Planning, informal settlement and housing in South Africa: the Development Facilitation Act in view of Latin American and African developments

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INTRODUCTION

The South African legal system dealing with land use control, planning and development has historically functioned on a racially exclusive and geographical basis. Before the new political dispensation, the land use control framework consisted of statutory and other measures governing both formal and informal settlement and included the ordinances of the four provinces, measures relating to the four national states, as well as the six self-governing territories. The Physical Planning Act 125 of 1991 formed the overall planning paradigm. Informal settlement was specifically governed by the Less Formal Township Establishment Act 113 of 1991 and the Provision of Certain Land for Settlement Act 126 of 1993. The dissolution of the above-mentioned territories and the consequent redrawing of the boundaries of the new provincial dispensation in 1994 resulted in a complicated formal and informal township establishment, planning and land use system. A variety of overlapping and conflicting legislation remained which continued to frustrate and hinder planning and development in general and the provision of housing in

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**Bjur; LLB; LLM; LLD (FU CHE).


2 Land Use Planning Ordinance 15 of 1985 (C), Town Planning Ordinance 27 of 1949 (N), Townships Ordinance 9 of 1969 (F) and Town Planning and Townships Ordinance 15 of 1986 (T).

3 Transkei, Bophuthatswana, Venda and Ciskei.

4 Lebowa, Gazankulu, KwaNdebele, QuaQua, KanGwane and Kwazulu-Natal.

5 Both of these Acts are still applicable in many of the provinces. See also Pienaar & Muller 'The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework' 1999 Stellenbosch Law Review 370–396 at 384–385.
The development of overriding legislation capable of providing a single procedure for land development was imperative. The Development Facilitation Act 67 of 1995 was consequently implemented. Existing legislation continued to operate alongside the DFA which provided a speedier procedure. Other unique characteristics of this Act are, for example, the provision of ownership in phases, the possibility of removing a title deed restriction simultaneously with a development application, and the provision of 'non-statutory development' of specific importance to the issue of land availability. Although the DFA is an Act of national application, it envisages that provincial legislatures can formulate their own legislation within the guideline framework it creates.

Many problems are currently being experienced with the application of the Act. Long-term solutions with regard to successful development planning impacting on the delivery of housing, urban sprawl, badly integrated city structure, loss of agricultural land and open spaces, the development of environmentally sensitive areas, and infrastructure planning are also needed urgently. Research into long-term solutions will enable movement in a consistent and constructive way towards redressing spatial inequalities on a sustainable developmental basis. In order to achieve this, comparative legal research into informal settlement and related issues in other developing countries is necessary.

In this article the first section deals with comparative legal work focused on Peru, Chile and Mexico's land use planning, land invasion, settlement and housing-related issues. This section will first provide the basis of comparison after which the focus shifts to the various jurisdictions in Latin America. This is followed by a discussion of the same issues in the context of Zimbabwe. Key issues resulting from the comparative study are outlined before the focus again shifts to South African land use planning and housing-related issues. The DFA is highlighted in this section. Recommendations based on the comparative work and the specific needs of the South African situation follow.

COMPARATIVE LEGAL PERSPECTIVE

Basis of comparison

When one deals with land, it is unavoidable that many other issues immediately become relevant. It is therefore impossible to research the impact of the DFA in isolation. The following issues are also topical: land reform, development, planning, housing and urbanisation (urbanisation growth rate and access to facilities and amenities). The land issue is in itself very complicated...
— for purposes of this discussion it relates to security of tenure; illegal occupation of land (including land invasions) and informal settlement. South Africa has experienced many developments in the form of policy documents, legislation and case law dealing with the broad research topic of land reform issues, development and planning. In the past year alone, the following crucial legislation has been promulgated: the Rental Housing Act 50 of 1999, the Housing Amendment Bill 7 of 2000 and the Home Loan and Mortgage Disclosure Act 63 of 2000. With regard to planning, many provinces have embarked on a process of formulating and promulgating individual planning laws. Although all of these issues are relevant, it is impossible to discuss the entire spectrum in detail in this article.

With regard to the comparative legal section, it was decided to investigate informal settlement in Latin America and Zimbabwe. The relevance of the developments in Chile, Mexico and Peru cannot be emphasised enough. These countries have experienced land reform, planning and developmental issues similar to those facing South Africa during the past four decades. There is much to be learned from their collective experiences. Zimbabwe is, like South Africa, a post-colonial African state and has also been through (and is still undergoing) the process of land reform and development adjustment. Having very similar backgrounds and developmental issues, the procedures adopted to address informal settlement in that country are also investigated.

**Latin America**

Until recently the South African planning and related laws were characterised as being control-based and racially orientated. Planning mechanisms were not merely directed at the promotion of planning in general, but also served to sustain racial segregation. Since the demise of apartheid, South African

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12It is interesting to note that there has not been any reported case dealing with the DFA. With regard to the other relevant issues, a considerable body of case law has developed since 1994. With regard to this topic the cases relating to illegal occupation of land are especially important, eg Ross v South Peninsula Municipality 2000 1 SA 589 (CPD); Bettas Eiendomme v Ekpele-Epob 2000 4 SA 468 (WLD); Grootboom v Oostenberg Municipality and Others 2000 3 BCLR 277 (C). See also Pienaar 'Uitleg en toepassing van die Wet op Voorkoming van Onwettige Uitsetting en Omregmate Besetting van Grond 19 van 1998' 2000 THIRR 464-471.

13See Van Wyk n 1 above at 81. Please note that racial divisions are not unique to the South African situation.
cities, settlements and townships are starting to look more and more like other developing countries. State policy has become a less vital component and international forces and markets have assumed greater importance. In both South Africa and Latin America, market forces are increasingly the dominant force behind urban procedures. Other factors have also increased the similarities between South African and especially Latin American cities:

- growth in informal employment;
- rapid city-ward migration;
- political protest over service provision.

As in South African cities, a large percentage of inhabitants live in overcrowded, unsatisfactory housing conditions and extensive land invasions are the order of the day. Residential segregation is no longer racial, but wealth orientated. Furthermore, social and economic similarities also emerge:

- highly unequal societies;
- low to middle income development status; and
- high levels of urbanisation.

