

**Culture in the pursuit of sustainable  
development in South Africa: A legal approach**

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## **DEDICATION**

To my parents, siblings, husband, and beautiful children - Demi and Onyii, thank you for your love, support and prayers.

The research conducted for this thesis is correct and up to date until the 30<sup>th</sup> of October 2017. Any subsequent political, social, cultural or legal developments after the date mentioned have not been considered.

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Owosuyi IL "The pursuit of sustainable development through cultural law, policy and governance frameworks in South Africa" a paper presented at the 2<sup>nd</sup> Global Change Conference held at Nelson Mandela Metropolitan University Port Elizabeth, South Africa, December 2014.

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## **LIST OF ABBREVIATIONS**

|          |   |
|----------|---|
| ANC      | African National Congress   |
| B-BBEE   | Broad-Based Black Economic Empowerment  |
| CBD      | Convention on Biological Diversity  |
| CDC      | Cultural Diversity Convention   |
| CEMIRIDE | Centre for Minority Rights Development  |
| CITES    | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| CJLG     | Commonwealth Journal of Local Governance  |
| CMS      | Conservation of Migratory Species of Wild Animals                               |
| CPPNE    | Cape Peninsula Protected Natural Environment                                    |
| DAC      | Department of Arts and Culture  |
| DAFF     | Department of Agriculture, Forestry and Fisheries                               |
| DD       | Department of Defence   |
| DEA      | Department of Environmental Affairs   |
| DEAT     | Department of Environmental Affairs and Tourism                                 |
| DH       | Department of Health  |
| DHS      | Department of Human Settlement  |
| DL       | Department of Labour  |
| DME      | Department of Energy  |
| DMR      | Department of Mineral Resources   |
| DOC      | Department of Communications  |
| DRDLR    | Department of Rural Development and Land Reform                                 |
| DSBD     | Department of Small Business Development  |
| DT       | Department of Transport   |
| DTI      | Department of Trade and Industry  |

|                             |  |
|-----------------------------|--|
| DWAF                        | Department of Water Affairs  |
| DWS                         | Department of Water and Sanitation   |
| ECA                         | Environmental Conservation Act   |
| ECOSOC                      | United Nations Economic and Social Council   |
| EDD                         | Economic Development Department  |
| EIA                         | Environmental Impact Assessment  |
| EJIL                        | European Journal of International law  |
| EIAR                        | Environmental Impact Assessment Review   |
| FILJ                        | Fordham International Law Journal  |
| ICCPR                       | International Covenant on Civil and Political Rights                                   |
| ICESCR                      | International Covenant on Economic, Social and Cultural Rights                         |
| ICH                         | Convention for the Safeguarding of Intangible Cultural Heritage                        |
| IEL                         | International Environmental Law  |
| IEM                         | Integrated Environmental Management  |
| IGRFA                       | Intergovernmental Relations Framework Act  |
| IISD                        | International Institute for Sustainable Development                                    |
| IKS                         | Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill |
| ITAC                        | International Trade Administration Commission of South Africa                          |
| IUCN                        | International Union for Conservation of Nature and Natural Resources                   |
| J Environ Plann Manag       | Journal of Environmental Planning and Management                                       |
| J Env'tl Law and Litigation | Journal of Environmental Law and Litigation  |
| JCI                         | Journal of Court Innovation  |
| JLP                         | Journal of Legal Pluralism   |
| JPA                         | Journal of Public Administration   |

|                 |   |
|-----------------|---|
| JPER            | Journal of Planning Education and Research                  |
| JSAL            | Journal of South African Law                                |
| JSE             | Journal of Socio-Economics                                  |
| LDD             | Law, Democracy and Development                              |
| MDGs            | Millennium Development Goals                                |
| MEC             | Member of the Executive Council                             |
| MRG             | Minority Rights Group International                         |
| NDP             | National Development Plan                                   |
| NEMA            | National Environmental Management Act                       |
| NEMBA           | National Environmental Management: Biodiversity Act         |
| NEMPAA          | National Environmental Management: Protected Areas Act      |
| NFA             | National Forest Act   |
| NFSD            | National Framework for Sustainable Development              |
| NHCA            | National Heritage Council Act                               |
| NHRA            | National Heritage Resources Act                             |
| NWA             | National Water Act  |
| NWRS            | National Water Resources Strategy                           |
| PER             | Potchefstroom Elektroniese Regsblad                         |
| PHRA            | Provincial Heritage Resources Authorities                   |
| PR              | Proportional representation                                 |
| PULP            | Pretoria University Law Press                               |
| QUTLJJ          | Queensland University of Technology Law and Justice Journal |
| SADC            | Southern African Development Community                      |
| SA-eDUC Journal | South African Journal of Education                          |
| SAGNC           | South African Geographical Names Council Act                |
| SAHRA           | South African Heritage Resources Agency                     |

|                     |  |
|---------------------|--|
| SAJAH               | South African Journal for Art History                            |
| SAJELP              | South African Journal of Environmental Law and Policy            |
| SAJHR               | South African Journal of Human Rights                            |
| SA J of Philosophy  | South African Journal of Philosophy                              |
| SAJS                | South African Journal of Science                                 |
| SAMAB               | South African Museums Association Bulletin                       |
| SAMRC               | South African Medical Research Council                           |
| SANPARKS            | South African National Parks                                     |
| SA Pharmaceutical J | South African Pharmaceutical Journal                             |
| SAPL                | South African Public Law   |
| SAYIL               | South African Year Book of International law                     |
| SIA                 | Social Impact Assessment   |
| SPLUMA              | Spatial Planning and Land Use Management Act                     |
| Stellenbosch L Rev  | Stellenbosch Law Review  |
| THRHR               | Tydskrif vir Hedensdaagse Romeins-Hollandse Reg                  |
| TSAR                | Tydskrif vir die Suid-Afrikaanse Reg                             |
| UNCHR               | United Nations Refugee Agency                                    |
| UNCTAD              | UN Conference on Trade and Development                           |
| UNESCO              | United Nations Educational, Scientific and Cultural Organisation |
| UNIDROIT            | International Institute for the Unification of Private Law       |
| WCCD                | World Commission on Culture and Development                      |
| WCED                | World Commission on Environment and Development                  |
| WD                  | World Development  |
| WHC                 | World Heritage Convention  |
| WHCA                | World Heritage Convention Act                                    |
| WILJ                | Washington International Law Journal                             |

## **ABSTRACT**

Over time, it has become evident that development that is measured by economic indices alone without consideration of other dimensions of development is ineffective and unsustainable. Concerns as to the continuous exploitation of environmental resources for purposes of industrial development and other projects began to emerge. In addition to this is the concern that decision-makers often ignore the human development indices in development plans and strategies such that the social and cultural impact of development are side-lined.

Subsequently, these concerns led to the search for sustainable means of development that recognised these concerns. The concept of sustainable development emerged as an international development agenda. The concept was primarily borne out of environmental concerns but it has since progressed to be understood that other interests that affect people should be considered in sustainable development thinking such as social, economic and cultural interests. In contemporary times, the concept has seen debates in scholarly literature and international actors for the inclusion of culture into the sustainable development equation. The argument for the inclusion of culture in development plans and strategies has also received international recognition with the adoption of the 2015 Sustainable Development Goals (SDGs) which recognised culture in the international developmental agenda.

In understanding how culture's inclusion in sustainable development thinking will apply in the South African context, this thesis considers the concept of sustainable development from the perspective of law. The concept of sustainable development is constitutionally recognised. However, the law-makers framed it in purely ecological terms. The implication is that the concept of sustainable development has developed domestically as mainly an environmental concept. Scholarly literature argues that the well-being of the people is a legitimate factor to be considered in the pursuit of sustainable development. Well-being is used here in the general sense and by way of analogy to emphasise the needs of the people as inextricably linked to culture. This thesis accepts that the notion of culture is fluid and not susceptible to one meaning.

Therefore, this thesis introduces a novel typology that may guide decision-makers in approaching cultural interests to be included in the sustainable development equation.

South Africa, being a culturally diverse society with constitutionally guaranteed cultural rights, offers a basis for the interrogation of the susceptibility, or not, of including culture in the pursuit of sustainable development. This thesis primarily questions the extent to and manner in which existing national law, policy and institutional government arrangements facilitate the inclusion of cultural interests in the country's pursuit of sustainable development. Consequently, this thesis commences with an exposition of relevant theoretical concepts namely: culture and sustainable development. The link and interdependence of both concepts are explored to establish the normative foundation for the rest of the thesis. Subsequently, an analysis of relevant national laws and policies that accommodate the inclusion of culture in development-related decisions is carried out. The relevant governance arrangements within government structures which might assist with the implementation of the legislative and policy frameworks identified is queried. Also, the judiciary's contribution and approach to the recognition of cultural interests in adjudicating over case law is analysed.

This thesis concludes on the premise that cultural interests must and can together with the environmental, economic and social interests contribute to the global and domestic idea of sustainable development. This thesis further makes recommendations on how the typology for the consideration of cultural interests adopted might guide and ease the inclusion of culture into decisions and planning relevant for sustainable development in South Africa.

### **Keywords**

Sustainable development; cultural diversity; cultural rights; cooperative cultural governance; law and culture; *National Heritage Resources Act*; *National Environmental Management Act*.

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## CHAPTER 1

### INTRODUCTION

#### **1.1 Background**

The concept of sustainable development first received international recognition in 1972 at the United Nations (UN) Conference on the Human Environment held in Stockholm. The international community in discussing issues pertaining to the depletion of the earth's resources in the process of development came to a consensus that both development and the environment could be managed in a mutually beneficial way.<sup>1</sup> The most often quoted and widely accepted definition of sustainable development is found in the Brundtland Report:<sup>2</sup>

Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

This definition highlights the need for sustainability in the use of the earth's resources in the process of industrialisation and development. In furtherance of this notion, the World Commission on Environment and Development (WCED) in 1987 was convened to argue, amongst other things, the resultant effect of exploitative resource use in industrialised countries. It was put forward that if industrialisation continued unabated without sustainability plans it would eventually lead to environmental and ecological collapse.<sup>3</sup> Thus, sustainable development as a concept was established primarily as an environmental concept and was subsequently interpreted as such. However, in 1992, at the UN Conference on Environment and Development in Rio de Janeiro, sustainable development was recognised in terms of the three pillars of economic viability, social inclusion, and respect for the environment.<sup>4</sup>

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1 The conference adopted a basic Declaration which contains a set of common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment. *Report of the UN Conference on the Human Environment* UN Doc A/Conf48/14 (1987)

2 *Our Common Future: Report of the World Commission on Environment and Development* UN Doc. GA/42/427.

3 *Our Common Future: Report of the World Commission on Environment and Development* UN Doc. GA/42/427.

4 *The Rio Declaration on Environment and Development* 1992 at the UN Conference on Environment and Development 3-14 June 1992. The conference is also known as the Earth Summit.

As debates about sustainable development continued, a paradigm shift about the content and meaning of the concept of sustainable development occurred with significant focus on the different social interests of human development.<sup>5</sup> The focus on human development was promoted on an international scale by the UN Development Programme, for example, which published its Human Development Reports in 1991. These reports typically analyse a range of issues which have an impact on human development like mobility,<sup>6</sup> global warming<sup>7</sup> and cultural liberty.<sup>8</sup> In this context, “culture” began to feature as a very prominent interest of human development.

The emphasis on human development in the sustainable development equation was also promoted in the works of Amartya Sen, who characterised development as “human capacity expansion”. He explained that human capacity expansion is the enhancement of peoples’ capacity to lead the kind of life they desire, including their access to cultural resources and cultural participation.<sup>9</sup> It is in line with this thinking that sustainable development<sup>10</sup> is prioritised over other more econometric<sup>11</sup> development models, which resulted over time in proposals for the inclusion of culture as a key element for the full development of people and communities.<sup>12</sup> Aspects of culture, such as cultural heritage, cultural diversity, cultural rights, the arts and creativity as well as indigenous knowledge systems have since become the object of studies, investigations and interests as a missing or undervalued link in the pursuit of sustainable development.<sup>13</sup>

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5 See discussions in para 2.2.2 and 2.4.1.

6 UNDP 2009 <http://hdr.undp.org/en/content/human-development-report-2009> accessed on 20 July 2014.

7 UNDP 2008 <http://hdr.undp.org/en/content/human-development-report-20078> accessed on 20 July 2014.

8 UNDP 2004 <http://hdr.undp.org/en/content/human-development-report-2004> accessed on 20 July 2014.

9 Amartya “Development as Capacity Expansion” 41-58.

10 The evolution of development and the relevance of sustainable development is pursued further in chapter 2.

11 Development models that focus only on the economic benefits of development. This is further discussed in para 2.2.2.

12 Marana “Culture and Development: Evolution and Prospects” 4.

13 Marana “Culture and Development: Evolution and Prospects” 4-8.

In this context, the World Commission on Culture and Development (WCCD) played a major role in analysing and conceptualising the role of culture in the context of sustainable development with the publication of the report *Our Creative Diversity* (hereinafter *Our Creative Diversity Report* 1995).<sup>14</sup> The WCCD highlighted the cultural interests of a human-centred development paradigm and proposed placing culture at the heart of development thinking. This argument was taken further at the International Conference on Cultural Policies for Development held in Stockholm in 1998 (hereinafter the Stockholm Conference). At the Stockholm Conference it was proposed that cultural policies become one of the key components of development strategies.<sup>15</sup> It was further proposed that governments should recognise culture in such a way that cultural policies become “one of the key components of endogenous and sustainable development”.<sup>16</sup> Despite these proposals, in both developed and developing countries opportunities for decision-makers to recognise the linkages between the environmental, economic, social and cultural interests of sustainable development seem to remain largely overlooked.<sup>17</sup>

The debate on the inclusion of cultural interests in sustainable development discourse has also caught the attention of academics and policy experts. Some scholars<sup>18</sup> argue for the inclusion of culture-related policy in public planning that will influence or enhance the quality of life in the neighbourhood, city or even region.<sup>19</sup> Others<sup>20</sup> have referred to the limitations of interpreting sustainable development only in the context of social, economic, and environmental interests. The idea that cultural interests should be explicitly included in development policies gradually became the focus of international scholarly and policy debates. For example, the UN Economic and Social

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14 World Commission on Culture and Development *Our Creative Diversity*. See further discussions in para 2.3.1.

15 Policy Objective 1 of *The Action Plan on Cultural Policies for Development* UN Doc CLT-98/CONF.210/4 (2 February 1998).

16 United Nations Educational, Scientific and Cultural Organisation (UNESCO) Final Report of Intergovernmental Conference on Cultural Policies for Development: The Power of Culture 30 March–2 April 1998 Paris UNESCO. UNESCO is the United Nations (hereafter UN) body mandated with the promotion of culture in international developments related to economic development, knowledge, politics, democracy, and trade.

17 Throsby 2008 <http://bit.ly/1wbjkb6> 2-3 accessed on 27 June 2014.

18 Hawkes *The Fourth Pillar of Sustainability* 25.

19 See the discussion in para 2.4.1.

20 Du Plessis and Feris 2008 *SAJELP* 157-168; Du Plessis and Britz 2007 *JSAL* 275-276.



Council (hereinafter ECOSOC)<sup>21</sup> has steadily promoted the relevance of culture in human development along with social, economic and environmental interests<sup>22</sup> in the context of sustainable development. ECOSOC argues, for example, that a three-pillar paradigm for sustainable development with only social, economic and environmental interests fails to advance sustainable development. This is because it downplays culture, which infuses soul, values, practices and expressions into the development equation and provides coherence and meaning to development in cities and nations, and in the existence of human beings.<sup>23</sup>

International treaty law also advocates the inclusion of culture in sustainable development.<sup>24</sup> One example is the wording of guiding principle 6 in article 2 of the UNESCO *International Convention on the Protection and Promotion of the Diversity of Cultural Expressions* 2005 (hereinafter *2005 Cultural Diversity Convention*), which provides that “the protection, promotion and maintenance of cultural diversity are essential requirements for sustainable development for the benefit of the present and future generations.” Article 13 of the *2005 Cultural Diversity Convention* further encourages member states to “integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development.” This provision of the *2005 Cultural Diversity Convention* appears to focus attention on the need to take a holistic view of sustainable development by recognising the cultural interests of development together with the traditional economic, social and environmental interests.

The debate for the inclusion of culture in the sustainable development equation has heightened since the UN Millennium Declaration<sup>25</sup> and the commencement of the realisation of the Millennium Development Goals (hereinafter MDGs) in 2000.<sup>26</sup> Consequently, the international community has seen the approval of standard-setting

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21 ECOSOC 2013 [www.agenda21culture.net](http://www.agenda21culture.net) 3 accessed on 14 May 2014.

22 ECOSOC 2013 [www.agenda21culture.net](http://www.agenda21culture.net) 4 accessed on 14 May 2014.

23 ECOSOC 2013 [www.agenda21culture.net](http://www.agenda21culture.net) 1; see discussion in para 2.2.3.

24 This is further explored and discussed in paras 2.3.1 and 2.4.1.

25 *UN Millennium Declaration* UN Doc A/55/L2 (8 September 2000).

26 The MDGs were until 2015 the world’s time-bound and quantified targets for addressing eight key issues as identified by world leaders in September 2000. See [www.unmillenniumproject.org/goals/](http://www.unmillenniumproject.org/goals/). The time limit for the actualisation of these goals was set at 2015. The MDGs have since been replaced by the post-2015 Sustainable Development Goals (SDGs).

documents and legal instruments to boost the relation between culture and development.<sup>27</sup> Although the MDGs did not recognise cultural interests in the formulation of the goals, international instruments such as the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR 1966), the *International Covenant on Civil and Political Rights* 1966 (ICCPR 1966),<sup>28</sup> and the *Convention for the Safeguarding of the Intangible Cultural Heritage* 2003 advocate the recognition of culture autonomously in sustainable development rather than being considered as part of the social, economic and environmental interests. These instruments along with others such as the 2005 *Cultural Diversity Convention* further advocate the inclusion of culture-related issues in sustainable development.<sup>29</sup>

## **1.2 Problem statement**

The notion of culture and the concept of sustainable development are well contested in the literature.<sup>30</sup> These two concepts form the basis of interrogation in this thesis. This thesis seeks to explore the advancement of culture in pursuance of sustainable development in South Africa.<sup>31</sup> The focus is on understanding the contemporary interpretation of sustainable development in the South African context and how culture fits into it. The context is hinged on the fact that the South African society is multicultural with a rich, varied, and diverse culture which is constitutionally recognised and protected. The *Constitution* does not expressly link culture to sustainable development.<sup>32</sup> However, the protection of cultural rights under the *Constitution* presents an unmistakable link between culture and development plans and strategies.<sup>33</sup> It is imperative at this point to give a background to the notion of culture as it is explored herein.

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27 An assessment of some of the relevant standard-setting documents is explored and discussed in para 2.3.1, 2.4.1 and 2.4.2.

28 A 1 recognises the right of all peoples to self-determination and consequently the right to determine *inter alia* their cultural development.

29 See the discussion in para 2.3.1.

30 See the discussion in chapter 2.

31 See the discussion in para 1.4.

32 See the discussion in para 2.6.1.

33 See the discussion in para 2.6.1.3.

### 1.2.1 *The notion of culture in international law*<sup>34</sup>

The notion of culture is far-reaching as a consequence of its varied, multi-layered and context-dependent meanings.<sup>35</sup> Culture can refer to a variety of things and issues, ranging from cultural products such as art and literature to the cultural process or culture as a way of life.<sup>36</sup> Featuring between these two broad categories (i.e. cultural products and cultural processes) are cultural institutions like museums, educational institutions and the media, that are established to transfer tangible and intangible aspects of culture.<sup>37</sup>

The UNESCO instruments serve as a point of departure for the exploration of the notion of culture in this thesis. These instruments refer to the potential contribution of cultural advancement to sustainable development. The instruments further highlight the relative connectedness of culture to the other three interests of sustainable development referred to above.<sup>38</sup> For example, article 3 of the 2001 *Declaration on Cultural Diversity* refers to cultural diversity as an interest in development.<sup>39</sup> In the same vein, cultural rights are relevant in the process of cultural development within the sustainable development context. Cultural rights could include the right to self-determination, the rights to freedom of thought, education, religion, assembly, and the right to preserve, develop and have access to cultural resources.<sup>40</sup>

From an international perspective, two international documents relevant to cultural issues are the UNESCO-approved *Universal Declaration on Cultural Diversity* 2001 (hereinafter 2001 *Declaration on Cultural Diversity*) and the 2005 *Cultural Diversity Convention*. The 2001 *Declaration on Cultural Diversity* advocates the crucial role of cultural policies in ensuring the free circulation of ideas and works by creating conditions conducive to the production of and dissemination of cultural goods and services through cultural industries that have the means to assert themselves at the

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34 See the further discussion in para 2.3.1.

35 Culture and its varied contextual meanings are further explored in chapter 2.

36 Donders "The Cultural Diversity Convention and Cultural Rights: Included or Ignored?" 166.

37 Donders "The Cultural Diversity Convention and Cultural Rights: Included or Ignored?" 166-167.

38 See the discussion in para 2.3.1, 2.4.1 and 2.4.2.

39 See the further discussion in paras 2.3.1 and 2.4.2.

40 Prott "Cultural Rights as Peoples' Rights in International Law" 93; Cultural resources are further discussed in para 2.4.

local and global level.<sup>41</sup> The Declaration also commends cultural human rights as an enabling environment for the realisation of cultural diversity.<sup>42</sup> In other words, cultural rights are considered to be entrenched in fundamental human rights.<sup>43</sup>

The 2005 *Cultural Diversity Convention*, on the other hand, is recognised as the first legally binding international document protecting and promoting the diversity of cultural expressions.<sup>44</sup> The Convention acknowledges the need to protect cultural diversity and reaffirms the link between culture and development.<sup>45</sup> The Convention further establishes the link between cultural diversity and human rights.<sup>46</sup> The Convention recognises the sovereign rights of states to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions in their territory.<sup>47</sup> The central objective of the Convention is to create an enabling environment in which artists, cultural professionals, practitioners and citizens internationally can engage in creating, producing, distributing, disseminating and enjoying a broad range of cultural goods, services and activities. The responsibility of implementation is on state members in their respective localities, as aforementioned.<sup>48</sup>

The more recent policy debate in 2013 at the Hangzhou International Congress “Culture: Key to Sustainable Development” organised by UNESCO led to the Hangzhou Declaration, *Placing Culture at the Heart of Sustainable Development Policies*<sup>49</sup> (hereinafter the *Hangzhou Declaration*).<sup>50</sup> The *Hangzhou Declaration* enshrined the goals of the 2005 *Cultural Diversity Convention*. The *Declaration* confirms the link between culture, sustainable development and lasting peace. The Congress features as the first of its kind specifically focusing on the linkages between culture and

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41 A 9 of the 2001 *Declaration on Cultural Diversity*.

42 A 4 and 5 of the 2001 *Declaration on Cultural Diversity*.

43 Donders “The Cultural Diversity Convention and Cultural Rights: Included or Ignored?” 167.

44 Rautenbach and Du Plessis 2009 *SAYIL* 133; A 1(a) 2005 *Cultural Diversity Convention*; see the discussion in para 2.3, 2.3.2, 2.6.3, 3.2.2 and 3.3.

45 A 1(f) 2005 *Cultural Diversity Convention*.

46 A 2(1) 2005 *Cultural Diversity Convention* states *inter alia* that cultural diversity can be protected and promoted only if human rights and fundamental freedoms are guaranteed.

47 A 1(h) 2005 *Cultural Diversity Convention*.

48 A 13 2005 *Cultural Diversity Convention*.

49 The Declaration was adopted on 17 May 2013. The text of the declaration can be viewed at <http://www.unesco.org>.

50 See the further discussion in para 2.3, 2.4.2 and 2.4.3.

sustainable development organised by UNESCO after the Stockholm Conference in 1998.<sup>51</sup> The Congress is also the first global forum to discuss the role of culture in sustainable development in view of the post-2015 development framework which succeeded the MDGs.

Furthermore, the General Assembly is the main deliberative, policy making and representative organ of the UN and provides a unique forum for multilateral discussions of the full spectrum of international issues covered by the UN Charter. According to the UN Charter,<sup>52</sup> the functions and powers of the General Assembly include but are not limited to the development and codification of international law in the field of culture. It is worth noting that the resolutions of the General Assembly are not legally binding on member states. However, through its recommendations the General Assembly can focus world attention on important issues, generate international cooperation and, in some cases, its decisions can lead to legally binding treaties and conventions.<sup>53</sup>

In line with its functions and responsibility, the General Assembly on 20 December 2013 adopted the *Resolution on Culture and Sustainable Development* (hereinafter the 2013 *Resolution*).<sup>54</sup> The 2013 *Resolution*, amongst other things, acknowledges the contribution of culture to inclusive economic development.<sup>55</sup> The 2013 *Resolution* builds on several other resolutions from 1986 to 2012.<sup>56</sup> The earlier resolutions<sup>57</sup> urged

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51 The Stockholm Conference was also organised by UNESCO and one of its aims was to contribute to the integration of cultural policies in human development strategies at international and national level.

52 A 13(a) and (b) of the 2005 *Cultural Diversity Convention*.

53 The UN Website (Date Unknown) *Functions and Powers of the General Assembly* [www.un.org/en/ga/about/background.shtml](http://www.un.org/en/ga/about/background.shtml) accessed on 21 May 2014.

54 Resolution on Culture and Sustainable Development GA Res 68/223, UN Doc A68/223 (2013).

55 This is further discussed in para 2.4.1.2 of chapter 2.

56 GA Res 41/187, UN Doc A41/187 (1986); GA Res 46/158, UN doc A46/158 (1991); GA Res 51/179, UN Doc A51/179 (1996); GA Res 52/197, UN Doc 52/197 (1997), GA Res 53/184, UN Doc A53/184 (1998); GA Res 55/192, UN Doc A55/192 (2000); GA Res 57/249, UN Doc A57/249 (2002); GA Res 65/166, UN Doc A65/166 (2010), GA Res 66/208, UN Doc A66/208 (2011), and GA Res 66/288, UN Doc A66/288 (2012). The texts of the resolutions can be accessed at [www.un.org](http://www.un.org) accessed on 24 June 2015.

57 For example, the *Resolution on Culture and Development* GA Res 66/208, UN Doc A66/208 (22 December 2011).

the mainstreaming of culture into developmental policies and strategies and highlighted the intrinsic contribution of culture to sustainable development.

South Africa is a member of the global community<sup>58</sup> and a party to various international and regional bodies and organisations that are at the forefront of the regulation of different issues of culture. Therefore, the country's cultural policies and legislation inadvertently exhibit a flavour of international, regional and sub-regional influence.<sup>59</sup>

Generally, on a regional level the African Union (AU), with its vision of an integrated, prosperous and peaceful Africa driven by its citizens and representing a global force in the global arena, spearheads the regulation of culture-related issues in the African continent.<sup>60</sup> South Africa is a member of the AU.<sup>61</sup> The AU's institutional structure and several AU treaties<sup>62</sup> allude to the recognition of cultural issues in the sustainable development of the continent.

### *1.2.2 South Africa's international and regional responsibilities*

South Africa has certain international and regional responsibilities in contributing to the advancement of culture in the promotion of sustainable development. It has been argued that in the sphere of international law,<sup>63</sup> South Africa cannot justifiably invoke the provisions of its domestic law as the basis for non-compliance with the provisions of any international agreement<sup>64</sup> or indeed any non-binding international law or standard-setting documents or guidelines. It is also trite that once a state is a party to a treaty the sovereignty of that state will necessarily be limited in as much as parties are obliged to implement treaty provisions in their domestic law and may not adopt legislation which would defeat the objectives of the treaty.<sup>65</sup> International law also

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58 For example, the UN, AU and Southern African Development Community (SADC) (these are international, regional and sub-regional bodies respectively).

59 Some of these international and regional instruments are further discussed in chapter 2.

60 An overview of the objectives of the AU in relation to the recognition of cultural issues and the promotion of sustainable development on the continent is further discussed in para 2.5.

61 See <https://au.int/memberstates> accessed on 21 November 2014.

62 These treaties are further discussed in para 2.4.1.

63 Aa 26 and 27 of the *Vienna Convention on the Law of Treaties* 1969.

64 Rautenbach and Du Plessis 2009 *SAYIL* 134.

65 Olivier and Abioye 2008 *SAYIL* 187.

defines the legal responsibilities of member states in their conduct both with one another and in their treatment of individuals within their boundaries.

The *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) recognises the place of international law in the South African legal system by the provisions of section 231, although the operation of this section of the *Constitution* is such that where the international instrument has not metamorphosed into domestic law by way of national legislation, such instrument is not binding on the country. However, the *Constitution* further provides in section 233 that in interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with it. The *Constitution* further recognises the importance of international law in the South African legal system by declaring in section 39(1)(b) that courts must consider international law when interpreting the Bill of Rights. This interpretive value of international law was applied in the case of *S v Makwanyane*,<sup>66</sup> where Chaskalson P stated that:

Public international law would include non-binding as well as binding law. They may both be used as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

Although South Africa played a significant role in the events leading to the creation of the 2005 *Cultural Diversity Convention*<sup>67</sup> it ratified it only on 21 December 2006, three months before the Convention went into force on 18 March 2007.<sup>68</sup> Yet by 2017 the 2005 *Cultural Diversity Convention* is still not incorporated into the South African domestic legal regime by means of national legislation. This does not, however, absolve South Africa from liability towards other member states in the event of non-compliance with the provisions of the 2005 *Cultural Diversity Convention*, having

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66 1995 3 SA 391 (CC).

67 Rautenbach "Implementation of the Convention on the Diversity of Cultural Expressions in South Africa: Perspective from a 'Developing Country'" 398.

68 UNESCO (Date Unknown) <http://bit.ly/2yluyTL> accessed on 23 May 2014.

ratified it at the international level.<sup>69</sup> South Africa's rights flowing from the 2005 *Cultural Diversity Convention* include the right to:

- (a) formulate and implement cultural policies;
- (b) adopt measures to protect and promote the diversity of cultural expressions; and
- (c) strengthen international cooperation to achieve the promotion and protection of the diversity of cultural expression.<sup>70</sup>

The duties, on the other hand, include:

- (a) to promote and protect cultural expressions;<sup>71</sup>
  - (b) to provide reports on a four-yearly basis with information on the measures taken to protect and promote cultural expressions;<sup>72</sup>
  - (c) to encourage better understanding of the 2005 *Cultural Diversity Convention* through educational and public awareness programmes;<sup>73</sup>
  - (d) to strengthen partnerships with and among the components of civil society;<sup>74</sup>
  - (e) to promote international co-operation;<sup>75</sup>
  - (f) to integrate culture in sustainable development policies;<sup>76</sup>
  - (g) to support co-operation for sustainable development and poverty reduction;<sup>77</sup>
- and

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69 Dugard *International Law: A South African Perspective* 62.

70 Aa 5 and 6 of the 2005 *Cultural Diversity Convention*.

71 Aa 7 and 8 of the 2005 *Cultural Diversity Convention*.

72 A 9 of the 2005 *Cultural Diversity Convention*.

73 A 10 of the 2005 *Cultural Diversity Convention*.

74 Aa 11 and 15 of the 2005 *Cultural Diversity Convention*.

75 A 12 of the 2005 *Cultural Diversity Convention*.

76 A 13 of the 2005 *Cultural Diversity Convention*.

77 A 14 of the 2005 *Cultural Diversity Convention*.



(h) to encourage the sharing of information, expertise, statistics and best practices pertaining to the diversity of cultural expressions between member states.<sup>78</sup>

In line with the above, the 2013 *Resolution* especially highlights the social and economic value of culture on many levels for South Africa, especially in view of the country's culturally diverse populace.<sup>79</sup> Thus, recognition of the resolution and subsequent application of the principles contained therein is potentially beneficial to cultural advancement in terms of sustainable development.

