as well as an accompanying detailed policy framework.[759] Pienaar explains that the focus on reform, specifically in the property clause, in the final Constitution has significant implications for the relevant role players, particularly in the context of property law and land reform.[760]

Pienaar notes that land reform, even in its current form, has limits in its potential to reverse the legacy of inequality and to promote transformation in society as a whole and, consequently, that systemic and institutional reforms are also needed to address these issues.[761] She believes that the restructuring of property law, together with the implementation of land reform measures, may lead to the necessary changes.[762]

Van Wyk and Oranje furthermore reiterate that South Africa's history, property and land is characterised by "dispossession, discrimination and a totally separate spatial planning system based on race."[763] These authors underline the significance of the

[755] White Paper on Land Reform (1991) 1-2.
[756] JM Pienaar *Land Reform* (2014) 154. See the *White Paper on Land Reform* (WP B-91) 1-2. The other point of departure in the *White Paper* contended that free enterprise and private ownership were the suitable means to fulfil the policy goals as set out.
[757] JM Pienaar *Land Reform* (2014) 166.
[758] See s 28 of the interim Constitution and s 25 of the final Constitution. See HJ Kloppers & GJ Pienaar "The historical context of land reform in South Africa and early policies" (2014) 17 *PELJ* 677 677 for a reference to the strong constitutional basis of land reform. See generally AJ Van der Walt *Constitutional Property Law* 3 ed (2011).
[759] JM Pienaar *Land Reform* (2014) 167.
[760] JM Pienaar *Land Reform* (2014) 167. See also AJ van der Walt *Constitutional Property Law* 3 ed (2011).
[761] JM Pienaar *Land Reform* (2014) 168.
[762] JM Pienaar *Land Reform* (2014) 168.
[763] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 352. See HJ Kloppers & GJ Pienaar "The historical context of land reform in South Africa and early policies" (2014) 17 *PELJ* 679 - 686 for a discussion of the legislative framework that facilitated territorial segregation.

first right mentioned in the Interim Constitution being the right to equality, as it had a pertinent influence on the other rights, and specifically on the property clause.[764]

The conflict surrounding the inclusion of the property clause in the South African Constitution points to the pertinent role of land, not only in an economic context, but in a cultural setting as well.[765] Accordingly, Van Wyk and Oranje suggest that legal measures must be employed to facilitate the use of well-located, specifically public land, in the assistance of previously disadvantaged people to access affordable housing.[766] It is clear that, even though land reform is essential, it cannot alleviate all land-related problems on the one hand, and it is integrally tied to other factors or elements that could, together, promote success and efficacy, on the other. Planning law or spatial planning instruments are thus also relevant in this overall endeavour.

4 2 4 3 SPLUMA and Sections 25(1)-(3) of the Constitution

Section 25, the property clause, has to be interpreted with due regard to its historical context.[767] For example, in the *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape*[768] case, Froneman J states the following:

> "In the introduction to this judgment, mention was made of the contested nature of our country's conversation about the protection of property and the potential danger this holds for the success of our constitutional project. We need to be open about why this is so. The explanation lies in our history and in the pre-constitutional conception, which entailed exclusive individual entitlement."[769]

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[764] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 352. See furthermore JM Pienaar *Land Reform* (2014) 168-172 for a discussion of the land reform programme in terms of the interim Constitution.

[765] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 364. See also AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 522-524. Furthermore, see JM Pienaar *Land Reform* (2014) 200-203 for the economic, geographical, political, social, cultural and demographic, among other, contextualisations of the land issue.

[766] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 364.

[767] T Ngcukaitobi & M Bishop *The Constitutionality of Expropriation Without Compensation*" (2018) Presented at the Constitutional Court Review IX Conference held at the Human Rights Room, Old Fort, Constitution Hill, Braamfontein, Johannesburg (2-08-2018) 2.

[768] 2015 6 SA 125 (CC).

[769] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape* 2015 6 SA 125 (CC) para 34.

Although reform is specifically provided for in the property clause, and although SPLUMA is aligned with the founding sections of the Constitution, as well as sections 9 and 10 in particular, it has been pointed out above that all legislation has to be considered via the lens of the Constitution. This means that all legislative measures, including SPLUMA, have to pass constitutional muster. Part of this exercise is to determine whether SPLUMA specifically complies with section 25, in particular the first two subsections of section 25. This exercise will be followed by a discussion as to SPLUMA's ability to promote spatial justice in terms of section 25(5), relating to access to land and 25(6), relating to security of tenure.

The property clause is divided into two parts: the first part (section 25(1) – (3)) protects existing property rights and interests against interference by the state which is unconstitutional and the second part (section 25(5) – (9)) contains the transformative thrust. The latter part thus includes land reform specifically, as well as imperatives to reform the law dealing with natural resources.[770]

Critically, questions of arbitrary deprivation of property and the payment of "just and equitable compensation" are still relevant and enjoy the attention of courts, specifically in cases where issues of redress for past dispossession are relevant, as well as in issues surrounding the redistribution of land.[771] This remains the case, despite current developments linked to the possible amendment of section 25.[772]

A measure like SPLUMA, in its goal to promote spatial justice, impacts on private landowners' property. The question, however, is whether such impact contravenes the parameters set out in section 25. If that is indeed the case, the legislative measure stands to be declared unconstitutional, with corresponding implications for its potential to promote spatial justice. While it is important to confirm that SPLUMA indeed complies with section 25, an in-depth constitutionality analysis of SPLUMA is not the

[770] See generally AJ Van der Walt *Constitutional Property Law* 3 ed (2011).
[771] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 364.
[772] JM Pienaar "Land Reform" (2018) 4 *Juta's Quarterly Review of South African Law* 1 2. See also T Ngcukaitobi & M Bishop *The Constitutionality of Expropriation Without Compensation*" (2018) Presented at the Constitutional Court Review IX Conference held at the Human Rights Room, Old Fort, Constitution Hill, Braamfontein, Johannesburg (2-08-2018); N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35 *SAJHR* 129-146.

main focus of this study.[773] Instead, only a very brief analysis, following the *FNB*-methodology, is sufficient here. The test for whether a deprivation was procedurally or substantively arbitrary was established in the *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* (*"FNB"*)[774] case in the form of questions which can, for purposes of this discussion, be summarised as follows:[775]

(a) "Does the law or conduct complained of affect 'property' as understood by s 25?
(b) Has there been a deprivation of the property by the law or conduct?
(c) If there has, is the deprivation consistent with the provisions of s 25(1)?
(d) If not, is the deprivation justified under s 36 of the Constitution?
(e) If it is, does it amount to expropriation for the purpose of s 25(2)?
(f) If so, does the deprivation comply with the requirements of s 25(2)(a) and (b)?
(g) If not, is the expropriation justified under s 36?"[776]

The next step is to ascertain how SPLUMA fares, given the list of questions above.[777] These questions will be considered in detail below.

(a) Does the law or conduct complained of affect "property" as understood by section 25?[778]

(b) Has there been a deprivation of property by the law or conduct?

The Constitution offers very little guidance as to what does or does not constitute property, other than the fact that property is not restricted to land.[779] In the *FNB* case,

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[773] For examples of in-depth constitutional analyses using s 25, see P Dhliwayo *A Constitutional Analysis of Access Rights that Limit Landowners' Right to Exclude* LLD Dissertation Stellenbosch University (2015); N Sono *Development of the Law Regarding* Inaedificatio: *A Constitutional Analysis* LLM Thesis Stellenbosch University (2014) and BV Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* LLM Thesis Stellenbosch University (2010).

[774] 2002 4 SA 768 (CC). This case resolved some uncertainties about the interpretation of s 25(1) and advanced a new methodology for resolving s 25(1) disputes. Critically, this methodology impacts on the application of all the requirements in s 25 and therefore must be taken into account before the individual requirements are considered. AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 220 and 190-333 generally.

[775] See *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 46.

[776] K Iles "Property" in I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 534.

[777] S 25.

[778] See AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 111 where Van der Walt confirms that "[t]he *FNB* decision established that … the claimant in a constitutional property dispute has to prove the existence of a recognised property interest as a threshold matter, before it can be established whether there had been a deprivation or expropriation that needs to comply with the requirements in section 25."

[779] S 24(4)(b) of the Constitution. See AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 112.

the court was very hesitant to attempt to define "property".[780] The Constitutional Court confirmed, in the *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* ("*First Certification"*) case, that there is "no universally recognised formulation of the right to property".[781]

By regulating zoning, SPLUMA allows for the interference of the use of "property" as understood by section 25.[782] Section 25(1) of the Constitution sets out two formal legal requirements for the deprivation of property. In terms of the first requirement, the deprivation has to take place in terms of a law of general application, and the second requirement stipulates that no law may permit arbitrary deprivation. Van der Walt moreover argues that there is an additional requirement that the envisioned deprivation should have a legitimate public purpose or serve the public interest.[783] Therefore, the first two legal requirements at least guarantee that any deprivation of property will not occur without the due process of the law.[784]

However, in the *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*[785] case, the Constitutional Court departed from this position, stating that the

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[780] *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 51.
[781] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 72.
[782] In *Pick 'n Pay Stores Ltd and Others v Teazers Comedy and Revue CC and Others* 2000 3 SA 645 (W) at para 656H, it was explained that zoning constitutes a limitation or condition restricting the exercise of ownership. See J van Wyk *Planning Law* 2 ed (2012) 248-268 for a discussion on what zoning entails. See also generally V Nel "SPLUMA, zoning and effective land use management in South Africa" (2015) 27 *Urban Forum* 1.
[783] AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 219. See the discussion in AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 225-232 where Van der Walt explains how foreign jurisdictions tend to require that deprivations must take place for a public purpose or in the public interest.
[784] AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 219. See also K Iles "Property" in I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 538. In terms of the *FNB* methodology, expropriation forms part of deprivation. *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 60, 100. Therefore, in terms of the methodology, all limitations of property are viewed as sub-sets of deprivations and have to be measured against the requirements of s 25(1) before it can be considered whether the limitation amounts to an expropriation and whether such measures pass constitutional muster. The requirements for ascertaining whether a limitation amounts to an expropriation are set out in s 25(2).
[785] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) para 32. See also AJ van der Walt "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* (CC)" (2005) 122 *SALJ* 75-89 for criticism of the *Mkontwana* judgment.

relevant consideration should be whether there had been "substantial interference" rather than whether interference went beyond what is considered "normal".[786]

By using land use schemes which are based on zoning, SPLUMA allows deprivations of property.[787]

(c) If there has, is the deprivation consistent with the provisions of section 25(1)?

Having established that SPLUMA does indeed authorise deprivations, as considered in the above sections, the following discussion centres on whether the requirements for deprivations, as set out in section 25(1) of the Constitution, are met.

(i) Law of general application

In terms of section 25(1) of the Constitution, any deprivation of property must, firstly, be authorised by a law of general application. The second requirement for the deprivation of property is that the deprivation may not be arbitrary. This section considers the first formal requirement. The requirement of a law of general application is similarly set out in section 36 of the Constitution, which allows the limitation of fundamental rights, but only "in terms of law of general application." This law of general application requirement "determines" that it is only possible to limit rights, firstly, where it is indeed authorised by law and, secondly, where the law in question burdens a so-called "abstract class".[788]

It is clear that SPLUMA is a law of general application, as it is a law which applies to the entire area of the Republic and impacts on all persons.[789]

(ii) Arbitrariness

Next, it must be noted that, even if a deprivation was in fact authorised by a law of general application, the deprivation will still be regarded as unconstitutional if the

[786] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) para 32. See AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 204-206 for a discussion of the decision and 209-211 generally.
[787] V Nel "SPLUMA, zoning and effective land use management in South Africa" (2015) 27 *Urban Forum* 1 3. Van Wyk underlines that, in a constitutional context, restrictive conditions are categorised under land management planning. J van Wyk *Planning Law* 3 ed (forthcoming) 316.
[788] K Iles "Property" in I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 539-540.
[789] SPLUMA s 2.

deprivation of property is arbitrary.[790] Accordingly, deprivations of property are arbitrary if they do not take place in line with due process, both in a procedural and a substantive sense.[791] Procedural due process refers to the fact that the deprivation of property is required to be in line with fair procedures and substantive due process in this context refers to the notion that a deprivation of property cannot be arbitrary in substance.[792] Essentially, in the *FNB* case, the court unequivocally stated that a deprivation which is procedurally unfair is arbitrary.[793]

It is furthermore necessary that it should not be arbitrary in its substance. This means that there is a link between the means employed (e.g. planning and zoning measures) and the ends achieved (e.g. orderly planning systems that endorse constitutional imperatives). It is important to note that it is possible to justify a limitation that does not comply with the requirements as set out in section 25(1) of the Constitution, (i.e. a deprivation that is arbitrary) subject to the requirements as set out in section 36(1) of the Constitution.[794] However, it is very unlikely that this will ever be the case, because the formal legal requirements set out in section 25(1) echo the justification requirements of section 36(1).[795]

Van Wyk argues that the property clause, section 25, and the understanding of "deprivation" as it restricts or limits what you are able to do with your property is helpful in the study of planning law, as planning law regulates land use.[796] She explains that the practice of zoning is an example of deprivation, as set out in the property clause.[797] A prominent statute that aims to regulate land use and planning is SPLUMA, the focus of this study.