In terms of per capita income, literacy and urbanisation, South Africa is more in line with Latin America than with the rest of Africa. South Africa has had an independent government for much longer than most other African countries. The nature of the state, too, more closely resembles Mexico or Peru than, for example, Tanzania. South Africa is also more akin to Latin America than its neighbours as regards powerful market forces.

The population increase in Latin America has also been very dramatic. Between 1950 and 1990 the annual growth has been 2.5 per cent. Even though still a developing continent, seventy-two per cent of its inhabitants are urbanised — although important differences exist between the various countries. Chile urbanised very early and already had an urban majority in the 1930s whereas most of the other countries only achieved this status in the

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14Gilbert 'What might South Africa have learned about housing subsidies from Chile?' 2000 *South African Geographical Jnl* 21-29.
17South Africa is, however, not on the same level of urbanisation as Latin America.
18Gilbert n 14 above.
19Gilbert & Crankshaw *Urban Studies* (1999) 2375-2400. The authors also note that SA has a long-established and deeply embedded capitalist sector that dominates the economy and that few other African states are similar in terms of per capita income, car ownership, a corporate presence, stock exchanges, infrastructure provision and telecommunications. Although the similarity to Latin America is not identical, it is quite remarkable.
21See for the historical background of the general housing conditions of Latin America's major cities, Gilbert *id* at 77.
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1950s. Furthermore, the urban systems in Chile, Peru and Mexico are dominated by huge concentrations of people in the national capitals. As major cities for economic and political activity, primary cities exert a powerful gravitational pull. After the 1970s the continent showed signs of 'polarisation reversal' in that secondary cities began to grow rapidly. Although there has been a slight shift, the proportion of the national population living in many of the giant cities is still very high.

Probably the most visible results of the rapid urbanisation in developing countries, have been the conditions under which low-income families exist. Slums and squatter settlements are the products of complex and interrelated factors. Not only do squatter areas comprise a large percentage of existing housing stock in cities, but these areas are also growing more rapidly than the cities themselves. The result is an overcrowded city core and sprawling shanty towns on the periphery and in other locations unsuitable for other purposes. Typically, shacks and shelters are constructed with any building material available. These settlements usually lack basic amenities or acquire them through the popular sector — generally at inflated rates. Traditionally, authorities have refused to provide services for fear of encouraging more migration.

Underlying this phenomenon is a fundamental urban land crisis. Lack of effective, proactive planning; domination of the land market and of land use patterns by the private sector; emphasis by the construction industry on high profit luxury housing; zoning and subdivision controls that do not reflect the needs of the whole population, among others, have led to a housing and land market that excludes the poor and forces them to resort to slum and squatter living. Related problems with broad implications include inefficient land use patterns for the city and urban area as a whole, and additional pressure on the relevant authorities to acquire land at fair prices.

Zimbabwe

Although a developing country, Zimbabwe has one of the most broadly based

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24Downs 'Housing the poor in developing countries: selected issues in the provision of services, land and shelter' 1980 Georgia Journal of International and Comparative Law 527-578.

25Villa & Rodriguez n 20 above at 27.

26Angel, Archers et al Housing the poor (1983); Trivelli 'Land and human settlements: access to land by the urban poor — an overview of the Latin American experience' 1985 Occasional Papers 17.

27Potter & Lloyd Evans The city in the developing world (1996) 137-158.

28Downs n 24 above.
economies in southern and central Africa. However, production appears to be fairly distinct in socio-spatial terms and continues to reflect a strong dichotomy between black and white, urban and rural, peasant and capitalist. The situation is further complicated by the division and conflict within expatriate capitalism between settler and colonial interests. The nature of this conflict has strongly influenced the spatial dimensions of urban and economic development.

Until independence, the urban areas were considered to be the preserve of the white population. The economy was also organised to serve the interests of the settler community. The black population was seen as subsidiary to white needs and their position was determined solely by their relevance within the settler economy. The entire structure was carefully reinforced by statutory measures governing land apportionment, crop-marketing and industrial relations.

All the main cities were developed along the railway line to facilitate marketing, industrial, administrative, communication and security needs. The two main axes for urban development were established between Harare and Bulawayo and between Harare and Mutare. Until the 1940s the majority of blacks in the urban areas were employed as domestic workers and were housed either on the employers' properties or in black housing areas known as locations — first established under the Native Locations Ordinance of 1906. In 1941 the Land apportionment Act was amended to allow local authorities to house blacks in their areas. Although provision was also made for the housing of blacks in the cities, this housing was very limited. After World War II it became clear that existing housing arrangements were inadequate.

The commencement of the Natives (Urban Areas) Accommodation and Registration Act of 1946 obliged local authorities to finance and administer urban black townships, and provided them with the machinery to do so.

The Department of African Administration embarked on major housing

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29 Especially before the economic crisis of the late 1990s.
31 See also Pederson Small African towns — between rural networks and urban hierarchies Centre for Research and Development Copenhagen (1996) 22-50.
33 See for information regarding the historical background concerning colonialism Teedon & Drakakis-Smith n 30 above.
34 These measures obliged local authorities to finance and administer urban black townships. Initially the housing for single males consisted of huts constructed from corrugated iron tanks with thatched roofs and barrack-style hostels located on the periphery of the city of town — see further Patel n 32 above.
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construction programmes during the 1940s and 1950s. Unfortunately, these efforts in general resulted in hostels for single males, thereby excluding families and women. The Vagrancy Act of 1960 enabled the local authorities to return persons who could not prove that they had employment within urban areas, to the rural areas.

Initially migration to the cities took the form of short sojourns to earn cash and return to the rural areas. Although violence and drought resulted in some inter-migration, economic considerations remained the principal reason for migration.

Before independence there was hardly any planning, as such. Regional planning primarily consisted of 'accepting' that urban growth throughout the white areas would continue and should therefore be 'planned' to avoid excessive concentration in Harare and Bulawayo. Most of the planning at that stage was physical and designed to cope with demands for accommodation. Despite the ostensible lack of regional and urban planning, the reality of decades of settler manufacturing capitalism stamped a clear spatial dimension on the class structure and modes of production.