Furthermore, the *Constitution* in section 7(1) provides that the Bill of Rights is a cornerstone of democracy in South Africa and thus enshrines the rights of all people in the country by affirming the democratic values of human dignity, equality and freedom. With the establishment of these rights, there is an implied social contract between the government and the people. The social contract is such that the organs of state (situated in the national, provincial and local spheres)<sup>80</sup> are legally obliged to provide a conducive environment via the instrumentality of legislation and appropriate policy to protect the exercise of such rights.<sup>81</sup> In the same vein, sections 16, 30, and 31 of the *Constitution* recognise the rights of the people to enjoy their cultural and linguistic heritage, which is inclusive of the different aspects of culture discussed above.

Furthermore, section 1 of the *National Environmental Management Act*<sup>82</sup> (hereafter the *NEMA*) in defining the environment includes "cultural properties", which implies that in the preservation of the environment within the context of sustainable development in South Africa,<sup>83</sup> cultural properties (which translates to physical cultural

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<sup>78</sup> A 19 of the 2005 *Cultural Diversity Convention*.

<sup>79</sup> The cultural diversity of South Africa and how it interacts with development issues is discussed further in chapters 2 and 3.

<sup>80</sup> S 40 of the *Constitution*; see the further discussion in chapter 4.

<sup>81</sup> S 8 of the *Constitution*.

<sup>82</sup> 107 of 1998.

<sup>83</sup> S 1 also defines sustainable development as "the integration of social, economic, and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations".

heritage in some instances) should be protected as well.<sup>84</sup> This reference to culture in the definition of the environment in the *NEMA*, when read together with the definition of sustainable development and section 24(b) of the *Constitution*, suggests that cultural interests have a significant role to play in developmental policies to advance the realisation of constitutionally enshrined cultural rights.

The government of South Africa has made far-reaching attempts towards the recognition of the concept of culture<sup>85</sup> in law and policy. Thus, the existing national law and policy framework facilitating the inclusion of culture in the sustainable development equation is examined.<sup>86</sup> In addition, the South African government in formulating the 2008 *National Framework for Sustainable Development* (NFSD),<sup>87</sup> the *National Strategy for Sustainable Development and Action Plan 2011-2014* (NSSD 1)<sup>88</sup> and the 2011 *National Development Plan: Vision for 2030* (NDP),<sup>89</sup> has highlighted the importance of institutions and systems of governance in implementing the ideals of sustainable development.<sup>90</sup> Therefore, although culture is not explicitly provided for in these strategic planning documents, there is perceived commitment to the progressive realisation of the constitutionally entrenched Bill of Rights.

### **1.3 Area of focus**

In line with the need to explore the advancement of culture in pursuance of sustainable development, this thesis focuses on understanding the contemporary interpretation of sustainable development in the domestic context, from the

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84 The interrelationship and intersection between culture and the environment, economic and social interests is discussed in chapter 3.

85 See for example, the Department of Arts and Culture's White Paper on Arts, Culture and Heritage (4 July 1996) accessible at <https://www.dac.gov.za/content/white-paper-arts-culture-and-heritage-0#CHAP3> which was published on 04 June 1996 and later revised on 04 June 2013; Revised White Paper on Arts, Culture and Heritage (Version 2.4 June 2013) <https://www.dac.gov.za/sites/default/files/REVISEDWHITEPAPER04062013.pdf> accessed on 9 June 2014. The 1996 *White Paper* in conjunction with the revised version is explored in chapter 3 in examining and evaluating the existing cultural policies of the cultural and creative industries in South Africa.

86 See the discussion in chapter 3.

87 Accessible at the Department for Environmental Affairs website <http://bit.ly/2uLEliS> accessed on 22 July 2014.

88 Approved by Cabinet on 23 Nov. 2011 and is available at <http://bit.ly/2tKfHIL> accessed on 21 July 2014.

89 National Planning Commission 2011 <http://bit.ly/2a5exJq> accessed on 21 July 2014.

90 The NFSD 2008 15.

perspective of the fact that South Africa has a rich, varied and diverse culture which is constitutionally recognised and protected. Of even greater relevance is the legal recognition of the concept of sustainable development in South Africa.<sup>91</sup>

This thesis is strategically set out against the context of contemporary international cultural law, policy and ancillary instruments and the inclusive understanding of sustainable development in South African law, policy, and institutional arrangements.

This research is distinguished from existing accounts on the role of culture<sup>92</sup> in sustainable development in the South African context, to the extent that it focuses on a more in-depth understanding of the inclusion of culture in the sustainable development equation in the country against the backdrop of international law and the guidelines promoting it. This thesis sets out to demonstrate how culture interacts with other competing interests such as environmental, economic and social interests in the sustainable development context, thereby, making culture a significant part of the sustainable development equation. The existing legislative and policy framework is analysed in terms of specified themes within the framework of the identified competing interests, and their interaction with culture is distilled. The role of the judiciary in giving recognition to cultural interests in the interpretation of the concept of sustainable development is recognised as an important aspect in the South African context. The institutional governmental arrangements in place at the national, provincial and local spheres are structured to accommodate cultural interests in the balancing of competing interests in the pursuit of sustainable development. In this way, the focus is on balancing competing interests as against the promotion of one aspect of the sustainable development equation.

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91 See s 24 of the *Constitution*.

92 See Du Plessis and Rautenbach 2010 13(1) *PER* 27-71; Church 2012 *De Jure* 511-531; Du Plessis and Feris 2008 *SAJELP* 157-168. These three accounts focus on the South African narrative in relation to the role of culture in the governance of cultural matters in the sustainable development context. Church however, differs from the other two studies, as she links the concept of culture to the role of indigenous law and specifically to the African philosophy of *uBuntu*. Her contribution however limits the interaction of culture with social interests in the pursuit of sustainable development. See further discussions in para 2.6.3.

### *1.3.1 Central research question*

To what extent and how does South Africa's national law, policy and institutional governmental arrangements facilitate the inclusion of "culture" in the country's pursuit of sustainable development?

### *1.3.2 Objectives*

The primary objective of this thesis is to analyse the existing national law and policy framework that facilitates the inclusion of culture in the sustainable development equation, in line with the contemporary understanding of the concept of sustainable development.

To achieve the main objective, the following secondary objectives are pursued:

- (a) to investigate the conceptual basis of the link between culture and sustainable development by examining the relevance of culture in the context of the contemporary meaning of sustainable development;
- (b) to interrogate the inclusion of culture in matters of sustainable development in South Africa by analysing how the existing national legislative and policy framework facilitates the inclusion of culture in the sustainable development equation;
- (c) to critically analyse the institutional arrangements in government relevant to the implementation of the sustainable development ideal which facilitate the inclusion of culture in the pursuit of sustainable development;
- (d) to assess the courts' approach to cultural issues to determine if they have up to date judicially elevated cultural interests to form part of the set of interests that are legally protected in the name of sustainable development; and
- (e) to assess and reach a logical conclusion based on the findings in objectives (a)-(d) that support the making of recommendations aimed at optimising the value of culture in the pursuit of sustainable development in South Africa.

### 1.3.3 Hypothesis and assumptions

#### 1.3.3.1 Hypothesis

This thesis adopts the following hypotheses in the analysis of the research question posed:

- (a) that the *Constitution* and the entrenched Bill of Rights give recognition to the right of the people to have their cultural interests protected;
- (b) that the realisation of a right to culture is connected to the human development of the people of South Africa and is hinged on the recognition of cultural interests in the sustainable development equation; and
- (c) that the existing national law and policy framework which give recognition to cultural interests can be explored in the facilitation of culture in the pursuit of sustainable development in South Africa.

#### 1.3.3.2 Assumptions

The following assumptions support the query posed by the research question:

- (a) sustainable development is a constitutional objective in South Africa and globally;
- (b) South Africa is culturally diverse and has a rich cultural heritage;
- (c) the *Constitution* recognises that social and economic development is hinged on the environment, while culture in terms of heritage intersects with the environment. In the same way, culture and social and economic interests intersect;
- (d) there is a relation between culture and the interests of sustainable development;
- (e) the recognition and protection of cultural interests is entrenched in the Bill of Rights of the *Constitution*; and

- (f) sustainable development must be understood to mean the balancing of environmental, economic and social interests.

#### ***1.4 Research methodology***

This research is carried out by critically analysing the literature existing on the extended meaning of the concept of development, the ideology of sustainable development, the triple bottom line approach adopted on an international level in the pursuit of sustainable development, and the contemporary understanding of the concept of sustainable development, which includes the acknowledgement of cultural interests.

In addition, the existing theoretical basis for the linkage of culture and sustainable development is critically reviewed from an international perspective and draws from the perspectives of scholars in legal and non-legal disciplines. This is primarily because the concept of sustainable development cuts across the legal, social and scientific fields of study. The South African application of the concept is approached from a constitutional perspective and is analysed in terms of the broad mandate conferred on the state to pursue socio-economic development whilst ensuring a safe and healthy environment. Although different perspectives and theories on sustainable development are discussed, this thesis demonstrates through a literature review that scholars who have argued for the meaning and applicability of the concept of sustainable development beyond environmental interests promote the contemporary understanding of the concept, which allows for the inclusion of cultural interests.

Against this backdrop this thesis motivates for the application of the contemporary understanding of sustainable development that allows for the balancing of interests beyond the triple bottom line of environmental, social and economic interests, to include cultural interests. In this respect, the thesis proves that cultural interests intersect and interact with environmental, economic and social interests of people and are essential for the full realisation thereof. Further, cultural interests are of intrinsic value and are for instance worthy of full protection in terms of cultural heritage.

The thesis also investigates the existing law and policy framework in South Africa, which facilitates the inclusion of culture in selected theme areas where issues of culture intersect and interact with environmental, social and economic interests. This investigation is crucial as it provides the legal basis which serves as a guide for decision-makers, who must now begin to consider cultural interests in the promotion of sustainable development in South Africa. The judiciary also has a significant role in terms of giving recognition to culture issues when cases of sustainable development are brought before it for adjudication. The extent to which the courts give cognisance to cultural issues within the sustainable development equation is queried by analysing relevant cases using a desktop review approach.

Furthermore, since decision-makers are responsible for the implementation of the ideal of sustainable development, this thesis explores institutional governance arrangements with an emphasis on cooperative governance structures in the national, provincial and local spheres of government, and the role of selected government departments the decisions of which directly or indirectly impact on sustainable development. The thesis also explores the theoretical basis for environmental impact assessment (EIA) as a tool used by environmental and other authorities in assessing the impact of a development project on the environment to provide a basis for understanding how cultural issues might be included to mitigate any cultural impact of industrial and other development projects.<sup>93</sup>

### ***1.5 Outline***

The thesis is structured to systematically address the research question posed. Chapter 2 commences with an analysis of the conceptual and theoretical perspectives on development and sustainable development, and how cultural interests link with sustainable development from a global, regional (African) and South African perspective. The chapter also critically explores the origins of sustainable development as a law and policy concept to highlight how the concept evolved from being a purely

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93 See the discussion in Chapter 4.

environmental concept to becoming an all-encompassing concept that interacts with diverse dimensions of development.

Chapter 3 identifies and analyses legislative and policy instruments in identified areas of environmental, economic and social interests of sustainable development that are relevant and inextricably tied to the promotion of cultural interests in South Africa.

Chapter 4 investigates the existing governance structures in government that may assist in implementing the legislative and policy frameworks relevant to cultural interests discussed in Chapter 3. The emphasis is on cooperative governance structures in the national, provincial and local spheres of government.

Chapter 5 focuses on a case law analysis of how the courts have given recognition to the concept of sustainable development. The aim of this exercise is to interrogate the courts' reasoning in reaching such decisions and to analyse whether the inclusion of culture is facilitated by the courts in view of the contemporary understanding of sustainable development.

Chapter 6 proposes recommendations that are aimed at optimising the facilitation of culture in the pursuit of sustainable development in South Africa in the application of the contemporary understanding and interpretation of sustainable development that is on a par with global trends.



## CHAPTER 2

### THE INTERDEPENDENCE BETWEEN CULTURE AND SUSTAINABLE DEVELOPMENT: THEORETICAL PERSPECTIVES

#### *2.1 Introduction*

This chapter theoretically explores the link between culture and sustainable development. The supplementary aim of this chapter is to elaborate on how law, policy and institutional government arrangements serve as a relevant and suitable conduit through which the nexus between the protection of culture and the pursuit of sustainable development may be recognised and established in South Africa.

In the international law and policy sphere sustainable development is understood as a development goal.<sup>1</sup> An interrogation into the origins of sustainable development as a law and policy concept is undertaken to highlight how the concept evolved from being a purely environmental concept to becoming an all-encompassing concept that intercepts diverse interests of development. The point of departure is the evolution of the culture and development nexus. Also relevant is the legal recognition of the notion of culture in the pursuit of sustainable development.

There is a growing focus in international discourse on culture and its relationship with sustainable development.<sup>2</sup> Considering global developments and the new global agenda for sustainable development,<sup>3</sup> the implications of the new global agenda for South Africa are investigated. This investigation aims at discovering what kind of changes in law, policy and institutional government arrangements, if any, will be imminent for South Africa to realise the inclusion of culture in its pursuit of sustainable development. This investigation forms the content of the remainder of this thesis.

In furtherance of the achievement of the set objectives, this chapter traces and examines relevant international law instruments, which include treaties as well as soft

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1 See para 2.2.3.

2 See paras 2.4 and 2.4.1.

3 The global developments leading up to the new global agenda will be chronologically examined in para 2.4.2.

law that have contributed to the promotion and recognition of culture in the sustainable development discourse. Most notable amongst them are the works, research, and contributions of UNESCO in the promotion of the relationship between culture and development – and, later, sustainable development. Regional instruments accommodating the inclusion of culture within the development and sustainable development discourse are also examined. The legal interpretation and understanding of the concept of sustainable development that is inclusive of culture are also investigated.

## ***2.2 The origins of sustainable development as a law and policy concept***

### *2.2.1 Introduction*

Sustainable development is a concept that is embraced by scholars in all sciences, including in the field of law.<sup>4</sup> The concept may be defined from different perspectives. Therefore, it is imperative that an understanding of what sustainable development entails from a law and policy perspective is investigated, commencing with tracing its origins and contemporary meaning.

This investigation is carried out by first examining the meaning of development. The term “development” does not lend itself to a universally acceptable meaning. Thus, this chapter commences with a discussion of the evolution of the concept of development.

### *2.2.2 The evolution of development*

The *Oxford Advanced Learner's Dictionary* defines the word development from five different perspectives.<sup>5</sup> Firstly, it defines development as the gradual growth of something (for example a baby in the womb, core competencies, a career) until it becomes more advanced or stronger.<sup>6</sup> Secondly, development is defined in terms of a new product, such that it refers to the process of producing or creating something (for

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4 Dresner *The Principles of Sustainability* 63; Baker *Sustainable Development* 6; Tladi *Sustainable Development in International Law* 15; Morris “Reconceptualising ‘sustainable development’” 8-10.

5 *Oxford Learner's Dictionaries* 2016 *Development* <http://bit.ly/2afQMy9> accessed on 20 July 2016.

6 *Oxford Learner's Dictionaries* 2016 *Development* <http://bit.ly/2afQMy9> accessed on 20 July 2016.

example, vaccines, aviation technology, a piece of equipment) new like a new or advanced product or material.<sup>7</sup> Thirdly, development is described as a new event or stage that is capable of influencing or affecting what occurs in a continuing situation.<sup>8</sup> Fourthly, development is defined in the context of new buildings occupying a piece of land.<sup>9</sup> Lastly, development is defined as the process of using or altering an area of land to make it profitable by erecting buildings.<sup>10</sup> It is evident from the dictionary attempt to set a definition for development that the term is not susceptible to a universal definition or meaning.

Several scholars and organisations have also investigated the meaning attributed to development over time. Early theories about development have focused on the economic value of development processes.<sup>11</sup> As observed by Todaro and Smith,<sup>12</sup> the experience of the post-World War II decades and postcolonial developments in the 1950s, 1960s and early 1970s raised doubts about the validity of measuring development only in economic terms. During those periods, while most developing nations achieved their economic growth targets, the growth achieved did not translate into improved levels of living for the majority of the people. Gaygisiz<sup>13</sup> observes that national development in the 1950s, 1960s and early 1970s was conceived purely on the premise of welfare economics biased towards macroeconomic indicators such as national income and economic growth.

Subsequently scholars began recognising the shortcomings of the narrow perspective of linking development with economic growth alone<sup>14</sup> and began exploring a broader meaning of development, to include other indicators of growth like social development<sup>15</sup> and human development.<sup>16</sup> Burgeoning debates in academia<sup>17</sup> and

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- 7 *Oxford Learner's Dictionaries* 2016 Development <http://bit.ly/2afQMy9> accessed on 20 July 2016.
  - 8 *Oxford Learner's Dictionaries* 2016 Development <http://bit.ly/2afQMy9> accessed on 20 July 2016.
  - 9 *Oxford Learner's Dictionaries* 2016 Development <http://bit.ly/2afQMy9> accessed on 20 July 2016.
  - 10 *Oxford Learner's Dictionaries* 2016 Development <http://bit.ly/2afQMy9> accessed on 20 July 2016.
  - 11 Todaro and Smith *Economic Development* 12th ed 16; Gaygisiz 2013 *JSE* 170.
  - 12 Todaro and Smith *Economic Development* 12th ed 7.
  - 13 Gaygisiz 2013 *JSE* 170.
  - 14 Todaro and Smith *Economic Development* 12th ed 7; also see Dresner *The Principles of Sustainability* 69.
  - 15 S 1 paragraph 3 of *IUCN World Conservation Strategy* (1980).
  - 16 Sen "Development as Capacity Expansion" 41-58; Anand and Sen 2000 *WD* 2029-2030; Dresner *The Principles of Sustainability* 70-71.
  - 17 Anand and Sen 2000 *WD* 2029-2049; Goklany "Economic growth and human well-being" 20-43.

international trends demonstrated that since people are at the centre of development processes, the targeted outcomes of development must consider the needs of people. Gallopin<sup>18</sup> suggests that development is now perceived and assessed from a broader perspective, which goes beyond economic growth to include socio-economic indicators and human development. Hence, development theories have metamorphosed into a multi-faceted model with a diverse range of interests beyond economic interests, which must be considered. Thus, broadening the development paradigm paved the way for the inclusion of other parameters affecting the overall well-being of people, such as liberty and political freedom, access to primary education<sup>19</sup> and healthcare, and the right to live in a clean and healthy environment.<sup>20</sup>

Development began to be redefined and measured against other parameters such as human well-being, which includes environmental health, the reduction or elimination of poverty, increased equality (or socio-economic justice)<sup>21</sup> and lower unemployment

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18 Gallopin "Impoverishment and Sustainable Development: A Systems Approach" 2.

19 S 29 of the *Constitution*.

20 S 24 of the *Constitution* and a 24 of the *1986 African Charter on Human and Peoples Rights* (hereafter *Banjul Charter*) which referred to a "general satisfactory environment favourable to their development".

21 The concept of socio-economic justice encompasses the sum of socio-economic rights being accessible equally by all members of society. The international scene has witnessed laudable initiatives aimed at creating an awareness of the need to protect socio-economic rights. To this end, the *Universal Declaration of Human Rights* adopted by the UN General Assembly in December 1948 (hereafter *UDHR* 1948) proclaimed the inviolability of social and economic rights. The social and economic rights contained in the Declaration include the right to own property (a 17), the right to social security and to the realization of social and economic rights "indispensable for [a person's] dignity and the free development of his [or her] personality" (a 22), rights with respect to employment (a 23) and rights with respect to education (a 26), while a 25 recognizes a right to a certain standard of living. The moral statements expressed in the Declaration were given legal force through two covenants: The *International Covenant on Civil and Political Rights* 1996 (hereafter *ICCPR* 1966) and the *International Covenant on Economic, Social and Cultural Rights* 1996 (hereafter *ICESCR* 1966). The *ICESCR* is one of the most influential and comprehensive international documents in social and economic rights. The new constitutional dispensation in South Africa affords the recognition and protection of socio-economic rights aimed at transformative constitutionalism. Such rights include property rights, housing rights, a right to education, health care rights, social security rights, food security, environmental rights, and a right to water - and all such related rights are constitutionally protected through an entrenched bill of rights. The *Constitution* provides for the judicial enforcement of socio-economic rights as well as a domestic reporting procedure. See ss 25(5), 26, 27, 29(1)(b) of the 1996 *Constitution*. For further discussions on the interpretation and applicability of socio-economic rights in the promotion of social justice in South Africa, see the works of Langford *et al* *Socio-Economic Rights in South Africa: Symbols or Substance*; Heyns and Brand 1998 *LDD* 153-167; Liebenberg "The Interpretation of Socio-Economic Rights" 1-66; Liebenberg 2002 *LDD* 159-191. For leading cases on judicial interpretation of socio-economic rights in South Africa, see *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC); *Government of the Republic of South Africa v*

rates.<sup>22</sup> In 1976 UNESCO stated: “it is by no means a new idea that development should serve man”.<sup>23</sup> The 1987 *World Commission on Environment and Development*, also known as the Brundtland Commission, gave recognition to the link between development, the environment and people by advocating protection of the environment in order to preserve its integrity for people in the present and future generations.<sup>24</sup> The UN further popularised this human-centred approach to development by giving significance to human well-being through the UN Development Programme (hereafter UNDP) in its annual *Human Development Report*, which was published from 1990 onwards.<sup>25</sup> In line with this multi-faceted model of development based on the “humanisation of development”, Sen<sup>26</sup> advocates that development should expand the ability of people to make choices, in other words, the expansion of opportunities available to people within the development framework.<sup>27</sup>

The concept of “development” is also a recurring theme in various international standard-setting documents. Conspicuously, the *Universal Declaration of Human Rights* 1948 (hereafter 1948 *UDHR*) does not expressly include the term “development”, although articles 25-28 refer to the notion. These articles highlight the right to a standard of living adequate for the health and well-being of all people, including food, clothing, housing, health care and social services. They also refer to a right to education, a right to participate freely in the cultural life of the community and a right to a social and international order wherein the rights and freedoms set out in

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*Grootboom* 2001 1 SC 46 (CC); *Minister of Health V Treatment Action Campaign* 2002 5 SA 721 (CC).

22 Todaro and Smith *Economic Development* 11th ed 15-16.

23 UNESCO *Medium-Term Plan 1977-1982* UN Doc. 19C/4 Approved (1977) available at <http://unesdoc.unesco.org/images/0003/000332/033260eo.pdf> 55 assessed on 12 November 2015.

24 See the discussion in para 2.2.3; Segger and Khalfan *Sustainable Development Law* 18.

25 These reports are accessible at the UNDP website <http://hdr.undp.org> accessed on 1 April 2016. The UNDP *Human Development Report* promotes the idea of development as a conduit leading to the expansion of choices.

26 Sen “Development as Capacity Expansion” 54.

27 Sen’s work is focused on developing a distinct normative approach to evaluating well-being in terms of an individual’s freedom to achieve the kind of life they have reason to value. Sen reasons that development provides a conduit for the expansion of that freedom. For more on Sen’s perspective of development see Sen *Development as Freedom*. Also see Wells *Reasoning about development: Essays on Amartya Sen’s Capability Approach* 2.

the *UDHR* 1948 can be fully realised. Similarly, article 11 of the *ICESCR* 1966<sup>28</sup> recognises “the right of everyone to a reasonable standard of living”, which is linked to the concept that development empowers people with basic rights and freedoms.

More to the point, article 1 of *ICESCR* 1966 and article 1 of *ICCPR* 1966<sup>29</sup> state that all peoples on the grounds of self-determination should be able to “freely pursue their economic, social and cultural *development*”.<sup>30</sup> The right to development is also explicitly included in article 22 of the *ACHPR* 1981, which reads:<sup>31</sup>

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

In 1986 the UN General Assembly accepted a declaration on the right to development, namely the *UN Declaration on the Right to Development*.<sup>32</sup> The Declaration was the outcome of discussions on the formulation of a right to development aimed at addressing inequalities in the world economic and political order.<sup>33</sup> The Declaration recognises in its preamble that development is a:

Comprehensive economic, social, cultural, and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The Declaration further promotes the right to development as an inalienable human right by virtue of which all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development. The right to development thus offers an opportunity for human rights and fundamental freedoms to be fully realised.<sup>34</sup> The right to development is delineated thereby as an “inalienable human

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28 The treaty was adopted on 16 December 1966 and entered into force on 3 Jan 1976. South Africa ratified this treaty on 18 January 2015 and it came into force on 12 April 2015.

29 The treaty was adopted on 16 December 1966, and entered into force on 23 March 1976. South Africa ratified it on 10 December 1998.

30 Emphasis added.

31 Emphasis added.

32 *UN Declaration on the Right to Development* UN doc A/RES/41/128 (1986).

33 Schrijver *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* 77-78.

34 A1.1 of the 1986 *UN Declaration on the Right to Development*.

right”.<sup>35</sup> Member states in the UN, though not legally bound to this Declaration, are committed to protect its substantive objectives. By the preamble of the UN Charter, wherein the member states “determine to reaffirm faith in fundamental human rights, in the dignity and worth of the human person” and “in the equal rights of men and women and of nations large and small”, there exists a solemn commitment to fundamental human rights and the principle of equality.<sup>36</sup>

Furthermore, the recognition by states of the status of the right to development as a human right was reinforced at the *Vienna World Conference on Human Rights* in 1993. At the conference, the right to development was described as an “integral part of fundamental human rights”, as human rights are interdependent, indivisible and mutually reinforcing.<sup>37</sup>

The right to development per Tomuschat<sup>38</sup> is an aggregate right which draws its substance from the other instruments (for example the *ICESCR* 1966 and the *ICCPR* 1966) which lay down human rights and fundamental freedoms with binding effect. Thus, collectively, the *UDHR* 1948, the *ICESCR* 1966, the *ICCPR* 1966, the *ACHPR* 1981 and the *UN Declaration on the Right to Development* 1986<sup>39</sup> recognise the interdependent nature of the rights of people and emphasise that economic, social, cultural, civil and political rights are indivisible.

An in-depth analysis of the evolution of the concept of development and development theories falls outside the scope of this thesis. However, the thesis endorses the view that the evolution of a multi-faceted model of development supports a development paradigm that paves the way for the inclusion of other indicators of development beyond economic growth. Development is therefore intrinsically linked with different societal interests such as economic, social, cultural and environmental interests. These

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35 As characterised by the General Assembly in considering alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms in UN Doc A/RES/36/133 (1981); A 1 of the *UN Declaration on the Right to Development* UN doc A/RES/41/128 (1986).

36 Kirchmeier 2006 <http://bit.ly/1NemN2b> 3 accessed on 26 February 2016; the preamble of the UN Charter 1948.

37 Kirchmeier 2006 <http://bit.ly/1NemN2b> 9 accessed on 26 February 2016; Segupta “Conceptualizing the right to development for the twenty-first century” 67-68.

38 Tomuschat *Human Rights: Between Idealism and Realism* 55.

39 UN Doc A/RES/41/128 (1986).

development interests are in turn capable of influencing the freedoms and well-being of people.<sup>40</sup>

On the other divide is the inter-relationship between economic development and the environment. Economic development largely depends on the exploitation of the natural resources base,<sup>41</sup> which over time results in the eroding of the earth's resources, leading to pollution and other negative environment-related problems.<sup>42</sup> Environment-related problems propelled by human activities are considered "life threatening"<sup>43</sup> and have a ripple effect on the social and human development of the peoples of the world, especially in developing countries.<sup>44</sup> The interface between development, the environment and human development promoted the idea of a paradigm shift from an econocentric model of development<sup>45</sup> to one that recognises the interconnectedness, interdependence and interrelation of the different interests of development. The shift advocates for development that not only promotes the consideration of economic interests but also incorporates ecological and social interests, with the aim of progressively realising sustainable development in the long run. In promoting the need to recognise development processes as such, the *World Conservation Strategy*<sup>46</sup> (hereafter the *Strategy Document*) of the International Union for Conservation of Nature and Natural Resources (IUCN), published in 1980, highlights development as a process that involves the modification of the biosphere

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40 For example, in the words of the Brundtland Commission "... the 'environment' is where we live and 'development' is what we all do to improve our lot within that abode. The two are inseparable." See WCED 1987 *Our Common Future* ix; Para 2 of the preamble to the *UN Declaration on the Right to Development*; Anand and Sen 2000 *WD* 2033; Segupta "Conceptualizing the Right to Development for the Twenty-first Century" 69-70.

41 Fuo 2013 *Obiter* 88.

42 The issue of environmental degradation due to human activities in pursuit of development has been the subject of environmental protection and the foundation for the inception of international environmental law and governance. See Sands "Environmental protection in the twenty-first century: Sustainable development and international law" 369-409; Feris 2010 13(1) *PER* 73-99; Tladi *Sustainable Development in International Law* 14-15.

43 Feris and Tladi "Environmental Rights" 249.

44 See generally from a rights-based perspective Du Plessis 2011 *SAJHR* 289 for a detailed discussion on the interrelationship between poverty and the environmental right in the South African context.

45 A development model that is focused only on the economic growth aspect of development.

46 This document is available at <https://portals.iucn.org/library/efiles/documents/WCS-004.pdf> accessed on 18 August 2015.



and the application of human, financial, living and non-living resources which are all aimed at satisfying human needs and improving the quality of human life.<sup>47</sup>

The *Strategy Document* further states that:<sup>48</sup>

For development to be sustainable it must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long term as well as the short-term advantages and disadvantages of alternative actions.

The *Strategy Document* recognises the economic interests of development and draws attention to other interests of development such as its social and environmental interests. For example, it defines conservation as:

The management of the human use of the biosphere so that it may yield the greatest sustainable benefit to present generations whilst maintaining its potential to meet the needs and aspirations of future generations.

This definition highlights the management of the economic, social and environmental interests of development to ensure that development is sustained while maintaining a mutual balance. The process of management will take the form of a balanced, integrated approach that will weave the economic, social, environmental and human development interests within an integrated framework.<sup>49</sup>

The meanings attributed to development as discussed above cumulatively converge on the notion that development must seek the integration of all the various interests thereof. This thesis acknowledges the argument that for such development processes to be sustainable in the long haul, it will require the balancing of interests.<sup>50</sup> However, this thesis also recognises that some have argued that a trade-off of one interest of development against the other is inevitable.<sup>51</sup> However, it is also suggested that an integrated framework for sustainable development will potentially cushion the effect of trade-offs which is inherent in development.<sup>52</sup> This idea is premised on the understanding that development should recognise human development needs and

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47 S 1 at para 3 of the *Strategy Document*.