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[790] T Roux "Property" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 41-1-41-37; Van der Walt AJ *Constitutional property law* 2011 74-78.
[791] See *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 35.
[792] K Iles "Property" in I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 540.
[793] See *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 67 and 100. At para 100, the arbitrariness test was set out as follow: "Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair." See also K Iles "Property" in I Currie & J de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 540.
[794] S 25(8) of the Constitution.
[795] AJ Van der Walt *Constitutional Property Law* 3 ed (2011) 78-79.
[796] J van Wyk *Planning Law* 2 ed (2012) 583.
[797] J van Wyk *Planning Law* 2 ed (2012) 583.

SPLUMA allows zoning and the changing of zoning. In this regard, SPLUMA may be seen as authorising a deprivation of property. However, because this deprivation takes place in terms of a law of general application and because it is not arbitrary, it can be seen to be in line with constitutional imperatives.[798]

In conclusion, SPLUMA is not inconsistent with section 25(1) of the property clause. Given this conclusion, the next step is to consider section 25(5) and (6) of the Constitution, as these subsections have a particular bearing on or can be connected to the notion of spatial justice.

4 2 4 4 Section 25(5) of the Constitution: Promotion of access to land

4 2 4 4 1 Introduction to section 25(5)

Landlessness in an urban context is linked to limited access to land and insecure tenure in urban environments and accordingly urban areas are also in need of land reform measures.[799] In this regard, Pienaar explains that either existing measures have to be amended to broaden access to land to a greater extent, or new measures must be introduced to combat the problem of urban landlessness.[800]

Section 25(5) of the Constitution deals with redistribution and in line with this section, necessary steps must be taken by the state to broaden access to land for South African citizens on an equitable basis. According to the *White Paper on South African Land Policy*,[801] the main aim of the redistribution programme is to provide access to land for the landless for both residential and productive purposes.[802] The *White Paper* furthermore explains:

> "When the redistribution programme was first embarked on, the intention was to assist particularly the urban and rural poor, farm workers, labour tenants and emerging farmers."[803]

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[798] See part 4 4 3 of this chapter for a question about the legitimacy of the use of zoning generally in a South African context.
[799] JM Pienaar *Land Reform* (2014) 208. See furthermore the *White Paper on South African Land Policy* (1997) 69. In this regard, the High Level Panel Report, in the context of spatial inequality, sets out that: "[t]he release of well-situated urban land to mitigate the legacy of the apartheid city is an urgent priority." *High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 33.
[800] JM Pienaar *Land Reform* (2014) 208. Where there is already some form of access to land, tenure must be made more secure. See the discussion under 4 2 3 5 in this chapter.
[801] Department of Land Affairs *White Paper on South African Land Policy* ("*White Paper*") (1997).
[802] S 25(5) should be read with ss 26(1) and (2).
[803] Department of Land Affairs *White Paper* (1997) ix.

Therefore, the policy objectives as set out in the *White Paper* were necessarily interwoven with the property clause in the Final Constitution, also impacting on urban contexts.[804]

4 2 4 4 2 The interpretation of land legislation

In the context of interpreting land legislation, there are a few relevant considerations. It is argued that the first factor that should be taken into account in the interpretation of land legislation should be the historical injustice that the legislation in question is aiming to redress.[805] Secondly, land legislation must be interpreted purposively within the constitutional context, with specific reference to section 39(2) of the Constitution, which states that, in the interpretation of legislation, courts have to promote the spirit, purport and objects of the Bill of Rights.[806] In this context, the founding values as well as the Bill of Rights are relevant[807] as explained.[808] It is argued that the right to dignity in section 10 of the Constitution is especially critical, as section 25 of the Constitution seeks to address the "grave assaults on the dignity of people" which were *inter alia* the result of apartheid dispossession.[809]

In terms of section 25(5) of the Constitution, "[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis." There is no unqualified right to land. However, the requirement that the state should foster conditions which enable citizens to gain access to land is seen to impose a positive obligation on the state to provide satisfactory and suitable assistance to those who do not have access to land.[810]

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[804] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 48-3.
[805] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 48-4. See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 9-10.
[806] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 48-4.
[807] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 48-5.
[808] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 48-5. *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 15.
[809] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 10. J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 48-5.
[810] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 3 2007) 48-6.

In the case of *Government of the Republic of South Africa v Grootboom*[811] at para 42 the Constitutional Court explained that the phrase "legislative and other measures" denotes the following:

> "[t]he state is obliged to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."

4 2 4 4 3 SPLUMA, spatial justice and section 25(5) of the Constitution

Given the exposition above, the next step is to consider SPLUMA's potential to promote spatial justice in the context of promoting access to land in terms of section 25(5) of the Constitution. Before the enactment of SPLUMA, the Development Facilitation Act (the "DFA")[812] was relevant in the broadening of access to land in urban and rural contexts, even though it was not intended to be a tool for redistribution.[813] Despite this practical application of the DFA, it is very difficult to evaluate exactly how effective the Act was in broadening access to land.[814] That is due to the fact that the DFA was not designated to be a tool for redistribution in itself, but was employed as a development measure specifically.[815] The government also clearly had not designed the DFA to be in effect permanently.[816]

Much faith was placed in the potential of SPLUMA to promote equitable access to land and to change settlement patterns, due to the transformational nature of the Act.[817] However, even though the promotion of access to and use of land features prominently in SPLUMA,[818] it is argued that there are very few instruments in the actual Act itself

[811] 2001 1 SA 46 (CC).
[812] 67 of 1995.
[813] JM Pienaar *Land Reform* (2014) 320.
[814] JM Pienaar *Land Reform* (2014) 320.
[815] JM Pienaar *Land Reform* (2014) 320. Furthermore, the DFA was not implemented in all nine provinces.
[816] JM Pienaar *Land Reform* (2014) 320.
[817] See JM Pienaar *Land Reform* (2014) 321.
[818] S 7(a)(i) and (iii).

that may contribute to the realisation of spatial justice generally,[819] as well as in the context of the promotion of access to land specifically.

4 2 4 4 4 Addressing potential shortcomings and pitfalls

The High Level Panel Report includes a proposal to introduce new framework legislation with the aim of addressing deficiencies in law and policy.[820] This legislation would provide solutions by setting out guiding principles, by defining critical terms such as "equitable access", as well by setting out clear institutional arrangements, especially at district level.[821] It would also contain requirements for transparency, reporting and accountability, as well as other measures to ensure good governance of the land reform process.[822]

These suggestions are clearly connected to the constitutional imperative to broaden access to land, as set out in section 25(5) of the Constitution, and these suggestions would promote the goal of spatial justice in an urban land reform context as well.

4 2 4 5 Section 25(6) of the Constitution: Tenure security

4 2 4 5 1 Introduction to section 25(6)

In terms of section 25(6) of the Constitution, a person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.[823] It is argued that the formulation of section 25(6) is surprising, as it seems to confer complete discretion to the legislature to decide the scope and content of the rights.[824]

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[819] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 399.
[820] See High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 223.
[821] High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 223.
[822] High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 223.
[823] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 48-7.
[824] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 48-7.

In a South African context there are clearly many and distinct land tenure arrangements in both rural and urban areas.[825] The relationship between these varied types of tenure is unclear.[826] It is crucial to note that some of these types of tenure arrangements differ markedly from the property rights linked to registered title.[827] These varying tenure arrangements have differing degrees of security.[828]

Critically, the necessity of having a tenure programme must be put into context: the historical land control system employed in South Africa was not only connected to race, but it was also fragmented and resulted in variations in the land control system based on other factors as well, such as the region in which it was applicable.[829] The consequence was a complex, diverse system of land tenure in which the level of tenure security depended on the particular form of control that was held, which in turn, was essentially determined by racial background.[830]

The High Level Panel confirms that there is a "fundamental correlation" between the insecure forms of tenure and the geography of spatial inequality and poverty.[831] Consequently**,** tenure reform requires the replacement of prevailing land controls with more tenure forms which will provide more security.[832]

The need for tenure reform is a consequence of the historic racial approach to land tenure, both in terms of rural and urban land.[833] As explained, urban landlessness and insecure tenure are identified as pressing problems for South African cities.[834] The situation of upgrading informal areas and settlements is furthermore complicated

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[825] D Hornby, L Royston, R Kingwill & B Cousins "Introduction" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 1 8.
[826] D Hornby, L Royston, R Kingwill & B Cousins "Introduction" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 1 8.
[827] D Hornby, L Royston, R Kingwill & B Cousins "Introduction" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 1 8.
[828] D Hornby, L Royston, R Kingwill & B Cousins "Introduction" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 1 5.
[829] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 48-7.
[830] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 48-7.
[831] High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 258.
[832] J Pienaar & J Brickhill "Land" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (OS 3 2007) 48-7.
[833] JM Pienaar *Land Reform* (2014) 505. However, the deracialisation of the tenure system is but one facet of tenure reform.
[834] See JM Pienaar *Land Reform* (2014) 578-681; J van Wyk *Planning Law* 2 ed (2012) 590-593.

because there is no uniform understanding of what an informal settlement is.[835] The issue is compounded as tenure security is also linked to equality and dignity, as argued above.[836]

Juanita Pienaar explains that the South African tenure reform programme is aimed at providing secure tenure on a rights-based approach which is in line with constitutional imperatives such as equality and dignity.[837] She argues that both the tenure reform and the redistribution programmes reflect the principles of redistributive justice that aim to address inequalities.[838] However, even though provision was made for tenure security in urban areas in the *White Paper on Land Policy* of 1997,[839] it is argued that the situation in urban areas has not been sufficiently addressed.[840]

Before the enactment of SPLUMA, urban tenure has been determined, basically, in relation to whether occupation is lawful or unlawful, in which case lawful occupation meant secure tenure[841] and, conversely, unlawful occupation meant insecure tenure.[842] In this regard, tenure security in urban areas normally becomes especially relevant in cases of evictions.[843]

Another factor in urban contexts specifically is the existence of so-called "backyard rental options" which do not operate in the realm of formal and legal structures.[844] Consequently, a number of people who stay in urban areas cannot be categorised as either owners or tenants.[845] This means that their tenure remains extremely insecure.[846] Finally, Pienaar concludes by saying that section 25(6) of the Constitution and the obligation contained therein to provide secure tenure should, in future, be used

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[835] J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 40.
[836] See 4 2 3.
[837] JM Pienaar *Land Reform* (2014) 506.
[838] JM Pienaar *Land Reform* (2014) 383.
[839] *White Paper on Land Reform* (1997) 84.
[840] JM Pienaar *Land Reform* (2014) 456.
[841] Either owners or tenants possess tenure security.
[842] JM Pienaar *Land Reform* (2014) 457. See also JM Pienaar *Land Reform* (2014) 659-811 for the complexities surrounding unlawful occupation and eviction. She mentions that the conventional response to unlawful occupation and informal settlement in a South African context has traditionally been that of eviction. In this regard, the regulation of access to land and settlement, more often than not involving involuntary removals and relocations, has been more than a mere planning tool. See also 659-660.
[843] See in general JM Pienaar *Land Reform* (2014) 659-811.
[844] JM Pienaar *Land Reform* (2014) 459.
[845] JM Pienaar *Land Reform* (2014) 459.
[846] JM Pienaar *Land Reform* (2014) 459.

more aggressively to promote the promulgation of legislation which would centre on urban environments.[847]

Critically, a solution to the predicament of insecure tenure, especially in urban areas, could be by way of upgrading existing forms of tenure so that the rights are more secure and enforceable.[848] Pienaar explains that, in South Africa, upgrading of tenure rights had been used as a tool generally and that the practice of upgrading commenced in the exploratory phase of land reform[849] already.[850] Significantly, she also notes that the *White Paper on Land Reform* in 1991 was introduced at the same time as the promulgation of legislation such as the Upgrading of Land Tenure Rights Act.[851] Upgrading was therefore identified as an important way to address the urban land reform challenges from the outset.