After independence, the repeal of the laws and the hopes of new life and opportunities led to increased informal settlement. At that stage there were already vested forms of madiro — settling where one pleased. The increased flow to urban areas can also be ascribed to the removal of influx control, the migration of the families of single men already living in the cities, and pressure in the rural areas. President Mugabe's extension of ownership in the urban areas was also a major incentive for migration to the cities.

The relatively low rate of urbanisation (twenty-six per cent of the total population is urbanised) must be seen against the background of a high population growth rate. The urban growth rate is some six per cent per annum. Racial division has been replaced by a division based on class. The formerly white suburbs are now low density areas, while the former black

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35 Even before independence in 1976, the government developed a more tolerant approach towards informal settlers, owing to the failure of the implementation of influx control due to war and migration. By 1979 the black townships were overcrowded.

36 Apart from the Vagrancy Act, all the above-mentioned legislation was repealed in 1979.

37 This was a popular practice during the liberation wars in defiance of the Land Apportionment Act — especially on commercial farmland. The recent illegal occupation of farmland in Zimbabwe is therefore not a new phenomenon — it started during the independence war.

38 These factors are all very similar to those experienced in South Africa.

39 Tedon & Drakakis-Smith n 30 above, point out that, in a sense, the redistribution of land after independence still reflected the pre-colonial image. This also had an impact on rural poverty actually increasing after independence, which has again resulted in a notable rise in migration to the urban areas.
townships are now high density areas. With the greater security of tenure in the cities and towns, family accommodation has also increased.

Land use planning
Planning and zoning laws

Latin America

Land use planning is essential to any strategy designed to deal with the deleterious effects of rapid urbanisation. Traditionally, long-term plans and zoning ordinances provide the necessary guidelines within which the private land market operates. Many factors contribute to the on-going failure in attempting to control rapid urbanisation by way of zoning laws. Most of these factors are directly linked to applying western-style (First World) planning to developing countries. These include an over-emphasis of beautification and the disregard of social and economic needs; a rigid classification of land uses and a reliance on the static master plan/zoning map approach. These mechanisms are rarely effective in developing countries in view of the institutional constraints on growth pressure prediction and on the implementation of control measures. Another drawback of the master plan approach is the dominance of private land use. Closely connected is the lack of a large, efficient civil service and the concomitant possibility of corruption and graft — a major problem in developing countries. Lack of coordination between the various planning agencies deciding on public infrastructural investment frequently diminishes the planning process further.

All of these factors mean that the planning process as such has minimal impact on actual settlement and land use patterns. This can clearly be seen in the informal land subdivision prevalent in most of Latin America. In these countries a separate set of rules have developed over decades to meet the needs of the so-called ‘informals’. Existing (formal) planning and development routes are so cumbersome, time-consuming and expensive, that the majority of the population functions extra-legally. In the past, land invasions, and thereafter illegal subdivision and development, have played an important role in addressing the housing needs of the poor in an effective and expedient fashion. However, increased land speculation and tighter government control over vacant land have recently made these well-tested techniques less viable options.

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40 It appears as if the most rapid transformation is occurring in the growth of an African urban proletariat and bourgeoisie. This has led to some improvements in personal gain and an improvement in housing standards as the black middle-class is beginning to move into formerly white suburbs.

41 Historically, the male population in cities used to be almost double than that of women because hostel accommodation was only available to men. As legislation permitted families to enter cities and to acquire ownership, gender disparity has been addressed and many more females joined the work force. There has been a significant reduction in the number of women who are employed in domestic service, but this has not led to an increase in manufacture. One of the major roles of women is to lower the costs of production through informal activities, such as illegal urban gardening and cropping. Also see the publication dealing with urban agriculture — Mbiba Urban agriculture in Zimbabwe 1995.
Apart from expanding more control measures over vacant land, the planning system in Latin America as such has also undergone major changes during the past few decades. In Peru, Chile and Mexico formal institutions were established that were responsible for planning. The master plan approach — the *Plano Regulado* — was in all instances the basic point of departure. However, experience has shown that the master plan approach, followed in Europe and North America, was inappropriate in these countries. During the 1970s and 1980s a new approach emerged: a more flexible planning system, incorporated into a new action-oriented approach. This entails the following:

- an acceptance of the limitation of planning law;
- flexible techniques that are responsive to rapidly changing needs; and
- an emphasis on institutional coordination and implementation.

This all-encompassing approach includes taking cognisance of social and economic factors that impact on planning. Other aspects closely linked to the new approach are 'critical areas planning' and 'infrastructure planning'. These are based on the varying standards of quality in different areas within developing cities. High-density informal settlements are approached differently to high quality areas of the metropole. The local authority is then empowered to classify various sections of the city in which specific legal measures will apply.

Infrastructure provision planning seeks to reverse the common patterns of public provision of infrastructure to newly urbanised areas only after settlement has occurred. This could be undertaken as a means of encouraging various types of development by supplying certain levels and types of infrastructure and services. These methods merit further consideration for their efforts to re-order objectives of the planning process, their links to public investment policies, and their feasibility within limited resources. Governments employing these strategic planning techniques arguably have greater impact on the urban environment than those employing the master plan approach.

Linked to the general rejection of the master plan approach, is the mixed-development approach. This method can play a significant role in financing projects in the form of cross-subsidisation. The cost of providing services, for example, is reduced incrementally once major infrastructure such as roads and water systems have been installed to service major industrial and commercial sites. Depending on the circumstances, this mechanism can be linked to either a mass housing scheme or a site-and-service scheme.

**Zimbabwe**

Although Zimbabwe in essence still follows planning techniques and practices established by the colonial government, the introduction of the pyramid-style of planning has been very interesting. This means that smaller scale plans feed into larger scale plans, involving some type of ‘communication’ between planners, and sometimes politicians at different levels. This planning system is essentially designed to function from the bottom up. Due to implementation problems, the success of this approach has not been tested in practice.

Emphasis on rural development makes sense in the prevailing circumstances
in Zimbabwe. The aim is that the promotion of development will ultimately flow over to the urban areas and eventually curb the city-ward movement.