48 S 1 at para 3 of the *Strategy Document*.

49 Segger and Khalfan *Sustainable Development Law* 1.

50 Ross 2009 *Journal of Law and Society* 47.

51 Tladi *Sustainable Development in International Law* 83.

52 Baker *Sustainable Development* 5; Ross 2009 *Journal of Law and Society* 47.

interests. Development that is sustainable will aim at the integration of the different interests of development in reaching decisions.<sup>53</sup>

### *2.2.3 The evolution of the concept of sustainable development as a law and policy concept*

The idea that there should be development that should be sustainable is widely contested<sup>54</sup> and yet widely accepted.<sup>55</sup> A growing consensus amongst scholars and the international community is that the tension between environmental interests such as ecological limits, economic interests such as the GDP, and social interests such as access to health care, is bridged *via* the concept of sustainable development.<sup>56</sup>

A detailed discussion of the historical evolution of the meaning of the concept of sustainable development falls outside the scope of this thesis, since a vast amount of literature on the subject already exists.<sup>57</sup> Discussion in this section is limited to some significant milestones and important standard-setting documents which emerged from the evolution of the concept. These milestones and standard-setting documents include:

- (a) 1972 *Declaration of the United Nations Conference on the Human Environment* (1972 Stockholm Declaration);<sup>58</sup>

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53 Tladi *Sustainable Development in International Law* 11; Baker *Sustainable Development* 7. The need for such an integrated approach is traced back to the Separate Opinion of Weeramantry J in *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Report 7, where the idea of sustainable development is traced to the practices of ancient tribes in Sri Lanka, Eastern Africa, America and Europe, and to Islamic legal traditions.

54 Baker *Sustainable Development* 6; Morris "Reconceptualising Sustainable Development" 8.

55 See the approval of the concept of sustainable development by over 140 governments in the 1992 *UN Conference on Environment and Development* (hereafter 1992 *UNCED*) also known as the Earth Summit. The agreement of the governments was reflected in the corresponding key consensus statements by way of the 1992 *Rio Declaration and Programme of Action and Agenda 21*.

56 Segger and Khalfan *Sustainable Development Law* 3; Tladi *Sustainable Development in International Law* 74-81; Baker *Sustainable Development* 7-8; International Institute for Sustainable Development (IISD) *Impoverishment and Sustainable Development; Our Common Future: Report of the World Commission on Environment and Development* UN Doc. GA/42/427 which was published in 1987.

57 See for instance Tladi *Sustainable Development in International Law* 12-33; Du Pisani 2006 *Environmental Science* 83-96; Mebratu *EIAR* 496-503.

58 *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972 UN Doc GA/CONF.48/14/Rev 1 (1972).

- (b) 1987 WCED;<sup>59</sup>
- (c) 1992 UN Conference on the Environment and Development (UNCED), also known as the Earth Summit or the Rio Conference;<sup>60</sup>
- (d) 2000 *Millennium Development Goals*;<sup>61</sup>
- (e) 2002 World Summit on Sustainable Development;<sup>62</sup>
- (f) 2012 UN Conference on Sustainable Development titled “The Future We Want”, also known as Rio+20;<sup>63</sup> and
- (g) 2015 *Transforming Our World: 2030 Sustainable Development Goals*,<sup>64</sup> also known as the Global Goals or the Sustainable Development Goals (SDGs).<sup>65</sup>

The significance of these documents lies in the fact that each of them contributed at different times to the contemporary understanding of the concept of sustainable development, which initially started out as an attempt to reconcile development concerns with environmental concerns (the primary theme of the 1972 *Stockholm Declaration*).<sup>66</sup> The theme was carried over to the Brundtland Commission.<sup>67</sup> The Commission’s Report – *Our Common Future* – is credited with promoting the concept of sustainable development on a global level. The most often quoted definition of the concept of sustainable development extracted from the Report reads:<sup>68</sup>

Development that meets the needs of the present without compromising the ability of future generations to meet their own needs

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59 *Our Common Future: Report of the World Commission on Environment and Development* UN Doc. GA/42/427.

60 It was held in Rio de Janeiro from 3-14 June 1992.

61 *UN Millennium Declaration* UN Doc GA/Res/55/2 (8 September 2000).

62 The Summit was held from 26 August - 4 September 2002.

63 *UN Resolution the Future We Want* UN Doc GA/RES/66/288 (27 July 2012).

64 *Resolution adopted by the General Assembly: Transforming Our World: 2030 Sustainable Development Goals* UN Doc GA/RES/70/1 (2015) (hereafter referred to as *2030 Sustainable Development Goals*).

65 Reference to the new global agenda, or the global goals or SDGs in this thesis refers to the *2030 Sustainable Development Goals*.

66 Tladi *Sustainable Development in International Law* 16.

67 Segger and Khalfan *Sustainable Development Law* 18.

68 *Our Common Future: Report of the World Commission on Environment and Development* UN Doc. GA/42/427.

This definition highlights two distinct elements, namely:

- (a) prioritising the essential needs of the world's poor; and
- (b) the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.<sup>69</sup>

These two elements underline the strong linkage between poverty alleviation, environmental improvement, and social equity.<sup>70</sup> The Report suggests that issues of environmental policy and economic policy cannot be evaluated separately but must rather seek to be integrated within the development framework.<sup>71</sup> The Commission introduced the notion of an integrated approach to socio-economic and environmental issues.<sup>72</sup> The Report alerted the global community to progress towards economic development that is sustainable.<sup>73</sup>

The Brundtland Report also set the tone for the convening of the Earth Summit in 1992. The Summit represented a giant leap forward in the conceptualisation of sustainable development with international agreements entered on climate change, forests and biodiversity.<sup>74</sup> The summit produced five outcome documents known as the *Rio Instruments*.<sup>75</sup> These five outcome documents include two legally binding and three non-binding legal instruments:

- a) the 1992 *Convention on Biological Diversity*,<sup>76</sup>
- b) the *United Nations Framework Convention on Climate Change*,<sup>77</sup>
- c) the *Rio Declaration*,<sup>78</sup>

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69 *Our Common Future: Report of the World Commission on Environment and Development* UN Doc. GA/42/427.

70 Mebratu 1998 *EIAR* 501-502.

71 WCED *Our Common Future* 314.

72 The Commission's perspective is that the environment and development issues are interwoven "into a seamless net of cause and effect". See WCED *Our Common Future* 4.

73 Sands "International law in the field of sustainable development" 58.

74 Segger and Khalfan *Sustainable Development Law* 20-21.

75 Parson, Haas and Levy 1992 *Environment: Science and Policy for Sustainable Development* 12-36.

76 ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

77 1771 UNTS 107 / [1994] ATS 2 / 31 ILM 849 (1992).

78 *Rio Declaration on Environment and Development* UN Doc A/CONF 151/26 (Vol. I) (1992).

d) the *Agenda 21*;<sup>79</sup> and

e) the *Forest Principles*.<sup>80</sup>

The overall significance and contribution of the Earth Summit and its instruments to the evolution of the concept of sustainable development is that it ushered in a new phase in the relevant international law.<sup>81</sup> Segger and Khalfan<sup>82</sup> conclude that the Earth Summit urged the integration of the environment and development so that both may be sustained over the long term.

In addition, the legally binding instruments (the 1992 *Convention on Biological Diversity* (hereafter the *CBD*)<sup>83</sup> and the 1992 *United Nations Framework Convention on Climate Change*)<sup>84</sup> provide an international law legal framework from which issues of the environment raised at both the 1972 *Stockholm Conference* and the 1987 *WCED* could be addressed globally. The principles contained in the *Rio Declaration* and the *Agenda 21* programme cumulatively stimulated the global community towards the recognition of the three interests of sustainable development (economic, environmental and social) as well as the need for institutional arrangements towards the promotion of sustainable development.<sup>85</sup> According to Kimball and Weiss,<sup>86</sup> the *Earth Summit* promoted institutional changes at national, regional and global levels, with increased emphasis on confronting environmental and developmental issues with

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79 *Agenda 21: Programme of Action for Sustainable Development* UN Doc A/CONF/151/26 (Vol. I and II) (1992).

80 *Non-Legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests* UN Doc A/CONF/151/26 (Vol. III) (1992).

81 Sands *Principles of International Environmental Law* 49. Sands distinguished four time-frames in the evolution of international environmental law. According to him, the third phase of the development of international environmental law commenced from the *Stockholm Conference* and lasted until the Earth Summit, while the fourth stage commenced at the Earth Summit and is currently still evolving. Also see Sands "International Law in the Field of Sustainable Development" 66; Segger and Khalfan *Sustainable Development Law* 15-78.

82 Segger and Khalfan *Sustainable Development Law* 20.

83 The Convention was adopted on 5 June 1992. It entered into force on 29 December 1993. The text of the Convention is accessible at <http://bit.ly/2cwxRwu> accessed on 4 July 2017.

84 The Convention was adopted on 9 May 1992. It entered into force on 21 March 1994. The text of the Convention is accessible at <http://bit.ly/2tchNVP> accessed on 4 July 2017.

85 Para 37 of the Agenda 21; also see generally Kimball and Weiss 1992 *Proceedings of the Annual Meeting American Society of International Law* 414-423.

86 Kimball and Weiss 1992 *Proceedings of the Annual Meeting American Society of International Law* 414-423.

an integrated approach. This approach also extends to the lowest level of government with the application of the principle of subsidiarity.<sup>87</sup> The outcomes of the *Earth Summit* and the ideas about sustainable development were subsequently reaffirmed 10 and 20 years later at the 2002 *WSSD* and the Rio+20 Conference respectively.

The 2002 *WSSD* led to more politically motivated commitments and facilitated the extension of the concept of sustainable development into business sectors, local government and civil society. It was also recognised that sustainable development is a global agenda for development.<sup>88</sup> Good governance was also affirmed as a pre-requisite.<sup>89</sup> The 2002 *WSSD* was convened on the heels of the Millennium Development Goals (MDGs) and as such it echoed some of the content of the MDGs, most notably poverty eradication.<sup>90</sup> The overarching import of the *WSSD* is that it brought other socio-economic interests (for example, poverty eradication, improved health services, women empowerment, food security, water and sanitation)<sup>91</sup> into sustainable development thinking on a global platform. This drive sent signals to the global community that these interests required to be addressed at all levels of government in the pursuit of sustainable development. Here lies an indication of the normative content of the concept of sustainable development, which is the improvement of human life (which signifies the relevance of the social interests of development), while promoting economic growth that is consistent with environmental protection for the present and future generations.<sup>92</sup>

The global understanding of sustainable development as a development goal received further attention at the Rio+20 Conference,<sup>93</sup> where the governments of the world decided that there is a need to agree on sustainable development goals that will replace the MDGs. The outcome of the conference, titled *The Future We Want*,

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87 The principle operates to the effect that environmental and developmental issues should be confronted at the lowest level in the hierarchy at which they can be practically and effectively managed.

88 Baker *Sustainable Development* 66.

89 Baker *Sustainable Development* 66.

90 Principle 11 *MDGs*.

91 Chapters II, V, VI *JPOI*.

92 See generally Bosselmann *The Principles of Sustainability* 56; Mebratu 1998 *EIAR* 493-520; Segger and Khalfan *Sustainable Development Law* 31; and Baker *Sustainable Development* 27-29.

93 The conference was held in Rio, Brazil from 13-22 June 2012.

envisioned that the ensuing sustainable development goals should reflect the multifaceted model of development.<sup>94</sup> The outcome document affirms that environment protection policies in pursuit of sustainable development must pay attention to poverty eradication by enhancing the welfare of indigenous peoples and their communities as well as other local and traditional communities and ethnic minorities.<sup>95</sup> The outcome document also suggests that to incorporate this human-centred paradigm of development into the sustainable development goals, there must be a corresponding acknowledgement and support of the identity, culture and interests of the communities.<sup>96</sup> In this regard, cultural heritage, practices, and traditional knowledge protection as well as non-market methods that contribute to the eradication of poverty and sustainable development must be integrated, preserved and respected.<sup>97</sup>

On 25 September 2015, the document *Transforming our World: the 2030 Agenda for Sustainable Development*, also known as *2030 Agenda for Sustainable Development* and the Global Goals,<sup>98</sup> was assented to by world leaders. It came into effect on 1 January 2016, succeeding the MDGs. The *2030 Agenda for Sustainable Development*, like the MDGs, consists of a set of voluntary agreements rather than a binding treaty.<sup>99</sup> The *2030 Agenda for Sustainable Development* is set to accomplish 17 goals, with 169 targets serving as indicators towards the accomplishment of these goals.

The goals reiterate the outcomes of the *Earth Summit* and previous international commitments like the 2002 *WSSD* and the Rio+20 that have contributed to the understanding of the concept of sustainable development. Most significant is that the contemporary understanding of the concept of sustainable development incorporates, along with environmental and economic interests, socio-economic interests and the

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94 See the preamble to *The Future We Want* UN Doc A/CONF.216/L.1.

95 A 58 (j) of *The Future We Want* UN Doc A/CONF 216/L.1.

96 A 58 (j) of *The Future We Want* UN Doc A/CONF 216/L.1. This idea is further explored in paras 2.5 and 2.6.

97 A 58 (j) of *The Future We Want* UN Doc A/CONF 216/L.1.

98 *Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development* UN Doc GA/Res/70/1 (2015) (hereafter referred to as the *2030 Agenda for Sustainable Development*).

99 Pogge and Sengupta 2015 *WILJ*2.

requirement to address the needs of people related to poverty eradication, quality education, social cohesion and inclusion.<sup>100</sup>

The *2030 Agenda for Sustainable Development* heralds a substantial leap for sustainable development. The *Agenda* incorporates the idea of the evolution of the concept of development into a multi-faceted model of development that goes beyond economic interests to other relevant interests. Hence, the *2030 Agenda for Sustainable Development* identifies four core elements which must be given full consideration in the understanding of sustainable development: People, Planet, Prosperity and Peace.<sup>101</sup> Within this framework the *2030 Agenda for Sustainable Development* recognises diverse interests of development, including culture. This is because the recognition of the role of people in sustainable development brings into consideration the interaction of human activities with the environment, which in turn impacts on the people's overall well-being. Human activities, on the other hand, are often motivated by the culture of the people.<sup>102</sup>

More specifically, the *2030 Agenda for Sustainable Development* aims to achieve by 2030 amongst other things the "appreciation of cultural diversity and culture's contribution to sustainable development"<sup>103</sup> by recognising and incorporating cultural interests in the pursuit of sustainable development. According to UNESCO, culture paves the way for a human-centred, inclusive and equitable development, without which development cannot be truly sustainable.<sup>104</sup> It is plausible to conclude that this perspective of UNESCO is perhaps premised on the view that the pursuit of sustainable development is inclusive and dependent on the harmonious alignment of the objectives of cultural diversity, social equity, environmental responsibility and economic sustainability.

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100 The preamble of the *2030 Agenda for Sustainable Development*.

101 The preamble to the *2030 Agenda for Sustainable Development*.

102 See generally Posey "Cultural and spiritual values of biodiversity" 1-19.

103 Target 4.7 of Goal 4 of the *2030 Agenda for Sustainable Development*.

104 UNESCO (Date Unknown) <http://bit.ly/1YCDrOe>; UNESCO (Date Unknown) <http://bit.ly/1g50y0d>; *2030 Agenda for Sustainable Development*; Duxbury, Hosagrahar and Pascual 2016 <http://bit.ly/2axAxwd> 1-42 accessed on 8 August 2016.



The international global agenda is the first place where culture is explicitly included within the framework for sustainable development.<sup>105</sup> The key areas identified where culture could play a decisive role in the new global agenda include poverty eradication, quality education, sustainable environmental management, sustainable cities, social cohesion and inclusion.<sup>106</sup> It is therefore arguable that the inclusion of culture in the new global agenda is probably owed to the evolution of the concept of development into a multi-faceted model which recognises diverse interests.<sup>107</sup> The promotion of cultural interests can be attributed to the work of UNESCO that has consistently promoted the link between culture, development and sustainable development.<sup>108</sup> The recognition of culture in sustainable development law and policy is relevant in exploring the value of culture in the framework for sustainable development. This forms the focus of the next section.

### ***2.3 The origin of the legal recognition of culture in law and policy***

The meaning and understanding of culture are complex,<sup>109</sup> broad and “polysemic”<sup>110</sup> with far reaching applicability because of its multi-layered and context-dependent meanings.<sup>111</sup> Culture refers to a variety of things and issues ranging from culture as a way of life to cultural products such as art and literature to artistic processes.<sup>112</sup>

In the study of human behaviour anthropologists have often engaged the dynamics of culture in defining human behaviour.<sup>113</sup> Several attempts have been made to define

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105 UNESCO 2015 <http://en.unesco.org/sdgs/clt> accessed on 7 May 2016.

185 UNESCO 2015 <http://en.unesco.org/sdgs/clt> accessed on 7 May 2016.

107 See para 2.4.2.

108 The work of UNESCO in promoting the link between culture, development and sustainable development is explored in para 2.4.2.

109 Gasper 1996 *Development and Change* 627-629.

110 WCCD *Our Creative Diversity Report* 10.

111 In 1952 cultural anthropologists, Kroeber and Kluckhohn *Culture: A Critical Review of Concepts and Definitions* in a search for a suitable definition of culture assembled 156 definitions of culture. These were classified under six headings, each presuming a different perspective of what a specific population is likely to share, namely: descriptive, historical, genetic, structural, psychological and normative definitions of culture.

112 Donders “The Cultural Diversity Convention and Cultural Rights: Included or Ignored?” 166; 1996 *Our Creative Diversity Report: Report of the World Commission for Culture and Development*; Albertyn 2009 *CCR* 170; Keesing 1974 *Annual Review of Anthropology* 75; Storey *From Popular Culture to Everyday Life* 128-130.

113 Over time anthropology has been divided into four areas of specialisation, namely: physical anthropology, archaeological anthropology, social (cultural) anthropology and anthropological

culture, but there is no universally agreed definition or understanding of the concept. Some of the existing definitions are coined from the perspective that culture plays a critical role and has significance in shaping human action. This point of view is known as the “subjective-behavioural” approach to culture.<sup>114</sup> According to Wuthnow,<sup>115</sup> this approach understands culture as not simply an inner state (feelings and experience), but also as a conduit for commitments, expressions and actions.

On the other hand, Haggis and Schech contest the limiting of culture to a distinct aspect of human social life (such as belief systems, rituals and norms) separate from the economic and political aspects of social life, as though culture is quarantined from the areas of production, consumption and authority.<sup>116</sup> For instance, culture’s interaction with economics can be traced to the Stockholm Intergovernmental Meeting,<sup>117</sup> where over 150 governments from around the world met in April 1998. They agreed that culture should play a greater role in economic policy-making. In another related meeting held in Florence,<sup>118</sup> the World Bank acknowledged cultural resources as being crucial to advancing sustainable development and economic growth. The World Bank declared that culture is an essential part of economic development, which should play a stronger role in shaping and conditioning the Bank’s commercial operations.<sup>119</sup>

The debates regarding the meaning, recognition and application of the notion of culture in general and in relation to development have filtered into law-based

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linguistics. See Schusky and Culbert *Introducing Culture* 4 for more about the specialisations of anthropology.

114 Almqvist *Human Rights Law in Perspective: Human Rights, Culture and the Rule of Law* 41.

115 Wuthnow *Meaning and Moral Order: Explorations in Cultural Analysis* 337-338.

116 Haggis and Schech *Culture and Development: A Critical Introduction* 25.

117 The Stockholm Intergovernmental Conference on Cultural Policies for Development (hereafter the 1998 Stockholm Conference) was held in Stockholm, Sweden from 30th March–2 April 1998. The Action Plan on Cultural Policies for Development was agreed upon at the 1998 Stockholm Conference. See the *Action Plan on Cultural Policies for Development* UN Doc CLT-98/CONF.210/4 (2 February 1998).

118 The novel aim of the conference organised by the World Bank and the Government of Italy in cooperation with the UNESCO was to build bridges between the worlds of culture and finance–“Culture Counts: Financing Resources and the Economics of Culture in Sustainable Development” held in Florence from 4th -7th October 1999.

119 Throsby 2001 *Economics and Culture* xiii.

literature.<sup>120</sup> This infiltration of culture into legal scholarship makes it relevant to investigate further the recognition of culture in sustainable development law and policy. The fluid nature of the concept of culture allows for its applicability in different contexts, which leads to several contextual meanings. Thus, it becomes plausible to engage with culture in a legal context. For this thesis, a descriptive approach to the concept of culture is adopted, and the author will therefore not attempt to forward a specific definition of culture. The international law and the UN parameters of culture within development discourse, as recognised and discussed in the following paragraphs, are applied in this thesis.

### *2.3.1 International law parameters of the notion of culture*

There are several parameters linking the notion of culture to development on international level. One such parameter is derived from an early international document linking the notion of culture to development.<sup>121</sup> This is found in the preamble to the 1982 UNESCO *Mexico City Declaration on Cultural Policies*<sup>122</sup> (hereafter the *Mexico City Declaration 1982*) at the World Conference on Cultural Policies (WCCP).<sup>123</sup> The description of culture put forward in the Declaration reads:

Culture is the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters but also modes of life, the fundamental rights of the human being, value systems, traditions, and beliefs; that it is culture that gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. It is through culture that man expresses himself, becomes aware of himself, and recognises his

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120 Rautenbach, Jansen Van Rensburg and Pienaar 2003 6(1) *PER* 2-20; Du Plessis and Rautenbach 2010 13(1) *PER* 27-71; Church 2012 *De Jure* 511-531.

121 The movement for a more elaborate meaning of "culture" was earlier evident in 1973. In that time, EURO CULT, the UNESCO organised regional Intergovernmental Conference on Cultural Policies in Europe, in Helsinki proposed a re-definition of the word "culture". The homologous Cultural Policies Conferences that followed featured Asia (Yogyakarta) in 1973, Africa (Accra) in 1975 and for Latin America (Bogota) in 1978. Each of these conferences made a bid for placing development objectives within a wider cultural context beyond the merely economic. The movement culminated in the 1982 World Conference on Cultural Policies in Mexico (*Mexico City Declaration*).

122 The text of the Declaration is available at [http://www.culturalrights.net/descargas/drets\\_culturals401.pdf](http://www.culturalrights.net/descargas/drets_culturals401.pdf) accessed on 20 May 2016. Also see Bandarin, Hosagrahar, and Albernaz 2011 *Journal of Cultural Heritage Management and Sustainable Development* 16-17.

123 The conference was held between 26 July and 6 August 1982 in Mexico City.

incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.<sup>124</sup>

The 1982 *Mexico City Declaration* adopted a broad view of culture. This perspective allows for increasing debates about the recognition of culture in the development framework. In further highlighting the link between culture and development, Principle 10 of the *Mexico City Declaration* states that:

Culture constitutes a fundamental dimension of the development process and helps to strengthen the independence, sovereignty and identity of nations. Growth has frequently been conceived in quantitative terms, without taking into account its necessary qualitative dimension, namely the satisfaction of man's spiritual and cultural aspirations. The aim of genuine development is the continuing well-being and fulfilment of each and every individual.

This description of culture expressly elevates culture to the most authentic expression of human experience, thereby, introducing the recognition of the indivisibility of culture into the development discourse with the aim of promoting and realising an integrated sustainable development framework inclusive of culture. In line with the commitments of the *Mexico City Declaration*, UNESCO declared 1988 to 1997 to be the World Decade for Culture and Development, with the aim of reinstating cultural and human values in their central place in scientific and economic development.<sup>125</sup>

According to Mayor, the Director-General of UNESCO at the time: <sup>126</sup>

Genuine development must be based on the best possible use of the human resources and material wealth of the community. Thus, in the final analysis, the priorities, motivations and objectives of development must be found in culture. But in the past, this has been conspicuously ignored. From now on culture should be regarded as a direct source of inspiration for development, and in return, development should assign to culture a central role as a social regulator.

From Mayor's perspective, culture forms the substance of development, in which case culture is imagined as forming the basis of the development paradigm shift which seeks to "humanise" development, in the sense that culture should be a driver and enabler of development. Thus, the link between culture and development and its relevance to law and policy become increasingly relevant. The World Decade for

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<sup>124</sup> Also see Rautenbach 2011 <http://www.eolss.net> accessed on 20 April 2014.

<sup>125</sup> *Proclamation of the World Decade for Cultural Development* UN Doc GA/RES/41/187 (1986).

<sup>126</sup> The Courier 1988 <http://bit.ly/2mMJtPF>.

Culture and Development further sought to advocate the contribution of culture to national and international development policies.<sup>127</sup>

In 1996 the UN *World Commission on Culture and Development* published a Report titled *Our Creative Diversity*<sup>128</sup> which proposed an expanded view of culture to mean the recognition of diversity that excluded people from development processes and outcomes. The Report considered culture in line with the anthropological view as simply “ways of living together”, which promotes the diversity of cultures. Rautenbach<sup>129</sup> suggests that the open-ended description of culture put forward by the Report is comprehensive enough to include all the diverse aspects and layers<sup>130</sup> of culture. It allows countries to give content to culture within their territories according to their local circumstances. The Report aims to intensify the international debate on the links between culture and development<sup>131</sup> as gleaned from the Executive Summary, which reads: <sup>132</sup>

Development divorced from its human, or cultural context is growth without a soul.  
Economic development in its full flowering is part of a people's culture.

The above suggests that culture is viewed as an enabler of development rather than a factor hindering economic development. Similarly, the 1998 *Intergovernmental Conference on Cultural Policies for Development* (hereafter *Stockholm Conference*)<sup>133</sup> was aimed at integrating cultural policies in human development plans and strategies at international and national level. The *Stockholm Conference* emphasised that it is imperative to establish the link between culture and development to ensure that “any policy for development must be profoundly sensitive to culture.”<sup>134</sup>

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127 UNESCO 2010 <http://bit.ly/1WKW3im> accessed on 22 May 2016.

128 UNESCO 1996 <http://bit.ly/2jfnuRq> accessed on 24 May 2016.

129 Rautenbach 2011 <http://www.eolss.net> accessed on 20 April 2014.

130 Such aspects of culture include cultural diversity, cultural heritage, arts and creative culture as well as cultural tourism.

131 Rautenbach 2011 <http://www.eolss.net> accessed on 20 April 2014.

132 UNESCO 1996 <http://bit.ly/2jfnuRq> accessed on 24 May 2016.

133 The Stockholm Conference was organised by UNESCO and was held in Stockholm, Sweden 30 March–2 April 1998. One of the aims of the conference was to contribute to the integration of cultural policies in human development strategies at international and national level.

134 UNESCO *Final Report* 13.

Moving on, in 2001 the General Conference of UNESCO adopted the *2001 Declaration on Cultural Diversity*, which recognises culture as an ethical imperative vital to achieving economic and social development.<sup>135</sup> According to article 3 of the 2001 *Declaration on Cultural Diversity*:

Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.

In this sense, cultural diversity seems to form the foundation from which creativity emanates and thrives. The recognition of the different identities of people and groups of people should inform the development strategies employed in contemporary times, bearing in mind the effect of globalisation and the dynamism of culture.<sup>136</sup> The understanding of cultural diversity in this context does not in any way attempt to promote cultural relativism or sustain the practice of harmful and discriminatory practices. On the contrary, cultural diversity is inseparable from universal human rights, since human rights emanate from the very fabric of cultures.<sup>137</sup> Thus, cultural diversity is central to the strengthening of the universality of human rights.<sup>138</sup>

Therefore, regarding the link between culture and rights instruments, article 4 of the 2001 *Declaration on Cultural Diversity* provides expressly that cultural diversity may not be evoked to infringe upon human rights that are guaranteed by international law or to limit their scope. However, one cannot ignore the existence of cultural rights. Acknowledging the diversity of cultures, culture is perceived as the common feature of all people and in this sense, cultural rights are inherent in every person.

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135 For more on the 2001 Declaration on Cultural Diversity, see Donders "Cultural Rights and the Convention on the Diversity of Cultural Expressions. Included or Ignored?" 174-175.

136 See the UN-proclaimed World Decade for Cultural Development (1988-1997) on 8 December 1986. The four main objectives of the decade were to acknowledge the cultural interests of development, to affirm the enriched cultural identities, to broaden participation in culture, and to promote international cultural co-operation. UNESCO subsequently published a practical guideline – Practical Guide to the World Decade for Cultural Development-focusing on the four main objectives, to which end the guidelines conceded that it is almost inconceivable that development programmes might be formulated without taking into active consideration the "diversity of cultures and of cultural interactions". Also see Rautenbach 2011 <http://www.eolss.net> 6-8 accessed on 20 April 2014.

137 Donders "Cultural Rights and the Convention on the Diversity of Cultural Expressions. Included or Ignored?" 174-175.

138 UNESCO 2009 [http://www.unesco.org/library/PDF/Diversity Chapter 8](http://www.unesco.org/library/PDF/Diversity%20Chapter%208) accessed on 24 May 2016.

Increasingly, culture features as a right to be recognised within the framework of human rights instruments. For example, the 1966 *International Convention on Economic, Social and Cultural Rights* (ICESCR) expressly gives recognition to cultural interests. Article 12 of the Convention stresses the right to enjoy the highest possible standard of physical and mental health, which includes corresponding cultural interests. The UN Committee on Economic, Social and Cultural Rights (CESCR) alludes to cultural interests and affirms that cultural interests include cultural rights which imply both freedoms and entitlements and extend to education and health services. Regarding health services, the CESCR reiterates that the provision of health services should be “culturally appropriate, taking into account traditional preventive care, healing practices and medicines.”<sup>139</sup>

Furthermore, the CESCR recommends that states should afford resources for indigenous peoples to design, deliver, and control the health services and offer protection of the valuable medicinal plants, animals and minerals necessary to the full enjoyment of the right.<sup>140</sup> For example, with regards to the right to safe drinking water, besides being of adequate quality, the right to safe drinking water ought to include access to water services and water facilities that are “culturally appropriate”. Similarly, the CESCR<sup>141</sup> in its General Comment on the right to adequate food defines the core content of the right to food as:<sup>142</sup>

the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, *and acceptable within a given culture*, and the accessibility of such food in ways that are sustainable and do not interfere with the enjoyment of other human rights.

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139 CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (A 12) Adopted at the Twenty-Second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C12/2000/4).

140 CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (A 12).

141 The CESCR is the supervisory arm of the 1966 ICESCR. The CESCR monitors the implementation of the 1966 ICESCR and the compliance of states with their obligations as contained through the reporting mechanism. Through this mechanism, states must submit reports regularly to the Committee detailing their implementation of the rights in 1966 *ICESCR*. The Optional Protocol to the 1966 ICESCR which was adopted in 2008 empowers the CESCR to receive complaints on violations of the rights in the 1966 *ICESCR*. The Committee has elaborated on the content of various socio-economic rights and on state obligations in the form of general comments.

142 *General Comment no 12 on the Right to Adequate Food*, UN Doc E/C12/1999/5 (1999). Emphasis added.

The core content of the right to food as identified draws a link between the obligation of the state to provide a clean and healthy environment that does not risk access to food and considers the cultural interests of the right to food, which respects, protects and promotes the culture of the people.

The human rights and cultural rights nexus demonstrates the increasing recognition of cultural interests in law and policy. In the same way, culture is linked to development. The features of the nexus between culture and sustainable development are the focus of the next paragraph.

### *2.3.2 Culture for and in sustainable development: A new global agenda*

The recognition of the linkages between culture and sustainable development can be traced back to the work of UNESCO in several global summits, conferences, the research of academics and resolutions of the UN General Assembly. This section investigates these sources to establish the link between culture and sustainable development. The research of academics and scholars, key milestones in global developments that have contributed to drawing the world's attention to the linkages between culture and sustainable development form the bulk of the literature to be explored.