In terms of the National Housing Council, informal settlements are most prevalent in countries which are experiencing accelerated urbanisation and are not sufficiently equipped to deal with the housing requirements of all the people, especially the poor, moving to cities in search of better opportunities.[852] In relation to informal settlements, Pienaar explains, the approach as set out in the "Breaking new ground" document acknowledged that backyard squatting as well as informal settlement would not disappear soon, despite the formal housing delivery schemes that were introduced.[853] Therefore, particular kinds of settlement had to be addressed separately: the Upgrading of Informal Settlements Programme (the "UISP") was introduced for this purpose.[854]

This programme is regulated in terms of the National Housing Code.[855] The UISP is central in the effort to upgrade living conditions of millions of poor people by way of

[847] JM Pienaar *Land Reform* (2014) 459.
[848] JM Pienaar *Land Reform* (2014) 489.
[849] See discussion above at 4 3 3 2 for the different phases of land reform.
[850] JM Pienaar *Land Reform* (2014) 489.
[851] 112 of 1991 s 2(1). The Upgrading of Land Tenure Rights Act has in the meantime been found to be unconstitutional on the basis of gender discrimination – see *Rahube v Rahube and Others* 2019 2 SA 54 (CC).
[852] See the discussion in J van Wyk *Planning Law* 2 ed (2012) 479.
[853] JM Pienaar *Land Reform* (2014) 680.
[854] JM Pienaar *Land Reform* (2014) 680.
[855] See generally the *National Housing Policy Subsidy Programmes: Simplified Guide to the National Housing Code, 2009* (2010). J van Wyk *Planning Law* 2 ed (2012) 479.

the provision of secure tenure and access to basic services and housing.[856] This programme deals with the *in situ* upgrading of informal settlements.[857]

Furthermore, in 1996 the Interim Protection of Informal Land Rights Act ("IPILRA")[858] was introduced with the aim of protecting certain informal land rights.[859] IPILRA was intended to afford protection to vulnerable rights holders, with the idea that a more extensive act would be developed later.[860] Section 2(1) of IPILRA provides for protection against the deprivation of rights, which, Pienaar argues, amounts to protection against eviction and interference.[861] This Act, in conjunction with the operation of SPLUMA, may further promote security of tenure in the context of informal settlements.

4 2 4 5 2 SPLUMA and the promotion of tenure security

A specific element introduced by SPLUMA relates to the incremental upgrading of informal areas.[862] SPLUMA specifically sets out a schedule containing matters to be addressed by provincial legislation, which include procedures in relation to the

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[856] J van Wyk *Planning Law* 2 ed (2012) 480.
[857] J van Wyk *Planning Law* 2 ed (2012) 480.
[858] 31 of 1996.
[859] These rights are set out in s 1(a)(iii) of the Act: They include the use of, occupation of or access to land in terms of five categories of sources:

> "(a) any tribal, customary or indigenous law or practice of a tribe;
> (b) the custom, usage or administrative practice in a particular area or community;
> (c) the rights or interests in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established under an Act of Parliament;
> (d) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; and
> (e) the use or occupation of any erf as if the person is the holder of Schedule I or II rights under the Upgrading Act, although that person is not formally recorded as such in a land rights register."

Pienaar notes that "beneficial occupation" as set out under subsection (d) "entails the occupation of land by a person openly, as if he or she is the owner of land, without force and without permission of the registered landowners of land for a continuous period of not less than five years prior to 31 December 1997." JM Pienaar *Land Reform* (2014) 796.
[860] High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 259. It is argued that the the Act does not only apply to land in former homelands, but also wherever land is occupied by "beneficial owners" and that this is acknowledgement of the apartheid legacy of denial of legal protection of black people's *de facto* and undisputed rights to land. This includes beneficial occupation in urban areas. High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 260.
[861] JM Pienaar *Land Reform* (2014) 796. S 2(1) of IPILRA stipulates that, subject to the provisions of subsection (4) and the provisions of the Expropriation Act 63 of 1975, or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal rights to land without his or her consent.
[862] See the definition of "incremental upgrading" in s 1 of SPLUMA. See s 21 of SPLUMA, which sets out the requirements of municipal spatial development frameworks, as tools to promote the incremental upgrading of informal areas, discussed more fully at 3 4 5 4.

formalisation or incremental upgrading of informal settlement areas, including measures related to tenure, land use control and the provision of services to these areas.[863]

This entails the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation, and may include any settlement or area under traditional tenure.[864] In terms of SPLUMA,[865] a municipal development framework must identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable.[866]

Furthermore, land use schemes are required to include provisions that would permit the incremental introduction of land use management and regulation in informal settlements, slums and areas that were not previously subject to a land use scheme.[867] In the context of informal settlements, SPLUMA provides for a "pragmatic differentiation" of land-use management systems which would introduce land-use management and regulation gradually in informal settlements and slums.[868] This is perhaps SPLUMA's greatest contribution to the promotion of spatial justice in the context of informal settlements.

Technically, the spatial justice principle is translated into a practical context in that it must be taken into account in practices and decisions made.[869] However, Van Wyk underlines that the practical application of a principle embedded in legislation is not always effective or enforceable and that, in this case, the implementation of the principle of spatial justice would remain subjective and at the whim of the relevant decision-maker.[870]

Critically, therefore, SPLUMA does not make provision for a large number of instruments or procedures that would facilitate the promotion of spatial justice in the

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[863] SPLUMA sch 1 s (g)(viii).
[864] SPLUMA s 1.
[865] S 21 (k).
[866] Furthermore, a municipal spatial development framework must also identify the designation of areas in which (i) more detailed local plans must be developed; and (ii) shortened land use development procedures may be applicable and land use schemes may be so amended. SPLUMA s 21(l).
[867] SPLUMA s 22(d).
[868] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 358.
[869] See Chapter 3 4 for a discussion of the working of the Act as well as how spatial justice is implemented practically.
[870] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 399.

context of planning.[871] Jeannie Van Wyk states that the only instrument introduced by the Act, which is in line with the principle of spatial justice as set out in section 7(a) of SPLUMA, is the "incremental upgrading area".[872] She also explains that the reality of implementation of SPLUMA, mostly a framework Act, is unfortunately relegated to the by-laws and that this state of affairs finally "condemns the planning to the inconsistency, uncertainty and fragmentation experienced in the past."[873] This may have critical implications for the efficacy of SPLUMA in promoting spatial justice.

4 2 4 5 3 SPLUMA, spatial justice and section 25(6): Conclusion

Land tenure is clearly an essential issue in all facets of land reform.[874] Particularly in an urban context, it is argued that urban tenure was not consolidated in a framework for land tenure reform in the same manner that rural tenure reform policies were.[875] Rather, urban tenure security was viewed as a consequence or outcome of housing delivery, rather than addressing urban tenure issues as distinct from housing issues.[876]

In this section, SPLUMA's ability to promote spatial justice in the context of section 25(6) of the Constitution was considered. As was stated before, spatial justice, as a development notion in SPLUMA, resonates both with constitutional imperatives of broadening access to land and promoting tenure reform.[877] In the case of both, emphasis is placed on the inclusion of informal settlements in the context of land use management systems.[878] Furthermore, land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas.[879]

However, it is argued that translating the elements of the development principle as it is set out in SPLUMA into implementable legislative frameworks will be challenging,

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[871] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 399.
[872] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 398.
[873] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 399.
[874] R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 55.
[875] R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 60.
[876] R Kingwill, L Royston, B Cousins & D Hornby "The Policy Context: Land Tenure Laws and Policies in Post-apartheid South Africa" in D Hornby, R Kingwill, L Royston & B Cousins (eds) *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017) 44 60.
[877] See also JM Pienaar *Land Reform* (2014) 457.
[878] See SPLUMA s 7(a)(iv).
[879] SPLUMA s 7(a)(v).

especially as different frameworks are required for the different spheres of government.[880] In this regard, the discussion on the challenges related to intergovernmental cooperation below refers. Still, the value of such a progressive developmental principle may not be lost completely.[881] Therefore, spatial justice may, to a very limited extent, be promoted in the context of tenure reform through mechanisms contained in SPLUMA.

4 2 5 Conclusion of the discussion of the interrelationship between the Bill of Rights, land reform and SPLUMA

From the preceding sections it has become clear that the alignment between the Bill of Rights generally and the new spatial planning system, embodied by SPLUMA, is not as strong as it could be in order to bring about meaningful change in a practical sense.[882] Therefore, some changes could be made to bring the relevant sections in the Bill of Rights and the spatial planning system, encapsulated in SPLUMA, closer together. This is considered in the final chapter of this thesis. In this context, special attention is given to land reform considerations.

This discussion commenced with an overview of the spatial planning concerns impacting on spatial justice[883] that existed prior to the introduction of SPLUMA, before the focus turned to the main research question of whether SPLUMA and the principle of spatial justice set out in SPLUMA, may be used to efficiently promote spatial justice in an urban land reform context. Firstly, it was found that the principle as it exists in SPLUMA is in fact aligned with the Constitution, specifically section 9, relating to equality, and section 10, relating to human dignity. It was confirmed that SPLUMA complies substantively with section 25 of the Constitution, using the *FNB*-methodology. Accordingly, the conclusion was drawn that SPLUMA had been enacted in light of the Constitution and passes constitutional muster. The focus thereafter shifted to an exploration of the alignment between SPLUMA, a planning instrument,

[880] See also JM Pienaar *Land Reform* (2014) 457.
[881] In this regard Juanita Pienaar explains that "approaching all future development and land use planning from such a transformative point of departure may be exactly what tenure reform in urban contexts requires." JM Pienaar *Land Reform* (2014) 457.
[882] See also J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366.
[883] Specifically in the context of informal settlements in South Africa.

and sections 25(5) and (6), that provide the broad parameters for the redistribution and tenure reform sub-programmes.

This led to the conclusion that there is some alignment between SPLUMA and the land reform programme, specifically relating to section 25(5) dealing with land redistribution, and section 25(6) of the Constitution, dealing with security of tenure in an urban context. However, some gaps were also identified.[884]

Although repeated mention is made of the need to redress past spatial imbalances,[885] there are very few provisions in SPLUMA which are able to translate these ideals into enforceable provisions.[886] This, of course, is where the municipal by-laws envisaged by SPLUMA and the issue of applicable regulations by the Minister become relevant. However, there is only one instrument in SPLUMA that is specifically focused on promoting security of tenure, by way of "incremental upgrading area".[887] Therefore, much more is needed to bolster SPLUMA's efforts at practically promoting spatial justice in an urban land reform context, given the land reform demands alluded to above.

The next chapter expands on the findings of this chapter by suggesting some recommendations as to the improvement of the alignment between SPLUMA and land reform measures, as embedded in the Constitution, in order to ensure the better realisation of the notion of spatial justice as a development principle in SPLUMA.

4 3 SPLUMA and the roles of relevant stakeholders

4 3 1 Intergovernmental cooperation and participation in decision-making

4 3 1 1 Introduction

Inextricably tied to the efficacy of SPLUMA in its endeavour to promote spatial justice is the effective cooperation of relevant role players. Of importance here is the role of local government and intergovernmental cooperation in the promotion of spatial justice in an urban land reform context. Intergovernmental co-operation is crucial for the

[884] Other challenges that may impact on the ability of SPLUMA to promote spatial justice in the context of urban land reform are considered under the next headings, before the discussion is concluded.
[885] See ss 3, containing the objects of the Act and 7, containing the development principles.
[886] J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 397.
[887] See the discussion at 3 4 5 4.

development of transformative planning practice.[888] The need for proper cooperation and participation must therefore not be underestimated.[889] However, according to the National Development Plan (the "NDP"), the intergovernmental system of spatial planning is not sufficiently developed.[890]

Having already set out the Bill of Rights context within which planning functions, as well as providing an exposition of SPLUMA's alignment (or not) with the broad land reform measures, the next step is to explore the functions of the relevant role-players and their roles in the promotion of spatial transformation and spatial justice.