Draconic approaches with regard to informal settlement and consequential resettlement have not been very successful. Apart from destroying the existing housing stock, the incidence of persons returning to informal settlement after being resettled is still increasing.

**Building codes and subdivision controls**

Standards in building and subdivision regulations have typically been based on western styled planning and have often been far beyond the budgets of low-income households. It is also ironic that the methods and standards used when informal settlements are being upgraded, would be illegal in most of the developing cities in view of the stringent requirements. However, in some developing cities the strict subdivision rules are not enforced, leading to land speculation in the informal market and the illegal subdivision of land. Experience has also shown that regulations requiring high standards of construction are in fact benefiting the capital intensive building material suppliers and hold no advantages for low-income households.

If a more informal approach is preferred, it does not necessarily mean that it would function without any standards whatsoever. *There will always be some form of standard to ensure public health and safety.* The standards should, however, be flexible in order to respond to changing needs and demands in the various sectors of the cities. Once everyone's basic needs have been met, nothing prevents the authorities from upgrading the existing standards requirements.

Required standards are determined in accordance with social, economic and environmental conditions, as well as the quantity and quality of available resources. The kind of building materials, the size of the building, and the facilities required, aim at a balance between health, safety, and cultural requirements. As a point of departure, it is also acceptable that middle-class permanent housing will in essence be different to low-income housing consisting of short-life materials. Bogota, for example, incorporated the *Normas Minimus* approach in 1973 with remarkable success. Chile also employs various building materials depending on the climate and area. Another approach is to provide for the possibility of different standards with regard to subdivision in the different areas of the city. The traditional approach can also be amended by accepting that homes can be occupied before completion — in other words, that building the home is an on-going process. In Zimbabwe, for example, the provision that no one may live on building premises, has led to numerous development projects being abandoned.

**Housing delivery**

Throughout the developing countries, governments have started to utilise more original methods of alleviating the problem. Two basic approaches can be identified here: (a) adjusting the planning system to incorporate housing and linking it up with a comprehensive mass housing scheme as in Chile; and (b) emphasising the role of the informal sector and placing more responsibility
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in the hands of the beneficiaries themselves. Mass housing is not necessarily a component of the latter category — the approach followed in Peru.

**Mass housing programmes**

The problems relating to mass housing production are basically that the range of choice is limited, the houses are small and all alike, development is usually on the periphery of urban areas, and location is extremely bad. The benefits are that housing construction is usually speedy, under control of authorities and it can alleviate the housing needs of a large group of persons at a time. In Chile it has been quite successful due to the commitment of the government, the long period during which the scheme has been functioning resulting in many of the short-comings having already being addressed and the direct involvement of the government in contracting out the building operations and allocating the houses. The government is the major housing provider. The down-side to this, is that there is no or hardly any competition, that the choices are few from the beneficiary's point of view, and that the process is rigid. Chile's economy is also healthier than most of the other countries in the region and this has enabled the government to spend more funds on housing on the one hand, and enabled the beneficiaries to contribute to and invest more in their homes on the other. Because the planning approach is flexible, adaptable and incorporates public participation, housing issues can be attended to as part of the whole planning process.

**Reliance on self-help**

Another theme that has emerged, is the rethinking of the public sector's role in the provision of housing for the urban poor. Many new housing policies focus on the performance of informal sector housing construction activities. Some governments have started to support these programmes by offering security of tenure while introducing infrastructure, utilities and community services into existing communities.

This approach is directly linked to a redefinition of the housing problem itself. Instead of viewing these areas, as unacceptable and ugly, the new approach focuses more on the attributes and stresses the enormous potential of individual construction initiatives. In this positive light, the problem is for the authorities to develop policy instruments that can fully harness the potential of the popular sector in its provision of shelter.

The emphasis has therefore shifted from housing subsidy schemes to site-and-service schemes and the upgrading of existing settlements. Although there are many varieties, the general concept implies that the public authorities identify land for low-income settlement, and are generally responsible for the provision of basic infrastructure and service systems which are capable of being expanded and improved over time. It is furthermore the government's responsibility to provide technical and other support and services in the construction of units.

Upgrading programmes introduce varying levels of infrastructural services, depending on local need and ability to pay and provide the residents with some form of tenure security. Official support in upgrading programmes has
encouraged further efforts and investment by the individuals concerned. Thus, the role and function of the informal sector in the provision of housing has been expanded to raise the standards to meet the minimum health requirements and to permit residents themselves to reconstruct their neighbourhoods over time. Both site-and-service and upgrading use public funds. The government's role is seen as assembling the elements of housing that require public provision: land, basic utilities and community services. Both are based on the premise that the total quality of the total residential environment is as important as the quality of the shelter/structure.

The level of services to be provided depends on the following factors: the level already available, the resources of the authority, and the priorities of the residents. The crucial element here is that the designs must be flexible — something that facilitates gradual improvement of standards as they become more affordable. This may result in relatively low standards, particularly in the beginning.

In Zimbabwe the high building standards of the previous government have remained in place. This has made the development of low-income areas extremely difficult. Site-and-service schemes have also not functioned as expected as support systems do not exist.

Relevant factors

Irrespective of the specific approach followed by government, or even if a combination of housing delivery approaches is followed, certain aspects will always be crucial to the eventual success of the venture.

- Locality, job opportunities and urban accessibility.
- Security of tenure is a vital component in the idea that residents should invest in their neighbourhood. In the modern concept of expanding primary cities, it is often necessary to transform low-density areas into high-density sectors. Tenure arrangements and infrastructure should be designed to facilitate these possible developments.
- Participation of the community in the planning and implementation of the project.
- Official sensitivity to the real needs of the urban poor.

Consistency between a country's housing programme and the socio-political objectives is also beneficial to the overall issue. Housing programmes can therefore also be employed in promoting human rights and to realise integrated racial settlement. In this way social goals are achieved through housing programmes. However, these goals may be hampered by the usual administrative problems encountered in developing countries. For example, institutional problems of coordination and implementation, overly bureaucratic systems, and the fact that government agencies often functions under severe financial and capacity constraints.