As earlier alluded to, the concept of sustainable development is not limited to its environmental connotations. It can also be interpreted theoretically to connote the concept of the self-supporting viability of development (based on the multifaceted model of development),<sup>143</sup> over an extended period.<sup>144</sup> Given the fact that sustainable development thinking underwent a paradigm shift globally, it becomes necessary to explore alternative interpretations of sustainable development beyond its understanding as an environmental management principle and a primary ideal in environmental law, globally.

Alternative interpretations of the concept present a focal point upon which the culture and sustainable development nexus are explored for the theoretical accommodation

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<sup>143</sup> See para 2.2.3 above.

<sup>144</sup> Throsby 1997 *International Journal of Cultural Policy* 11.



of cultural interests. Therefore, an understanding of sustainable development that goes beyond the environmental connotations to include other interests necessary for the realisation of optimal living conditions within a community<sup>145</sup> for the present and future generations, is relevant.

In this thesis, sustainable development is regarded as the maximisation of the success of development processes. It is aimed at maintaining environmental, economic, social, cultural and human interests<sup>146</sup> to foster optimal living conditions for the benefit of the people in a community or society. Culture within this understanding of sustainable development is conceptualised to represent the total sum of the intangible and tangible aspects of the community life, relevant and favourable to the development of the people and their communities.<sup>147</sup>

The intangible and tangible aspects of community life are embedded in cultural diversity. Accordingly, the first piece of international treaty law that firmly links culture to sustainable development is the 2005 *Cultural Diversity Convention*. The Convention recognises cultural diversity as fundamental to the different expressions of culture through the arts and creative expressions.<sup>148</sup> The identity of a community informs the cultural diversity of the community, which in turn becomes the creative resource base for the cultural goods produced in such communities. Therefore, it is possible to suggest that the preservation of the cultural diversity of the community contributes to the sustainable development of such communities.

In other words, the concept of sustainable development should seek not only to align environmental interests with economic development but also to align it with the wider concept of "human development."<sup>149</sup> This model of development places the individual in the centre of developmental concerns. Bearing in mind that individuals co-exist with one another, it becomes possible to refer to groups of people (communities) as well as their values as essential components of development. Based on the assumption that culture is understood within the context of its instrumental or constituent

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145 Owosuyi 2015 18(5) *PER* 2014.

146 Owosuyi 2015 18(5) *PER* 2018.

147 Du Plessis "The Balance of Sustainability Interests" 38-39.

148 A 4(1) of the 2005 *Cultural Diversity Convention*.

149 As earlier discussed in para 2.3.2 above.

application as constructed by the *Our Creative Diversity Report* of the WCCD<sup>150</sup> it becomes possible to relate culture to development interpreted and measured by a variety of indicators, like the quality of life, the standard of living, the availability of access to a wide range of choices, and the overall well-being of individuals and communities. In this sense, where development is interpreted as an enhancement of living standards, culture becomes an integral part of the development equation and cannot be ignored.

## **2.4 Linking culture to sustainable development**

Earlier initiatives of UNESCO set out to promote the inclusion of culture in the tri-dimensional sustainable development framework. These initiatives include the *Action Plan* endorsed by UNESCO's 1998 *Intergovernmental Conference on Cultural Policies* held in Stockholm, which recognises primarily that "sustainable development and the flourishing of culture are interdependent."<sup>151</sup> Another initiative of UNESCO promoting the inclusion of culture in sustainable development is the UNESCO-World Bank Florence Intergovernmental Conference titled "Culture Counts: Financing Resources and the Economics of Culture in Sustainable Development" which recognised the significance of cultural capital to sustainable development and economic growth. "Capital" in relation to economic theories of forms of capital refers to the material needed to produce goods and services. Ekins has further disaggregated capital stock into four categories, namely natural, human, social or organisational and manufactured capital.<sup>152</sup> Within this distinction, cultural capital features as a subset of human capital. According to McCormick,<sup>153</sup> the productivity of human made capital is intimately tied to the community's pool of knowledge, which is produced and owned by the community collectively.

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150 Culture's contribution to development in this respect according to the Report is two-fold, namely culture as an instrument for economic growth and culture for its own sake, which the report refers to as the constituent role of culture in development. Thus, underscoring the intrinsic value of cultural pluralism and diversity. See WCCD *Our Creative Diversity Report* 22-23; Throsby 1997 *International Journal of Cultural Policy* 9.

151 *The Action Plan on Cultural Policies for Development* UN Doc CLT-98/CONF.210/4 (2 February 1998).

152 Ekins "A Four-Capital Model of Wealth Creation" 147-155.

153 McCormick 2002 *Review of Social Economy* 263-278.

Throsby<sup>154</sup> and Cochrane<sup>155</sup> both from an economic perspective, also explore the subject of cultural capital<sup>156</sup> as it relates to sustainable development. Throsby<sup>157</sup> draws a comparison between natural capital<sup>158</sup> and cultural capital based on their links with other elements of the economic and social systems. The maintenance and proper management of natural resources are essential for the actualisation of the economic and social objectives of development that depends on natural capital or resources. Similarly, the recognition, maintenance and accumulation of cultural capital and resources are contemplated as critical to the same objectives of development, with the added dimension that cultural capital is valued for its intrinsic worth.<sup>159</sup> Cochrane aligns his concept of cultural capital with the work of Bourdieu, who asserts that cultural capital can be embodied as a state of mind or body or objectified in the form of cultural goods or institutionalised as a cultural institution such as museums.<sup>160</sup>

Cochrane describes cultural capital as the underlying (mostly unseen) factors that provide societies with the means and resilience required to maintain themselves in their environment.<sup>161</sup> Bearing in mind the ongoing debate on what cultural capital or cultural resources may or may not include, Bandarin, Hosagrahar and Albernaz<sup>162</sup> acknowledge that the culture-development relationship is potentially synergetic, thereby creating a virtual circle: where culture nourishes development and development fosters culture, achieving development.

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154 Throsby 1997 *International Journal of Cultural Policy* 7-19.

155 Cochrane 2006 *Ecological Economics* 318-330.

156 Cultural capital is delineated to occur in two forms, tangible (existing in the form of buildings, places, art works that are of cultural significance) and intangible forms (existing in the form of ideas, practices, beliefs and values which are shared by a group), thereby highlighting again the broad instrumental and constituent role culture can play in the development context.

157 Throsby 1997 *International Journal of Cultural Policy* 9-12.

158 Natural capital is sometimes referred to as ecological capital. Per Cochrane, natural capital performs four distinct functions. It provides resources for production, constitutes a sink for waste products, provides life support functions such as environmental services like flood or erosion control and climate stability, and it directly contributes to human welfare through the provision of amenities like aesthetic landscapes. Also see Cochrane 2006 *Ecological Economics* 319.

159 Cochrane 2006 *Ecological Economics* 318-330.

160 Cochrane 2006 *Ecological Economics* 319.

161 Cochrane 2006 *Ecological Economics* 318.

162 Bandarin, Hosagrahar and Albernaz 2011 *Journal of Cultural Heritage Management and Sustainable Development* 19.

In the same light, several other academics have referred to the limitations of interpreting sustainable development only in the context of social, economic and environmental interests.<sup>163</sup> They have suggested the inclusion of culture either as a fourth autonomous interest within the sustainable development framework or as an interest to be integrated into the already existing framework.<sup>164</sup> Whether as a fourth autonomous interest or as an additional interest interacting with the other three interests - environmental, economic and social - it remains to be decided how culture can be integrated into the sustainable development equation. Upon the premise of culture and development being mutually dependent on one another, UNESCO's focus over the years has been on the cultural value of development by promoting on a global scale the understanding of how culture may contribute to the sustainable development framework.

The next paragraphs engage in the discussion of some of the most important milestones pioneered by UNESCO on a global level, as well as scholarly contributions that have promoted the ideas leading to the new global agenda that incorporates cultural interests in sustainable development.

#### *2.4.1 Scholarly and global contributions*

UNESCO is the UN organ tasked with advancing issues of culture through promoting collaboration among nations, as set out in article 1 of the UNESCO Constitution.<sup>165</sup> UNESCO has been innovative and persistent in pushing for the recognition of the link between culture and sustainable development and drawing the attention of governments and policy makers to the potential influence of culture in the pursuit of sustainable development.<sup>166</sup> Contemporary developments such as international

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163 Church 2012 *De Jure* 511-531; Du Plessis and Feris 2008 *SAJELP* 157-168; Du Plessis and Britz 2007 *TSAR* 275-276; see generally Yencken and Wilkinson *Resetting the Compass: Australia's Journey towards Sustainability* 3-9; Du Plessis and Rautenbach 2010 13(1) *PER* 27-71.

164 Church 2012 *De Jure* 511-531; Du Plessis and Feris 2008 *SAJELP* 157-168; Du Plessis and Britz 2007 *TSAR* 275-276; see generally Yencken and Wilkinson *Resetting the Compass: Australia's Journey towards Sustainability* 3-9; Du Plessis and Rautenbach 2010 13(1) *PER* 27-71.

165 The text of the constitution is accessible at [http://www.unesco.org/education/pdf/UNESCO\\_E.PDF](http://www.unesco.org/education/pdf/UNESCO_E.PDF) accessed on 20 March 2017.

166 Some of UNESCO's pioneering works in relation to culture and development include: World Conference on Cultural Policies 1982, World Decade for Cultural Development 1988-1997, *Our Creative Diversity Report of the World Commission on Culture and Development* 1995, the 2001 *Declaration on Cultural Diversity*, and the 2005 *Cultural Diversity Convention*). The 2005

conferences, reports and instruments as well as a selected collection of the works of scholars and experts under the auspices of UNESCO and outside of UNESCO are discussed in the following paragraphs. The discussion is aimed at understanding the conceptualisation of the culture and sustainable development nexus globally and locally.

#### 2.4.1.1 Scholarly writings

The selected research of scholars that are insightful in drawing global attention to the linkages between culture and sustainable development include the works of Hawkes,<sup>167</sup> Church<sup>168</sup> and Throsby.<sup>169</sup> This is by no means an exhaustive list of all the scholars that have contributed to this field of study. The scholars selected are chosen for discussion because their works provide an indication of the interconnectedness of cultural interests with the other three interests of sustainable development.<sup>170</sup> Hawkes and Throsby approach the subject matter of culture and development from a policy perspective, while Church connects the concept of well-being with development and uses culture as an element of well-being in her analysis.

##### 2.4.1.1.1 Hawkes' contribution

Hawkes argues that the notion of sustainability broadly considers visions of the future that are informed by cultural values. Hawkes explains: <sup>171</sup>

In its simplest form, the concept of sustainability embodies a desire that future generations inherit a world at least as bountiful as the one we inhabit. However, to get there will always be the subject of constant debate. This debate is about values; it is a cultural debate.

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*Cultural Diversity Convention* is the first piece of international treaty law that firmly links culture to sustainable development.

167 See generally Hawkes *The Fourth Pillar of Sustainability*.

168 Church 2012 *De Jure* 511-531.

169 Throsby 2008 <http://bit.ly/1wbjkb6> accessed on 27 June 2014.

170 Other authors that also indicate the link between sustainable development and culture are Du Plessis and Feris 2009 *SAJELP* 157-182; Du Plessis and Rautenbach 2010 13(1) *PER* 26-71.

171 Hawkes *The Fourth Pillar of Sustainability* 11.

Building on this conceptualisation, Hawkes suggests that culture that manifests as cultural capital<sup>172</sup> represents community cohesion, participation in the arts, creativity and innovation. Hawkes goes further to suggest that:<sup>173</sup>

Without a foundation that expressly includes culture, the new frameworks are bereft of the means of comprehending, let alone implementing the changes they promote. Culture has to be a separate and distinct reference point.

Hawkes named the four interests of sustainability as cultural vitality, social equity, environmental responsibility and economic vitality.<sup>174</sup> This conceptualisation aims at complementing the tri-dimensional interests featured in the concept of sustainable development along with cultural interests. Hawkes' approach is motivated by his concerns about the negative impact of certain development policies on the cultural vitality of communities. He suggests the inclusion of cultural impact assessment tools that would prevent the loss of valuable cultural identities, capacities and resources.<sup>175</sup>

Hawkes' idea of integrating cultural interests into public policy planning and development is directly linked to the concept of development, which aims at the well-being of people in a human development context. According to article 3 of the 2001 *Declaration on Cultural Diversity* development should be conceptualised and understood in wider terms. Development is concerned not only with economic growth but also concerns itself with achieving a more satisfactory intellectual, emotional, moral and spiritual existence. The nature of earlier modes of development focusing on economic growth was such that social, political and cultural development were believed to be dependent on economic growth and development.<sup>176</sup> However, it is increasingly being recognised that people's well-being as well as the integrity of the environment are integral to development. According to Darlow,<sup>177</sup> it is important to understand that sustainable development is not only about the environment but also about the quality of life, both now and in the future. In this context, quality of life is an indication of well-being, and it cannot be measured by economic metrics alone.

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172 As earlier stated in para 2.4.1.

173 Hawkes *The Fourth Pillar of Sustainability* 25.

174 Hawkes *The Fourth Pillar of Sustainability* iii.

175 Hawkes *The Fourth Pillar of Sustainability* vii.

176 Escobar 1999 *Current History* 383.

177 Darlow 1996 *Planning and Practice Research* 292.

#### 2.4.1.1.2 Church's contribution

Understanding the interaction between well-being and development, Church proposes that the cultural realities of a community are interwoven with the tri-dimensional concept of sustainable development.<sup>178</sup> She uses the interaction between the tri-dimensional concept of sustainable development and the cultural realities of a cultural community to illustrate this point. She states that the social interest of sustainable development, which aims at meeting social needs equitably, unwittingly ignores the subjective sense of life satisfaction which individuals derive when their spiritual and emotional needs are met. These spiritual and emotional needs are directly linked to the culture of the community which they belong to, which are not put into consideration in mapping out the social needs that are to be met in the community.<sup>179</sup> She notes that the equitable distribution of resources with the underlying aim of alleviating poverty is necessary for the preservation of political and community values.<sup>180</sup> However, culture's role in attending to the spiritual and emotional needs of the community cannot be relegated to the backbench as these spiritual and emotional needs are directly linked to the well-being of people. Therefore, Church suggests that when strategies are formulated in furtherance of socially sustainable development, such strategies must include policies that cater for the well-being of the community by considering its culture.<sup>181</sup>

#### 2.4.1.1.3 Throsby's contribution

Throsby approaches the theme of culturally sustainable development from a policy perspective. He suggests a set of principles which serves as "a checklist against which particular policy measures can be judged in order to ensure their cultural sustainability."<sup>182</sup> The principles are for all intent and purposes similar to the principles formulated by the 1972 *Declaration of the United Nations Conference on the Human*

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178 Church 2012 *De Jure* 511-515.

179 Church 2012 *De Jure* 518.

180 Church 2012 *De Jure* 518-519.

181 Church 2012 *De Jure* 518.

182 Throsby 2008 <http://bit.ly/1wbjkb6> accessed on 27 June 2014. Throsby's research was commissioned and published by UNESCO.

*Environment* (hereafter 1972 *Stockholm Declaration*).<sup>183</sup> These principles include the following:

- a) intergenerational equity: Culturally inclusive sustainable development must adopt a generational approach. It must safeguard the capacities of future generations to access cultural resources in the form of intangible and tangible cultural resources, ensuring that the resources are not adversely compromised in meeting the culture-related needs of the present generation;<sup>184</sup>
- b) intra-generational equity: Culturally inclusive sustainable development must be a process which offers equal access to cultural production, participation and enjoyment to all members of the community or nation on a fair and non-discriminatory basis;<sup>185</sup>
- c) the crucial need to protect cultural diversity: Just as biodiversity requires protection when sustainable development is to take place within the context of environmental interests, cultural diversity, being the core resource for cultural creativity, demands to be protected and taken into consideration when decisions are taken about sustainable development.<sup>186</sup> To this end, the value of cultural diversity for and in economic development,<sup>187</sup> social development<sup>188</sup> and the protection of the environment<sup>189</sup> must be recognised and mainstreamed in the sustainable development framework; and

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183 The UN Conference on the Human Environment was held in Stockholm from 5-16 June 1972.

184 Principle 2 of the 1972 *Stockholm Declaration* recognised the need to safeguard the environment against degradation “for the benefit of present and future generations through careful planning or management”.

185 Principle 2.2 of the *ILA Declaration of Principles* describes this equity as “the right of all peoples within the current generation’s entitlement to the earth’s natural resources”.

186 See generally Horton 1995 *J Envtl Law and Litigation* 1-38, particularly at 6; 1993 *Convention on Biological Diversity* (hereafter 1993 *Biodiversity Convention*); 1991 *Indigenous and Tribal Peoples Convention* (hereafter *Indigenous Convention*); and the 2005 *Cultural Diversity Convention*.

187 For example, through the creative industry.

188 For example, through fostering social cohesion and access to culturally sensitive health care.

189 By using indigenous knowledge in the management and conservation of natural resources.



- d) precautionary principle:<sup>190</sup> As in the case of environmental law, this principle in the cultural context requires that the state adopt a risk-averse position in the face of the irreversible destruction of tangible cultural heritage or the extinction of valued cultural practices.

Throsby proposes that the theoretical basis for cultural sustainability derives from the interaction between natural (ecological) capital and cultural capital.<sup>191</sup> As earlier illustrated, just as natural capital includes natural resources, ecosystems and biodiversity, so also does cultural capital contain cultural property (both tangible and intangible), cultural networks and support systems and cultural diversity. Therefore, sustainable development that is inclusive of culture is not limited to what cultural industries can contribute to economic development.<sup>192</sup> Rather, it extends to the recognition of the cultural value that is attached to cultural property. For example, in the observance of the precautionary principle for culturally sustainable development, the principle must be invoked where items of cultural capital such as heritage buildings are in danger of demolition, or when languages are faced with extinction.<sup>193</sup>

Throsby also supports the views held by other scholars who are in favour of the need to recognise the interconnectedness of the environmental, economic, social and cultural interests from a holistic view.<sup>194</sup> The holistic approach must recognise the interconnectedness of all the interests of the sustainable development equation in the promotion of development that is sustainable and favourable to people. Throsby, together with Petetskaya,<sup>195</sup> further propose that the institutionalisation of culture as an equally important interest along with economic, social and environmental interests in the sustainable development framework would promote an integrated approach to sustainable development.

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190 Principle 15 of the *Rio Declaration* codified at the global level the precautionary approach to the management of the environment and natural resources.

191 Throsby 1999 *Journal of Cultural Economics* 3-12.

192 Throsby 2008 <http://bit.ly/1wbjkb6> accessed on 27 June 2014.

193 Throsby and Petetskaya 2016 *International Journal of Cultural Property* 123.

194 See generally Nurse 2006 <https://bit.ly/1iSnHs2> accessed on 26 September 2015; Du Plessis and Rautenbach 2010 13(1) *PER* 38-45; Church 2012 *De Jure* 523.

195 Throsby and Petetskaya 2016 *International Journal of Cultural Property* 133.

Apart from scholarly writings, the linkage between culture and sustainable development is also evident in contemporary law and policy developments at international level.

#### *2.4.2 Contemporary developments linking culture to sustainable development*

Several linkages between culture and sustainable development can be found in legally binding treaties<sup>196</sup> as well as non-legally binding standard-setting documents.<sup>197</sup> This thesis is limited to the contemporary developments linking culture to sustainable development after the MDGs 2000 and leading up to the SDGs that were adopted in 2015.

Debates on the linkage between culture and sustainable development intensified as the awareness of the relevance of culture in development at the global level increased. Two resolutions on culture and development were issued and adopted in 2010 and 2011<sup>198</sup> by the UN General Assembly. In these resolutions, the General Assembly acknowledged the need to better integrate culture into sustainable development strategies. Debates and deliberations ensued about the proposals contained in the two resolutions. Four key milestone events focusing attention on the integration of cultural interests in sustainable development are recognised as instrumental in promoting the link between the two.

The first was the policy debate at the Hangzhou International Congress in China, from 15 to 17 May 2013, titled "Culture: Key to Sustainable Development." The Congress led to the adoption of the Declaration: *Placing Culture at the Heart of Sustainable*

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196 For example, the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* and the 2005 *Cultural Diversity Convention*.

197 For example, the 2001 *Universal Declaration on Cultural Diversity*, several resolutions passed by the General Assembly of the UN echoing concepts proposed by the UNESCO in relation to the linkages between culture and sustainable development, the *UNESCO Report on Culture and Sustainable Development: Report of the United Nations Educational, Scientific and Cultural Organisation* UNGA Doc GA/69/216 (31 July 2014), and several earlier resolutions such as the UN General Assembly *Resolution on Culture and Development* UN Doc GA/Res/65/166 (20 December 2010) and again in 2011 another UN General Assembly *Resolution on Culture and Development* UN Doc GA/Res/66/208 (22 December 2011).

198 UN General Assembly *Resolution on Culture and Development* UN Doc Res/65/166 (20 December 2010); UN General Assembly *Resolution on Culture and Development* UN Doc Res/66/208 (22 December 2011).

*Development Policies*<sup>199</sup> (hereinafter the *Hangzhou Declaration*). The second, the UN General Assembly thematic debate on “Culture and Development” was held at the UN headquarters in New York in June 2013 (hereafter the *June 2013 Thematic Debate*).<sup>200</sup> The third, the *Ministerial Declaration of the High-Level Segment of the UN Economic and Social Council* (ECOSOC)<sup>201</sup> was adopted in July. The fourth event was the special edition of the *Creative Economy Report: Widening Local Development Pathways* launched by UNESCO in collaboration with the UNDP.

The objectives and outcomes of these events are examined hereunder, with a view to understanding their contributions in the culture and sustainable development nexus.

#### 2.4.2.1 The Hangzhou Declaration

The Declaration urges member states to place culture at the heart of public policy to address global development challenges including environmental sustainability, poverty, and social inclusion. The *Hangzhou Declaration* confirmed the link between culture, sustainable development and lasting peace<sup>202</sup> and recommended that culture be included as part of the post-2015 sustainable development goals of the UN development agenda. The Declaration recommended that reference to culture in the post-2015 UN agenda should rest on heritage, diversity, creativity and the transmission of knowledge.<sup>203</sup>

#### 2.4.2.2 The June 2013 Thematic Debate

The Thematic Debate took careful note of the outcome document of the Rio+20 Conference, *The Future We Want*, which emphasised the veracity of promoting the natural and cultural diversity of the world and the potential contribution of cultures

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199 The Declaration was adopted on 17 May 2013. The text of the declaration can be viewed at <http://www.unesco.org> accessed on 20 September 2016.

200 UN General Assembly, The High-Level Thematic of the 67th Session of the United Nations General Assembly: Culture and Development New York, 12 June 2013.

201 *Ministerial Declaration of the 2013 High Level Segment of the Economic and Social Council: Science, Technology, and Innovation, and the Potential of Culture, for Promoting Sustainable Development and Achieving the Millennium Goals* UN Doc E/HLS/2013/1 (2013).

202 Which is particularly useful when considering that armed response to conflicts in Africa has failed to ensure lasting peace among opposing parties. A case in point is Burundi.

203 *The Hangzhou Declaration: Placing Culture at the Heart of Sustainable Development Policies* accessible at <http://bit.ly/2mPXpsp> accessed on 2 March 2017.

and civilisations to sustainable development.<sup>204</sup> The thematic debate acknowledged that development projects in the arena of culture contributed to achieving the MDGs, although culture as a concept had not been included in the framework. Some of the impacts of culture in achieving the goals included:<sup>205</sup>

culture as an economic factor which generates incomes and jobs contributes to poverty eradication (MDG 1); culturally-adapted curricula content allow for relevant, and improved quality education and citizenship building (MDG 2); culture-oriented activities such as craft entrepreneurship are a source of gender empowerment (MDG 3); socio-cultural approaches to health lead to cost-effective and more efficient health policies (MDGs 4, 5, and 6); cultural and traditional know-how are inexhaustible resources for sustainable development and livelihoods (MDG 7).

The *June 2013 Thematic Debate* further proposed that since culture has proven to have direct and indirect, tangible and intangible impacts on the MDGs, culture should be understood not only within the limits of its economic role as a sector that generates jobs and revenue but also as a social system which enhances well-being and influences health, food, water and security.<sup>206</sup>

#### 2.4.2.3 The Ministerial Declaration of the high-level segment of the UN Economic and Social Council (ECOSOC)<sup>207</sup>

The *Ministerial Declaration* recognises that “culture is an essential component of sustainable development”. The Declaration further states that culture represents a source of identity, innovation and creativity both for the individual and the community. According to the Declaration, culture is also an essential factor in building social inclusion and eradicating poverty, contributing to economic growth, the ownership of development processes and the realisation of the internationally agreed development

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204 UN General Assembly, *The Future We Want Resolution* UN Doc GA/RES/66/288 (27 July 2012). The Rio+20 recognition of the natural and cultural diversity of the world and of their contribution to sustainable development echoes a 3 of 2001 *Declaration on Cultural Diversity*, which states that “cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.”

205 UN General Assembly, The High-Level Thematic of the 67th Session of the United Nations General Assembly: Culture and Development New York, 12 June 2013.

206 UN General Assembly, The High-Level Thematic of the 67th Session of the United Nations General Assembly: Culture and Development New York, 12 June 2013.

207 *Ministerial Declaration of the 2013 High Level Segment of the Economic and Social Council: Science, Technology, and Innovation, and the Potential of Culture, for Promoting Sustainable Development and Achieving the Millennium Goals* UN Doc. E/HLS/2013/1.

goals at major UN conferences and summits in the economic, environmental, social and related fields.<sup>208</sup>

#### 2.4.2.4 The special edition of the Creative Economy Report: Widening Local Development Pathways<sup>209</sup>

This Report highlights that concerning economic development particularly in the context of developing countries, indigenous knowledge and creativity in the promotion of the creative industries are fast becoming powerful engines driving economic growth with profound implication for trade and development.<sup>210</sup> The *Creative Economy Report: Widening Local Development Pathways* provides additional evidence of the contribution of culture to sustainable development via the economic growth route. The Report rests on quantitative data collected by the United Nations Conference on Trade and Development (UNCTAD), which showed that globally creative industries account for seven per cent of the world's domestic product, and it is predicted that it will grow, on average, by ten per cent every year.<sup>211</sup>

In December 2013, the *Resolution on Culture and Sustainable Development* (hereinafter the *2013 Resolution*) was adopted.<sup>212</sup> The *2013 Resolution* builds on several other resolutions from 1986 to 2012.<sup>213</sup> The earlier resolutions<sup>214</sup> urged the mainstreaming of culture into developmental policies and strategies and highlighted the intrinsic contribution of culture for sustainable development.

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208 Torggler *et al* 2015 <http://unesdoc.unesco.org/images/0023/002344/234443e.pdf> 10 accessed on 2 June 2016.

209 UNCTAD *Creative Industries and Development* UN Doc. TD(XI)/BP/13 (4 June 2004).

210 UNCTAD *Creative Industries and Development* UN Doc. TD(XI)/BP/13 (4 June 2004).

211 UNCTAD *Creative Industries and Development* UN Doc. TD(XI)/BP/13 (4 June 2004).

212 UN General Assembly *Resolution on Culture and Sustainable Development* Res 68/223, UN Doc A68/223 (20 December 2013).

213 General Assembly Res/41/187; UN Doc A41/187 (1986); General Assembly Res/46/158; UN doc A46/158 (1991); General Assembly Res/51/179; UN Doc A51/179 (1996); General Assembly Res 52/197; UN Doc 52/197 (1997); General Assembly Res 53/184; UN Doc A53/184 (1998); General Assembly Res 55/192; UN Doc A55/192 (2000); General Assembly Res 57/249; UN Doc A57/249 (2002); General Assembly Res 65/166; UN Doc A65/166 (2010); General Assembly Res 66/208; UN Doc A66/208 (2011); and *Resolution on Culture* General Assembly Res 66/288; UN Doc A/66/288 (2012). The texts of the resolutions can be available at [www.un.org](http://www.un.org) accessed on 20 May 2015.

214 For example, the *Resolution on Culture and Development* UN Doc A/66/208 (22 December 2011) adopted on 22 December 2011.

The *2013 Resolution* built on the previous resolutions by laying down international standard-setting instruments and frameworks in relation to culture. The Resolution represents a significant breakthrough for culture in the development agenda.<sup>215</sup> It states that culture contributes to inclusive social development for all, which includes local communities and indigenous peoples, and advocates respect for cultural diversity, the safeguarding of the cultural and natural heritage, the fostering of cultural institutions, and the strengthening of cultural and creative industries.<sup>216</sup>

Culture also contributes to environmental sustainability, since the protection of cultural and biological diversity and natural heritage is crucial to sustainable development.<sup>217</sup> It does so through traditional systems of environmental protection and resource management of indigenous knowledge.<sup>218</sup> The *2013 Resolution* also acknowledges that culture contributes to peace and security, and at the same time is a valuable resource for empowering communities to participate fully in social and cultural life. Culture facilitates inclusive governance and dialogue at the national, regional and international levels and contributes to conflict prevention and resolution, as well as to reconciliation and recovery.<sup>219</sup>

In addition, the *2013 Resolution* acknowledges the contribution of culture to inclusive economic development by highlighting<sup>220</sup> cultural heritage, cultural and creative industries, sustainable cultural tourism and cultural infrastructure as sources of income generation and job creation, particularly at the community level, thus improving living conditions, fostering community-based economic growth, and contributing to empowering individuals.

When formulating law and policy directed at the implementation of sustainable development concerning social development interests like health, education, food

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215 A 7(a) of the *Resolution on Culture and Sustainable Development* UN Doc GA/68/223 (20 December 2013); Owosuyi 2015 18(5) *PER* 2029.

216 A 7(b) of the *Resolution on Culture and Sustainable Development* UN Doc GA/68/223 (20 December 2013)

217 *Resolution on Culture and Sustainable Development* UN Doc GA/68/223 (20 December 2013).

218 *Resolution on Culture and Sustainable Development* UN Doc GA/68/223 (20 December 2013).

219 *Resolution on Culture and Sustainable Development* UN Doc GA/68/223 (20 December 2013).

220 A 7(a) of the *Resolution on Culture and Sustainable Development* UN Doc GA/68/223 (20 December 2013); Owosuyi 2015 18(5) *PER* 2029.

security and water and sanitation, attention should be paid to the underlying cultural implications. The UN Secretary-General describes the new SDGs as a call for a transformational approach to development post-2015.<sup>221</sup> It is also contemplated that recognising culture as an enabler and driver of sustainable development gives support to the transformative capacity of culture within the framework of the SDGs.<sup>222</sup> The SDGs have successfully integrated culture in the international development agenda at the operational level within the framework target set.<sup>223</sup> Such integration is regarded as a significant achievement for UNESCO<sup>224</sup> and the recognition of culture in the international development agenda. The agenda contains specific reference to entry points for culture namely:

- a) Fully acknowledging the role of culture as an enabler of sustainable development. Thus, introducing the transversal role of culture throughout the agenda, which sufficiently reflects the definition of culture as adopted by the *Mexico Declaration* 1982;<sup>225</sup>
- b) Fully recognising cultures, cultural diversity and inter-cultural understanding.<sup>226</sup> The agenda explicitly links cultural diversity to the rule of law, justice and non-discrimination by contemplating that a world that recognises universal respect for human rights and human dignity is achievable by respecting race, ethnicity

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221 UN General Conference 2015 <http://unesdoc.unesco.org/images/0023/002352/235214e.pdf> accessed on 27 June 2017.