4 3 1 2 The constitutional framework

Planning law functions within the framework of the Constitution.[891] In terms of the Constitution, the government is divided into the national, provincial and local spheres.[892] These spheres are compelled to abide by a set of principles relating to cooperative government.[893] Notably these spheres are not conceived of as functioning in a hierarchical manner.[894] Cooperative government refers to cooperation not only between the different spheres of government, but also to cooperation between different government departments and organs of state in a particular sphere.[895]

Planning takes place in all three spheres of government and in some cases there are overlaps or conflicts between the organs of state, which necessitated the provisions on cooperative governance in Chapter 3 of the Constitution.[896] In relation to planning it has historically been quite difficult to ascertain which sphere of government is

[888] P Harrison "Strategic Planning for Transformation in Post-apartheid Johannesburg, South Africa" in L Albrechts, A Balducci & J Hillier (eds) *Situated Practices of Strategic Planning: An International Perspective* (2017) 217 218.
[889] P Harrison "Strategic Planning for Transformation in Post-apartheid Johannesburg, South Africa" in L Albrechts, A Balducci & J Hillier (eds) *Situated Practices of Strategic Planning: An International Perspective* (2017) 217 218.
[890] National Planning Commission *National Development Plan: Vision for 2030* (2012) 244.
[891] J van Wyk *Planning Law* 2 ed (2012) 101.
[892] S 40(1) of the Constitution. See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 para 43; *City of Cape Town and Another v Robertson and Another* 2005 2 SA 323 (CC) para 59; *Swartland Municipality v Louw NO and Others* 2010 5 SA 314 (WCC) para 26 and *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2003 1 SA 678 (CC) para 2.
[893] Constitution S 40(2). See also generally S Woolman & T Roux "Co-operative government and intergovernmental relations" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2009) 14-10-14-13.
[894] J van Wyk "Planning in all its (dis)guises: spheres of government, functional areas and authority" (2012) 15 *PELJ* 288 288.
[895] J van Wyk *Planning Law* 3 ed (forthcoming) 93.
[896] J van Wyk *Planning Law* 2 ed (2012) 141.

empowered to legislate on which matter, or functional area.[897] The competences of the different spheres of government are set out in Schedules 4 and 5 of the Constitution, but there are still gaps and the need for interpretation.[898] In this regard, the courts have played an important role in clarifying the different competences.[899]

The government consists of three separate branches which fulfil separate functions and this complicates the planning situation. The legislative branches of each of the three spheres of government are responsible for legislating on a variety of matters.[900] In matters of planning, all three legislatures have had legislative power and therefore it must be determined which sphere is competent to legislate on which planning matters, which include matters such as "regional planning and development", "urban and rural development", "provincial planning" and "municipal planning".[901]

Van Wyk explains that a number of functional areas are connected to planning, for example agriculture, environment, as well as housing and transport.[902] Therefore principles of co-operative government should play a prominent role.[903]

4 3 1 3 Relevant case law pertaining to the allocation of planning functions

The *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[904] case has been particularly helpful in giving content to the meaning of "municipal planning" as it is listed in Schedule 4 Part B of the Constitution. Other decisions, such as *Maccsand (Pty) Ltd and Another v City of Cape Town and Others*[905] and *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government,*

[897] J van Wyk *Planning Law* 2 ed (2012) 102. See T Humby "Hands on or hands off? The constitutional court's denial of a provincial municipal planning role" (2015) 1 *TSAR* 178-188.
[898] J Van Wyk "Planning in all its (dis)guises: spheres of government, functional areas and authority" (2012) 15 *PELJ* 288 288.
[899] See T Humby "Hands on or hands off? The constitutional court's denial of a provincial municipal planning role" (2015) 1 *TSAR* 178-188. Humby is slightly critical, though not thoroughly pessimistic in respect of the reality of cooperative government in relation to municipal planning after the *Habitat Council v Provincial Minister of Local Government, Western Cape* 2013 6 SA 113 (WCC) decision.
[900] S 43 of the Constitution.
[901] J van Wyk *Planning Law* 2 ed (2012) 103.
[902] J van Wyk *Planning Law* 3 ed (forthcoming) 79.
[903] J van Wyk *Planning Law* 3 ed (forthcoming) 79.
[904] 2010 6 SA 182 (CC).
[905] 2011 6 SA 633 (SCA).

Environmental Affairs and Development Planning of the Western Cape and Others,[906] have also considered the meaning of "municipal planning" in this context.[907]

Furthermore, the more recent cases of *Habitat Council v Provincial Minister of Local Government, Western Cape*[908] and *Minister of Local Government, Western Cape v The Habitat Council (City of Johannesburg Metropolitan Municipality* Amicus Curiae*)*[909] have also sought to shed light on the question of which sphere of government is responsible for planning.

In conclusion, therefore, the role of the different spheres of government related to planning has been controversial.[910] Humby argues that the recent increase in case law on the interpretation of "municipal planning", as it is set out in Schedule 4 Part B of the Constitution, points to the greater judicialisation of cooperative government and intergovernmental relations in South Africa.[911]

The next section therefore considers SPLUMA's interaction with other pieces of legislation that relate to the matter of intergovernmental cooperation in order to determine whether the cooperation or lack thereof could have a meaningful impact on the realisation of spatial justice in informal settlements.

4 3 1 4 SPLUMA and the promotion of intergovernmental cooperation

4 3 1 4 1 National support and monitoring

The Constitution is very clear on how monitoring and support must transpire, and sets out where interventions are required and steps that have to be taken in cases of conflicts.[912] Subject to section 44 of the Constitution, regulating national legislative competence, national as well as provincial governments possess the required

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[906] 2011 4 All SA 270 (WCC).
[907] J van Wyk *Planning Law* 2 ed (2012) 102. See additionally T Humby "Hands on or hands off? The constitutional court's denial of a provincial municipal planning role" (2015) 1 *TSAR* 178-188 for a discussion of relevant case law in this regard.
[908] 2013 6 SA 113 (WCC).
[909] 2014 5 BCLR 591 (CC).
[910] See for example *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC). The 2008 Spatial Planning and Land Use Management Bill ("SPLUMB") was criticised as being unconstitutional because of issues with the legislative and executive competences of local government. J Van Wyk "The legacy of the 1913 Black Land Act for spatial planning" (2013) 28 *SAPL* 91 102.
[911] T Humby "Hands on or hands off? The constitutional court's denial of a provincial municipal planning role" (2015) 1 *TSAR* 178 178. See the article generally for a discussion of the pitfalls of the increased judicialisation.
[912] J van Wyk *Planning Law* 3 ed (forthcoming) 94.

legislative and executive authority, to direct municipalities to perform their functions efficiently in terms of matters set out in Schedules 4 and 5 of the Constitution.[913]

In the context of monitoring and support measures, the national government is required to develop mechanisms to support and strengthen the capacity of provinces and municipalities to adopt and implement an effective spatial planning and land use management system, in line with SPLUMA and the Intergovernmental Relations Framework Act. [914] The Minister must, within available resources, provide support and assistance in the performance of its land use management functions and related obligations to any province, as contemplated in section 125(3) of the Constitution, or to any municipality, as contemplated in section 154(1) of the Constitution.[915]

The Minister must also monitor compliance with the development principles and norms and standards, progress made by municipalities with the adoption or amendment of land use schemes, quality and effectiveness of municipal spatial development frameworks and other planning tools and instruments as well as the capacity of provinces and municipalities to implement the Act.[916]

In terms of section 9(3) of SPLUMA, the Minister may, after consultation with organs of state in the provincial and local spheres of government, prescribe procedures to resolve and prevent conflicts or inconsistencies which may emerge from spatial plans, frameworks and policies of different spheres of government and between a spatial plan, framework and policies relating to land use of any other organ of state.

There are a few provisions in SPLUMA aimed at facilitating cooperative government and promoting intergovernmental cooperation.[917] However, a Minister is required to consult with any Minister who has responsibilities in terms of a national function affected by the performance of that function.[918]

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[913] See also s 156(1) of the Constitution, as well as s 155(7). See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC) para 47; *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 6 SA 633 (SCA) para 24. J van Wyk *Planning Law* 3 ed (forthcoming) 94.
[914] 13 of 2005. SPLUMA s 9(2).
[915] SPLUMA s 9(1)(a).
[916] SPLUMA s 9(1)(b).
[917] J van Wyk *Planning Law* 3 ed (forthcoming) 93. See Chapter 3 4 4.
[918] J van Wyk *Planning Law* 3 ed (forthcoming) 94. See s 9(4) of SPLUMA.

4 3 1 4 2 Provincial support and monitoring

In terms of section 155(6)(a)-(b) of the Constitution, provincial government has the competence to monitor and support local government in the relevant province, as well as the competence to promote the development of local government capacity to enable municipalities "to perform their functions and manage their affairs."[919] Furthermore, section 10(6) of SPLUMA states that provincial legislation having the effect of regulating land use, land use management and land development within a province must promote the development of local government capacity to enable municipalities to perform their municipal planning functions. In terms of section 10(5), provincial governments must develop mechanisms to support, monitor and strengthen the capacity of municipalities to adopt and implement an effective system of land use management in accordance with SPLUMA.

In terms of section 10(3), a Premier may, subject to the Constitution and any other law regulating provincial supervision and monitoring of municipalities in the province, assist a municipality with the preparation, adoption or revision of its land use scheme, facilitate the coordination and alignment of the land use management systems of different municipalities or the land use management system of a municipality with structure plans, development strategies and programmes of national and provincial organs of state. In terms of section 10(3)(c), the Premier may take appropriate steps consistent with the Constitution and the Intergovernmental Relations Framework Act[920] to resolve disputes in connection with the preparation, adoption or revision of a spatial development framework, a land use scheme or related tools and planning instruments between a municipality and its local community or different municipalities.[921]

In terms of section 10(4) of SPLUMA, a Premier may, by notice in the *Provincial Gazette*, identify matters of provincial interest in respect of which provincial legislation, policies, frameworks, norms and standards consistent with SPLUMA must apply.[922]

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[919] J van Wyk *Planning Law* 3 ed (forthcoming) 95.
[920] 13 of 2005.
[921] J van Wyk *Planning Law* 3 ed (forthcoming) 95.
[922] J van Wyk *Planning Law* 3 ed (forthcoming) 95.

4 3 1 4 3 Provisions regulating the consultation with other land development authorities

Furthermore, municipalities are required to consult with any organ of state bearing responsibility for the administration of legislation which relates to any aspect of an activity that also requires approval in terms of the Act to coordinate activities and give effect to the respective requirements of such legislation, and to avoid duplication.[923] Following such consultation, the municipality is required to enter into a written agreement with the relevant organ of state in order to avoid duplication in the submission of information or the carrying out of a process which relates to any aspect of an activity that also requires authorisation under the Act.[924]

Moreover, after conclusion of the agreement, the Municipal Planning Tribunal in question may take account of any process authorised under the legislation covered by that agreement as adequate for meeting the requirements of the Act.[925]

4 3 1 4 4 Municipal differentiation

Section 11(1) of SPLUMA explains that, in the development and application of measures to monitor and support the performance of the functions of municipalities in terms of both SPLUMA and other legislation relating to spatial planning, land development and land use management, the national government and provincial governments must take into account the unique circumstances of each municipality.[926]

The unique circumstances of a municipality in this context may be determined on the basis of identified criteria.[927] Section 11(3) states that, for purposes of this section, different information may be requested from different municipalities, taking into consideration the capacity of a municipality to administer SPLUMA and the compliance of a municipal SDF and land use scheme with SPLUMA.[928] Van Wyk points out that, regarding national intervention in provincial administration and provincial intervention in municipalities, the Constitution sets out two similar provisions – sections 100 and 139.[929]

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[923] SPLUMA s 29(1). J van Wyk *Planning Law* 3 ed (forthcoming) 94.
[924] SPLUMA s 29(2). J van Wyk *Planning Law* 3 ed (forthcoming) 94.
[925] SPLUMA s 29(3). J van Wyk *Planning Law* 3 ed (forthcoming) 94.
[926] J van Wyk *Planning Law* 3 ed (forthcoming) 96.
[927] SPLUMA s 11(2). J van Wyk *Planning Law* 3 ed (forthcoming) 96.
[928] SPLUMA s 11(3).
[929] J van Wyk *Planning Law* 3 ed (forthcoming) 96.