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42 In South Africa security of tenure is also vitally important in view of the history of racially-based land control. Improving security of tenure is an intrinsic part of land reform — especially the tenure reform leg of the overall land reform programme.
Key issues resulting from comparative investigation

This section highlights some of the key issues that were identified in the process of legal comparison and which can be considered relevant for the South African scene.

Chile

- Housing programmes need to be moulded in accordance with the specific requirements of the beneficiaries. In Chile, for example, the Basic Housing Programme still did not reach the very poor. This led to the introduction of a new category, the Progressive Housing Programme. This provides for lower standards in housing and requires less up-front savings. It also has no loan repayment. In order to meet the needs of those for whom the programme was intended in the first place, a shift in emphasis was needed from a western perspective to lower standards. This has made the scheme effectively accessible.
- A variety of building materials is used in the housing schemes. Brick and mortar are not the only acceptable building medium.
- Every two years beneficiaries under the programme are evaluated. Those who have managed to save can apply for additional grants which are usually used for upgrading.
- A single, dedicated housing Ministry in Chile.
- A state-operated National Housing Finance Corporation responsible for making more funds available in the form of loans.
- Settlement upgrading programmes are also aimed at providing services.
- All social housing land is exempted from land taxes and rates.
- The all-encompassing approach towards land use planning incorporates housing and public participation from the outset.

Negative aspects

- The emphasis on home ownership has led to ignoring rental accommodation.
- Only newly-built houses can be bought with the housing subsidy.
- There is often little or no supervision over the construction of houses resulting in poor workmanship. There are also no official controls over builders or the building process, as such.
- Housing scheme houses are erected with no regard to urban impact — more emphasis on quantity than on quality has resulted in badly located housing schemes.
- The housing scheme does not promote inner-city renewal in general. The existing urban renewal leg of the housing scheme only earmarks specific areas — an overall approach is therefore lacking.

Mexico

- Formal attention to renting accommodation.

Negative aspects

- The lack of official control over land use planning has exacerbated urban-based problems. This emphasises that there should be at least some form of control over land utilisation and that it must be enforced. This aspect relates to the lack of long-term planning when the process of rapid
urbanisation started.
• The existing land use planning system is still too cumbersome, expensive and time-consuming. Illegal subdivision of land remains a problem.

Peru
• Informal settlement is still a major concern in Peru due to the expensive, time-consuming land use planning system. Planning is still very much a centralised function with little autonomy on municipal level. The provision of services is a major problem.
• Urban sprawl, peripheral development, and the loss of agricultural land are in essence due to the planning approach in which the city is separate from the region. Regional or area-wide planning is therefore lacking.
• Although illegal subdivision of land is still a general occurrence, informal settlement is linked with participatory planning, making the end results more attractive to participants.
• In all informal settlements there are always sections allocated for rental accommodation.

Zimbabwe
• The general lack of technical and other support for site-and-service schemes are extremely detrimental to the delivery of housing.
• The on-going process of splitting up and re-organising government departments involved in land use planning and the provision of housing impacts negatively on the overall successes.
• Zoning and planning measures are generally rigid and of a high standard.
• Planning processes are characterised by a high level of bureaucracy and inflexibility.
• Persons relocated to resettlement areas could not afford to live there due to rates and levies and were forced to return to informal settlements.
• Impact and influence of informal institutions (community associations and leaders) in the planning and development processes were initially overlooked by planners.

Conclusion
Traditional responses by authorities in the developing world to space, planning and housing-related issues varied from attitudes of benign neglect (Latin America); to bulldozing strategies and resettlement (Zimbabwe); and attempts at heavily subsidised housing programmes (Chile). These conventional approaches have generally proved unsuccessful in addressing the problem. The result of bulldozing techniques, for example, further diminished the existing housing stock and exacerbated the housing shortage. Public sector house building has not had a major impact on the provision of housing due, *inter alia* to unaffordability by low income families; poor locality — linked with urban inaccessibility; lack of financial support in the form of credit and loan facilities; and an over-emphasis on home ownership.

Most governments of the developing world do not have the resources to provide enough conventional or standardised housing for everyone. Standard housing designs are better suited to the needs of the upper- or middle-class
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than to those of the low-income group. In many instances, instead of alleviating the problem, these attempts have in fact contributed to the complexity of the issues. In Bogota the cheapest housing facility is available to about forty-seven per cent of the population. In Mexico City the lowest forty per cent of the population cannot afford the option available to low-income families.

Zoning and planning measures and standards have also been problematic in these countries. Land use planning in Latin America has come a long way from copying European — but mainly North American — planning approaches by adapting to a more all-encompassing approach in the last few decades. Zimbabwe, on the other hand, has clung to rigid planning laws and high building and planning standards.

From the comparative study it emerged that one of the reasons for the failure, is that most governments tend to see the provision of housing in isolation and mainly as providing shelter. This is also seen in the demolition/relocation/mass housing/housing production approach. Shelter is emphasised while other important factors, such as location and urban accessibility, are overlooked. The latter refers to access to markets, schools, public amenities, jobs, transport systems etcetera. Resettlement areas on the periphery with little or no access to these facilities, may have less value to low-income families than living in a slum or squatter area with a better location. Most governments in developing countries have not seriously investigated issues of land speculation, increase in land value and land use patterns to the benefit of the capitalist or more wealthy.

Most of these developing cities lack the institutional ability and political will to adopt new plans and policies and to implement them effectively.

It has consequently become clear that:

- An effective land use planning system has to be in place and has to be enforced. If the lack of supervision continues for too long it will be extremely difficult (if not impossible) to reverse the consequences — as seen from Mexico's experience.

- The characteristics of the planning system are crucial for its success: if the process is too time-consuming, too complicated, too expensive and too bureaucratic, there is a great risk that the end users will simply ignore the whole process and follow their own, shorter and more effective (albeit illegal) procedure either by way of land invasions or by illegal subdivision — like the informals in Peru. A similar result was seen in Zimbabwe with a too rigid system with too high standards.

- However, no planning system can function in the total absence of standards and norms. In Chile the planning system has been more effective because an all-encompassing approach was followed, taking into account economic and social factors, and moving away from the master plan approach towards a flexible planning approach based on: planning and development norms; flexible standards; public participation (thereby incorporating housing issues); cognisance of the city and the area surrounding it; and promoting
mixed development.