222 UN 2014 <http://bit.ly/2zt4bij> accessed on 20 January 2015.

223 See specifically Target 4.7, which refers to the appreciation of cultural diversity and of culture's contribution to sustainable development; Target 11.4, which makes significant reference to protecting and safeguarding cultural and natural heritage; Target 8.9, which aims at the promotion of local culture and cultural products through devising and implementing policies that promote sustainable tourism; Target 14.7, which aims at increasing the economic benefits to Small Island Developing States and least developed countries from the sustainable use of marine resources/the sustainable management of aquatic life, aquatic culture and tourism; Target 12.b, which suggests the development and implementation of tools aimed at monitoring sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products; and Target 16.4; which aims at significantly reducing illicit financial and arms flows while strengthening the recovery and return of stolen cultural assets and combating all forms of organised crime. See generally the *2030 Agenda for Sustainable Development*; UN General Conference 2015 <http://unesdoc.unesco.org/images/0023/002352/235214e.pdf> accessed on 27 June 2017.

224 UN General Conference 2015 <http://unesdoc.unesco.org/images/0023/002352/235214e.pdf> accessed on 27 June 2016.

225 See para 2.4.1

226 See paras 8, 36 and target 4.7 as contained in *2030 Agenda for Sustainable Development*.

and cultural diversity.<sup>227</sup> Furthermore, the agenda acknowledges the natural and cultural diversity of all people and the potential of all cultures and civilisations to contribute to and to be crucial enablers of sustainable development.<sup>228</sup> In addition, Target 4.7 of the agenda aims at ensuring amongst other things the appreciation of cultural diversity and culture's contribution to sustainable development;

- c) Linking cultural and natural heritage by suggesting that efforts can be strengthened to protect and safeguard the world's cultural and natural heritage. It is further suggested that such efforts can significantly contribute to making cities and human settlements inclusive, safe, resilient and sustainable;<sup>229</sup>
- d) Setting out targets that aim to promote culture for sustainable development. Two of such targets are Targets 8.9 and 12.b, which together aim at the promotion of local culture and cultural products through devising and implementing policies that promote sustainable tourism. The contemplated targets are realisable by the development and implementation of tools aimed at monitoring of the sustainable development effects of sustainable tourism that creates jobs and promotes local culture and products; and
- e) Explaining the role of culture conventions in achieving sustainable development through heritage as well as creativity is explicit in several of the goals and targets contained in the SDGs. These goals and targets build on prominent UNGA resolutions passed between 2010 and 2014 and discussed in the preceding paragraphs,<sup>230</sup> which also recognise culture as a driver and enabler of sustainable development.

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227 Para 8 of the *2030 Agenda for Sustainable Development*.

228 Para 36 of the *2030 Agenda for Sustainable Development*.

229 See Goal 11, target 11.4 of the SDGs as listed in the *2030 Agenda for Sustainable Development*.

230 UN General Assembly *Resolution on Culture and Development* UN Doc GA/Res/65/166 (20 December 2010); UN General Assembly *Resolution on Culture and Development* UN Doc GA/Res/66/208 (22 December 2011); UN General Assembly *Resolution on Culture and Sustainable Development* GA Res 68/223 UN Doc GA68/223 (20 December 2013) and *Resolution adopted by the General Assembly on Culture and Sustainable Development* UN Doc GA/Res/69/230 (2014).



The recognised entry points for culture for sustainable development in the international agenda demonstrate the international community's firm acknowledgement of the role of culture in the pursuit of sustainable development.

#### *2.4.3 Addressing the culture and sustainable development nexus*

Following from the scholarly writings and the relevant contemporary developments linking culture to development investigated in the preceding paragraphs, culturally sensitive sustainable development is interpreted in two ways. One interpretation features culture as the "be all and end all" of development. Interpreted this way, culture becomes a fundamental ingredient in the realisation of an optimised level of living condition that contributes to well-being and human development. This interpretation typically supports the proposal for culture to be recognised as the fourth pillar of sustainable development. This may be referred to simply as the recognition of culture in sustainable development.

The second interpretation features culture as a "means" of development and, in this respect, culture contributes to the realisation of the economic, environmental and social objectives of development. The second interpretation may be used as a platform on which to show the importance of the interaction of cultural interests of development within the context of sustainable development. The second interpretation should be approached cautiously, however, because it has the potential to challenge the sustainability of cultural diversity itself. This may simply be referred to as the recognition of culture for sustainable development.

Therefore, in making sense of the nexus between culture and sustainable development, this thesis proposes the following typology of cultural interests, which consists of two major streams:

- (a) The cultural interest of sustainable development depicts the autonomous recognition of the value of culture. Such values feature the broad understanding of culture as a way of life and the recognition of the tangible and intangible manifestations of community life in terms, for instance, of creativity, cultural diversity, an expression of self-determination and of the spiritual and physical

relationships with lands, territories and resources.<sup>231</sup> This interpretation of culture in sustainable development requires a fundamental adjustment in terms of law and policy. Legal frameworks guiding decision-makers in reaching decisions concerning sustainable development would be required to explicitly accommodate issues of culture in the pursuit of sustainable development that is culturally sensitive.

The implication for law and policy might be such as is proposed by Hawkes in paragraph 2.4.2.1.1 above, where he suggests that a cultural impact assessment akin to an environmental impact assessment may be useful in reaching policy decisions concerning sustainable development.

(b) Culture for sustainable development depicts the recognition of the interaction and contribution of culture to the established tri-dimensional framework of sustainable development, in which case, culture is recognised for its instrumental value in contributing to economic development, social equity and the protection of the environment, for example:

- (aa) the contribution of the creative economy to economic growth through trade in cultural products;
- (bb) the increasing recognition of the role culture can play in the pursuit of sustainable cities;<sup>232</sup>
- (cc) the relevance of indigenous knowledge in providing a knowledge base for environmental management;

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231 See A 13 of the *International Labour Organisation Convention No 169 Concerning Indigenous and Tribal People in Independent Countries* (1989); see paras 12-20 of UNCHR 2001 *Indigenous Peoples and their Relationship to Land: In Prevention of Discrimination and Protection of Indigenous Peoples and Minorities Final Working Paper* prepared by the Special Rapporteur, Mrs Erica-Irene A Daes UN Doc E/CN 4/Sub.2/2001/21 (11 June 2001).

232 See Duxbury, Hosagrahar and Pascual 2016 <http://bit.ly/2axAxwd> 1-42 accessed on 8 August 2016. Other initiatives increasing the awareness of the potential contribution of culture to sustainable urbanisation development include the International Conference on Culture for Sustainable Cities Hangzhou, People's Republic of China, 10 to 12 December 2015; the initiatives of the United Cities and local governments efforts at implementing Agenda 21 for Culture such as the Culture Summit in 2015. See <http://www.ifla.org/node/9490> accessed on 11 August 2016.

- (dd) the links between the health and well-being of the people and the environment;
- (ee) the importance of the protection of cultural heritage and biodiversity; and
- (ff) the UNESCO initiative promoting the role of intangible cultural heritage in education for a sustainable future.

A hybrid of the two streams of the proposed typology is possible to promote the idea that the relevance of culture in sustainable development cannot be ignored. Culture strengthens the link between well-being and human development.<sup>233</sup> Culture offers a framework within which the well-being of the people as well as their spiritual, physical, social and emotional needs can be pursued within the normative and substantive goals of sustainable development. Therefore, the investigation into culture for sustainable development in this thesis covers cultural heritage in direct relation to biodiversity, health and trade. Indigenous knowledge is explored in terms of its relevance in biodiversity and health.

## ***2.5 The interdependence between culture and sustainable development in Africa***

The global developments linking culture to sustainable development are of relevance to the African continent. The relevance of the link between culture and sustainable development is not unrelated to the strong cultural connections which the continent reveals from a historical and contemporary perspective. One indication is the fact that the African continent is rich in both biodiversity and cultural diversity.<sup>234</sup> The link

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<sup>233</sup> See the discussion in para 2.4.2.

<sup>234</sup> Biological diversity, simply put, is the total variety of living organisms, which includes plants, animals, fungi and microbes, existing on our planet. Biodiversity has been categorised into three parts, namely genetic diversity, referring to the variety of genes which makes it a measure of variability, both within and between species; species diversity, which is considered a measure of the total number of species in each area, and ecosystem diversity, which relates to the variety of habitats (for example, forests, wetlands, coral reefs, rivers, savannahs, deserts) within which species occurs. These categories of biodiversity occur in Africa as the continent embraces a very broad range of habitats and ecosystems with varying degrees of species diversity occurring within them. See generally International Union for Conservation of Nature and Natural Resources (IUCN) *Biodiversity in Sub-Saharan Africa and its Islands: Conservation, Management and Sustainable Use* 3-5. It is further postulated that cultural diversity is another category of biodiversity as humans

between both forms of diversities is increasingly coming to the fore, and it is advocated that a comprehensive approach should be taken, based on the understanding that cultural and biological phenomena should not be dissociated, as so often is the case.<sup>235</sup> Further discussion on the culture and biological diversity nexus and the benefit to sustainable development is canvassed in Chapter 3.<sup>236</sup>

In the African context, the relevance of culture to development and in sustainable development was recognised in several regional instruments<sup>237</sup> before the recent global developments linking culture to sustainable development came about. The recognised regional political organisation governing African affairs is the AU. Amongst the key objectives of the AU as set out in the *Constitutive Act*<sup>238</sup> is the integration of the African economies and the promotion of sustainable development at the economic, social and cultural levels.<sup>239</sup> In furtherance of its objective and attainment of its vision, the AU organisational structure caters for the recognition of and governance of cultural issues through institutional arrangements and several instruments.<sup>240</sup> For example, the Economic Social and Cultural Council of the AU (hereinafter ECOSCC)<sup>241</sup> primarily deals specifically with cultural issues. Apart from the *Constitutive Act*, the *Cultural Charter for Africa* 1990<sup>242</sup> deals with matters such as cultural diversity, cultural oppression, national identity, cultural development, education, language and

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are a part of the ecosystem. The diversity of cultures is also quite evident in the continent, and it is argued that to protect and conserve biodiversity it is essential to recognise the importance of cultural interests, especially those associated with indigenous communities. See generally Persic and Martin (eds) *Links between biological and cultural diversity-concepts, methods and experiences*.

235 Persic and Martin (eds) *Links between biological and cultural diversity-concepts, methods and experiences* 12-18.

236 See para 3.2.1.

237 For example, the *Cultural Charter for Africa* 1990, the *Treaty Establishing the African Economic Community* 1994, and the *African Charter on Human and Peoples' Rights* 1986.

238 Details of the key objectives can be found in the preamble to the 2001 *Constitutive Act*.

239 A 3(j) of the 2001 *Constitutive Act*. The *Constitutive Act* entered into force in 2001. South Africa ratified it on 3 March 2001.

240 Rautenbach and Du Plessis 2009 *SAYIL* 147.

241 The ECOSCC is an organ of the AU, was established under the provisions of A 5 and A 22 of the *Constitutive Act*, and was inaugurated in Durban, South Africa in July 20002.

242 The Charter entered into force in 1990 but South Africa has not ratified it yet. The text of the Charter is accessible at <http://www.au.int/en/content/cultural-charter-africa> accessed on 6 June 2014.

international cultural cooperation among member states of the AU and how these issues are essential to the full development of the continent.<sup>243</sup>

Furthermore, the *Treaty Establishing the African Economic Community*<sup>244</sup> (hereafter the 1994 *Treaty*) seeks to promote economic, social and cultural development, and the integration of African economies<sup>245</sup> to increase economic self-reliance and promote endogenous and self-sustained development on the continent.<sup>246</sup> The 1994 *Treaty* also requires that member states pursue the objectives of the 1990 *Cultural Charter for Africa*. It also ensures that development policies adequately reflect their socio-cultural values to consolidate their cultural identity.

One of the earlier instruments that highlights the right to development and identifies culture as an essential tool in the realisation of this right is the 1986 *African Charter on Human and Peoples' Rights* (hereafter referred to as the *Banjul Charter*).<sup>247</sup> The *Banjul Charter* promotes a plethora of human rights such as civil, political, social, economic and cultural rights, as well as individual and collective rights.<sup>248</sup> The preamble of the Charter recognises the right to development and reaffirms that civil and political rights cannot be disassociated from economic, social and cultural rights. It goes on to state that the enjoyment of civil and political rights can be guaranteed only where economic, social and cultural rights have been satisfied.

The *Charter for African Cultural Renaissance*<sup>249</sup> goes a step further in recognising culture in the sphere of sustainable development by articulating basic principles of cultural policy.<sup>250</sup> As part of its objectives the Charter seeks the integration of cultural objectives in development strategies.<sup>251</sup> The Charter is guided by previous

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243 See the preamble of the *Cultural Charter for Africa* 1990.

244 The treaty entered into force in 1994. South Africa ratified it on 31 May 2001.

245 Dube 2013 [www.saiia.org.za/occasional-papers/437-traditional-and-emerging-partners-role-in-african-regional-economic-integration-issues-and-recommendations/file](http://www.saiia.org.za/occasional-papers/437-traditional-and-emerging-partners-role-in-african-regional-economic-integration-issues-and-recommendations/file) accessed on 8 July 2016.

246 A 4(1)(a) of the 1994 *Treaty*.

247 OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). The Charter entered into force in 1986 and was ratified by South Africa on 3 July 2002.

248 Ekhatior 2014 *AJICL* 67.

249 The Charter was adopted on 24 January 2006. However, it is not yet in force as it has been ratified by only 8 countries (out of 54-member states of the AU). South Africa is one of the 47 countries yet to ratify the Charter.

250 Aa 8-17 of the *Charter for African Cultural Renaissance*.

251 A 3(g) of the *Charter for African Cultural Renaissance*.

international instruments<sup>252</sup> relating to cultural issues and is intended by the AU (when the Charter comes into force) to replace the *Cultural Charter for Africa*.<sup>253</sup>

Another instrument of relevance is the *African Charter on Democracy, Elections and Governance*.<sup>254</sup> Article 37 of the Charter stipulates that state parties should pursue sustainable development. Article 8(3) urges states to respect the ethnic, cultural and religious diversity that contributes to strengthening democracy and citizen participation. Article 40 urges states to adopt and implement policies, including the cultural policies, strategies and programmes required to generate productive employment, to further human development. In addition, the recent *African Union Agenda 2063: The Future We Want*<sup>255</sup> in its Aspiration 5 recognises that Africa possesses a strong cultural identity, a shared heritage, values and ethics which can be channelled in achieving inclusive and prosperous societies.

With regards to the environment, article 24 of the *Banjul Charter* guarantees the right to a “general satisfactory environment favourable to their development”. Du Plessis<sup>256</sup> argues that article 24 of the *Banjul Charter* is broadly framed to accommodate the protection of the environment in a way that is favourable to human development.

### *2.5.1 Linking development needs with competing interests in Africa*

The AU and its state parties have been caught up in the struggle of balancing the right to development with other competing interests such as environmental protection, the right to culture and right to life. The *Banjul Charter* is the principal treaty guiding the affairs of the African community in terms of human rights protection and other rights ancillary to development and well-being. Two prominent cases are discussed hereunder to highlight the interdependence between development and some of these

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252 See the preamble of the Charter.

253 The Charter entered into force in 1990 but is yet to be ratified by South Africa. The text of the Charter can be viewed at <http://www.au.int/en/content/cultural-charter-africa> accessed on 6 June 2014.

254 This Charter was adopted 30 January 2007 and it entered into force on 15 February 2012. South Africa ratified it on 24 December 2010.

255 African Union Commission 2015 <http://bit.ly/2mq9mZk> accessed on 12 March 2016.

256 Du Plessis “The Balance of Sustainability Interests from the Perspective of the African Charter on Human and People’s Rights” 38-39.

competing rights. These two cases are selected for discussion because they provide insight into the right to development and the right to culture.

The right to development and its justiciability was tested for the first time in the case of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*<sup>257</sup> (hereafter referred to as the *Endorois* case). As a background to the case, the Endorois are a semi-nomadic people who had for centuries herded their cattle and goats around Lake Bogoria in the Rift Valley, Kenya. In the 1970s the Kenyan government evicted them from their traditional lands to create a nature reserve for tourism.<sup>258</sup> The creation of the reserve deprived the people of access to grazing lands and ultimately degenerated their standard of living and quality of life. Having exhausted all local remedies,<sup>259</sup> the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions brought the case on behalf of the Endorois community before the African Commission on Human and Peoples' Rights (hereafter the African Commission) in 2009. The complainants claimed that the forced eviction of the Endorois community was a violation of a plethora of rights protected by the *Banjul Charter*, which include the freedom of conscience and religion,<sup>260</sup> the rights to property,<sup>261</sup> to culture,<sup>262</sup> to natural resources<sup>263</sup> and to development of indigenous people.<sup>264</sup>

Adjudicating on the violation of the right to development, the African Commission found that the absence of "meaningful participation" by the Endorois people as espoused in article 2(3) of the UN *Declaration of the Right to Development*<sup>265</sup> was a violation of the right under consideration because the people were informed of the

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257 Communication 276/2003, see African Commission, 27th Activity Report, 2009.

258 See African Commission, 27th Activity Report, 2009.

259 In accordance with article 56(6) of the *Banjul Charter*, communications (cases) will be considered only if they are sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged.

260 Article 8 of the *Banjul Charter*.

261 Article 14 of the *Banjul Charter*.

262 Article 17 of the *Banjul Charter*.

263 Article 21 of the *Banjul Charter*.

264 Article 22 of the *Banjul Charter*.

265 UN *Declaration of the Right to Development* A/Conf.157/23 (12 March 1993).

“development” project on their traditional lands only as a *fait accompli*.<sup>266</sup> The African Commission further found that the act of encroachment upon the people’s choices and capabilities was a violation of the right to development.<sup>267</sup> This is in line with Sen’s<sup>268</sup> contentions that the right to development is underpinned by the empowerment and freedom of the beneficiaries of the development, in this case the Endorois people. It is notable that the right to development is legally binding in the *Banjul Charter*.<sup>269</sup> State parties to the treaty intended to create legal rights and duties to the extent that the *Banjul Charter* sets obligatory standards that states are not allowed to negotiate. In this context, the right to development is a legal right which state parties are bound to fulfil.

The *Endorois* case set the benchmark for participation needed for the realisation of the right to development. According to the African Commission, prior informed consent is the minimum standard to be achieved by states before undertaking any development endeavours in indigenous peoples’ communities. The African Commission declared that:<sup>270</sup>

The State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties.

The case further explains the content of the right to development, which the African Commission describes as multifaceted as it comprises elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities. It may be concluded that the *Endorois* decision provides guidance on how to ensure the justiciability of the right to development. The obligation placed on states to consult with communities before embarking on development projects is a viable avenue for the inclusion of cultural interests for sustainable development purposes.

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266 Communication 276/2003 para 281; also see Kamga 2011 *De Jure* 382.

267 Communication 276/2003 para 283; also see Kamga 2011 *De Jure* 382

268 Sen *Development as Freedom* 35 also see para 2.2.2 above; Kamga 2011 *De Jure* 382.

269 See A 22 of the *Banjul Charter*.

270 Communication 276/2003 para 289.



In a recent case<sup>271</sup> focused on the right to culture<sup>272</sup> the African Court on Human and People's Rights (hereafter referred to as the African Court) held that the right to culture of indigenous peoples as protected under article 17(2) and (3) of the *Banjul Charter* is upheld in the face of the Kenyan's government's eviction of the Ogiek people from their ancestral lands.

The case concerns the Ogiek people, an indigenous community of about 20,000 people living in the East Mau Forest in the central Rift Valley in Kenya. The dispute began in 2009 when the Kenyan Forest Service served an eviction notice on the community stating that the forest constitutes a reserve water catchment zone and that the land is state property under section 4 of the *Government Land Act*.<sup>273</sup>

The matter was communicated to the African Commission in November 2009 by the Centre for Minority Rights Development (CEMIRIDE) joined by Minority Rights Group International (MRGI), both acting on behalf of the Ogiek Community of the Mau Forest. Citing the far-reaching implications on the social, economic and political survival and its reparable harm to the Ogiek Community if the eviction notice was executed, the Commission issued an Order for Provisional Measures requesting the respondent (the Kenyan government) to suspend the implementation of the eviction notice.<sup>274</sup> However, the respondent never responded. This led to the matter going before the African Court on Human and People's Rights.

The African Court directed the parties to settle the matter amicably as the Applicant was amenable to settlement out of court.<sup>275</sup> However, the parties were unable to reach an amiable settlement.<sup>276</sup> The prayers of the Applicant to the court included, among

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271 *African Commission of Human and People's Rights v The Republic of Kenya Application No. 006/2012* 26 May 2017 (hereafter referred to as the *Ogiek* case).

272 Aa 17(2) and (3) of the *Banjul Charter*. The host of other rights protected by the *Banjul Charter* and adjudicated upon in the *Ogiek* case include the recognition of the rights and freedoms enshrined in the Charter (a 1), the protection of the right of every individual to enjoy the rights and freedoms recognised and guaranteed by the *Banjul Charter* (a 2), the right to freedom of religion (a 8), the right to economic, social and cultural development (a 22), the right to property (a 14), the right to life (a 4), and the right to the free disposal of wealth and natural resources (a 21).

273 *Ogiek* case para 8; Townsend 2017 <http://bit.ly/2uUJQg9> 1 accessed on 13 July 2017.

274 *Ogiek* case para 4.

275 *Ogiek* case para 31-37.

276 *Ogiek* case para 38-40.

others, that the respondent halts the eviction from the East Mau Forest and refrains from harassing, intimidating or interfering with the community's traditional livelihoods<sup>277</sup> and that the court declare that the respondent State was in violation of a plethora of rights as shown above.<sup>278</sup> The Applicants averred that the Mau Forest is the ancestral home of the Ogiek people and their occupation of the forest is paramount for their survival and the exercise of their culture, customs, traditions and religion, and for the well-being of their community.<sup>279</sup>

The African Court found it necessary to decide on the concept of "indigenous community." The Court noted that term "indigenous population" is not defined in the *Banjul Charter* and that there is no universally accepted definition of "indigenous population" in other international human rights instruments. However, the Court drew inspiration<sup>280</sup> from the work of the African Commission through its Working Group on Indigenous Populations/Communities and the work of the United Nations Special Rapporteur on Minorities<sup>281</sup> and deduced that for the identification and understanding of the concept of indigenous populations, the relevant factors to consider included:<sup>282</sup>

- (a) the presence of priority in terms of time with respect to the occupation and use of a specific territory;<sup>283</sup>
- (b) a voluntary perpetuation of cultural distinctiveness which includes, but is not limited to, aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;<sup>284</sup>
- (c) self-identification as well as recognition by other groups or by state authorities that they are a distinct collective;<sup>285</sup> and

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<sup>277</sup> *Ogiek* case para 41.

<sup>278</sup> *Ogiek* case para 43.

<sup>279</sup> *Ogiek* case para 43(B).

<sup>280</sup> Aa 60 and 61 of the *Banjul Charter* allows the Court to draw inspiration from other human rights instruments to apply the criteria thereon to the case at present in terms of such concepts as "Indigenous Population/Community".

<sup>281</sup> *Ogiek* case paras 105-106.

<sup>282</sup> *Ogiek* case paras 107.

<sup>283</sup> *Ogiek* case para 109.

<sup>284</sup> *Ogiek* case para 110.

<sup>285</sup> *Ogiek* case para 110.

(d) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, irrespective of the fact that these conditions persist or not.<sup>286</sup>

The Court further noted that a salient feature of most indigenous populations is their strong attachment to the land and natural environment. Their survival is hinged on unhindered access to and use of their traditional land and its natural resources. In this regard, the Ogieks, as a hunter-gatherer community, had from time immemorial depended on the Mau Forest for their residence and as a source of their livelihood.<sup>287</sup> Therefore, it followed that their dependence on the environment for their development was also linked to preserving their religion,<sup>288</sup> their culture and their identity as a people.

On the violation of the right to culture, the respondent argued that while protecting the cultural rights of the community, it also has the responsibility to ensure a balance between cultural rights and environmental conservation in order to undertake its obligation to all Kenyans, in view of the provisions of the *Banjul Charter*<sup>289</sup> and its Constitution.<sup>290</sup> The respondent further argued that the cultural rights of indigenous peoples such as the Ogieks may involve activities related to natural resources, such as fishing or hunting, which could have a negative impact on the environment, and these must be balanced against other public interests.<sup>291</sup> The respondent urged the court to consider the intricate balance between the right to culture and environmental conservation for future generations.<sup>292</sup> The respondent also added that the Ogiek no longer led traditional lifestyles and as a result of their newly assimilated modern way of life, the community had lost their distinctive cultural identity and as such the respondent had not violated this cultural identity by evicting the community.<sup>293</sup>

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286 *Ogiek* case para 111.

287 *Ogiek* case para 109.

288 *Ogiek* case para 157. The Ogieks practise a monotheistic religion closely tied to their environment. Their beliefs and spiritual practices are protected by A 8 of the *Banjul Charter* and constitute a religion under international law.

289 Aa 1 and 24 of the *Banjul Charter*.

290 Aa 2(5) and (6) of the *Constitution of Kenya* 2010.

291 *Ogiek* case para 174.

292 *Ogiek* case para 174.

293 *Ogiek* case para 175.

The Court held that the right to culture as enshrined in article 17(2) and (3) of the *Banjul Charter* must be considered in a dual dimension: individual and collective.<sup>294</sup> The right ensures the protection of individuals' participation in the cultural life of their community and also obliges the state to promote and protect the traditional values of the community.<sup>295</sup> The protection of the right to culture goes beyond the duty not to destroy or deliberately weaken minority groups, but it requires respect for and protection of their cultural heritage, which is essential to the group's identity.<sup>296</sup>

The Court noted that in the context of indigenous communities, the conservation of their culture is of importance. Indigenous communities have often been affected by the economic activities of large-scale developmental programmes.<sup>297</sup> Due to their obvious vulnerability, which often stems from their numbers or their traditional way of life, indigenous communities have, at other times, been the subject and easy target of deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution, whereas some have encountered the extinction of their cultural distinctiveness and continuity as a distinct group.<sup>298</sup>

The Court rejected the respondent's argument that the Ogiek lifestyle has metamorphosed into a modern lifestyle that does not reflect their traditional lifestyles. The Court found that the respondents had not demonstrated that the alleged change to the Ogiek's lifestyle had metamorphosed to the extent that it can be considered as an "elimination of their cultural distinctiveness".<sup>299</sup> The Court went on to stress that:

Stagnation or the existence of a static way of life is not a defining element of culture or cultural distinctiveness. It is natural that some aspects of indigenous populations' culture such as a certain way of dressing or group symbols could change over time. Yet, the values, mostly, the invisible traditional values embedded in their self-identification and shared mentality often remain unchanged.

The Ogiek people could be rightly said to have been culturally displaced because of the denial of access to their land by the respondents,<sup>300</sup> and their adaptive measures

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294 *Ogiek* case para 177.

295 *Ogiek* case para 177.

296 *Ogiek* case para 179.

297 *Ogiek* case para 180.

298 *Ogiek* case para 180.

299 *Ogiek* case para 185.

300 *Ogiek* case para 186.

to cope with being denied access could not be equated to an elimination of their lifestyle.

With regards to the eviction measures, the respondents contended that the measures were in the best interest of the public. The Court held that the mere assertion by the respondent of the existence of a common interest<sup>301</sup> warranting interference with the right to culture was not enough to allow the restriction of the right or to sweep away the essence of the right in its entirety. Rather, in the circumstances of each case, the State Party should substantiate that its interference with the rights and freedoms guaranteed in the *Banjul Charter* was necessary and proportional to the legitimate interest sought to be attained by such interference.<sup>302</sup> In the *Ogiek* case the Court found that the respondent was unable to substantiate its claim that the eviction was for the preservation of the environment but rather the eviction interfered with the cultural rights of the Ogieks.<sup>303</sup>

The *Ogiek* case has further contributed to the understanding of the nexus between culture and sustainable development in Africa. The case has helped to show that the preservation of culture and the preservation of the environment should not be considered as separate but as interdependent interests of development.

These regional instruments and the cases discussed above demonstrate that the link between culture and sustainable development in the African context is not nascent. The global recognition of this link further presents the necessary framework within which the integration of culture in the African development agenda may be framed.

Against this background, it is argued that sustainable development on the continent should recognise the value and role of culture, which in the face of recent global developments must be given full attention within the context of the global *2030 Agenda for Sustainable Development*.<sup>304</sup> In this regard, the active engagement of law,

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301 Per A 27(2) of the *Banjul Charter*.

302 *Ogiek* case para 188.

303 *Ogiek* case para 189.

304 See para 2.4.2 above.

policy and institutional arrangements in the pursuit of sustainable development becomes an essential focus for states in Africa.

What, then, does sustainable development mean in and for South Africa? How do global and regional developments affect the pursuit of sustainable development in South Africa? What are the law and policy implications, and what responses are envisioned? These queries form the focus of the investigations that follow.

## ***2.6 The need for and meaning of sustainable development in the context of culture in South Africa***

The democratic constitutional state of South Africa after years of apartheid rule<sup>305</sup> is based on the principles of human dignity, equality and the advancement of human rights and freedoms as manifested in the Bill of Rights<sup>306</sup> entrenched in the *Constitution*. The Bill of Rights integrates civil, political, and cultural rights. It also guarantees a host of socio-economic rights, which are agreed to be progressive and transformative.<sup>307</sup> It not only offers a framework to redress the injustices of the past, but also facilitates the creation of a more equitable society in the future,<sup>308</sup> a society that is based on democratic values, social justice and fundamental human rights. The cultural diversity of the South African society is an underlying element of the need to conceive sustainable development that is inclusive of culture in the post-apartheid dispensation.

### ***2.6.1 South Africa as a culturally diverse society***

South Africa is famously described as the Rainbow Nation,<sup>309</sup> a description that truly captures the country's cultural and ethnic diversity. According to Beukes,<sup>310</sup> the fact of South Africa's cultural diversity is manifest in the considerable number of languages used<sup>311</sup> and the varied traditions, customs and objects that express the way of life of

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305 Between 1948 and 1994 the ruling National Party adopted and pursued its infamous policy of separate development, known as apartheid. During this time, Afrikaner nationalism was rife and cultural and religious groups were separated from one another simply because individuals belonging to the various groups were considered not to be culturally (or racially) equal. During this time, unequal development policies for the various groups were enforced. For more about the policy of separate development, development and intergroup relations, see generally Kotzé, Charton and Jeppe *Balanced Development in South Africa* 50-65.

306 Chapter 2 of the *Constitution*.

307 Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* 23-25; Klare 1998 *SAJHR* 150; see generally Liebenberg and Goldblatt 2007 *SAJHR* 335-361.

308 Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* xxi; Klare 1998 *SAJHR* 146.

309 Archbishop Desmond Tutu first described South Africa as so, post-apartheid. The first democratically elected President of South Africa, President Nelson Mandela, also used the expression.