4 3 1 5 SPLUMA's interaction with other relevant legislative measures pertaining to issues of intergovernmental cooperation

4 3 1 5 1 Introduction

Chapter 3 of SPLUMA contains provisions related to intergovernmental support. Section 9(1)(a) of SPLUMA states that national government must provide support and assistance as well as create capacity. Section 9(1)(b) of SPLUMA requires national government to monitor the compliance of municipalities and provinces and section 9(2) places an obligation on national government to "support and strengthen" provincial and municipal government.[930] It is therefore clear that SPLUMA envisions a planning system that supports intergovernmental cooperation and aims to facilitate this cooperation and minimise conflicts between the different spheres of government. However, SPLUMA does not function in isolation and therefore some prominent pieces of legislation that may impact on issues of intergovernmental cooperation are also briefly discussed below.

4 3 1 5 2 The Local Government: Municipal Systems Act 32 of 2000

The Local Government: Municipal Systems Act[931] gives effect to Chapter 7 of the Constitution, relating to local government.[932] It is a potentially powerful Act in the promotion of social and spatial justice as it contains core principles, mechanisms and processes that may enable municipalities to progressively move towards the social and economic upliftment of communities and to ensure universal access to essential services that are affordable to all.[933] Chapter 5 of the Act is important in the context of planning, because it sets out provisions in relation to integrated development plans ("IDPs")[934] of which a spatial development framework ("SDF")[935] forms part.[936]

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[930] See furthermore SPLUMA ss 10, relating to provincial support and monitoring, and 11, relating to municipal differentiation, as part of the chapter on intergovernmental support.
[931] 32 of 2000.
[932] J van Wyk *Planning Law* 2 ed (2012) 110. See also *Democratic Alliance and Another v Masondo and Another* 2003 2 SA 413 (CC) para 12.
[933] Long title. See also J van Wyk "Local government" in WA Joubert & J Faris (eds) *The Law of South Africa* 2 ed (2008). In that context, the Act provides for the legal nature and rights and duties of municipalities, municipal functions and powers, performance management, local public administration, municipal services and credit control and debt collection.
[934] See J van Wyk *Planning Law* 2 ed (2012) 270-274.
[935] See J van Wyk *Planning Law* 2 ed (2012) 274-276.
[936] Local Government: Municipal Systems Act 32 of 2000 s 26(e). See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae)* 2008 4 SA 572 (W) paras 31-35.

Van Wyk explains that this Act forms part of the spatial planning aspect of planning law and, furthermore, the Act significantly includes a chapter on community participation, which is an important component of the approach to planning matters post-1994.[937]

In terms of section 23(1) of the Municipal Systems Act every municipality is required to undertake developmental-oriented planning in order to meet the goals and development duties of local government in order to promote, in conjunction with other organs of state, the progressive realisation of constitutional socio-economic rights.[938] Fuo also argues that local government planning could in fact be implied in the socio-economic rights obligations which are imposed by the Constitution on all spheres of the government to adopt reasonable legislative and other measures to progressively realise socio-economic rights.[939]

4 3 1 5 3 The National Environmental Management Act 107 of 1998

An Act that shows promise to promote spatial justice is the National Environmental Management Act.[940] Van Wyk explains that the multi-disciplinary essence of planning law requires an investigation into the interaction between development and the environment and therefore a knowledge of environmental issues is critical.[941] In 1998 a *White paper on environmental management policy for South Africa* was published. This led to the enactment of the National Environmental Management Act ("NEMA").[942] Similar to SPLUMA, it consists of framework environmental legislation that, in conjunction with sectoral statutes, such as the National Environmental Management: Protected Areas Act[943] and the National Environmental Management: Air Quality Act,[944] make up a group of environmental laws.[945]

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[937] J van Wyk *Planning Law* 2 ed (2012) 111.
[938] Local Government: Municipal Systems Act 32 of 2000 s 23(1)(a)-(c). See the constitutionally entrenched socio-economic rights, such as contained in ss 24, 25, 26, 27 and 29.
[939] See ss 25(5), 26(2), 27(2) and 29(1)(b) of the Constitution. ON Fuo "A critical investigation of the relevance and potential of IDPs as a local governance instrument for pursuing social justice in South Africa" (2013) 16 *PELJ* 221 235.
[940] 107 of 1998.
[941] J van Wyk *Planning Law* 2 ed (2012) 115.
[942] 107 of 1998.
[943] 57 of 2003.
[944] 39 of 2004.
[945] See J van Wyk *Planning Law* 2 ed (2012) 115-119 for a discussion.

Therefore, there are a number of pieces of legislation that are relevant to planning, such as the Local Government: Municipal Systems Act[946] and NEMA. Many of the other acts that were previously applicable to spatial planning[947] have been repealed by SPLUMA.[948] The emphasis on intergovernmental cooperation is therefore clear.[949]

4 3 1 6 SPLUMA and public administration

The functional area of planning interacts with and is interwoven with a number of other functional areas. In this regard, the principles relating to public administration in the Constitution are particularly relevant. Currently, the only planning Act in operation is SPLUMA.[950] The implementation of SPLUMA in the national, provincial and local spheres of government is subject to the principles of public administration as they are contained in the Constitution.[951]

Even though public administration *per se* is not defined in the Constitution, public administration could be seen to include the administration in each sphere of government, organs of state and public enterprises and entities.[952] In this regard it is critically important that public administration occurs in line with the democratic values and principles as set out in the Constitution. [953] Van Wyk underlines that, even though section 195(3) of the Constitution requires the enactment of national legislation, this has not yet happened. Therefore, other pieces of legislation, such as SPLUMA, PAJA and local government legislation containing references to issues of public administration must be resorted to.[954]

4 3 1 7 Conclusion

As has been established, efficient intergovernmental cooperation is crucial for the development of transformative planning practice.[955] Furthermore, in the 2016 SACN

[946] 32 of 2000.
[947] Such as the Development Facilitation Act 67 of 1995, the Less Formal Township Establishment Act 113 of 1991 as well as the Physical Planning Acts 88 of 1967 and 125 of 1991.
[948] Sch I of SPLUMA.
[949] See also Chapter 3 4 4.
[950] J van Wyk *Planning Law* 3 ed (forthcoming) 83.
[951] J van Wyk *Planning Law* 3 ed (forthcoming) 82.
[952] S 195(2) of the Constitution. See also J van Wyk *Planning Law* 3 ed (forthcoming) 82.
[953] J van Wyk *Planning Law* 3 ed (forthcoming) 83. S 195(1)(f)-(g) of the Constitution.
[954] J van Wyk *Planning Law* 3 ed (forthcoming) 83.
[955] P Harrison "Strategic Planning for Transformation in Post-apartheid Johannesburg, South Africa" in L Albrechts, A Balducci & J Hillier (eds) *Situated Practices of Strategic Planning: An International Perspective* (2017) 217 218.

Report, it is contended that a critical factor of the success of SPLUMA is the extent to which intergovernmental cooperation is taken seriously by all the spheres and sectors of government.[956]

In this thesis, the focus has been on local government, as planning occurs principally at the municipal level.[957] In terms of the Constitution, local government is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.[958] Critically, the Constitution sets out the ideal of developmental local government,[959] in terms of which municipalities must "provide democratic and accountable government for local communities, encouraging their involvement; ensure the sustainable provision of services; and promote social and economic development."[960]

However, it is argued that municipalities do not perform their crucial functions efficiently.[961] SPLUMA's potential to promote intergovernmental cooperation as well as the municipal role in the promotion of spatial justice was therefore explored in the preceding sections. SPLUMA has a number of provisions aimed at promoting intergovernmental cooperation, which were considered above.[962] It is therefore clear that SPLUMA takes its commitment to promote intergovernmental cooperation seriously.[963]

4 3 2 SPLUMA and the promotion of public participation

4 3 2 1 Introduction

Van Wyk underlines that participation in planning law in the past has left much to be desired.[964] As was highlighted in this chapter,[965] the new planning system has aimed to make a break from the apartheid and colonial past by striving to be integrated and

[956] South African Cities Network *Report on the State of South African Cities* (2017) 1 66.
[957] J van Wyk *Planning Law* 2 ed (2012) 593.
[958] S 7(2) of the Constitution. See *Government of the Republic of South Africa and Others v Grootboom and others* 2001 1 SA 46(CC). See also J van Wyk *Planning Law* 2 ed (2012) 594.
[959] Ss 152 and 153 of the Constitution.
[960] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 354.
[961] J van Wyk *Planning Law* 2 ed (2012) 595. See the latest dismal municipal audit results, published by the Auditor-General South Africa *Integrated Annual Report 2018-19* (2019).
[962] See 4 3 1 4.
[963] See generally Ch 3 of SPLUMA.
[964] See also AM Burdzik *The Effect of Public Participation in Land Use Planning on the Concept of Ownership in South Africa* (1987) for a historical overview.
[965] See 4 2 1.

providing for intergovernmental as well as inter-sectoral cooperation, as well as participation.

Pieterse emphasises the role of citizens and the importance of their engagement to ensure that cities are developed in line with their needs.[966] The right to participate in decision-making forms part of the overarching right to the city, as explained in Chapter 3.[967] In Chapter 3, the role citizens have to play in their own development was emphasised, with reference to both the NDP and the IUDF. For this reason it is necessary to briefly explain how planning works practically and how people can participate, in order to ascertain whether they are enabled to participate fully.[968] In this regard, Van Wyk and Oranje argue that:

> "For participation in spatial development plan preparation and review processes to have real meaning, and truly reverse the exclusion and silence of the apartheid years, a broader, more inclusive type of 'meaningful engagement' is required."[969]

4 3 2 2 Defining public participation

It must be noted that there is some difficulty in defining public participation.[970] As a start, the critical case of *Doctors for Life International v The Speaker of the National Assembly*[971] set out the principles of public participation:

> "The nature of our democracy must be understood in the context of our history. As has been observed, during the struggle against apartheid, a system that denied the majority of the people a say in the making of the laws which govern them, the people developed the concept of the People's Power as an alternative to the undemocratic system of apartheid. This concept ensured that the people took part in community structures set up to fight the system of apartheid. Against this background, public involvement is particularly significant 'for members of groups that have been the victims of processes of historical silencing.'"[972]

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[966] E Pieterse "Building with ruins and dreams: Some thoughts on realising integrated urban development in South Africa through crisis" (2006) 43 *Urban Studies* 285 294.
[967] See 3 2 4.
[968] However, a full discussion of meaningful engagement in this context is beyond the scope of this thesis.
[969] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365.
[970] J van Wyk *Planning Law* 3 ed (forthcoming) 160.
[971] 2006 6 SA 416 (CC). See also the cases of *Matatiele Municipality v President of the Republic of South Africa* 2 2007 6 SA 477 (CC) and *Land Access Movement of South African v Chairperson of the National Council of Provinces* 2016 5 SA 635 (CC).
[972] *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 324.

4 3 2 3 Relevant provisions in SPLUMA

Van Wyk rightly points to the development principles as the first port of call for finding direction or support that SPLUMA aims to promote public participation and good governance.[973] The first relevant principle here is efficiency, which requires decision-making procedures which minimise negative financial, social, economic or environmental impacts.[974] The second relevant principle is good administration, which sets out that the preparation and amendment of spatial plans, policies, land use schemes as well as procedures for development applications include transparent processes of public participation that afford all parties the opportunity to provide inputs on matters affecting them.[975] The principle of good administration also sets out that policies, legislation and procedures must be clearly set in order to inform and empower members of the public.[976]

Secondly, SDFs – conceptualised in line with the requirements as set out in SPLUMA – are to be prepared, reviewed and amended with the participation by "all interested and affected parties in a cooperative fashion.[977] As was explained in a previous chapter,[978] there are four different types of SDFs which must each contain provisions for public participation that are appropriate for the sphere in question.[979]

Thirdly, a municipality is required to take spatial justice into account in the determination of land uses through spatial development frameworks and land schemes.[980]

[973] J van Wyk *Planning Law* 3 ed (forthcoming) 170.
[974] SPLUMA s 7(c)(ii).
[975] SPLUMA s 7(e)(iv).
[976] SPLUMA s 7(e)(v).
[977] J van Wyk *Planning Law* 3 ed (forthcoming) 170.
[978] See 3 4 5.
[979] J van Wyk *Planning Law* 3 ed (forthcoming) 170. They are national, provincial, municipal and regional SDFs.
[980] SPLUMA ss 12-22, 24.