- Participation in the planning process is imperative for its effective functioning. It is extremely important that the impact of informal institutions is not overlooked in the planning and development process — as evidenced by Zimbabwe's experience.

FOCUS ON SOUTH AFRICA

Background

The link between land, land use planning, housing, informal settlement and land reform initiatives cannot be sufficiently emphasised. The co-existence of formal and informal planning procedures and mechanisms impact directly on the release of land, the kind of structure or shelter to be erected, informal settlement and environmental issues. The options available are also influenced by the developments in land in general, and the introduction of new policies and legislation in particular. All these factors are, furthermore, directly linked to development as such. Within this very broad spectrum of issues, the DFA is central. It is impossible to evaluate the application of the DFA without also discussing these relevant issues. However, it is equally impossible to discuss all of these aspects in detail in this article. Instead, this section will give a very brief exposition of the current legislative and policy framework within which the DFA functions. The DFA will then be discussed in greater detail. Current shortcomings and problems will be identified and recommendations based on the comparative work and current needs will be offered.

Planning legislative and policy framework

Although other policy documents like the Urban Development Strategy of 1995, the White Paper on Housing of 1995, the White Paper on Land Policy of 1996, and the White Paper on Local Government of 1998, all impact on land use planning in general, the most significant development in this field has been the publication of the Green Paper on Planning and Development in 1999. This publication describes and assesses the historical background to spatial planning and the way it has developed since 1994. The Green Paper addresses the following broad issues: the proposed spatial planning system for South Africa, managing land development and the rationalisation of legal measures. It also lists various mechanisms to implement the recommendations. One of the points of departure of the National Planning and Development Commission was that, although the legal framework had to be rationalised, the DFA should still form the basis.

Apart from the DFA, other legislation that had been promulgated by the former government is still relevant with regard to planning, eg the Less Formal Township Establishment Act 113 of 1991, Provision of Land and Assistance Act 126 of 1993,43 and the Physical Planning Act 125 of 1991. As already mentioned, the DFA also functions within new planning and development legislation promulgated by the provincial legislatures.

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43As amended in 1998, previously known as the Provision of Certain Land for Settlement Act.
Development Facilitation Act

Introduction

The long title of the Act announces its aim as ‘to promote extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects relating to land’. The central theme of the DFA is the integration of various aspects of land development. These include the integration of an inclusive development approach incorporating physical planning and developing policy-making as a technique informing decision-making and procedural measure formulation to achieve policy goals. In short, the Act is applied in order to facilitate and speed up the process of development in the context of provision of housing.

The impact of the Act is far-reaching: it lays down principles governing all future land development throughout the Republic and accommodates a new approach entailing the development of both rural and urban areas, land tenure matters, general planning and conservation standards, financial measures, and a new planning and developmental infrastructure.

The general principles governing all future development provide for more than a mere planning perspective, in that they include conservation provisions and specifically provide that land development legislation should give further content to the fundamental rights set out in the constitution. The illegal occupation of land is actively discouraged, while section 4 sets out the general principles for decision-making and conflict resolution. It is clear that the aim of the Act was to eliminate all possible obstructions that might lead to unnecessary delay in the planning and development process.

Planning infrastructure

This infrastructure is headed by a Development and Planning Commission, a juristic person established under section 5 of the Act. The main function of this body is to advise the minister or the premier concerned on policy and legislation relating to all spheres of planning and development. The Act also provides for Provincial Planning Commissions which play an indispensable role in planning within the province. The overall Planning Commission will act as a coordinating body for the various Provincial Commissions.

At provincial level provision is also made for development tribunals consisting of a chairperson, deputy chair person and persons appointed by reason of their qualifications and knowledge of land related matters. The main
function of the tribunal system is to deal with land development applications and procedures connected therewith.\textsuperscript{51}

**Development procedures**

It should be borne in mind that the Act operates in parallel to existing land development and planning legislation. Chapters V and VI (urban and rural land respectively) specifically provide for ‘fast track’ development routes and mechanisms as alternatives to the time-consuming procedures. The tribunals are responsible for the handling of these alternative planning applications. This enables faster decision-making, conflict resolution between interested parties, and greater community involvement.

**Illegal occupation of land**

Although policy, administrative practice and laws discourage the illegal occupation of land, due recognition of informal land development processes is unavoidable.\textsuperscript{52} This aspect is dealt with in procedures under Chapters V and VII relating to the investigation and authorisation of non-statutory land development processes. It relates to cases of actual or likely settlement on land or where structures have been or are likely to be erected or some other action that amounted to the layout of the land. If these actions are unlawful, but it can be shown that it is in the best interest of the public and the persons who have settled or are likely to settle, that they be exempted from the procedures of the Act, the initiating persons or bodies must request it. The matter is then referred for investigation after which a report is filed with the tribunal. The tribunal must ascertain whether it is feasible to develop the land by considering all relevant factors. These factors may include the environmental impact of the settlement, the impact of the settlement on neighbouring communities, the possibility of upgrading, the existing infrastructure, road and communication networks, and the locality of job creation opportunities. The feasibility considerations have to be balanced against the right of any person in respect of that land. If the tribunal decides against the development of the area it must reject the development application. The tribunal cannot, however, grant an eviction order. The normal eviction proceedings as set out in the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 would have to be followed.\textsuperscript{53} If the development is indeed feasible, the tribunal has vast powers to give effect to it. It can allow exemption from all procedures relating to development and can issue directions regarding a certain facilitating role bodies have to assume in relation to development. It is important to note that a decision in favour of non-statutory development will only be made if it is certain that any development of the land will otherwise proceed unlawfully. It is thus a procedure of last resort only and not one of choice. This has the possibility of restricting the general use of this procedure as a mechanism for effective township development.

\begin{footnotesize}
\begin{enumerate}
\item Section 16 of the DFA.
\item Chapter I: general principles for land development.
\item The Act provides for normal eviction proceedings in s 4, evictions by an organ of government in s 6 and urgent proceedings under s 5 — see for more detail Pienaar & Muller n 5 above at 370–396; Pienaar n 12 above at 464–471.
\end{enumerate}
\end{footnotesize}
Tenure related provisions
Chapter VII of the Act provides for the upgrading of certain unregistered and informal tenure arrangements to full ownership. This will normally be the case where land development takes the form of upgrading existing settlements. Another key innovation in the Act is the development of 'initial ownership' which introduces 'staged' land tenure. This allows for security of tenure at a much earlier stage in the land development process, minimising the initial costs for the developer. Initial ownership can be registered in a deeds registry, enabling the holder to use and occupy the land as if he or she were the registered owner (including the right to encumber the land with a servitude or mortgage) until the upgrading of initial ownership to full ownership had been completed. When the land becomes registrable initial ownership is converted into full ownership without the payment of transfer or stamp duties.