310 Beukes 2004 *SAYIL* 228.

311 S 6 of the *Constitution*. This is illustrative of the government's commitment to recognise cultural diversity. There are eleven official languages in South Africa. These are English, Afrikaans, Ndebele, Sepedi/Northern Sotho, Xhosa, Venda, Tswana, Southern Sotho, Zulu, Swazi or SiSwati and Tsonga. South Africa also recognises other non-official languages such as South African sign

South African communities. The 1994 *White Paper on Reconciliation and Development*,<sup>312</sup> which set in motion the reconciliation and development programme after apartheid (hereafter referred to as the 1994 *White Paper on RDP*), refers to the cultural diversity of the people as a major national asset.<sup>313</sup>

There are several provisions in the *Constitution* referring to the diversity of the people. For example, the Preamble refers to the diversity of South Africa, and sections 211 and 212 relate to the recognition of traditional communities adhering to a system or several systems of customary law. Protection against unfair discrimination on the grounds of religion, conscience, belief and culture is also afforded under sections 9(3), 15, 30 and 31, which guarantee the rights of traditional, religious, cultural and linguistic communities. Finally, schedules 4 and 5 recognise and assign cultural matters under the functional areas of national and provincial government. The Commission for the Promotion and Protection of the Right of Cultural, Religious, and Linguistic Communities is established by section 181(1)(c) of the *Constitution* with the mandate *inter alia* to promote respect for the rights of cultural, religious and linguistic communities.<sup>314</sup>

Despite the several references to culture in the *Constitution*, there is no definition offered for the term. However, the use of the term “culture” in the *Constitution* manifests in three distinct forms, as distinguished by Rautenbach, Jansen van Rensburg and Pienaar.<sup>315</sup> They argue that the term could refer to a particular tradition based on ethics, could be a collective term for aesthetic expression, or could be a modality that identifies and binds a specific group of people.<sup>316</sup> These three distinct forms are explored below.

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language, Khoe and the San language – South African History Online 2016 <http://bit.ly/29TmbGA> accessed on 13 July 2016.

312 *White Paper on Reconciliation and Development* GN 1954 in GG 16085 of 23 November 1994.

313 Para 1.4.8 of *White Paper on Reconciliation and Development* GN 1954 in GG 16085 of 23 November 1994.

314 Currie “Minority Rights: Education, Culture, and Language” 35.

315 See generally, Rautenbach, Jansen van Rensburg and Pienaar 2003 16(1) *PER* 1-20.

316 Rautenbach, Jansen van Rensburg and Pienaar 2003 16(1) *PER* 4-6.



### 2.6.1.1 Culture as ethics

Culture is used to describe the evolution of a pattern of ethics. For example, section 184(a) of the *Constitution* assigns to the South African Human Rights Commission the responsibility for promoting a “culture” of human rights. Section 234 encourages the Parliament to adopt Charters of Rights consistent with the provisions of the Constitution to deepen the “culture” of democracy established by the Constitution. Similarly, the Constitutional Court has adopted the term in the same context. For example, in the case of *S v Walters*<sup>317</sup> the Constitutional Court speaks of promoting a culture of respect for human life and dignity. Also, in the case of *Islamic Unity Convention v Independent Broadcasting Authority*<sup>318</sup> the court referred to a society based on a constitutionally protected culture of openness and democracy and universal human rights for South Africans. Rautenbach, Jansen van Rensburg and Pienaar express reservation about the use of the term “culture” in this context, from the perspective of cultural relativism.<sup>319</sup> The apparent evaluation of certain elements of a cultural system by measuring it against another cultural system can be complex and should be not necessarily be accepted. One of the reasons for caution in such evaluation is the potential oversimplification of the problems which could potentially affect the global approach to human rights, considering that in the context of human rights, a Western orientation and domination is indeed a possibility.<sup>320</sup>

### 2.6.1.2 Culture as a collective term for cultural expression

When culture is taken to be a collective term for aesthetic expression it includes, amongst other things, artistic representations like theatre, music, literature, and graphic art creations like sculpture.<sup>321</sup> The use of culture in this sense is described as

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317 2002 4 SA 613 (CC) para 6.

318 2002 4 SA 294 (CC) para 27.

319 Rautenbach, Jansen van Rensburg and Pienaar 2003 16(1) *PER* 5.

320 For more on this line of argument see Penna, Campbell 1998 Third World Quarterly 7-27, where the authors argue convincingly that the western interpretation of human rights should not by default be regarded as superior to African and perhaps by extension third world notions since these parts of the world have viable and vibrant indigenous traditions of human rights.

321 Currie “Minority Rights: Education, Culture, and Language” 35, where Currie explains that culture means the “practice of intellectual and artistic activity and the works that result from this activity”. The results of the activity include literature and the arts. Therefore, reference to culture may include the promotion and publication of literature and the arts.

“narrow”.<sup>322</sup> Nurse<sup>323</sup> suggests that when engaging issues of sustainable development, it is critical to extend the meaning of the term beyond the promotion and preservation of the arts, tangible heritage and emblems of cultural identities. It should be:<sup>324</sup>

[a] broad civilizational notion embodied in culture as...embodied in culture as a ‘whole way of life’ because it informs the underlying belief systems, worldviews, epistemologies and cosmologies that shape international relations as well as human interaction with the environment.

In the South African context, the arts and the creative industry are significant contributors to economic growth,<sup>325</sup> bearing in mind the *Creative Economy Report 2010*<sup>326</sup> report, the significant contributions that artistic and cultural production, dissemination and participation make to economic empowerment, cultural enrichment and social cohesion in the community which in turn promote major social progress cannot be ignored. The Report<sup>327</sup> stipulates that if:

adequately nurtured, creativity fuels culture, infuses a human-centred development and constitutes the key ingredient for job creation, innovation and trade while contributing to social inclusion, cultural diversity, and environmental sustainability.

These are good reasons to promote the “narrow” perspective of culture as having to do with the arts. The meaning of culture in this context receives recognition in the South African context as suggested by the *Mzansi’s Golden Economy: Contribution of the Arts, Culture and Heritage Sector to the New Growth Path* initiative.<sup>328</sup> The new growth path is government’s commitment to creating five million jobs in twenty years beginning in 2010 in unconventional ways, including turning to the creative industry as one such means of creating these jobs. The Department of Arts and Culture (DAC) is the government department with a constitutional and legislative mandate in terms of sections 16, 30 and 31 of the *Constitution* to oversee issues of culture within the

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322 Nurse 2006 <http://bit.ly/1iSnHs2> 35-36 accessed on 26 September 2015.

323 Nurse 2006 <http://bit.ly/1iSnHs2> 36 accessed on 26 September 2015.

324 Nurse 2006 <http://bit.ly/1iSnHs2> 36 accessed on 26 September 2015.

325 Department of Arts and Culture (DAC) 2011 <http://bit.ly/29TveOq> 6 accessed on 14 July 2016.

326 UNCTAD 2010 [http://unctad.org/en/Docs/ditctab20103\\_en.pdf](http://unctad.org/en/Docs/ditctab20103_en.pdf) accessed on 15 July 2014.

327 UNCTAD 2010 [http://unctad.org/en/Docs/ditctab20103\\_en.pdf](http://unctad.org/en/Docs/ditctab20103_en.pdf) accessed on 15 July 2014

328 Department of Arts and Culture (DAC) 2011 <http://bit.ly/29TveOq> 6 accessed on 14 July 2016.

creative industry, extending to a range of institutions<sup>329</sup> and legislation.<sup>330</sup> The DAC contends that the arts, culture and heritage sectors are of tangible and extensive intangible value, and as such the tangible and intangible cultural heritage must be preserved and protected for current and future generations.<sup>331</sup> In this context, the preservation and protection of culture inevitably links the tangible to the intangible and asserts that their continuous preservation is critical to nation building and social cohesion and is a vital ingredient for creating a climate of social stability and economic growth.<sup>332</sup> Also, in this context culture is recognised as a contributor to human development by way of job creation. According to Snowball,<sup>333</sup> the results of South Africa's first cultural and creative industries mapping study in 2014 showed that the industries had created between 162,809 and 192,410 jobs, about 1.08 per cent to 1.28 per cent of employment in the country, and had contributed 2.9 per cent to the GDP.

#### 2.6.1.3 Culture as a modality that identifies and binds groups of people

In this sense, culture is perceived as a source that helps determine identity by drawing distinctions between people on the grounds of certain characteristics such as language, religion, beliefs and traditions.<sup>334</sup> Sections 30<sup>335</sup> and 31<sup>336</sup> of the *Constitution* make reference to "cultural life" and "their culture", thus suggesting that culture can

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329 Cultural institutions become so declared according to the provisions of the *Cultural Institutions Act* 119 of 1998 and a host of other legislation as listed at DAC Date Unknown <http://bit.ly/29RLPKk> accessed on 14 July 2016. Such institutions are corporate bodies receiving annual subsidies from the Department.

330 A few of the pieces of legislation include the *Culture Promotion Act* 35 of 1983; the *Cultural Institutions Act* 119 of 1998; and the *NHRA*.

331 DAC 2011 <http://bit.ly/29TvEOq> 6 accessed on 14 July 2016.

332 DAC 2011 <http://bit.ly/29TvEOq> 6 accessed on 14 July 2016.

333 Snowball <http://bit.ly/1NtlnPa> accessed on 14 July 2016.

334 Currie "Minority Rights: Education, Culture, and Language" 35.18.

335 S 30 provides that "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

336 S 31 provides that "1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community: to enjoy their culture, practise their religion and use their language; and b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. 2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

tie in with tradition and religion, as these also form a part of the cultural life of communities and groups of people.

Section 31 is cast in specific terms and is not a blanket provision referring to culture in general but to “their culture”<sup>337</sup> – the culture of a specific group of people. In the case of *Hattingh v Juta*<sup>338</sup> the Supreme Court dealt with the right in section 6(2)(d) of the *Extension of Security of Tenure Act*,<sup>339</sup> a right “to family life in accordance with the culture of that family.” The right was held to give effect to the rights in sections 30 and 31 of the *Constitution*. It was held that the associative nature of the rights meant that a claim that it was the “culture” of a particular family or occupier to live with her adult independent sons and daughter-in-law could not succeed. This was because it was necessary to show that this culture was shared by at least a portion of the community.<sup>340</sup>

According to O’Reagan J,<sup>341</sup> using culture in this sense makes it synonymous with terms such as tradition, customs, civilisation, race, nation or folkways. These equivalents of culture cumulatively refer to the “way of life of a particular community” which deserves to be protected, preserved and given consideration when development plans and strategies are set out. Therefore, a group of people with certain characteristics, the same belief or religion and sharing certain traditions in common are classified as a group with its own culture. In which case, the interests of such communities (in terms of their culture) must be put into consideration where development strategies are considered within the context of sustainable development. However, there are tensions relating to how far the government and the courts will recognise religious rights and individual cultural rights that are not consistent with the Bill of Rights. These tensions are fueled by the rich cultural diversity of South African

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337 Currie “Minority Rights: Education, Culture, and Language” 35.

338 2012 5 SA 237 (SCA).

339 62 of 1997.

340 *Hattingh v Juta* 2012 5 SA 237 (SCA) para 21.

341 *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 149; Currie “Minority Rights: Education, Culture, and Language” 35.

people and they are best investigated from the lens of legal pluralism and a human rights perspective, both of which this thesis will not dwell on.<sup>342</sup>

Flowing from the analysis of the three distinct ways in which the term culture is engaged in the *Constitution*, it is settled that of the three forms, two of the forms apply more closely to the sustainable development discourse. The first is the reference to culture as a collective term for aesthetic expression, given the potential contribution of the arts and creative industry to economic growth. Culture in this form engages with the environment, as the sustainability of the environment is crucial to creativity in terms of access to raw materials, for example. Culture in this form also stimulates trade in cultural products locally and globally.<sup>343</sup> The second is the reference to culture as contributing to individual and collective identity, as it inseparably links to a person's sense of self-worth and hence to human dignity.<sup>344</sup> Culture in this form engages with social interests such as health.

Health is defined by the World Health Organisation's Constitution as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".<sup>345</sup> In section 27(1)(a), the *Constitution* entrenches a right to have access to health care services and places a duty on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Donders<sup>346</sup> points out that the realisation of the right to health is also influenced by other factors beyond the control of the state, which include "natural factors, education

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342 For these see generally Rautenbach "Deep legal pluralism in South Africa: Judicial Accommodation of Non-State Law" 2010 *The Journal of Legal Pluralism* 143-177; Rautenbach, Jansen van Rensburg and Pienaar 2003 *PER* 1-20.

343 This will be further discussed in para 2.6.3 and chapter 3.

344 Currie and De Waal *The Bill of Rights Handbook* 632; *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 53. Thereby linking to certain institutional aspects of cultural life such as the use of language and the control by a cultural, linguistic or religious community of the education of its members. See s 29 of the *Constitution*.

345 The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States, and entered into force on 7 April 1948.

346 Donders 2015 18(2) *PER* 180; UN Committee on Economic, Social and Cultural Rights *General Comment No 14 on the Right to the Highest Attainable Standard of Health* UN Doc E/C/12/12/2000/4 (11 August 2000) (hereafter *General Comment No 14*) para 9. The Committee

and incomes as well as one's own behaviour." Donders<sup>347</sup> goes further to stipulate that in such circumstances, in giving effect to the right to health, the state must recognise that it goes beyond the right to access health care and health goods and services. The right to health extends to other determining factors such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.<sup>348</sup> The right to health according to the UN Committee on Economic, Social and Cultural Rights (hereafter the ESC Committee) contains both freedoms and entitlements.<sup>349</sup> These freedoms and entitlements broadly come together to mean "the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health".<sup>350</sup> The freedoms and entitlements so conceived have been recognised as having important cultural interests.<sup>351</sup>

According to Donders,<sup>352</sup> the way people exercise their right to health is often influenced by cultural and religious considerations. In terms of entitlements to the right to health, the cultural identity and integrity of the individuals and communities are important factors which must be taken into consideration by the state in giving effect to the right to health. For example, some communities may prefer access to traditional preventive care, healing practices or medicines. In such cases, the state law and policy tools giving effect to the right to health must be culturally sensitive and culturally appropriate.<sup>353</sup> This is in line with the recognition of the cultural interests of the right to health by the ESC Committee,<sup>354</sup> where it states that:

All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities.

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is the independent body supervising the implementation of the *ICESCR*. South Africa ratified the covenant on 12 January 2015.

347 Donders 2015 18(2) *PER* 181.

348 *General Comment No 14* para 8.

349 *General Comment No 14* para 8.

350 *General Comment No 14* para 8.

351 See generally Vrdoljak *The Cultural Dimension of Human Rights; Rentein International Human Rights: Universalism Versus Relativism*.

352 Donders 2015 (18)2 *PER* 181.

353 Rautenbach 2011 *THRHR* 28-46; Rautenbach 2007 *Obiter* 519-536.

354 *General Comment no 14* para 12(c).

This thesis argues that culture acknowledged in this manner and considered together with the transformative agenda of the *Constitution* and its core values, is increasingly relevant in development and to sustainable development. Therefore, culture in the South African context may be conceptualised to represent the way of life of the people informed by customs which have over time become a factor to be considered in reaching decisions which impact on their overall human development, and is catered for through the fulfillment of their environmental, economic and social needs. Culture in this context incorporates the diverse interests which proceed from the way of life of any given community within the limits guaranteed by the *Constitution*. Such interests are wide and varied and should be considered on a case-by-case basis so that that development plans and strategies are conceived and crafted in consideration of the total sum of the intangible and tangible aspects of the community's way of life (culture) that must be preserved for the full development of the people.

It is suggested that in applying culture to development in the South African context, it is necessary to investigate the understanding of the term development and the interpretation of sustainable development in the South African context. This query is considered in the next paragraph.

## *2.6.2 Defining development and sustainable development in the South African context*

### *2.6.2.1 Defining development*

Conceptualising the notion of development in the South African context, recourse is had to legislation and scholarly research. For example, the provisions of the *Spatial Planning and Land Use Management Act*<sup>355</sup> (hereafter the *SPLUMA*) as it concerns development makes specific reference to land development. In its Preamble, *SPLUMA* states that:

development of land requires the integration of social, economic and environmental considerations in both forward planning and ongoing land use management to ensure that development of land serves present and future generations

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355 16 of 2013.

In consideration of the fact that land constitute a major aspect of the environment, the way land is developed is pivotal to meeting the needs of present and future generations as indicated. In terms of transforming the local government sphere of government, the 1998 *White Paper on Local Government*<sup>356</sup> defines “developmental local government” as “local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives”. This definition also offers some insight into the interpretation of the notion of development, which demands that efforts and resources are channelled towards improving the quality of life of communities.

In addition, the definitional section<sup>357</sup> of the *Local Government: Municipal Systems Act*<sup>358</sup> describes development to mean the integration of social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at:

- (a) improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and
- (b) ensuring that development serves present and future generations.

Flowing from these definitions of development is the salient point that in the South African context, development is conceived from the perspective of social transformation through *inter alia* the reconstruction of an imbalanced land ownership and land utilisation regime, as well as catering to socio-economic issues.

Scholars like Kotzé<sup>359</sup> propose that within the context of section 24 of the *Constitution*, development is a process targeted at the transformation of “an impoverished society plagued by landlessness, inadequate access to life-sustaining infrastructure and poor socio-economic conditions.” Therefore, planning for development should apply not only to the use and management of land and the natural resources it provides, but also to socio-economic, financial, cultural, political and other ancillary interests that

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356 See para 1 of the 1998 *White Paper on Local Government* GN 423 in GG 18739 of 13 March 1998.

357 S 1 of the Act.

358 32 of 2000 (hereafter *Municipal Systems Act*).

359 Kotzé 2003 6(2) *PER* 85.



would aid the transformation and reconstruction of the society.<sup>360</sup> It is agreed with Kotzé who holds that the developmental need of South Africa extends to other issues beyond economic growth indices and GDP.<sup>361</sup> It extends for example to the alleviation of conditions like poverty, unemployment, to infrastructural development, and to spatial and housing issues,<sup>362</sup> which collectively impact on the living conditions and well-being of people.

To assist effectively in the facilitation of the improvement of living conditions, this broad definition of development aligns with the definition of development as earlier discussed in paragraph 2.2.2. Therefore, in line with Kotzé's point of view, development as employed by *SPLUMA* is an instructive definition within which the contemporary understanding of sustainable development is applicable in the South African context. With regards to this thesis, the working definition of the measurement of development proposes a cross-pollination between economic growth indices, which are the conventional measurements of development, and social, environmental and cultural indices, which reflect the overall well-being of the people. The improvement of these indices must be supported by relevant spatial, infrastructural, institutional, organisational, financial and human resources, all of which are directed at improving the living conditions of all South Africans, both now and in the future.

#### 2.6.2.2 Defining sustainable development

The *Constitution* with its transformative vision is instructive in aiding human development and addressing development needs. To this end, section 24 of the *Constitution* provides:

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation, and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

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360 Kotzé 2003 6(2) *PER* 86.

361 Kotzé 2003 6(2) *PER* 86.

362 Kotzé 2003 6(2) *PER* 85.

Although section 24 is framed in the environmental context and thus entrenches a substantive environmental right,<sup>363</sup> it is argued that the concept of sustainable development is not exclusively an environmental concept and is applicable in non-environmental contexts as well. A notable instance is the recognition of the natural environment as a part of cultural heritage in existing legislation.<sup>364</sup>

The *NEMA* recognises that in the pursuit of sustainable development, development planning, implementation and decision-making must take into consideration other interests that influence equity and social justice apart from environmental interests in giving force to the transformative purpose of the *Constitution*. Section 2 of the *NEMA* establishes relevant principles that should be considered by competent authorities in the pursuit of development aimed at meeting the transformative and social justice agenda of the *Constitution*.

Bearing in mind that the *Constitution* pursues a social transformation agenda, an acknowledgment that the central component of sustainable development thinking needs to integrate the different interests of development in reaching development decisions would serve the overarching purport of the *Constitution*. The description of sustainable development in the South African environmental framework legislation, the *NEMA*, specifically in the preamble to the Act, is instructive in contextualising sustainable development. The Act recognises sustainable development in its preamble as the “integration of all relevant factors” into planning, implementation and the evaluation of decisions to ensure that development serves the needs of present and future generations. It is submitted that although this definition emanates from an environmental act, it provides a more comprehensive description of sustainable development than that provided under section 24(b) of the *Constitution*.

Furthermore, due to South Africa’s unique developmental needs, Du Plessis and Feris<sup>365</sup> have argued that sustainable development cannot be thought to have bland reference to the three intersecting areas of environmental, social and economic

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363 Kotzé and Du Plessis 2010 *JCI* 157.

364 This argument is further pursued in Chapter 3. See for example section 2(4)(a)(iii) of the *NEMA*, which refers to the preservation of cultural heritage as among the principles of environmental management.

365 Du Plessis and Feris 2008 *SAJELP* 166.

interests. They suggest that all the interests of sustainable development are embedded in one another and as such one interest cannot be separated from the other.<sup>366</sup> Rather they must be considered integrally and holistically.<sup>367</sup>

The 2008 NFSD<sup>368</sup> applies a systems approach to the notion of sustainable development, but in terms of the extended connotation of sustainability. The systems approach implies the continuous and mutually compatible integration of the environmental, social, economic and cultural systems over time. Therefore, sustainable development means ensuring that these systems remain mutually compatible as development challenges are overcome through specific actions and interventions to eradicate poverty and severe inequalities.<sup>369</sup>

Furthermore, the National Planning Commission - in drafting the NDP - draws strongly from definitions of development that focus on creating the conditions, opportunities, and capabilities that enable people to lead the lives that they desire.<sup>370</sup> The NDP<sup>371</sup> advocates that developing and upgrading capabilities to enable sustainable and inclusive development requires a new approach and a new mindset.<sup>372</sup> It is envisioned that if the value of culture is harnessed locally, it will serve as a non-market mechanism that can actively contribute to the pursuit of sustainable development in South Africa. South Africa's developmental needs as outlined in the NDP<sup>373</sup> will indeed benefit from an increased recognition of culture within the sustainable development framework, because the emphasis on building an economy that is resilient, with increased capacities and that will create more jobs,<sup>374</sup> speaks to the potential of culture as identified in the SDGs.

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366 Du Plessis and Feris 2008 *SAJELP* 166.

367 This idea is credited to Sachs J in his dissenting judgement in one of the leading environmental cases discussed in para 2.6.3.

368 Accessible at the Department for Environmental Affairs website <http://bit.ly/2uLEliS> accessed on 22 July 2014.

369 The 2008 NFSD 15.

370 National Planning Commission 2011 <http://bit.ly/2a5exJq> 5 accessed on 27 September 2017.

371 See the discussion in para 2.6.

372 National Planning Commission 2011 <http://bit.ly/2a5exJq> 5 accessed on 27 September 2017.

373 National Planning Commission 2011 <http://bit.ly/2a5exJq> 10 accessed on 27 September 2017.

374 National Planning Commission 2011 <http://bit.ly/2a5exJq> 10 accessed on 27 September 2017.

### *2.6.3 The interlinkages between culture and sustainable development in the South African context*

The previous paragraphs<sup>375</sup> suggest that it is plausible for the concept of culture to be fused into the understanding of sustainable development in South Africa as envisioned in the SDGs.<sup>376</sup> It is argued that, considering the contemporary understanding of sustainable development that is inclusive of culture, an appropriate approach to development will require the integration of culture-related matters in the pursuit of sustainable development in South Africa.

Section 2(4)(a) of the *NEMA* provides that sustainable development requires the consideration of all relevant factors, which include *inter alia*:

- a) that the disturbance of ecosystems and loss of biological diversity be avoided or minimised and remedied;<sup>377</sup> and
- b) that the disruption of landscapes and sites that constitute cultural heritage be avoided or minimised and remedied.<sup>378</sup>

The reference to cultural heritage in this context is a recognition by *NEMA* that matters of culture will inevitably have to be addressed in the course of development and the subsequent pursuit of sustainable development in the short and long term.

It is noticeable that the Act does not give further guidance on what constitutes cultural heritage. Perhaps the Act omits this because other legislation and policy documents like the *National Heritage Resources Act (NHRA)*,<sup>379</sup> the *National Heritage Council Act (NHCA)*,<sup>380</sup> and the *White Paper on Arts, Culture and Heritage* (4 July 1996) provide direction on what constitutes cultural heritage.<sup>381</sup> The *White Paper on Arts, Culture*

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375 Paras 2.6.1 and 2.6.2.

376 See 2.6.2 above.

377 S 2(4)(a)(i) of *NEMA*.

378 S 2(4)(a)(iii) of *NEMA*.

379 25 of 1999.

380 11 of 1999. The *NHCA* in s 2(iii) provides a definition of living heritage: "living heritage" means the intangible aspects of inherited culture, and may include- (a) cultural tradition; (b) oral history; (c) performance; (d) ritual; (e) popular memory; (f) skills and techniques; (g) indigenous knowledge systems; and (h) the holistic approach to nature, society and social relationships."

381 Para 2 of the *White Paper on Arts, Culture and Heritage* (4 July 1996). The *White Paper* was revised in 2013. For more comments on the *White Paper on Arts, Culture and Heritage* and the

and *Heritage* highlights the importance of living heritage within the context of development and the transformative agenda of the *Constitution*, by stipulating that:<sup>382</sup>

Attention to living heritage is of paramount importance for the reconstruction and development process in South Africa.

Paragraphs 32 and 33 of the *White Paper* go on to highlight the importance of intangible cultural heritage with regard to tourism and its contribution to economic development. It must, however, be noted that the aim of the policy paper is to promote the arts and creative industry, which is only a part of what the concept of culture embraces.

Similarly, the *NHRA* 1999 is primarily mandated to manage heritage resources, including objects and sites to which living heritage or oral tradition is attached. Tangible heritage refers to objects and places with a cultural value.<sup>383</sup> In section 2 the Act goes on to make a case for the relevance of safeguarding living heritage with a deliberate and specific reference to the preservation and conservation of intangible aspects of inherited culture. Section 2 goes on to list such intangible aspects of culture as cultural tradition, oral history, performance, rituals, modern memory, indigenous knowledge systems, skills and techniques. It adopts a holistic approach to the environment, society and social relationships. As noted by Thabo,<sup>384</sup> the shortfall of the *NHRA*'s provisions with regard to living heritage is that the Act does not expressly provide for the safeguarding of intangible heritage not associated with objects or places.

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Revised White Paper, which at the time of this research is yet to be finalised, see Van Graan 2013 16(3) *PER* 23-34. Van Graan observes that one of the fundamental differences between the 1996 White Paper and the revised version is that the former was based on a human rights approach, encouraging everyone to have the right to participate in the cultural life of the community and enjoyment of the arts. The latter emphasises a market-driven, cultural industry approach that limits access to a select few. See Van Graan 2013 16(3) *PER* 28. The approach of the former is better suited to the arguments raised in this thesis and as such, its provisions are well linked to complexities inherent in the links between culture and the promotion of human development in the pursuit of sustainable development and in the light of the transformative agenda framework of the Constitution. DAC 1996 <https://www.dac.gov.za/content/white-paper-arts-culture-and-heritage-0#CHAP3> accessed on 9 June 2014.

382 Para 2 of the *White Paper on Arts, Culture and Heritage* (4 July 1996).

383 S 2 of the *NHRA* 1999.

384 Thabo 2006 *SAMAB* 80.

In the light of the *NHRA's* shortfall, intangible cultural heritage should be protected and promoted for its intrinsic value. Any attempt to tie the value of intangible cultural heritage to tangible cultural heritage will pose an obstacle to the pursuit of sustainable development through the recognition of cultural interests in the South African context. The impetus for this reasoning is derived from the fact that intangible cultural heritage is the foundation of cultural diversity and cultural identity.<sup>385</sup> It is from cultural diversity and cultural identity that creativity proceeds,<sup>386</sup> and it applies to the production of cultural goods and services which are of value to communities and support the development of such communities.<sup>387</sup> It is argued that<sup>388</sup> cultural diversity not only potentially serves as a catalyst to the overall realisation of the goal of sustainable development of the environment, economy and social equity, but also provides an opportunity for the aspirations of the people to be addressed within a cultural context.<sup>389</sup>

In related terms, the *Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill* (the IKS Bill) 2016 defines indigenous knowledge to mean:<sup>390</sup>

Tangible and intangible aspects of the whole body of knowledge that has been held, used, refined and transmitted by the indigenous communities collectively or as individual custodians of such knowledge as part of expressing their cultural identity and includes but is not limited to knowledge and management of biological resources

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385 A 2.6 of the 2005 *Cultural Diversity Convention*, which provides that the protection, promotion and maintenance of cultural diversity are essential requirements for sustainable development for the benefit of present and future generations. The Operational Guidelines for the 2005 *Cultural Diversity Convention* also assert that cultural diversity contributes to social and cultural fulfilment, individual and collective well-being and the maintenance, creativity and vitality of cultures and institutions. See *Operational Guidelines for the Integration of Culture in Sustainable Development in Operational Guidelines* approved by the conference of Parties at its second session (Paris, 15-16 June 2009), third session (Paris, 14-15 June 2011) and fourth session (Paris, 11-13 June 2013) available at <http://bit.ly/20vCicg> accessed on 20 July 2016. The Operational Guidelines of the Convention include a set of texts elaborated by the Intergovernmental Committee and adopted by the Conference of Parties. These provide general guidelines for the implementation and application of the provisions of the Convention. They are referred to as a "roadmap" for understanding, interpreting and implementing the specific articles of the Convention.

386 See para 2.5 above; A 7 of the 2001 *Declaration on Cultural Diversity*. The Declaration pioneered the promotion of cultural heritage as world heritage and identified cultural diversity as a relevant development factor. See A 3 of 2001 *Declaration on Cultural Diversity*.

387 See para 2.5 above; see also the *Convention for the Safeguarding of Intangible Cultural Heritage* 2003.

388 Owosuyi 2015 18(5) *PER* 2027-2028.

389 See para 2.4 above.

390 An explanatory summary of the bill is published in GG No 39910 of 8 April 2016.

and ecosystems; literary performance including artistic works; moveable cultural property; immovable cultural property; indigenous institutions, philosophies, governance matters and languages; scientific, technical and spiritual knowledge; indigenous environmental resources and indigenous community heritage.

It is worthy to note that the preamble of the Bill endeavours to encourage the use of indigenous knowledge in the development of novel, socially and economically suitable products and services. This desire of the Bill implies the application of cultural knowledge in the promotion of sustainable development. Such indigenous knowledge forms a part of intangible cultural heritage within the South African context.<sup>391</sup>

According to Bernstein,<sup>392</sup> research on the precise ways in which culture and development interact has been microscopic in South Africa. However, academics like Church,<sup>393</sup> Du Plessis W, Du Plessis AA, Feris and Rautenbach<sup>394</sup> have contributed to outlining the linkages between culture and sustainable development. In addition, some government strategic development plans, policy framework and programmes give recognition to issues of culture. Examples of such plans, policies and programmes are discussed further in the remainder of this thesis.<sup>395</sup> However, some of these programmes and policies are referred to in this section, as it is necessary to establish the links between culture and sustainable development. The various contributions by the academics previously mentioned, are examined below.

#### 2.6.3.1 Church's attempt at linking culture and sustainable development in South Africa

Church's contribution suggests that the relationship between culture and sustainable development is tied to the broad way in which section 24 is framed, as earlier mentioned in paragraph 2.6.<sup>396</sup> Therefore, the right to an environment that is not harmful to people's well-being means that the environment includes amongst other things an individual's or a community's relationship with natural resources as well as

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<sup>391</sup> See s 2 of *NHRA*.

<sup>392</sup> Bernstein "Culture and Development: Questions from South Africa" 23-43.