Fourthly, land development applications are subject to certain provisions which allow for participation, subject to certain qualifications.[981] Van Wyk emphasises the importance of these provisions, as large-scale land development endeavours necessarily affect land which is situated in a particular municipality and which may involve developers that operate nationally or provincially.[982] If this is the case, applications in terms of section 45 of SPLUMA for parties to intervene are relevant.[983]

4 3 2 4 Conclusion

Much is made of the importance of the ability of citizens to engage in processes that affect them. The right that people should have to participate in decision-making constitutes a critical part of the broad right to the city, as discussed earlier in this thesis.[984]

In the context of SPLUMA and spatial justice, there are a number of provisions which promote public participation in decision-making, a component of spatial justice. For example, municipalities are obliged to take spatial justice into account in determining land uses through spatial development frameworks and land schemes.[985] Furthermore, spatial justice is a necessary consideration in decision-making on development applications, such as township establishment, amendments to land use schemes, removals of restrictive conditions, subdivisions and consolidations.[986]

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[981] See SPLUMA s 44(1) which states that the Minister must, after public consultation, prescribe timeframes for the consideration and determination of an application before a Municipal Planning Tribunal. Furthermore, s 45(2) of SPLUMA states that an interested person may petition to intervene in an existing application before a Municipal Planning Tribunal or an appeal authority and if granted intervener status, the interested person may be allowed to participate in such proceeding in the manner prescribed by the Minister or in provincial legislation. In terms of s 45(3) of SPLUMA, a person who is claiming to be an interested person in a land development application or an appeal has the burden of establishing his or her status as an interested person. In terms of s 45(4), if a question arises as to whether a person is an interested person in a land development application or an appeal, the Municipal Planning Tribunal or appeal authority concerned may make a determination as to whether such person qualifies as an interested person. Finally, s 45(5) states that if an interested person has not demonstrated an interest in all of the issues presented in a particular land development application or an appeal, the Municipal Planning Tribunal or appeal authority may limit the interested person's participation to only those issues in which an interest has been established.

[982] J van Wyk *Planning Law* 3 ed (forthcoming) 172-173.

[983] See J van Wyk *Planning Law* 3 ed (forthcoming) 173.

[984] Chapter 3 2 4. See also JI Muller *Making Great Places through the Right to the City: A South African Perspective* Paper presented at the Planning Africa 2014 – Making Great Places Conference in Durban, South Africa (22-10-2014) 286.

[985] SPLUMA ss 12-22, 24.

[986] SPLUMA s 41.

However, by broadening the notion of spatial justice as it is set out in SPLUMA to include elements of meaningful engagement to promote redress and inclusion, as set out above, the principle of spatial justice could be promoted to a greater extent.[987] This is considered in the fifth and final chapter.

4 4 Conclusions on the potential of SPLUMA to promote spatial justice in the context of urban land reform

4 4 1 Some comments on the realisation of spatial justice in an urban context

In the previous chapter, spatial justice as a development principle in SPLUMA was contextualised.[988] In this part of the discussion, the focus was narrowed to discover what spatial justice in an urban land reform context in South Africa might look like and thereafter, to consider whether SPLUMA has the potential to make this vision a reality.

In this context, it is argued that the search for a just city starts at the injustices that have resulted from accelerated urbanisation, such as violence or poverty and inequality and barriers to equitable access to resources.[989] Consequently, it can be said that the notion of the just city challenges unequal distribution of power and resources in cities and promotes the vision that spatial planning should include marginalised groups, especially the poor, so that they may benefit from spatial planning.[990]

Lefebvre contended that any production of urban space will necessarily reproduce the social relations in that space.[991] Justice in an urban context therefore requires at the very least the real democratic participation of previously excluded groups in decision-making processes.[992] Urban residents have to be involved in decision-making processes that affect the production of urban space.[993] The right to the city and the

[987] See the goals of SPLUMA in s 3, as well as the development principle of spatial justice set out in s 7(a).
[988] Chapter 3 2.
[989] J Connolly & J Steil "Introduction: Finding Justice in the City" in P Marcuse, J Connolly, J Novy, I Olivo, C Potter & J Steil (eds) *Searching for the Just City: Debates in Urban Theory and Practice* (2009) 1 1.
[990] S Fainstein "Spatial justice and planning" (2009) 1 *Justice Spatiale/ Spatial Justice* 4.
[991] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 102.
[992] S Fainstein "Spatial justice and planning" (2009) 1 *Justice Spatiale/ Spatial Justice* 3.
[993] JI Muller *Making Great Places through the Right to the City: A South African Perspective* Paper presented at the Planning Africa 2014 – Making Great Places Conference in Durban, South Africa (22-10-2014) 284.

existence of spatial justice in an urban context is therefore predicated on true public participation and democratic decision-making.[994]

Furthermore, as was explained, the search for spatial justice is both an outcome and a process.[995] Spatial injustices will not be remedied by purely spatial remedies, but require adjustments of social, political and economic circumstances.[996] Therefore, it is clear already that the principle as it is contained in SPLUMA, to be implemented by the instruments in SPLUMA, is constrained. The extent of the limits to the realisation of this principle are briefly explored below.

4 4 2 Conceptual and terminological challenges for the realisation of spatial justice as a development principle in SPLUMA

Much has been said about SPLUMA's potential to promote spatial justice in an urban environment.[997] However, if the understanding of spatial justice is too superficial, the effectiveness of it will be lost.[998] In this regard, it has been argued that any attempts to promote "redress and reconciliation through spatial justice" will flounder if a so-called absolute (in contrast with a relative) view of space still exists.[999] Briefly, this means that space, in the context of the operation of the law, cannot be seen as a passive background to the actions of people, such as judges and lawmakers, but rather that it must be seen to form part of and influence the action.[1000]

Linked to this argument, De Villiers warns that spatial justice cannot simply be reduced to a formal requirement for municipal land and land use policies, because that would mean that it would lose its relational qualities and only be thought of in abstract

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[994] JI Muller *Making Great Places through the Right to the City: A South African Perspective* Paper presented at the Planning Africa 2014 – Making Great Places Conference in Durban, South Africa (22-10-2014) 286.
[995] E Soja *Seeking Spatial Justice* (2010) 31.
[996] P Marcuse "Spatial justice: Derivative but causal of social injustice" (2009) 1 *Justice Spatiale/ Spatial Justice* 5.
[997] See for instance M Strauss & S Liebenberg "Contested spaces: housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 434.
[998] See chapter 3 2 for a more in-depth discussion of the principle of spatial justice.
[999] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 2. De Villiers explains that if the references to "spatial" aspects of justice "…merely entails the incorporation of spatial metaphors or geographical references" it entrenches the view of space as abstract and prohibits the possibility to view space as relational. This is connected to whether or not law will be able to facilitate true reconciliation, which sits alongside references to spatial justice. I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 1.
[1000] S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2015) 23. Refer to chapter 3 2 3 generally. See also I de Villiers "The lawyer as mapmaker and the spatial turn in jurisprudence" (2014) 46 *Acta Academica* 25-39.

terms.[1001] The danger therefore exists that spatial justice will not be realised if it is viewed through a positivist lens.[1002]

In a South African context, legal positivism has always been dealt with in terms of how the courts have interpreted statutes and decided cases, rather than focusing on the social thesis of legal positivism.[1003] However, in this instance, positivism can be seen to refer to the school of law which regards law to be a precise science and which has the goal of creating a set of rules that set out what the law is and which allows for the complete rationalisation of law.[1004]

Furthermore, if too much attention is given to the practical measurable notions of efficiency or sustainability, the possibility arises that justice will not be achieved.[1005] De Villiers argues that SPLUMA embodies the goal of "deep" reconciliation, although it is not expressly stated in the Act.[1006] The achievement or non-achievement of this reconciliation, however, and – connected to this – whether the goal of spatial justice is achieved, depends on how spatial justice is understood.[1007] Therefore, by viewing space as relational and focusing on justice rather than mere efficiency of process, the likelihood increases of achieving some degree of reconciliation through redress as envisioned in SPLUMA.[1008]

Furthermore, in terms of SPLUMA, spatial justice is a formal requirement for all documents drafted by the separate spheres of government.[1009] Section 7(a) of SPLUMA refers to "redressing past injustices" and one of the goals of SPLUMA, set out in section 3(f), is to redress the imbalances of the past. However, the imbalances as referred to in SPLUMA section 7 are not elucidated in the Act and neither is the influence of the past in the way that space reproduces inequality in society

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[1001] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 2.
[1002] I de Villiers "Leibniz, Lefebvre and the spatial turn in Law" (2016) 72 *HTS Theological Studies* 1 5.
[1003] See IJ Kroeze "Legal Positivism" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 62 74-79 for the South African debate.
[1004] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 4. De Villiers relies on Berkowitz's argument that the transformation of modern law into a science impacts negatively on the realisation of justice. She explains that Berkowitz conceived of social scientific thinking as posing a threat to justice, as it subjects justice to ideas such as fairness and efficiency. See I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 4.
[1005] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 5.
[1006] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 2.
[1007] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 2.
[1008] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 6.
[1009] SPLUMA s 7(a).

acknowledged in the Act.[1010] This may prove to complicate the achievement of spatial justice in an urban land reform context.

4 4 3 The dilemma of the use of zoning

4 4 3 1 Zoning as an exclusionary tool

Zoning is a practice which entails the setting out of districts or areas in a city or town in which distinct sets of activities are either permitted, or prohibited.[1011] Examples of zoning are the divisions of areas into residential, business or industrial zones and Van Wyk explains that, based on how complicated the town planning scheme in question is, the uses could be delineated to a greater extent.[1012] There are also specific restrictions in terms of buildings (pertaining to the height etc).[1013] Zoning forms a key part of the new planning system as well and SPLUMA makes extensive use of zoning as a land management tool.

In the *Pick 'n Pay Stores Ltd and Others v Teazers Comedy and Revue CC and Others* case,[1014] it was explained that zoning constitutes a limitation or condition restricting the exercise of ownership. Zoning as a limitation, or a legitimate deprivation of property, in terms of section 25(1) of the Constitution was discussed earlier.[1015] It was decided that SPLUMA does not allow arbitrary deprivation of property.[1016] However, the history of our country must be taken into account when evaluating the suitability of tools such as zoning. In this regard, Van Wyk explains that zoning could potentially be exclusionary.[1017] It is furthermore argued that zoning is critical in the creation and maintaining of the exclusivity and land use as well as income group, which is in conflict with the principle of spatial justice as contained in SPLUMA.[1018]

[1010] I de Villiers "Leibniz, Lefebvre and the spatial turn in law" (2016) 72 *HTS Theological Studies* 1 2.
[1011] J van Wyk *Planning Law* 3 ed (forthcoming) 248.
[1012] For the origin and use of zoning, see J van Wyk *Planning Law* 3 ed (forthcoming) 249.
[1013] See J van Wyk *Planning Law* 3 ed (forthcoming) 248.
[1014] *Pick 'n Pay Stores Ltd and Others v Teazers Comedy and Revue CC and Others* 2000 3 SA 645 (W) para 656H.
[1015] As zoning takes place in terms of a law of general application and in a way that is not arbitrary, it is seen as permissible in terms of s 25(1). See also J van Wyk *Planning Law* 3 ed (forthcoming) 249.
[1016] 4 2 4 3.
[1017] J van Wyk *Planning Law* 3 ed (forthcoming) 156.
[1018] V Nel "SPLUMA, zoning and effective land use management in South Africa" (2015) 27 *Urban Forum* 1 5.