Local government planning
Land Development Objectives (LDOs) are prescribed by Chapter 4. Local government planning is effected by way of LDOs which are based on the development and planning principles listed in Chapter 1. In practice it is similar to a business plan for the use of land in accordance with the specific needs of the local government area. When applications are lodged with the tribunals, approval will depend, inter alia, on whether the application is consistent with the LDOs.

Speedy development
The value of the Act lies furthermore in the various mechanisms to expedite land development (when compared to conventional methods) or to overcome obstacles that would otherwise make land development difficult or even impossible. The latter applications relate, inter alia, to the suspension and repeal of title deed conditions, the suspension of certain laws, and applications for 'non-statutory' procedures. These procedures relate to informal settlements, subject to the general rule that illegal occupation of land should be discouraged, but with due recognition of informal land development processes. In view of the continued occurrence of land invasions, it is here where the Act can play a vital role.

EVALUATION AND RECOMMENDATIONS

Land use planning
In essence, it would seem as if the DFA does have the necessary components,
measured against the factors listed under the comparative section, to make
land use planning in South Africa, also a developing country in many ways,
more effective. It certainly is normatively based, it provides for public
participation, takes cognisance of the city and the surrounding area, and also
promotes mixed development. Why are there then still so many difficulties in
using the DFA to promote development? It is not so much only the DFA that
has to be amended, but the whole South African planning system that has to
be restated. The following general conclusions with regard to the South
African planning system are therefore relevant:
• Planning should remain a function of the public sector.
• The current three-sphere spatial planning system is sensible and logical.
• The value of the planning and development principles of the DFA should be
emphasised and further promoted.
• The DFA can be utilised more creatively with regard to non-statutory
development in view of the great need for access to shelter and housing.
• Spatial plans should not attempt to be comprehensive
• The promotion of cooperative governance
• Planning and development have to be monitored at a national as well as a
provincial level.
• Capacity problems on local government level have to be addressed.
• Technical training of South African planners has to be reviewed and
adjusted in accordance with the needs and requirements of a normative-
based planning approach.
• The participation in and support of traditional authorities in planning and
development have to be further promoted.
• The development and planning approach within the province should be
uniform, although local needs may differ.
• Planning needs a departmental home. Both the Department of Land Affairs
and Agriculture or Local Governance, should be evaluated to find the
department best suited to spearhead planning and development.
In view of the comparative work it has become clear that:
• The concept of a normative-based approach instead of the Plano Regulado-
approach is sound and has been used with great success in Latin America.
The planning and development principles (embodying the normative
approach) set out in the Schedule of the DFA are comprehensive, numerous
and touch on almost every aspect relating to development and planning.
However, the formulation of these principles is generally long-winded,
verbose and rather tedious. In addition, the set of principles is in some
instances vague and generally lacks clarity. These principles have to be re-
worded, some re-ordered, and generally made more clear and understand-
able for the persons who are going to apply them. For these purposes
workshops and seminars can be held to enable the users to understand the
principles better and to adapt them to the specific requirements and needs.
As mentioned before, the normative approach needs a different type of
thinking than was traditionally employed with a control-based system.
Anyone who has to deal with these principles must be schooled in the new
way of thinking.
• Participation in planning has not nearly been promoted to an acceptable
Informal settlement and housing

standard and utilised optimally. Neither planners nor the affected communities emphasise this aspect enough. More information about the process and the way it functions has to reach the communities. More education in this respect is urgently needed. This is especially true with regard to females in the community. Women have to be informed of their participatory rights and duties and persons involved in the planning process have to be especially sensitive to this matter. Special effort must be made to involve informal institutions that have a definite impact on the community.

- The DFA must be more specific with regard to the contents of integrated development plans. It has to set out, albeit in broad terms, what the issue (or topic) of the spatial and land aspects of the integrated development plan have to be.

- Once the problem of local government capacity had been successfully addressed, more responsibility and functions can be channelled to these government bodies to make the planning process more effective. For example: the DFA can set out a clear framework for land decision-making and provide for decisions to be taken at this government level by a body set up by the local authority itself. This body can consist of both experts and officials and can decide on previously fixed matters. The list of matters that fall within their capacity can be amended regularly to keep the process flowing.

- An overall land use management system is still lacking. It is therefore proposed that an all-encompassing land use management act be drafted to provide for a South African land use management framework. Once this has been attended to, the DFA can also be amended to include principles dealing with how land use management must be made compatible with the spatial dimension of integrated development planning.

- Spatial information must be regulated. Most of the recommendations listed above, impact on spatial information and vice versa: no effective spatial planning can be done in the absence of spatial data. Although still in draft bill format, the Draft Bill on Spatial Information\(^{62}\) will go a long way in addressing this matter. The purpose of the bill is to achieve coordination in order to enable spatial information-driven planning and decision-making. Although the bill is not aimed primarily at physical planning as such, it has the capacity to play a major role in this field. This aspect furthermore underlines the urgency for drafting an overall land management framework.

- The watershed decision in Grootboom\(^{63}\) emphasised the need for emergency or relief housing. Obviously this would impact on land use planning as such. The DFA has the capacity to be utilised more pro-actively than its present usage indicates. The provisions for non-statutory development set out in the Act currently have the point of departure that it may only be employed in urgent cases or where there is no other method available for developing the area formally. Surely the many instances of homeless

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\(^{62}\)GN 4227 in GG 11728 of 2000-11-22.