<sup>393</sup> Church 2012 *De Jure* 511-531.

<sup>394</sup> Du Plessis and Rautenbach 2010 13(1) *PER* 26-71.

<sup>395</sup> See chapters 3 and 4.

<sup>396</sup> Church 2012 *De Jure* 523.

cultural heritage.<sup>397</sup> Church also asserts that the particular reference to well-being in section 24 gives the impetus for culture to play a vital and recognisable role in the sustainable development framework. However, Church links the concept of culture to the role of indigenous law and specifically to the African philosophy of *uBuntu*.<sup>398</sup> Church suggests that:<sup>399</sup>

Like sustainable development, the culture of *uBuntu* encapsulates both intergenerational and intra-generational equity. Analogous to intra-generational equity *uBuntu* as a social ethic prescribes that members of a community should care for one another and where one suffers all suffer.

In linking culture with sustainable development, Church further asserts that the culture of the relevant community must be accounted for in reaching any decision regarding sustainable development.<sup>400</sup> Therefore, by recognising the cultural ethic of a community, sustainable development strategies could be facilitated for the benefit of the people and in the promotion of human development. Church concludes by stating that:<sup>401</sup>

It would be politically expedient if sustainable development reflected both the Western and African ethos. Where the value system of a community is respected and incorporated into policies and strategies and social needs are met, there would be a greater likelihood that they would be embraced by the people concerned.

Church gives an example of a South African government programme that echoes her conclusions. The programme is the "Working for Wetlands" programme<sup>402</sup> dedicated to the rehabilitation, protection and sustainable use of South Africa's wetlands.<sup>403</sup> This programme supports the pursuit of a more people-centered approach to sustainable

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397 S 24(b) of the *Constitution*; Church 2012 *De Jure* 523.

398 Church 2012 *De Jure* 524. *uBuntu* is expressed by the Zulu maxim *Umuntu ngumuntu ngabantu*, which is translated to mean "a person is a person through other persons". For more about the *uBuntu* philosophy see generally Hord and Lee "I am because We are: An Introduction to Black Philosophy" 10-17; Mbiti 2008 *SA J of Philosophy* 367-385.

399 Church 2012 *De Jure* 528.

400 Church 2012 *De Jure* 528-529.

401 Church 2012 *De Jure* 531.

402 It is a joint initiative of four South African government departments, namely the Department of Environment Affairs (DEA), the Department of Water and Sanitation (DWS) and the Department of Agriculture, Forestry and Fisheries (DAFF). See DEA 2004 <http://bit.ly/2sBLJg5> accessed on 8 July 2017; DAFF 2014 <http://bit.ly/2uCUgRh> accessed on 8 July 2017; DEA 2016 <http://bit.ly/2sZpHTQ> accessed on 8 July 2017.

403 Church 2012 *De Jure* 529.



development in the conservation and sustainable use of wetlands and their resources.<sup>404</sup>

In the operation of this programme the culture of the inhabitants of the wetland area is considered and strategies are developed to protect the environment along with the culture and economic survival of the people.<sup>405</sup> Church gives an example of women from two craft groups assisted by the programme to sustainably harvest wetland reeds which were later used to produce crafts that were sold.<sup>406</sup> This case goes on to encapsulate the arguments put forward in this thesis that the protection of the cultural diversity of the people interlinks with the preservation of the environment, creative activity, human development and economic development. Church's study captured the linkage between culture and sustainable development as canvassed in the global frontiers and discussed in paragraphs 2.4.2 above. Complementary to Church's study is the attempt of other academics to link culture and sustainable development in South Africa, as examined below.

#### 2.6.3.2 Du Plessis and Feris' attempt at linking culture to sustainable development in South Africa

Du Plessis and Feris<sup>407</sup> in their contribution to the debate surrounding the decision of the court in the *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*<sup>408</sup> (hereafter *Fuel Retailers* case), observed that although culture was not mentioned in the case as it was not a point of dispute, it should not be ignored in general debates and decisions dealing with sustainable development, because culture often influences social behaviour.<sup>409</sup>

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404 DEA 2004 <http://bit.ly/2sBLJg5> accessed on 8 July 2017; DAFF 2014 <http://bit.ly/2uCUgRh> accessed on 8 July 2017; DEA 2016 <http://bit.ly/2sZpHTQ> accessed on 8 July 2017.

405 DEA 2004 <http://bit.ly/2sBLJg5> accessed on 8 July 2017; DAFF 2014 <http://bit.ly/2uCUgRh> accessed on 8 July 2017; DEA 2016 <http://bit.ly/2sZpHTQ> accessed on 8 July 2017.

406 Church 2012 *De Jure* 530.

407 Du Plessis and Feris 2008 *SAJELP* 157-168.

408 2007 6 SA 4 (CC). The case is further discussed in para 2.6.3.4 and chapter 5.

409 Du Plessis and Feris 2008 *SAJELP* 165.

The authors pointed to the argument canvassed by Sachs J indicating that where environmental sustainability is threatened, then other sustainability issues must be addressed.<sup>410</sup> Sachs J approached the interpretation of sustainable development from an integration perspective rather than a silo perspective, which tends to isolate one issue of sustainability from another. Du Plessis and Feris<sup>411</sup> observed that all sustainable development interests should be embedded in one another because of South Africa's unique developmental needs, as discussed in para 2.6.2 above. The authors argue that sustainable development interests "must be considered integrally and holistically"<sup>412</sup> so that no interest is elevated above the others in terms of priority and importance. This argument is in line with the principles of environmental management in section 2(4) of the *NEMA*, which shows that environmental interests are inclusive of cultural as well as economic and social interests.

The contribution of the above-mentioned authors further elaborates on the linkage between culture and sustainable development and demonstrates that cultural issues can no longer be ignored in legal debates on sustainable development.

#### 2.6.3.3 Du Plessis and Rautenbach's attempt at linking culture to sustainable development in South Africa

Du Plessis and Rautenbach,<sup>413</sup> on the other hand, introduced some legal perspectives on the role of cultural issues in decisions directed at sustainable development in the South African context. The authors agree that the constitutionally entrenched environmental right also gives a legal claim to sustainable development,<sup>414</sup> and therefore it becomes expedient to ensure that an environment that is not detrimental to health and well-being is protected for the people. They further suggest that it is germane for public authorities to re-evaluate the importance of the role of cultural interests in sustainable development. This conclusion is anchored in the fact that South

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410 Du Plessis and Feris 2008 *SAJELP* 167.

411 Du Plessis and Feris 2008 *SAJELP* 166.

412 Du Plessis and Feris 2008 *SAJELP* 166.

413 Du Plessis and Rautenbach 2010 13(1) *PER* 26-71.

414 Du Plessis and Rautenbach 2010 13(1) *PER* 62.

Africa is culturally diverse,<sup>415</sup> coupled with the growing recognition of the need to integrate culture into sustainable development globally.

Their contribution aims to provide decision-makers and authorities with a governance benchmark within the existing cultural law framework for the effective governance of culture issues.<sup>416</sup> Therefore they suggest that cultural governance will serve as a relevant benchmark against which the consideration of culture in the sustainable development framework may be applied.<sup>417</sup> They also argue that the role of culture in sustainable development may potentially become prominent to the level that it receives autonomous attention in the sustainable development equation,<sup>418</sup> although it is contestable whether culture needs to be recognised as an independent factor for it to be of interest given that integration is identified as a core element of sustainable development in South Africa.<sup>419</sup> However, the recognition of entry roads for culture in the SDGs is, on the other hand, an active and promising step towards ensuring that culture becomes relevant in sustainable development discussions.

Flowing from the above contributions by the selected authors, there are clear indications of the conceptual understanding of the interaction between culture and sustainable development. The way culture intersects with matters of sustainable development necessitates the integration of culture issues in the framework of development plans and strategies and how they affect the communities where they are executed. Bearing in mind the individual and collective right to the enjoyment of cultural life (the right to and protection of which are constitutionally guaranteed), the cultural right extends to interaction with the environment, trade in cultural goods, and social interests. The combination of the environment, trade and social interests such as health, cumulatively contributes to the well-being of the individuals in the community.<sup>420</sup>

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415 See the discussion in para 2.4.

416 Du Plessis and Rautenbach 2010 13(1) *PER* 62.

417 Du Plessis and Rautenbach 2010 13(1) *PER* 63.

418 Du Plessis and Rautenbach 2010 13(1) *PER* 61.

419 See the discussion in para 2.6; Murombo 2008 *SALJ* 492; Feris 2008 *CCR* 236, 245. Also see Paterson's critique of *Sasol Oil (Pty) Ltd v Metcalf* 2004 5 SA 161 (W) in Paterson 2006 *SALJ* 53-62.

420 See para 2.6.

In addition, the judicial interpretation of the concept and application of sustainable development as given by the landmark case of the *Fuel Retailers*<sup>421</sup> offers some guidelines as to how cultural considerations are applicable in the pursuit of sustainable development. This case, especially the dissenting judgment of Sachs J, is discussed below.

#### 2.6.3.4 Judicial attempts to link culture to sustainable development in South Africa

Adjudicating the delicate balance between the two conflicting interests, namely: environmental protection and sustainable development, in the South African context<sup>422</sup> falls within the constitutional responsibility of the judiciary.<sup>423</sup> The *Constitution* suggests that none of the rights entrenched in the Bill of Rights is superior to the others. This implies that the continuous balancing of various interests, such as economic, environmental, social and cultural interests, is required. The interpretation clause of section 39(1) of the *Constitution* states that in interpreting the Bill of Rights, the courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and they must also consider international law. Du Plessis and Du Plessis<sup>424</sup> explain that the term “equity” as used in the *Constitution* suggests that in the broad sense fairness is necessary when interpreting the Bill of Rights. Considering that South Africa is bound by international law instruments, which are aimed at sustainability, the judiciary is obliged to take applicable rules and principles into account when interpreting any of the rights in the Bill of Rights. The object of the *Constitution* must furthermore be considered when developing the common law or customary law or when interpreting legislation.<sup>425</sup> Du Plessis and Du Plessis<sup>426</sup> argue that this rule of interpretation applies to laws regulating environmental, economic, social and cultural affairs in South Africa.

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421 2007 6 SA 4 (CC).

422 See generally *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 5 SA 124 (W); *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd* 2006 5 SA 483 (SCA). The general issue in these cases was how to strike a balance between economic development and environmental protection.

423 See generally chapter 8 of the 1996 *Constitution* and the discussion in chapter 5.

424 Du Plessis and Du Plessis “Striking the sustainability balance in South Africa” 432.

425 S 39(2) of the *Constitution*.

426 Du Plessis and Du Plessis “Striking the sustainability balance in South Africa” 433.

The Constitutional Court was approached in the *Fuel Retailers case* to give guidance on how to deal with the competing interests between environmental protection and development. The court aptly noted that:<sup>427</sup>

Development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment, and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.

The court stated that the enjoyment of other rights in the Bill of Rights is dependent on the realisation of the environmental right.<sup>428</sup> However, the dependence of the other rights in the Bill of Rights does not limit the concept of sustainable development to the confines of the environmentalist paradigm. Rather it further underscores the need for a balance between the competing interests of environmentalism and socio-economic development and indeed other considerations that contribute to the achievement of the overarching purpose of development based on the South African interpretation of development.

In this regard, existing literature promotes the idea that the central component of sustainable development is the need to integrate social, economic, environmental and indeed other ancillary interests.<sup>429</sup> Such ancillary interests extend to the cultural interests of development as suggested in paragraph 2.4 above. It is therefore plausible that public authorities should consider cultural interests in the pursuit of sustainable development.<sup>430</sup> However, Field<sup>431</sup> expresses the view that it is wrong to reduce the concept of sustainable development to the principle of integration. Field<sup>432</sup> reasons that, assuming but not conceding that an understanding of the intricate linkages between economic and social systems and the environment exists, then the basis of this understanding is the pursuit of a balance between the three systems, primarily aimed at ensuring equity. Weighing this understanding against the settled principles

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427 *Fuel Retailers case* 2007 6 SA 4 (CC) para 44.

428 *Fuel Retailers case* 2007 6 SA 4 (CC) para 102. Also see Fuo 2015/2016 *CJLG* 19.

429 Sands *Principles of International Environmental Law* 153; Tladi *Sustainable Development in International Law* 53; Feris 2008 *CCR* 247.

430 Murombo 2008 *SALJ* 492; Feris 2008 *CCR* 236.

431 Field 2006 *SALJ* 416.

432 Field 2006 *SALJ* 416-417.

of intra- and inter-generational equity, it flows logically that the principle of integration must incorporate an element of social justice. In line with Field's reasoning, Murombo<sup>433</sup> also states that the concept of integration must guide policy and decision-makers to ensure that development does not unnecessarily damage life support systems.

However, the jurisprudence firmly acknowledges the principle of integration as the central tenet of sustainable development.<sup>434</sup> More importantly, the broad definition of the environment as employed by section 1 of the *Environmental Conservation Act (ECA)*,<sup>435</sup> when read together with the court's argument in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*<sup>436</sup> (hereafter *BP* case) gives an indication of the interests that may be integrated into the pursuit of sustainable development. To this end the court argued that the broad definition of "environment" allows the inclusion of all conditions and influences that affect the life and habits of man, which includes socio-economic conditions and influences in the pursuit of sustainable development.<sup>437</sup> Since the "life and habits of man" are within the scope and understanding of culture as discussed in paragraphs 2.5, 2.6 and 2.6.1 above, it is possible to integrate issues of culture into sustainable development thinking. Therefore, ecologically sustainable development can be pursued in conjunction with justifiable economic, social and cultural development.

Furthermore, in the *Fuel Retailers*<sup>438</sup> case the court held that the concept of sustainable development provides a framework for reconciling social development, economic development and environmental protection.<sup>439</sup> The court extensively considered the application of the principle of integration within the concept of sustainable development with a view to interpreting, contextualising and applying it in South African law.<sup>440</sup> The court recognised the existing tensions inherent in balancing

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433 Murombo 2008 *SALJ* 498.

434 Also see Feris 2008 *CCR* 247.

435 73 of 1989. This Act has been repealed.

436 2004 5 SA 124 (T).

437 *BP* case para 145E.

438 *Fuel Retailers* case 2007 6 SA 4 (CC)

439 *Fuel Retailers* case 2007 6 SA 4 (CC) para 58.

440 Also see Feris 2008 *CCR* 236.

the need to protect the environment and the need for socio-economic development and argued that the: <sup>441</sup>

Nature and scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment.

Ngcobo J further argued that if the relationship and the tensions between socio-economic conditions and the environment are accepted, it follows that socio-economic conditions have a direct impact on the environment. As mentioned in paragraph 2.5.2.2, section 2 of the *NEMA* establishes relevant principles that should be considered by competent authorities in reaching sustainable development decisions which incorporate the transformative and social justice agenda of the *Constitution*.

Referring to the requirements in the *NEMA*, the court stated that the *NEMA* requires that the cumulative impact of a proposed development, in conjunction with existing developments on the environment, socio-economic conditions and cultural heritage, must be assessed.<sup>442</sup> As Feris<sup>443</sup> aptly notes, the practical and normative applications of integration were only marginally addressed by the court. The court referred to data collection and the dissemination of environmental information, environmental impact assessments, how they are conducted and the fact that economic and development policy will now have to give active attention to environmental considerations.<sup>444</sup>

Although environmental impact assessments and policy tools are helpful in the practical application of the balancing of sustainable development interests, they fail to address the *lacuna* where no environmental impact assessments have been conducted or where conducting an environmental impact assessment is not applicable.<sup>445</sup> For example, how would an environmental impact assessment alone be sufficient or useful in determining if a proposed development will erode certain plants or micro-organisms

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441 *Fuel Retailers* case 2007 6 SA 4 (CC) para 71.

442 *Fuel Retailers* case 2007 6 SA 4 (CC) paras 72 and 74.

443 Feris 2008 *CCR* 247.

444 *Fuel Retailers* case 2007 6 SA 4 (CC) para 52.

445 For example, when a proposed development activity is listed in terms of the *NEMA* and an environmental authorisation is required to be obtained. See *National Environmental Management Act: Environmental Impact Assessment Regulations* GN R543-547 GG 33306 18 June 2010.

that are crucial for the health of the community? Such an environmental impact assessment will therefore be useful only if the community is consulted and is involved in the process. Community participation becomes a useful tool especially if the knowledge of the plants and micro-organisms in that community is held in the repository of indigenous knowledge which is not documented but is passed down orally from generation to generation. Given what is discussed in paragraph 2.4.1 above about culture's link with sustainable development globally and in paragraph 2.6.1 about the nature of cultural diversity, it follows that tangible and intangible cultural aspects of the community life that may potentially be adversely affected by any proposed development must be assessed in conjunction with environmental protection and socio-economic development.

Feris<sup>446</sup> notes that the various interests of development, whether they be environmental, social, or economic, do not always demand equal consideration in decision-making. In other words, if a decision-maker, whether administrative or judicial, takes decisions within the sustainable development framework, such an official effectively chooses which interest to prioritise in terms of the nature of the development project.<sup>447</sup> Bearing in mind that the current understanding of sustainable development has to do with environmental, social and economic interests, an attempt to balance these interests might lead to decisions that are skewed in favour of one of these interests over culture issues, thereby missing an available opportunity to include the cultural interests of development.

Tladi's<sup>448</sup> nuanced approach in the application of sustainable development is instructive for introducing cultural issues into the legal system. According to Tladi,<sup>449</sup> a nuanced approach to the implementation of sustainable development is one that provides three variations of integration based on the preferred system in the event of conflict. Where the needs are either economic, environmental or social, the decision-makers decide which of the variations, whether economic growth variation, environment-centred variation, or social needs-focused variation, best serves the

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446 Feris 2008 *CCR* 251.

447 Feris 2008 *CCR* 251.

448 Tladi *Sustainable Development in International Law* 80.

449 Tladi *Sustainable Development in International Law* 82.



purpose of sustainable development. Extending the variation approach to cultural interests, one could speculate that a culture-centred variation might be one where cultural interests should be placed at the forefront of the development decision. This analysis does not suggest that while one variation takes centre stage, the other competing interests should be obliterated. However, Feris<sup>450</sup> cautions that the preferred system in any of the variations suggested by Tladi must be centred on a legitimising basis, such that whatever the decision reached, it must be grounded in law, and there should be a legal foundation for the preferred system. Such a basis may be derived from a legal or policy instrument and “may provide an indication of the preferred variation of sustainable development”.<sup>451</sup>

With regard to the *Fuel Retailers* case, the dissenting opinion of Sachs J is instructive in providing a guide on how issues of culture may be integrated into the sustainable development equation. The dissenting opinion of the learned judge provides valuable guidelines on how the “variation” approach to integration may be applied. In this case, Sach J’s legitimising base is the *NEMA*. In his opinion, the overall aim of the *NEMA* is primarily to ensure environmental protection.<sup>452</sup> Therefore, where the *NEMA* is the legitimate basis of any sustainable development decision, then the environment-centred variation of sustainable development is the priority. Sachs J further notes that concerning the application of the preamble and the principles of the *NEMA*, the sustainability of economic development interests is not “treated as an independent factor to be evaluated as a discrete element in its own terms.”<sup>453</sup> Rather, the interrelationship between economic and environmental sustainability is interrogated.<sup>454</sup> Therefore Sachs J argues to the effect that within the confines of the *NEMA*, environmental interests must be preferred and that economic or social interests become relevant only once the environment is implicated.<sup>455</sup>

How does Sachs J’s dissenting opinion give guidance on how cultural interests may be integrated within the meaning of the contemporary understanding of sustainable

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450 Feris 2008 CCR 251.

451 Feris 2008 CCR 251.

452 *Fuel Retailers* case 2007 6 SA 4 (CC) para 111.

453 Feris 2008 CCR 252.

454 *Fuel Retailers* case 2007 6 SA 4 (CC) para 113.

455 *Fuel Retailers* case 2007 6 SA 4 (CC) para 112.

development? Sachs J's approach to the interpretation of sustainable development seeks to integrate all relevant competing interests in the pursuit of sustainable development. This approach gives guidance on how to interpret legal instruments such as legislation and policy that speak to the value of culture in sustainable development. Moreover, Sachs J's approach gives the impetus for further exploration of the inclusion of cultural interests in sustainable development thinking.

Therefore, the focus of the next section is an exploration of the possibilities of integrating culture into sustainable development thinking in the South African context. The discussion centers on what the variation approach demands of law and policy in the country. It is argued that the variation approach might provide an avenue for decision-makers to accommodate culture issues in reaching decisions that serve to promote the pursuit of sustainable development. However, the question remains as to whether a legitimate basis exists for such integration in South Africa.<sup>456</sup>

## ***2.7 Implications of the variation approach for the inclusion of culture in the pursuit of sustainable development in South Africa***

Considering the rich cultural diversity of the South African society and the interlinkages between culture and sustainable development, it is evident that cultural interests permeate and cut across different aspects of the national life.<sup>457</sup> For instance, cultural interests linked to the environment, health and the economy are in line with the expanded view of development globally, which is also reflected in the South African context.<sup>458</sup> Therefore it becomes pertinent to adapt the contemporary understanding of sustainable development, which includes cultural interests, to the South African context. Certain changes are imminently necessary for law, policy and governance, and especially institutional set-up, including cooperative government, across the environmental, economic, social and cultural sectors.<sup>459</sup>

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<sup>456</sup> See Chapter 3 for a discussion of the national legal framework's accommodation of issues of culture for the pursuit of sustainable development in South Africa.

<sup>457</sup> See the discussion in para 2.3.1.

<sup>458</sup> See the discussion in para 2.4.3.

<sup>459</sup> These expected changes are investigated in detail in the remainder of this thesis.

In consideration of the above and being reminded that the concept of sustainable development is not only a constitutional objective but also a recognised tool applied in balancing competing development interests, decision-makers might be guided by the framework the sustainable development ideal provides. Therefore, to ascertain the implementation of cultural interests in the sustainable development equation it is necessary to determine the extent to which the existing law, policy and governance structures in South Africa facilitate the inclusion of culture within the framework.

The investigation of how law facilitates the inclusion of culture in the sustainable development equation involves looking at the general constitutional provisions that support the link between culture and different development interests. These constitutional provisions must also be interpreted along with specific legislation in specific thematic areas. It therefore becomes necessary to determine specific areas that interact with culture and will impact on the pursuit of sustainable development in South Africa. In this regard, direction is sought from the new global agenda with an emphasis on the articulated entry points for culture in the pursuit of sustainable development.<sup>460</sup> These entry points are employed as the point of departure for the interpretation and contextualisation of the application of cultural interests in the pursuit of sustainable development. Therefore, the applicable existing law, policy and institutional arrangements and how they facilitate the inclusion of culture is the focus of the remainder of this thesis.

In accomplishing this task, culture's interaction with the specific theme areas highlighted in paragraphs 2.6.1, 2.6.2 and 2.6.3 above and how they might be included in the pursuit of sustainable development in South Africa are summarised as follows:

- (a) Culture and the economy: In view of the relevance of cultural issues to economic growth,<sup>461</sup> where culture's contribution to the GDP of South Africa would assist in realising improved poverty and inequality levels, it is pertinent to assess the existing legislation, policy and institutional structures

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<sup>460</sup> See the discussion in para 2.4.4.2.

<sup>461</sup> See the discussion in para 2.6.1.

in relation to cultural goods and services. The aim of the assessment is to uncover the legitimate basis, if any, for prioritising cultural goods and services in the sustainable development context. Since both culture and sustainable development are constitutionally recognised, the question is, what role would culture play in enabling sustainable development that is directed at economic growth variation and how would culture reinforce the environmental and social interests? Inevitably, the existing legal landscape will have to adjust reach these goals. The envisaged adjustments to accommodate issues of culture are examined in this thesis<sup>462</sup> in terms of the trade in cultural goods and services.

(b) Cultural diversity, cultural heritage and the environment (biodiversity in particular): The link between the environment and culture is further strengthened by the legislative recognition of cultural issues in the preamble to the *NEMA* and the definition of environment in the *ECA*.<sup>463</sup> To give effect to this recognition in the light of the SDGs full recognition of cultures, cultural diversity and intercultural understanding<sup>464</sup> may require the constitutionally recognised cultural rights to be interpreted and applied within the context of sustainable development more than in the context of human rights alone. In this regard, the recognition of the cultural rights of a community in relation to proposed developments must be brought into focus by decision-makers and the government. Perhaps, in this regard, the recommendations for a cultural impact assessment and its implementation will be a potential policy innovation.

(c) Culture and health: In this regard legislation, policy and institutional arrangements governing the health sector are interrogated. To this end, questions pertaining to the well-being of people asked in the context of section 24 of the *Constitution* serve as the departure point. How might existing legislation on health facilitate the inclusion of culture within the

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462 See the discussion in chapter 3.

463 See the discussion para 2.6.2.3.

464 See paras 8 and 36 and target 4.7 as contained in the *2030 Sustainable Development Goals*.

context of the pursuit of sustainable development? Investigating the impact of development on the health of people is therefore an avenue that should facilitate the inclusion of culture in the sustainable development context. As discussed earlier,<sup>465</sup> health and culture issues find common ground. The effect of this interaction necessitates interrogation of indigenous people's traditional healing practices that support the health needs of the people in the community, for example.<sup>466</sup>

The above themes do not cover the full spectrum of culture's interaction with the other three interests of sustainable development, considering the international development agenda expressed through the SDGs. However, these themes offer insight into the areas where the framework legislation, specific legislation, policies and institutional arrangements might have to be re-considered to facilitate the inclusion of culture in the interpretation and implementation of decisions in the sustainable development context.

## ***2.8 Theoretical perspectives: a summary***

This chapter has analysed the conceptual and theoretical perspectives on development, sustainable development and culture to establish the normative foundation upon which to conduct an exploration of the extent to which and how South African national legal and institutional arrangements facilitate the inclusion of "culture" in the pursuit of sustainable development.

The chapter furthermore reviewed the pre-SDGs understanding of sustainable development and the contemporary understanding of the concept. It has been established that the concept of sustainable development is an international development goal; an ideal to which an end is not articulated in finite terms, but which nevertheless is acknowledged as a noble goal to which all nations should aspire. The

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<sup>465</sup> See the discussion in para 2.6.1.

<sup>466</sup> The interaction between culture and health is further explored in Chapter 3. See generally Donders 2015 18(2) *PER* 179-222.

concept of sustainable development was initially understood and interpreted within the context of economic, social and environmental interests exclusively.<sup>467</sup>

However, recent events on the global level have increasingly recognised the inclusion of culture in the sustainable development equation.<sup>468</sup> It is also concluded that the new international global agenda (SDGs) firmly recognises culture within the framework of sustainable development. The key areas in which culture can play a decisive role in the new global agenda include poverty eradication, sustainable environmental management, the development of sustainable cities, and social cohesion and inclusion.<sup>469</sup> It is argued that the inclusion of culture in the new global agenda is owed to the evolution of the concept of development into a multi-faceted model and is attributable to the work of UNESCO, which has consistently promoted the link between culture, development, and sustainable development.<sup>470</sup>

On a regional level, it was established that sustainable development in Africa is intrinsically tied to the natural and cultural diversity of the continent.<sup>471</sup> In the face of recent global developments, sustainable development must be given full attention within the context of the new global agenda.<sup>472</sup> In giving force to the potential of culture in this regard, the active engagement of law, policy and institutional arrangements in the pursuit of sustainable development becomes an essential focus for states in Africa.

Although there are contested meanings of the term “culture”, scholars and academics commenting on the significance of the concept in development discourse share the view that culture is relevant to overall human development and contributes to economic growth.<sup>473</sup> In the context of sustainable development culture is therefore conceptualised as representing the sum of the intangible and tangible aspects of

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467 See the discussion in paras 2.2 and 2.3.

468 See the discussion in paras 2.3.1 and 2.3.2.

469 UNESCO (Date Unknown) <http://en.unesco.org/sdgs/clt> accessed on 7 May 2016; UNESCO (Date Unknown) <http://en.unesco.org/themes/culture-sustainable-development> accessed on 7 May 2016.

470 See the discussion in 2.2.2, 2.3 and 2.4.

471 See the discussion in para 2.5.

472 See the discussion in 2.4.2.

473 See the discussion in para 2.4.2.

community life which are relevant and favourable to the development of the people and their communities. According to the existing literature, culture is relevant on the one hand in the way it intersects with the already established interests of sustainable development.<sup>474</sup> On the other hand, culture features as a potentially autonomous interest of sustainable development which should be considered in reaching decisions pertaining to sustainable development. Therefore, the typology adopted by this thesis in articulating the inclusion of culture in sustainable development is a hybrid of both approaches to culture for and in sustainable development. This typology is anchored mainly in the normative aims of sustainable development which speak to equity, as expressed in the principles of intergenerational and intra-generational equity. Such equity seeks the well-being, improved living conditions and overall human development of people, both now and in the future.

This thesis therefore interrogates the inclusion of culture in matters of sustainable development under the following themes:

- (a) Culture in environmental interests, with emphasis on biodiversity and cultural heritage;<sup>475</sup>
- (b) Culture in economic interests, with emphasis on trade in cultural goods and services;<sup>476</sup> and
- (c) Culture in social interests, with emphasis on health.<sup>477</sup>

The contemporary understanding of sustainable development that requires the integration of cultural interests in the pursuit of sustainable development is the basis upon which this thesis seeks to analyse the legal implication of the SDGs for the local implementation of sustainable development in the context of South Africa as a developing country.

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<sup>474</sup> See the discussion in 2.4.2.

<sup>475</sup> See the discussion in Chapter 3.

<sup>476</sup> See the discussion in Chapter 3.

<sup>477</sup> See the discussion in Chapter 3.

Although the South African *Constitution* recommends ecologically sustainable development in section 24(b), it is argued that sustainable development is not automatically an environmental concept.<sup>478</sup> It is further established that development is broadly framed to include not only the use and management of land and the natural resources it provides for planning and development, but also socio-economic, financial, cultural, political and ancillary factors that would aid the transformation and reconstruction of society. So construed, development, and in turn sustainable development, have the potential to contribute to the attainment of the transformative agenda of the *Constitution*.

This chapter has also established that culture is recognised in the *Constitution* and entrenched in the Bill of Rights, giving it the status of a justiciable right. The different perspectives in which culture is construed in the *Constitution* pave the way for the appreciation of the inclusion of culture in the sustainable development framework.

Therefore, to give force to the understanding of development in the South African context, and bearing in mind the rich cultural diversity of the country, the recognition of culture in the sustainable development equation is relevant. It is established that law and policy guide the interpretation and application of the concept of sustainable development, and the implementation is governed by institutional and government structures. The inclusion of culture in the sustainable development framework must therefore be guided by law, policy and institutional government arrangements. The interrogation of the available legislation in relation to the adopted typology of cultural interests is the focus of the next chapter. The interrogation aims at primarily assessing and analysing how the existing legislative framework facilitates the inclusion of culture in the sustainable development equation.

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<sup>478</sup> See the discussion in para 2.3.2.



## CHAPTER 3

### NATIONAL LEGAL FRAMEWORK INCLUSIVE OF CULTURE FOR SUSTAINABLE DEVELOPMENT IN SOUTH AFRICA

#### ***3.1 Introduction***

This chapter analyses relevant constitutional provisions and national legislation that potentially facilitate culture's interaction with matters of sustainable development as featured in the typology adopted in Chapter 2 of this thesis.<sup>1</sup> Chapter 2 established that law and policy that guide the interpretation and application of the concept of sustainable development in South Africa.