4 4 3 2 Possible alternatives to zoning

In this regard, Nel recommends criteria for a more suitable land use management system, which focuses on eliminating "spatial fragmentation and exclusion and promote[s] inclusion and integration".[1019] Consequently, other instruments have been suggested, such as performance zoning, master plans and form-based codes.[1020]

Nel furthermore proposes a functional system which meets SPLUMA's principles of spatial justice and spatial resilience[1021] which would take the form of a regulatory system based on the transect concept, but modified to suit South African needs.[1022] This system would draw on elements from standard and performance zoning, discretionary and plan-based systems as well as form-based codes.[1023]

Nel concludes by explaining:

> "While land use zoning as currently practiced in South Africa and contemplated in SPLUMA will not contribute to the ideals of socially just, sustainable and integrated settlements, many other land use management systems either suffer from the same exclusionary effects or inflexibility of zoning, or require professional planning skills that are not available in most municipalities. However…there are elements of other land use management systems that South African planners and legislators could explore in the search for a more appropriate system."[1024]

4 5 Conclusion of chapter

In conclusion, this chapter has sought to build on the preceding chapters in order to answer the overarching question of whether the provisions of SPLUMA may be used to promote spatial justice in an urban land reform context. This was done by firstly considering the alignment between the Constitution and SPLUMA, specifically concerning constitutional provisions related to land reform and, secondly, by evaluating the relationship between the constitutional imperative of intergovernmental

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[1019] V Nel "SPLUMA, zoning and effective land use management in South Africa" (2015) 27 *Urban Forum* 1 10.
[1020] See generally V Nel "SPLUMA, zoning and effective land use management in South Africa" (2015) 27 *Urban Forum* 1-14. See also J van Wyk *Planning Law* 3 ed (forthcoming) 94.
[1021] See SPLUMA s 7.
[1022] V Nel "A better zoning system for South Africa?" (2016) 55 *Land Use Policy* 257 263.
[1023] For more detail see V Nel "A better zoning system for South Africa?" (2016) 55 *Land Use Policy* 257 263.
[1024] V Nel "A better zoning system for South Africa?" (2016) 55 *Land Use Policy* 257 263.

cooperation and SPLUMA. In this context the link between the post-1994 spatial planning system, embodied by SPLUMA, and the Constitution was emphasised.

This chapter contained an evaluation of whether SPLUMA is compliant with the Constitution, specifically section 25(1) and (2) relating to the deprivation and expropriation of property. In this brief excursion SPLUMA was found to be compliant. The next part of the discussion centred on two elements of the land reform programme: redistribution[1025] and tenure security,[1026] as these elements were found to be pertinent to the discussion of spatial justice in an urban land reform context. Some conclusions were made about the extent to which SPLUMA and spatial justice, as it is set out in the Act, is able to be realised in the context of urban land reform. It was found that there were limited instruments specifically aimed at promoting spatial justice in this context.

Next, the role of local government, as well as effective intergovernmental cooperation, were elements identified as critical for the success of any measures intended to promote spatial justice. In the 2016 SACN Report, it is contended that a significant factor of the success of SPLUMA is the extent to which intergovernmental cooperation is taken seriously by all the spheres and sectors of government.[1027] SPLUMA has numerous provisions aimed at promoting intergovernmental cooperation, and therefore it takes its commitment to promote intergovernmental cooperation seriously.[1028]

Local government is the level at which implementation of planning measures happens and municipalities, as well as other organs of state, are vital for the progressive realisation of fundamental rights contained in sections 25 and 26 of the Constitution.[1029] However, there are numerous challenges for local government in the context of planning which may impede the efficacy of SPLUMA to promote spatial justice in the context of land reform.

Finally, some other issues which may impact on SPLUMA's ability to promote spatial justice were also identified and briefly discussed. These issues related to conceptual

[1025] See s 25(5) of the Constitution.
[1026] See s 25(6) of the Constitution.
[1027] South African Cities Network *Report on the State of South African Cities* (2017) 1 66.
[1028] See generally Ch 3 of SPLUMA.
[1029] J van Wyk *Planning Law* 2 ed (2012) 595.

and terminological challenges, as well as challenges with the use of zoning as a land use system, which is deemed to be exclusionary and therefore not compatible with the notion of spatial justice.

The next chapter summarises the discussion and suggests possible solutions to the overarching research question.

Chapter 5: Concluding remarks and recommendations

5 1 Introduction

> "The urban land question is central to cities: In the post-apartheid era, the focus has been more on rural than on urban land transformation. The urban land question has not received much attention, and little has been done to alter the structure of urban land relations. Yet land lies at the heart of all the projected and desired changes in urban centres. The exclusionary nature of urban land markets plays out in the form of poor settlements located on cheaper peripheral land; the homelessness of people working informally in urban centres who are unable to find appropriate shelter; strains on infrastructure and management capacity, as densities exceed their design capacity; and increased vulnerabilities, when people are unable to gain secure tenure. *These are not technical outcomes but rather lived realities*."[1030]

The spatial legacy of apartheid is clearly still intact and cities are not prepared for urbanisation.[1031] Problems of poverty and marginalisation are especially prevalent in informal settlements in South Africa, which showcase the immense spatial disparity so in need of redress. Due to a lack of intergovernmental cooperation as well as insufficient investment in housing and infrastructure,[1032] the inherent inequalities in urban areas are being reproduced.[1033] Other issues relate to a lack of inclusion, specifically as it relates to participation in decision-making.

For these reasons it has become necessary to evaluate whether existing policies and legislation aimed at promoting urban spatial transformation and spatial justice are effective. In this regard, the focus shifts to the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA") and in this study a particular development principle that links to the promotion of spatial transformation and spatial justice[1034] was identified.

[1030] South African Cities Network *The Urban Land Paper Series Vol 2* (2018) 7 (emphasis added).
[1031] I Turok "South Africa's Tortured Urbanisation and the Complications of Reconstruction" in G McGranahan & G Marine (eds) *Urban Growth in Emerging Economies: Lessons from the BRICS* (2014) 143 174.
[1032] See National Planning Commission *National Development Plan: Vision for 2030* (2012) 260.
[1033] I Turok "South Africa's Tortured Urbanisation and the Complications of Reconstruction" in G McGranahan & G Marine (eds) *Urban Growth in Emerging Economies: Lessons from the BRICS* (2014) 143 174.
[1034] SPLUMA s 7(a).

Based on the considerations outlined above, certain criteria for the realisation of spatial justice in urban areas were identified in the first chapter: the eradication of segregation based on race and income, therefore the promotion of inclusion[1035] and also the integration of these different groups.[1036] These goals are furthermore underscored by statements in the High Level Panel Report (the "Report")[1037] highlighting the need for an integrated solution to the problems of inequality, which would transcend the mandates of separate government departments.[1038] The Report also makes recommendations to this effect[1039] and identifies the critical need to release well situated urban land to address the consequences of apartheid in urban areas.[1040]

5 2 Contextualising SPLUMA

In order to answer the research question pertaining to the promotion of spatial justice, a historical exposition of legislation which created and perpetuated spatial injustices was necessary. To this end, chapter two contained a brief historical overview of the most prominent pieces of legislation used to control influx and settlement in pre-democratic South Africa.

The devastating effects of this legislation, which led to the economic and social marginalisation and exclusion still experienced by many residents today, emphasised the need to ultimately enact SPLUMA, a planning framework act intended to guide land use planning and land development. The enactment of SPLUMA consequently represented a clear break from pre-constitutional approaches to planning.

[1035] See also J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 37-39.
[1036] 1 2 3.
[1037] Released in November 2017. The High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change grappled with issues surrounding (i) poverty, unemployment and the inequitable distribution of wealth; (ii) land reform; (iii) social cohesion and nation-building as part of the post-apartheid ideal of building and inclusive society - *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 26.
[1038] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 81.
[1039] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 81.
[1040] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 82.

Clearly, SPLUMA, as other policy documents and legislation, does not function in isolation and its functioning cannot be separated from the context within which it was promulgated, nor within which it currently operates. In Chapter 3, then, spatial justice as it is set out as a development principle in SPLUMA section 7(a), was contextualised and compared with some international notions of spatial justice. This led to a discussion of relevant policy documents mentioning spatial justice and considering their alignment with SPLUMA.

5 3 Towards a measure of spatial justice in South African cities

5 3 1 Alignment between the Constitution and SPLUMA

The fourth chapter built on the previous chapters by applying all the relevant provisions in SPLUMA and drawing a conclusion about whether or not spatial justice may be achieved in a land reform context.[1041] In this regard, Van Wyk and Oranje explain that the new spatial planning system, of which SPLUMA is an integral part, is linked to a number of rights as set out in the Bill of Rights, which relate to issues such as housing[1042] and property,[1043] among others.[1044] The focus in this discussion and specifically in this chapter was on the property clause of the Constitution of the Republic of South Africa, 1996 (the "Constitution"), with specific emphasis on section 25(5) and 25(6).

Moving from the broader constitutional context and a consideration of the compatibility, on a superficial level, of various rights in the Bill of Rights and the new spatial planning system, the focus turned to the compatibility of spatial justice, as set out in SPLUMA, and section 25(5) and (6) of the Constitution.[1045] It was evaluated whether SPLUMA can potentially promote spatial justice in an urban land reform context. To this end, as has been explained, the reasons for the urgent implementation of land reform in the

[1041] SPLUMA s 7(a).
[1042] S 26 of the Constitution.
[1043] S 25 of the Constitution.
[1044] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365.
[1045] Although a major part of the discussion surrounding the upgrading of informal settlements and the promotion of spatial justice in the context of informal settlements centres on s 26 of the Constitution, pertaining to the right to access to adequate housing (see s 26(1)), this thesis focuses on the land reform elements, and therefore housing is only briefly dealt with. For a discussion of how housing matters intersect with planning matters in the informal settlement context, see J van Wyk *Planning Law* 2 ed (2012) 470-504.

urban context were briefly expanded on. This led the way for a cursory discussion of the historical development of the land reform programme, before the focus turned to whether specific provisions in SPLUMA could promote spatial justice in the context of the land reform programmes envisioned in section 25(5) and 25(6).

A specific instrument introduced by SPLUMA relates to the incremental upgrading of informal areas. This entails the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation and may include any settlement or area under traditional tenure.[1046] It was explained that, in terms of SPLUMA,[1047] a municipal development framework must identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable.[1048]

Furthermore**,** land use schemes[1049] are required to include provisions which permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme.[1050] This is perhaps SPLUMA's greatest contribution to the promotion of spatial justice in the context of informal settlements.

It was consequently decided that SPLUMA can, to a degree, promote spatial justice in an urban land reform context. It is argued that the provisions in SPLUMA can, to an extent, aid the pursuit of redistribution of and access to land, promoting equality and fairness, as well as the redressing of historic imbalances, by specifically using the newly-introduced instrument of incremental upgrading.[1051] However, there are still compelling gaps between the land reform measures discussed and the provisions of SPLUMA.[1052]

[1046] SPLUMA s 1.
[1047] S 21 (k).
[1048] Furthermore, a municipal spatial development framework must also identify the designation of areas in which (i) more detailed local plans must be developed; and (ii) shortened land use development procedures may be applicable and land use schemes may be so amended. SPLUMA s 21(l).
[1049] In terms of SPLUMA s 24(1) a municipality is required to, after a process of public consultation, adopt a single land use scheme for its entire area.
[1050] SPLUMA s 24(1)(c). In terms of s 24(1)(d), it must be noted, the land use scheme is also required to include provisions to promote the inclusion of affordable housing in residential land development.
[1051] See J van Wyk *Planning Law* 2 ed (2012) 513.
[1052] See also 5 4 2.

5 3 2 Intergovernmental cooperation and participation in decision-making

Van Wyk and Oranje argue that the degree to which the applicable rights in the Bill of Rights[1053] are realised in practice, in the context of planning, depends on the level of skill and involvement of all kinds of planning officials.[1054] The authors underline the way the Constitution was designed (with specific reference to Chapter 3 of the Constitution) to facilitate and promote intergovernmental support.[1055] However, it is argued that these goals of cooperative government and intergovernmental cooperation have remained unrealised and that neither the Constitution, nor the Intergovernmental Relations Framework Act[1056] has sufficiently addressed the problem.[1057] Van Wyk and Oranje believe that this situation, even with the focus on collaboration in new spatial planning legislation, will lead to a diminished impact in terms of the goals of the new spatial planning system.[1058]

As was explained, a lack of coordination between government spheres and departments, and therefore a lack of both vertical and horizontal alignment, could seriously impact the efficacy of any attempt to promote spatial justice in the context of planning. In this regard, SPLUMA does provide for measures to bolster intergovernmental cooperation[1059] in line with the vision of the new spatial planning system. However, there are questions about the effectiveness in practice.