\(^{63}\)See CONCLUSION.
persons being in dire need of housing would qualify for this form of
development — at least to construct interim shelters while waiting for
houses to be allocated? The mechanism for the actual development of the
area is already provided for in the Act in its present form. Section 42 and
section 57 respectively already provide for 'non-statutory' development.
In terms of these provisions local government bodies or any interested
person or party can approach the designated officer in the case of actual or
likely settlement — irrespective of whether it is lawful or unlawful. The main
point is that it should be in the public interest or in the occupants' interest
to formalise the settlement, although it is not nearly on the same formal
standard as usual township establishment. After an investigation by the local
authority a report is submitted to the tribunal which considers the applica­
tion in light of all the relevant circumstances, inter alia, the human need,
health and sanitary considerations and environmental concerns. If the
application is granted, development takes place exempted from the usual
statutory requirements. The tribunal furthermore has extensive powers to,
for example, involve the local governments concerned and to provide for
the necessary funding. It would even function more effectively if the
community approached the designated officer directly and fast-tracked the
process even more. The need for housing can then be identified timeously
so that the basic services can be installed before occupation occurs.
Another approach, however more pragmatic, would be to abolish the
concept that non-statutory development is reserved for urgent cases only
and employ this method more routinely. The latter could be achieved by
identifying land in a local authority's jurisdictional area in the integrated
development plan and allocating a portion of that land for informal
settlement. This would mean that the land could be developed in accord­
ance with the fast-track procedure as an accepted form of development
under the integrated development plan (and not as an exception to the
rule).

Housing and services
The market-approach to housing delivery has not been successful in
developing countries. The most successful housing delivery programme of all
of those studied — Chile — has been successful due to the direct involvement
of the government, on a totally dedicated basis and over a long period. And
even though thousands of houses have been built this way, the results have
still not been one hundred percent acceptable to the beneficiaries, as
discussed above. In the absence of government intervention, or in the case
of limited government interference, the results are even worse. Presently the
construction of houses for the lower end of the income category is simply not
profitable for the private sector. Incentives to promote more involvement,
have also not been very successful. Legal comparative work has therefore

\[ \text{66With regard to Chapter V applications.} \]
\[ \text{67With regard to Chapter VI applications.} \]
\[ \text{68See Housing delivery above.} \]
emphasised that the government has to be actively involved in the delivery of housing. Business and the private sector will be willing to get more involved if their involvement is coupled with some form of profit. If enterprises could be embarked on in which both the occupant and the developer benefit, the problem could be addressed more efficiently.

If the government is serious about alleviating the housing crisis, it has to increase the budget: two per cent per annum is clearly not enough. Other subsidies may also be considered — in all of the countries that were studied the same problem was identified, namely that of beneficiaries under the relevant housing programme not being able to afford taxes, levies and services. This eventually leads to houses being sold and former beneficiaries returning to informal settlements. Although the exemption of all taxes may be a bit too drastic and could impact negatively on the tax base of the community, it is proposed that extra subsidies be developed to assist in the payment of levies and services.

More emphasis has to be placed on the development of rental housing. Although there are indications that this is receiving attention by government in the form of the Rental Housing Act, this concept has to be promoted more vigorously. Apart from the fact that government can play a more active role in the provision of rental housing, the institutional subsidy can be upgraded to make the building of rental accommodation more profitable.

Employee housing could be investigated further. In Chile the mass housing programme specifically provides for subsidies for employers to provide housing to employees. Although many employers in South Africa already follow this approach in one form or another, the state could support these initiatives by furthering subsidisation categories. Special regard will have to be given to the financial control and administration of these ventures in order to protect employees in the case of insolvency of the employer.

If the objective is to improve the land, service and public systems for the low-income household, several administrative responses have to be made. Unrealistically high standards could be abandoned in favour of levels attuned to the priorities and resources of low-income groups. The ideal should be the provision of minimum services. Access to land should be broadened with a more effective land use policy. In this respect a linkage of planners with officials who determine public investment policies is crucial. This is directly linked to the concept that the assumptions at work are different to those in the developed world’s urbanisation sphere. Flexible planning, in the form of mixed-use zoning might be more preferable than rigid planning, as discussed above. Government assistance in delivering the various components of low-income housing must be facilitated by adequate measures for public acquisition of land and for the adjustment of tenure forms. Government responses to the needs of the urban poor have to extend beyond the project-oriented phase.

Finally, the success of housing the poor will depend on whether developing countries have the institutional strength and political will to solve this burning
CONCLUSION
The recent decision of Government of the Republic of South Africa and Others v Grootboom and Others67 was finally decided on the criterion of reasonableness.68 Judge Jacoob found that governmental policies, legislation and programmes relating to access to housing have not satisfied the requirement of reasonableness. The court provides a favourable evaluation of the existing policies and programmes:69

The programme is not haphazard but represents a systematic response to a pressing social need. It takes account of the housing shortage in South Africa by seeking to build a large number of homes for those in need of better housing.

However, it still found that the requirement of reasonableness had not been met, because the measures exclude a major portion of the community by not making any provision for housing that falls short of the definition of housing development in the Housing Act. It is not flexible enough to include those in desperate need for housing. It also falls short because the government fails to provide access to housing to those in crisis, not only on the medium or long term, but also in the short term. Despite the advances in housing delivery, and despite numerous policies and programmes being in place, the reality is still:

The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nation wide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nation wide housing programme.70

The above decision, as well as the research done, indicate that there is only one solution to this immense problem, namely a coordinated approach incorporating land use planning and land use management, thereby addressing housing and informal settlement issues.

The great need for an effective land use planning and management system in South Africa is underlined. The lessons to be learned from Latin America and neighbouring Zimbabwe are numerous and extremely valuable. The South African planning system intrinsically has all the essential components. As was indicated in the comparative legal work, however, the existing components have to be re-organised and amended to make the system function more effectively. The DFA in itself, can be employed more creatively in view of the

672001 1 SA 46 (CC).
69At [53]–[54].
70At [65].
extreme need for access to housing and shelter. Land use planning, urbanisation, access to land, informal settlement, housing and urban accessibility are all intertwined in the broad concept of land use management, of which an overall framework is still lacking.