Therefore, although many provisions in SPLUMA aim to combat prevalent problems in relation to intergovernmental cooperation, it is concluded that greater measures are needed to address the issues and ensure that SPLUMA can efficiently function to promote spatial justice in both an urban and a rural land reform context.

Furthermore, the importance of participation in decision-making in the new constitutional dispensation was underlined. In this regard, more could be done to

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[1053] See 5 3 1.
[1054] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365.
[1055] This cooperation and support is essential, because the different spheres have different competences and functions. J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365. See also SPLUMA ch 3, which sets out the intergovernmental duties.
[1056] 13 of 2005.
[1057] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365.
[1058] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 365.
[1059] See specifically SPLUMA ch 3.

ensure that the tools and instruments in SPLUMA could be used to promote participation in decision-making, which can be considered to be a subset of the right to the city and is in line with broader notions of spatial justice as set out in Chapter 3.

In summary, therefore, it is argued that the legacy of the past may still impede the realisation of the future envisioned by those who compiled the Constitution and the new spatial planning system.[1060] Van Wyk and Oranje suggest incorporating interventions that go beyond legal provisions in order to promote a better fit between the two systems and the realisation of actual, tangible results on ground level.[1061] Other suggestions and recommendations are explored under the final heading.[1062]

5 4 Final conclusions and recommendations

5 4 1 Intergovernmental cooperation and support and improving municipal capacity

Although planning is done primarily at the level of local government, this study has demonstrated the all-importance of effective intergovernmental cooperation and support for the efficient functioning of the planning system as a whole. SPLUMA clearly allocates greater powers to municipalities to do land-use planning; however, the successful implementation of plans is dependent on alignment with national and provincial spheres of government with the duty to deliver infrastructure at local level.[1063]

Therefore, local government is entreated to solicit the active support and collaboration of provincial and national government in the formulation, preparation and approval of local spatial development frameworks and land-use schemes. Similarly, national and provincial levels of government are enjoined to support local government, so that the plans may be aligned and not conflict with each other.[1064] Furthermore, there is clearly

[1060] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366.
[1061] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366.
[1062] 5 5.
[1063] South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 8.
[1064] South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 8.

a need to enhance mechanisms that would improve the internal capacity of municipal development planning departments in particular.[1065]

5 4 2 Legislative framework

In this investigation it has become clear that both SPLUMA and the programmes of redistribution[1066] and improving tenure security[1067] are, to an extent, aligned with each other. However, in order to further promote spatial ideals in the context of urban land reform, it could arguably be necessary to enact new legislation[1068] which would provide a clear definition of what constitutes "equitable access" as provided in section 25(5) of the Constitution.[1069] This law would then create a framework to guarantee that existing and new laws are consistent with constitutional obligations and indeed give effect to ideas of justice and transformation.[1070]

The role of provincial legislation in promoting spatial justice cannot be overestimated. It is therefore argued that provincial laws must include provisions that would promote access to secure tenure and the incremental upgrading of informal settlements, at the very least.

The legislative framework needs to be adjusted to provide more effectively for urban contexts where (a) there is access, even limited access, but no secure tenure; and (b) where there is no access.

With regard to the former, where access exists but secure tenure is absent, the following is suggested:

(a) Consider/explore the application of the Interim Protection of Informal Land Rights Act 31 of 1996 ("IPILRA") in this context. This would require specific

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[1065] Specifically their capacity to enforce land-use decisions and monitor their implementation, with emphasis on decisions which relate to the upgrading of informal settlements. South African Cities Network *Background Information for Urban Land Dialogues* (2018) 1 8.
[1066] S 25(5) of the Constitution.
[1067] S 25(6) of the Constitution.
[1068] This would take the form of an overarching framework law, which will provide principles and, similar to the Spatial Planning and Land Use Management Act 16 of 2013 and the National Environmental Management Act 107 of 1998, be the responsibility of the national sphere of government. Conflicts are to be resolved with due regard to Chapter 3 of the Constitution, which refers to intergovernmental cooperation.
[1069] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 227.
[1070] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 512.

touching points with SPLUMA, including better intergovernmental cooperation, alluded to above.[1071]

(b) Consider the suggested Land Records Act[1072] so as to reflect and record informal rights better.

(c) Specifically linking existing settlements to incremental upgrading procedures set out in SPLUMA.

(d) Alignment with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 to regulate occupation while upgrading is in process.

(e) Better alignment with the regulatory framework dealing with building requirements and housing so as to speed up the process of the provision of housing.

Integral in the above is participation of and consultation with relevant parties, in particular informal occupiers. Also part of this process is effective working arrangements between local government and relevant departments of land reform, planning and housing, in particular.

With regard to instances where access to land is absent, the following is suggested:

(a) The identification of sustainable land, expediently and effectively.[1073] The envisaged new Framework Act, referred to by the High Level Panel Report of 2017[1074] could be very useful here. This Act is intended to provide guidelines, including what is understood under "equitable access". In this context, well-situated state-owned land must be made available for housing and for services

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[1071] See 5 4 1.

[1072] See s 25(6) of the Constitution.

> "The motivation is for national legislation and executive capacity to develop a robust, inclusionary land rights administration system to address the gap in the current state apparatus to recognise and administer land tenure rights that are insecure….It aims to put in place a model of land administration with capacity to underpin the rights-based approach to the land tenure laws passed after 1994 and to create capacity to resolve disputes where land rights are contested."

The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change (2017) 1 59. This Act would also need to be aligned with currently existing land rights legislation, such as SPLUMA. The use of the Land Records Act was also supported in the *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 87.

[1073] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 33. The Report identifies the urgent need to release well-situated land to mitigate the legacy of the apartheid city and also calls for the recognition and administration of a continuum of land rights.

[1074] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017).

for the poor and well-situated privately-owned land could also be targeted for expropriation.[1075]

(b) Exploitation of 4 of the 5 categories listed in clause 12(3) of the Expropriation Bill of 21 Dec 2018. These categories provide opportunity to acquire land, possibly at nil compensation, to be employed for purpose of redistribution and tenure security. The four categories are: where the land is held for purely speculative purposes; where the land is owned by a state-owned corporation or other state-owned entity; where the owner of the land has abandoned the land; and where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.[1076]

Again, the participation and consultation of role-players is essential, including better and more effective working arrangements between relevant government departments.

An adjusted legislative framework, with spatial justice and section 7 of SPLUMA in the centre, will ultimately promote broadening access to land and improving tenure security within an urban context.

5 4 3 Political will

Critically, political will is identified as an important factor in the success or not of the new spatial planning system in transforming the wrongs of the past.[1077] Political will is necessary to deal with vested interests that support and maintain the status quo and is therefore essential to effect any change:

> "Without the wish and will to effect the necessary changes by politicians, spatial planners and others involved in the social, economic and spatial development of the country, the belief that it is possible to 'make a change', and the ability, both from a capacity and a funding-perspective, to do what is required, even the most progressive Bill of Rights and

[1075] *The High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 1 51, 55-56. In this context, the Panel suggests that the Government Immovable Asset Management Act 19 of 2007 is used to free up well-situated state-owned land for low-cost housing.

[1076] Cl 12(3)(b)-(e) of the Expropriation Bill (draft) GN 1409 in *GG* 42127 of 21-12-2018. The fifth category listed includes land occupied and used by labour tenants, thus referring to land in rural contexts, which is not the main focus of this study.

[1077] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366.

spatial planning system, will not be able to undo the deep and divisive imprint of the past."[1078]

5 5 Conclusion of the study

This chapter concludes the study. In this study it was found that SPLUMA does indeed, although to a very limited extent, promote spatial justice in the context of the particular constitutional imperatives contained in section 25(5) and (6) of the Constitution.[1079] Essentially SPLUMA is a planning tool and not inherently aimed at promoting land reform. Yet, because of the very specific touching points between SPLUMA and section 25(5) and (6) of the Constitution, with some adjustment and with more emphasis on particular tools in SPLUMA, the efficacy of SPLUMA in its endeavour to promote spatial justice in informal settlements can and must be improved.

The need to address spatial justice issues in informal settlements is indisputable.[1080] The significance of the spatial dimension of colonialism and apartheid has long been recognised.[1081] However, it is argued that the prevalence of informal settlements reflects a new "post-apartheid" type of oppression,[1082] as opposed to the more overt oppression that gave rise to spatial injustices during apartheid.[1083]

Accordingly, the discourse has shifted from discussing justice[1084] to a consideration of oppressions and injustices as they manifest in and are influenced in spaces.[1085] In this regard it is contended that the social injustices of apartheid seem to have become

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[1078] J van Wyk & M Oranje "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" (2014) 13 *Planning Theory* 349 366.
[1079] See 1 2 3.
[1080] See JM Pienaar *Land Reform* (2014) 678-681; Van Wyk *Planning Law* 2 ed (2012 590-593. See also J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 40- 41 for a brief discussion of informal areas and settlements.
[1081] P Gervais-Lambony "La justice spatiale pour re-visiter et comprendre mieux l'Afrique du Sud métropolitaine" (2017) 713 *Annales de Géographie* 82 88. See also J van Wyk "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381 382; J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 29 and P Gervais-Lambony *Territoires Citadins, 4 Villes Africaines* 272.
[1082] The number of informal settlements, which increased rapidly in the 1980s, has not decreased since 1994. P Gervais-Lambony "La justice spatiale pour re-visiter et comprendre mieux l'Afrique du Sud métropolitaine" (2017) 713 *Annales de Géographie* 82 93.
[1083] See Chapter 2 2. See also J van Wyk "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26 29-30.
[1084] See generally I Young *Justice and the Politics of Difference* (1990); I Young *Inclusion and Democracy* (2000); D Smith *Geography and Social Justice* (1994) and J Rawls *A Theory of Justice* (1971).
[1085] P Gervais-Lambony "La justice spatiale pour re-visiter et comprendre mieux l'Afrique du Sud métropolitaine" (2017) 713 *Annales de Géographie* 82 83.

entrenched in liberal society.[1086] This necessarily means that the mere abolition of apartheid-era laws[1087] and the related change of regime will not automatically lead to the end of oppression, but rather, as is demonstrated, represent a transmutation of oppression.[1088]

Therefore, without due regard to space and the spatial-social dialectic, this situation of oppression, particularly as highlighted in the informal settlement context[1089] in this thesis, will likely remain dire.

Viewing the current challenges faced by residents in informal settlements through the lens of spatial justice presents new perspectives on the South African urban situation.[1090] The notion of spatial justice is therefore relevant and pertinent in an urban land reform context. To this end, it may be useful to further research and develop the notion of spatial justice so that it can be better integrated into the current system of law, or used to reform it.

[1086] See in this regard I Young *Justice and the Politics of Difference* (1990) 41.
[1087] See, for example, the Abolition of Racially Based Land Measures Act 108 of 1991.
[1088] P Gervais-Lambony "La justice spatiale pour re-visiter et comprendre mieux l'Afrique du Sud métropolitaine" (2017) 713 *Annales de Géographie* 82 93. See also J Hayem "L'État Sud-Africain face à Marikana et Abahlali: Haine de la Démocratie? De la Nature des Lutes et des Réactions qu'elles Suscitent" in R Porteilla, J Hayem, M Severin & PP Dika (eds) *Afrique du Sud, 20 Ans de Démocratie Contrastée* (2016) 213-136.
[1089] P Gervais-Lambony "La justice spatiale pour re-visiter et comprendre mieux l'Afrique du Sud métropolitaine" (2017) 713 *Annales de Géographie* 82 93.
[1090] P Gervais-Lambony "La justice spatiale pour re-visiter et comprendre mieux l'Afrique du Sud métropolitaine" (2017) 713 *Annales de Géographie* 82 83.

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Table of constitutions

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