This chapter identifies and analyses national law and policy instruments in certain areas of the environmental, economic and social interests of sustainable development that are identified as relevant to the promotion of cultural interests. The identified areas include cultural diversity, cultural heritage, biological diversity,<sup>2</sup> trade<sup>3</sup> and health.<sup>4</sup> They serve as themes interacting with culture and are thus valuable as instruments to promote the cultural interest of sustainable development.

The domestic framework for cultural heritage is made up of legislation and policy documents and is linked to the concept of sustainable development through the applicable legislation. Cultural heritage as understood and applied from a law and policy perspective includes elements of the environment<sup>5</sup> in the South African context and is further explored in this chapter. It is noteworthy that the rich heritage of the country contributes to cultural identity and promotes it while the biological diversity of the country makes it the third most biologically diverse country in the world, hosting a wide range of species of both flora and fauna.<sup>6</sup> The rich and spectacular array of ecosystems and landscape ranges from deserts to subtropical forests, and to an

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1 See the discussion in paras 2.6 and 2.7.

2 See the discussion in para 3.1.

3 See the discussion in para 3.2.

4 See the discussion in para 3.3.

5 Glazewski "The nature and scope of Environmental law" 1-10.

6 Wynberg 2002 *SAJS* 233; Kotzé and Du Plessis 2006 *QUTLJ* 30.

abundant marine and coastal system.<sup>7</sup> It is recognised that biodiverse resources in the form of flora and fauna make up the basis of the livelihoods of millions of South Africans. This in turn contributes significantly to the country's economic growth.<sup>8</sup>

As noted by Reyers and McGeoch,<sup>9</sup> South Africa is experiencing rapid and extensive biodiversity loss, which is being triggered primarily by development-related habitat conversion or transformation such as logging, land clearance and mining. These activities also have a profound effect on culturally diverse groups of indigenous people whose livelihoods depend on the environment. In this sense, there is a nexus between biological diversity and cultural heritage. The maintenance of biodiversity with the aid of cultural practices which are often expressed through cultural heritage can help preserve cultural diversity.<sup>10</sup> The reverse is also true. Hinged on the fact that indigenous people are often the custodians and stewards of biological diversity, the management of cultural heritage is an important factor in the conservation of biological diversity.<sup>11</sup>

Furthermore, trade in cultural goods and services contributes to economic growth and development. Apart from creating jobs and increasing economic turnover financially for the country, the export of cultural goods contributes to the dynamism of local economies.<sup>12</sup> In this context, the creative industry and the creative economy in South African come into focus.<sup>13</sup> In relation to the link between culture and the social interest of sustainable development, the health sector and the legislative and policy framework guiding it are explored in the furtherance of the objectives of this chapter.

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7 Kotzé and Du Plessis 2006 *QUTLJ*30; Wynberg 2002 *SAJS*233; Cocks, Dold and Vetter 2012 *SAJS* 1-8.

8 Cocks 2006 34(2) *Human Ecology* 190; Shackleton *et al* 2007 *Forest Policy and Economics* 558-577; see also para 1.2 of the *White Paper on Conservation and Sustainable use of South Africa's Biological Diversity* GN 1095 in GG 18163 of 25 July 1997.

9 Reyers and McGeoch 2007 *SAJS* 295.

10 Davis 1998 <http://bit.ly/1w9gq6s> accessed on 8 February 2017.

11 Davis 1998 <http://bit.ly/1w9gq6s> accessed on 8 February 2017; Horton 1995 *J Envtl Law and Litigation* 23-25.

12 UNESCO *The Globalisation of Cultural Trade* 12.

13 See the discussion in para 3.3.

The chapter is divided into three parts. Each part commences with a discussion of the importance and relevance of the various themes identified and their potential contribution to the promotion of culturally sensitive sustainable development.

The existing legislative and policy framework related to the identified themes found in the environmental, social and economic interests of sustainable development are traced in a bid to determine the extent to which they accommodate cultural interests. In addition, relevant legislation and policy which recognises culture as essential for sustainable development is referred to where applicable. In terms of the applicable law, international law and international instruments<sup>14</sup> that have influenced the domestic law and policy landscape will be discussed to draw on principles and matters of interpretation.

### ***3.2 Culture and the environment***

The approach adopted in this thesis is to regard the environment and environmental law as interconnected with issues of cultural heritage and biodiversity. This approach is premised on the assumption that cultural heritage and biodiversity fall under the category of legal issues associated with conservation and the exploitation of natural resources.<sup>15</sup> By implication cultural heritage should be afforded the same level of protection afforded to the components of the environment (such as biodiversity) in terms of law.<sup>16</sup>

One national law that supports this proposition is the *NEMA*. The Act defines the environment as consisting amongst other things of "micro-organisms, plant and animal life" as well as "the physical, chemical, aesthetic, and cultural properties and conditions that influence human health and well-being".<sup>17</sup> According to the *NEMA*, historical and cultural resources as well as micro-organisms, plant and animal life (which make up

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14 The relevance of international law and international instruments in South Africa is discussed in para 1.3.

15 Glazewski "The nature and scope of Environmental law" 1-11.

16 See the discussion in paras 2.6.2.2 and 2.6.3.

17 The *NEMA* comprehensively defines the environment in s 1 as meaning "the surroundings within which humans exist and that are made up of (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being."

biodiversity)<sup>18</sup> all fall within the scope of the environment. The *NEMA* establishes that biodiversity resources, as well as cultural heritage and resources accruing therefrom, also make up a portion of the environment. Furthermore, there is increasing consensus in the literature about the inextricable connection between biodiversity and human or cultural diversity.<sup>19</sup> This link is *inter alia* premised on the idea that the relationship between people and their environment is mediated by culture.<sup>20</sup>

As earlier indicated, section 24(a) of the *Constitution*, entrenches a substantive environmental right<sup>21</sup> which aims to ensure the protection and enjoyment of the environment and the health, quality of life and overall well-being of the present and future generations.<sup>22</sup> This constitutional guarantee denotes an anthropocentric<sup>23</sup> interpretation of the interests that people hold in the environment. Such an interpretation requires that people and their needs should be placed at the forefront of concerns in the realisation of ecologically sustainable development. People's needs are recognised as including their physical, psychological, developmental, cultural and social interests, which must be served equitably.<sup>24</sup>

The scope of constitutional protection provided by section 24(b) of the *Constitution*<sup>25</sup> extends to biodiversity and cultural heritage as components of the environment. The

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18 See para 3.2.1 for an acceptable definition of biodiversity.

19 Cocks 2006 *Human Ecology* 191.

20 Laird "Forests, Culture and Conservation" 345-396; Posey "Cultural and Spiritual Values of Biodiversity" 1-19; Berkes, Colding and Folk 2000 *Ecological Applications* 1251-1268.

21 See para 2.6.2.2.

22 Kotzé and Du Plessis 2010 *JCI* 158.

23 This means that the constitutional guarantee of the right to a healthy environment confers this right to people and to people only. Scholarly arguments opposing the anthropocentric interpretation of environmental rights exist. One such argument is put forward by Hayward, who expresses the opinion that prioritising human interests in environmental law will potentially jeopardise the interests of other species. Supporting this argument further is the view proffered by Bruckerhoff, that incorporating biodiversity protection into constitutional environmental rights will guarantee a truly healthy environment for present and future generations. Bruckerhoff further urges courts to consider the importance of biodiversity protection and its relation to human rights in the broad interpretation of environmental rights. See Bruckerhoff 2002-2008 *Texas Law Review* 615-646; Hayward 1997 *Environmental Values* 49-63. This thesis does not concern itself with the different arguments but rather treats environmental rights as relevant to the overall well-being of people.

24 S 2(2) of the *NEMA*.

25 S 24(b) of the *Constitution* specifically recognises biodiversity as part of the natural environment, urging states to afford it protection through reasonable legislative and other measures to ensure its conservation.

implementation of section 24(b)(iii)<sup>26</sup> should give effect to the right in section 24(a). It might be argued that biodiversity conservation should not only promote conservation and the sustainable use of natural resources, but also serve as a tool that promotes overall ecologically sustainable development, while promoting justiciable economic and social development.

The state has made considerable efforts to afford substantive form and meaning to section 24(b)(iii) by the enactment of the framework legislation on the environment (the *NEMA*), and sector-specific laws and policy that recognise the conservation of biodiversity and the preservation of cultural heritage.<sup>27</sup> The further reading of section 24(a) with section 7(2) of the *Constitution*<sup>28</sup> indicates that the state has a duty to take positive action towards its fulfilment.<sup>29</sup>

It is useful in this regard to consider the existing nexus between culture and biodiversity in exploring the relevant interactions.

### *3.2.1 The culture and biodiversity nexus*

Biodiversity is generally defined to include flora and fauna: the diverse variety of living organisms and the ecological communities they dwell in.<sup>30</sup> The *Convention on Biological Diversity (CBD)* 1992 defines biological resources to include genetic resources, organisms and any other biotic component of the ecosystem which is valuable in fact or potentially valuable to humanity.<sup>31</sup> This definition emphasises that these resources and where they are situated are thoroughly relevant to human development. This is suggestive of a symbiotic relationship between the ecosystem, consisting of terrestrial, marine and other aquatic ecosystems, the ecological complexes of which they are part, and people. People are dependent on the diversity of species and the ecosystem, and the resilience of biodiversity is in turn reliant on

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26 See para 2.6.2.2.

27 Two specific pieces of legislation in this regard are the *National Environmental Management: Biodiversity Act* 10 of 2004 (hereafter *NEMBA*) and the *NHRA*.

28 S 7(2) of the *Constitution* provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights."

29 S 8(1) of the *Constitution* makes the provisions of the Bill of Rights binding on the legislature, the executive, the judiciary and all organs of state.

30 Sands *Principles of International Environmental Law* 499.

31 A 2 of the *CBD*.

human activities, such as sound cultural activities, practices as well as indigenous knowledge.<sup>32</sup> Thus, the need to ensure the sustainable utilisation of biodiversity for the present and future generations through conservation.

Although the term “conservation” does not have a universally acceptable definition, it may simply be described as the process of protecting, preserving and restoring the variability among all living organisms, which extends to the maintenance of the present avenues for human development and the future options for the same.<sup>33</sup> Studies have shown that governments have traditionally pursued policies that alienate conservation from people,<sup>34</sup> on the rationale that exclusion leads to the protection of the resources situated within these areas. It is noted that the modern concept of conservation stresses the need for a people-centred management approach,<sup>35</sup> as it has been observed that conservation policies that regard local communities as the adversaries of conservation and deny them access to conservation-protected areas are unsustainable.<sup>36</sup> It is therefore imperative that conservation policies do not treat local communities as a threat to conservation. Their active participation should instead be encouraged. One way of doing this is by the recognition of the input of intangible aspects of culture (such as indigenous knowledge and certain cultural practices) in the furtherance of conservation.<sup>37</sup>

Davis<sup>38</sup> argues that indigenous people and their knowledge systems are the *prima facie* custodians of and stewards of biological diversity. As such, the preservation of cultural diversity and indigenous knowledge is an essential factor in the conservation of biodiversity. Acknowledging the influence of culture, conservation creates an in-road into further discussions on the interaction between biological diversity and culture in the pursuit of sustainable development.

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32 A 2 of the *CBD*.

33 Secretariat of the Convention on Biological Diversity and Netherlands Commission for Environmental Assessment 2006 <http://bit.ly/2tbVm6m>.

34 Kiss 1990 <http://bit.ly/2tB8c0V> 5.

35 Paterson 2007 *SAPL* 6.

36 Summers 1999 *Acta Juridica* 189; Paterson 2007 *SAPL* 6.

37 Gadgil, Berkes and Folke 1993 *Biodiversity: Ecology, Economics, Policy* 151-156.

38 Davis 1998 <http://bit.ly/1w9gq6s> accessed on 8 February 2017.

According to Cocks, Dold and Vetter,<sup>39</sup> biodiversity conservation is not just about the application of the appropriate conservation technologies and management processes. Rather, it is a process that is inextricably bound up with people's values and views on nature. This is because the traditional values of indigenous and local communities are informed by their culture. The link between biodiversity and culture hinges on the argument that cultural diversity can sustain a wide range of uses and the conservation of natural resources.<sup>40</sup> An example is the recognition and use of certain aspects of South Africa's rich biodiversity<sup>41</sup> by communities. One such is the use of forest products for cultural and traditional reasons, for example, the use of forest products as medicinal plants for cultural purposes as opposed to conventional medicine.<sup>42</sup>

It is considered that these biodiverse resources form the basis of the livelihoods of millions of South Africans and contribute significantly to the country's economic growth.<sup>43</sup> As alluded to above, scholars have also identified the core cultural values of certain medicinal plants. Cocks and Møller's research shows that an estimated 30 per cent of the total value of medicinal plants in South Africa could be ascribed to cultural uses.<sup>44</sup> Cocks and Wiersum further argue that other biodiversity resources beyond medicinal plants include woodpiles and certain fuelwood species which are used for specific rituals and cultural ceremonies.<sup>45</sup> They indicate that over half the annual direct-use value harvested by rural households in communities in South Africa was aimed at cultural use as opposed to utilitarian use.<sup>46</sup>

With regard to cultural heritage, the *Constitution's* recognition and application of culture<sup>47</sup> encompasses the way of life of communities as it interacts with their socio-economic living conditions, which deserves to be protected, preserved and taken into consideration in reaching development decisions. In defining cultural heritage, Kotzé

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39 Cocks, Dold, and Vetter 2012 *SAJS* 1.

40 Posey "Cultural and spiritual values of biodiversity" 1-19.

41 Wynberg 2002 *SAJS* 233; Kotzé and Du Plessis 2006 *QUTLJ* 30.

42 Shackleton *et al* 2007 *Forest Policy and Economics* 571.

43 Cocks 2006 *Human Ecology* 190; Shackleton, *et al* 2007 *Forest Policy and Economics* 558-577; see also para 1.2 of the *White Paper on Conservation and Sustainable use of South Africa's Biological Diversity* GN 1095 in GG 18163 of 25 July 1997.

44 Cocks and Møller 2002 *Social Science and Medicine* 387-397.

45 Cocks and Wiersum 2003 *Forest, Trees and Livelihoods* 39- 58.

46 Cocks and Wiersum 2003 *Forest, Trees and Livelihoods* 39- 58.

47 See the discussion in para 2.6.1.

and Janse Van Rensburg <sup>48</sup> state that it is an all-determining concept which includes texts, images, talk, codes of behaviour, narrative structures, law and legal science, which is formed within an ethnical context to ensure survival, adaption and development. The international community acknowledges that there is a need to conserve cultural heritage for the value it contributes to development.<sup>49</sup> One such value is the contribution of cultural practices in biodiversity conservation.<sup>50</sup>

For instance, in many parts of the world, natural features and biodiverse species are protected by the use of cultural practices and beliefs such as myths, superstitions, rituals, and religious taboos which are considered sacred by members of the community.<sup>51</sup> For illustration purposes, scientific research shows that myth and superstition have played a significant role in preserving biodiversity in the traditional Vhavenda community in South Africa.<sup>52</sup> One such myth is the belief among this community that a person collecting *Millettia stuhlmanni*<sup>53</sup> (*Muangaila*)<sup>54</sup> must be naked and should do so in the darkness. The belief prevented people from harvesting the plant effectively and has played an important role in its protection and preservation.<sup>55</sup> Such a nexus between culture and biodiversity is valuable in promoting conservation practices, which in turn promote sustainable development.

Flowing from the above, the existence of culture and the biodiversity nexus in South Africa's national law in the promotion of a culture sensitive sustainable development is further investigated. However, before delving into the core legislative analysis, it

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48 See Kotzé and Janse Van Rensburg 2003 *QUTLJ* 130.

49 See the discussion in para 2.4.

50 Simelane 2009 *Africa Insight* 84-92.

51 For example, the native American Menominee tribes have a spiritual relationship with their forest, which has made it possible for them to hold on to 100 hectares of their native territory, most of which is still forested and contains the only significant concentration of old-growth tree stands in the mostly deforested region of the mid-Western states in the United States of America. See Groenfeldt 2003 *Futures* 927.

52 Mutshinyalo and Siebert 2010 *Indilinga: African Journal of Indigenous Knowledge Systems* 151-152.

53 *Millettia stuhlmannii* is a well-known timber tree internationally exported for woodwork. Only one subpopulation of this species exists in South Africa within an area of approximately 300 hectares of communal grazing land in Ha-Makhuvha Mountains in the Vhavenda community in Limpopo Province. Mutshinyalo 2011 <http://bit.ly/2ITM8tu> accessed on 8 February 2017.

54 The traditional name of the timber tree. See Mutshinyalo 2011 <http://bit.ly/2ITM8tu> accessed on 8 February 2017.

55 Mutshinyalo and Siebert 2010 *Indilinga: African Journal of Indigenous Knowledge Systems* 151-152.



must be noted that international instruments wield much influence in the development of South African law in terms of cultural heritage and biodiversity. To this end, relevant international instruments relating to cultural heritage and biodiversity are briefly reviewed below.

### *3.2.2 An overview of international instruments relevant to culture and biodiversity*

Several attempts have been made at the international level to protect, conserve and manage cultural heritage and biodiversity in a general sense not aimed specifically at promoting sustainable development.

Although the list is not exhaustive, it may be said that the international conventions that promote the need to protect cultural heritage (given in chronological order) include: the *Convention for the Protection of Cultural Property in the event of Armed Conflict* 1954<sup>56</sup> and its First Protocol in 1954 (also known as the *Hague Convention* 1954 and referred to as such hereafter); the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970<sup>57</sup> (hereafter referred to as the UNESCO *Convention* 1970); the

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56 The Convention is followed by two protocols. The first Protocol to the Convention was published in 1954 and the second protocol in 1999. Although South Africa acceded to *The Hague Convention* on 18 December 2003, it is not a signatory to any of the subsequent protocols. This convention was agreed on in the wake of the vast destruction of the European cultural heritage during the Second World War. Therefore, the Convention's sole aim is the protection of cultural property. Per a 2 of *The Hague Convention* 1954, the protection of cultural property "shall comprise the safeguarding of and respect for" cultural heritage. The Convention is essentially focused on the protection of cultural heritage during an armed conflict. See generally Forrest *International Law and the Protection of Cultural Heritage* 78-79. The protection regime under the Convention covers immovables and movables, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of all kinds. See a 1 of *The Hague Convention* 1954.

57 South Africa ratified the Convention on 18 December 2003. This Convention focuses on preventing the illicit trafficking of cultural property during times of peace, as opposed to the *Hague Convention* 1954, which focuses on times of war. The Convention provides measures preventing the import of and trade in stolen artefacts by creating restitution provisions, inventories, and export certifications, monitoring trade, promoting scientific and technical institutions, promulgating rules of ethics for those who deal with cultural artefacts, imposing penal or administrative sanctions, and creating a general international cooperation framework between States party to the Convention. See generally Veres 2014 *Santa Clara Journal of International Law* 97.

*World Heritage Convention*,<sup>58</sup> the *UNIDROIT*<sup>59</sup> *Convention* 1995, which is regarded as the private law companion of the *UNESCO Convention* 1970;<sup>60</sup> the Second Protocol to the *Hague Convention* 1954 in 1999;<sup>61</sup> the *UNESCO Convention Concerning the Protection of Underwater Cultural Heritage* 2001;<sup>62</sup> the *UNESCO Convention for the Safeguarding of Intangible Cultural Heritage* 2003<sup>63</sup> (hereafter the *ICH* 2003); and the 2005 *Cultural Diversity Convention*.<sup>64</sup> The international protection, conservation and management of biodiversity is represented mainly by the *CBD*,<sup>65</sup> which is one of five

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58 South Africa ratified the Convention on 10 July 1997. This Convention is a result of three international initiatives. The first is the UNESCO initiated treaty entitled "International Protection of Monuments, Groups of Buildings and Sites of Universal Value" in 1970. The second is a draft treaty by the International Union of the Conservation of Nature (IUCN) on the conservation of the world's natural heritage – "Convention for the Conservation of the World's Heritage." The two treaties were then considered by a working group established in 1968 by the UN Conference on the Human Environment which is the third initiative. See Forrest *International Law and the Protection of Cultural Heritage* 227.

59 UNIDROIT is the International Institute for the Unification of Private Law. The Institute is an independent intergovernmental organisation headquartered in Rome. The purpose of the Institute is to study needs and methods for modernising, harmonising and co-ordinating private and commercial law as between states and groups of states and to formulate uniform law instruments, principles and rules to achieve those objectives. UNIDROIT is established by the UNIDROIT Statute. Membership of UNIDROIT is achieved solely by states' acceding to the UNIDROIT Statute. South Africa acceded to the Statute on 27 April 1971 and has since been a member. See UNIDROIT 18 May 2016 <https://unidroit.org/about-unidroit/overview> accessed on 20 June 2017.

60 Lostal 2013 *Nordic Journal of International Law* 398.

61 South Africa is not a signatory to this Protocol.

62 South Africa is yet to ratify this Convention. The Convention sets out basic principles for the protection of underwater cultural heritage. It provides a detailed state cooperation system and provides widely recognised practical rules for the treatment and research of underwater cultural heritage.

63 The *ICH* 2003 is the outcome of the recognition of the need to raise awareness about cultural manifestations and expressions that previously had no legal or programmatic framework to protect them. The *ICH* 2003 considers cultural heritage to be "a mainspring of cultural diversity and a guarantee of sustainable development" deeply interrelated with "tangible cultural and natural heritage" and providing groups and communities "with a sense of identity and continuity, thereby promoting respect for cultural diversity and human creativity". See the preamble of the *ICH* 2003; Lenzerini "The 1972 World Heritage Convention and the Convention on the Diversity of Cultural Expressions" 130. A 2 of the *ICH* 2001 defines intangible heritage as "oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship knowledge and techniques." It also extends to the instruments, goods, objects of art and cultural spaces inherent in intangible cultural heritage. See generally UNESCO 2016 *the Convention for the Safeguarding of Intangible Cultural Heritage* accessible at UNESCO 2016 <http://bit.ly/2m8TI3J> accessed on 28 January 2016.

64 South Africa ratified the Convention on 21 December 2006. In the words of Lenzerini, "The Convention on the Diversity of Cultural Expressions may be plainly considered as representing the pinnacle of the evolution of the international community's perception concerning the safeguarding of cultural heritage and culture" See Lenzerini "The 1972 World Heritage Convention and the Convention on the Diversity of Cultural Expressions" 128.

65 See the discussion in para 3.1.1.

international conventions<sup>66</sup> that have contributed to the expansion of the International Environmental Law (IEL) framework on biodiversity in South Africa. Owing to the recognition of international law in the South African legal system, the provisions of the *CBD* and other relevant international agreements to which the state is party have greatly influenced the domestic legal framework of biodiversity conservation and preservation.

The recognition of the culture-biodiversity nexus is reflected in international treaties and documents. The *CBD* specifically recognises the role and importance of traditional values of indigenous and local communities.<sup>67</sup> To this end, article 8(j) of the *CBD* requires that contracting states to the Convention must, subject to their national legislation:

Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

Thus, the *CBD* recognises the link between biodiversity conservation and cultural heritage through the acknowledgement of the value of indigenous and traditional lifestyles that are relevant in the promotion of the sustainable use of biological diversity.

It is noteworthy that not all the cultural heritage conventions have been ratified by South Africa, yet their principles have profoundly influenced the domestic legislative framework of the management, protection and conservation of cultural heritage and even of biodiversity.<sup>68</sup> For example, cultural assets are deemed to be national

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66 The other four are: (1) The 1971 *Convention on Wetlands of International Importance*, the Convention is also known as the *Ramsar Convention*. It came into force in 1975. The Convention entered into force in South Africa on 21 December 1975. (2) The 1972 *Convention concerning the Protection of the World Cultural and Natural Heritage* was signed and ratified by South Africa on 10 July 1997. (3) The 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). It entered into force in 1975. South Africa signed and ratified the Convention on 5 July 1975 and it entered into force in the same year in South Africa. (4) The 1979 *Convention on the Conservation of Migratory Species of Wild Animals* (CMS) entered into force in 1983. South Africa has been a party to this Convention since 1991.

67 Cocks 2006 *Human Ecology* 188.

68 For example, the *World Heritage Convention* 1972.

property.<sup>69</sup> Thus, the *Hague Convention* 1954, the *UNESCO Convention* 1970, the Second Protocol to the *Hague Convention* 1954, and the *Convention Concerning the Protection of Underwater Cultural Heritage* 2001 protect cultural heritage for its substantive value.

The *World Heritage Convention* is equipped with the momentum to drive an international scheme of protection for tangible and immovable manifestations of cultural and natural heritage of outstanding universal value. This Convention establishes two schemes and patterns of protection at national and international level. Indeed, the scope of protection offered by the Convention to cultural<sup>70</sup> and natural heritage,<sup>71</sup> has influenced the domestic legislative landscape for the protection of cultural heritage for future generations.

In ratifying the *World Heritage Convention* and indeed the other conventions as identified above, South Africa assented to there being a moral and legal basis for the domestic establishment of protection, management and conservation measures. The *World Heritage Convention* places the duty on state parties to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage as defined in the articles 1 and 2 of the Convention. The Convention further gives state parties a wide discretion in article

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69 See the reasoning of Lenzerini "The 1972 World Heritage Convention and the Convention on the Diversity of Cultural Expressions" 128-129.

70 A 1 of the *World Heritage Convention* defines cultural heritage as "architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view."

71 A 2 of the *World Heritage Convention* defines natural heritage as "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty".

3<sup>72</sup> to identify and delineate the different properties situated on its territory mentioned in articles 1 and 2. Article 3 could be interpreted by the South African legislature to include items of national cultural significance worth protecting, even though it may not be of universal value, because it is of value to the people in the country.<sup>73</sup> Article 5<sup>74</sup> supports this idea by providing that states have a responsibility to take active and effective measures to protect, conserve and present their respective cultural and natural heritage, for instance by adopting policy measures, setting up territories, conducting research and taking appropriate measures.

The Minister of Environmental Affairs is permitted to introduce legislation or regulations that may be necessary to give effect to international instruments in the environmental context.<sup>75</sup> Noting that cultural heritage and the environment are inextricably linked, the enactment into South African law of the *World Heritage Convention* by the *WHCA*<sup>76</sup> is an important step towards the realisation of the protection of cultural heritage for the present and future generations. The *WHCA* is primarily concerned with the domestic conservation of cultural heritage and natural

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72 A 3 of the *World Heritage Convention* provides that “[it] is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in As 1 and 2 above.”

73 There is currently no provision in the *World Heritage Convention Act* 49 of 1999 (hereafter referred to as the *WHCA*) expressly allowing the national, provincial or local authorities the powers to do this. The Act forms a part of the legal framework for cultural heritage analysed further in this chapter. The *World Heritage Convention* was ratified by South Africa in 1997 to provide for the possibility of the domestic establishment of the protection measures offered by an international environmental instrument. Kotzé and Janse Van Rensburg 2003 *QUTLJ* 128.

74 A 5 of the *World Heritage Convention* provides that “to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this *Convention* shall endeavour, in so far as possible, and as appropriate for each country: (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions; (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage; (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.”

75 S 25(3) of the *NEMA*.

76 49 of 1999.

heritage on the international level, and as such the Act establishes a legal framework for the management and development of World Heritage sites in South Africa.

The next section of this discussion focuses on an analysis of the existing legislative and policy framework protecting, preserving and managing cultural and environmental interests. Following thereon is an analysis of the existing national law and policy regime protecting and regulating cultural heritage and biodiversity, while recognising its interaction the culture-environment nexus for the promotion of sustainable development.

### *3.2.3 Cultural heritage law and policy framework for sustainable development*

The plethora of national legislation and policies accommodating issues of cultural heritage includes the culture-specific and non-culture-specific.<sup>77</sup> Therefore, the discussion of the legal framework of cultural heritage in South Africa is not focused on the provisions of the culture-specific alone. Rather, the approach adopted is to identify areas of both culture-specific and non-culture-specific legislation and policies that recognise and accommodate the protection, conservation and management of cultural heritage resources in a manner that promotes sustainable development. This thesis argues that in the furtherance of sustainable development cultural heritage resources must be protected, preserved and managed for the benefit of the present and future generations. Such protection, preservation, and management must also take into consideration the connection between cultural heritage and other interests of sustainable development.

#### **3.2.3.1 Legislative framework for sustainable development: Cultural heritage**

The primary legislation providing for the protection, preservation, conservation and management of cultural heritage resources is the *NHRA*. The *WHCA* is also instructive with regards to the identification, management and nomination of World Heritage Sites. The primary aim of the *WHCA* is the conservation of cultural heritage and natural heritage found on the international level. This does not in any way limit the influence

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<sup>77</sup> This thesis focuses on cultural interests on a national level. However, references are made to provincial legislation and local government laws where applicable.

of the *WHCA* in the cultural heritage legislative framework in South Africa. Rather the *WHCA* functions alongside the *NHRA* as an instrument to protect cultural heritage.

In South Africa, cultural heritage is acknowledged as broadly consisting of tangible and intangible cultural heritage.<sup>78</sup> According to the *NHRA*, tangible heritage refers to objects and places with a cultural value.<sup>79</sup> They are listed as including townscapes, landscapes, geological sites, and natural features of cultural significance, archaeological and palaeontological sites, various graves, sites related to the history of slavery, and various kinds of objects.<sup>80</sup> In a general sense, such tangible cultural heritage contributes to peoples' sense of place.<sup>81</sup>

Intangible heritage, on the other hand, is often referred to as living heritage. Section 2(iii) of the *NHCA* and the *National Policy on South African Living Heritage*<sup>82</sup> in its definitional paragraph refer to intangible cultural heritage as living heritage which, according to the *NHRA*, includes cultural tradition, oral history, performance, rituals, modern memory, indigenous knowledge systems, skills and techniques, and involves the adoption of a holistic approach to the environment, society and social relationships.<sup>83</sup> The definition of living heritage according to the *National Policy on South African Living Heritage* 2009 is comprehensive and relevant within the contemporary understanding of sustainable development that seeks to integrate diverse aspects of culture and human development. The definition of living heritage is that it consists of:<sup>84</sup>

Cultural expressions and practices that form a body of knowledge and provide for continuity, dynamism, and meaning of social life to generations of people as individuals, social groups, and communities. Living heritage allows for identity and a sense of belonging for people as well as an accumulation of intellectual capital for current and future generations in the context of mutual respect for human, social, and cultural rights.

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78 See paras 2.4.2 and 2.6.1.2.

79 S 2 of the *NHRA*.

80 S 2 of the *NHRA*.

81 Kusel 2001 *Sustainable Forest* 359; Wiersum, Singhal and Benneker 2004 *Forests, Trees, and Livelihoods* 281-293.

82 The March 2009 *First Draft of the National Policy on South African Living Heritage*.

83 S 2(xxi)(a)-(h) of the *NHRA*.

84 Definitional para 1 of the *National Policy on South African Living Heritage*.

This definition accommodates the use of cultural practices as a body of knowledge for the conservation of biodiversity, for instance. People's sense of identity and of belonging involves them in wanting to protect and preserve cultural landscape and other tangible aspects of cultural heritage. In line with this definition, the *NHRA* promotes the relevance of safeguarding living heritage with a deliberate and specific reference to the preservation and the conservation of intangible aspects of inherited culture.<sup>85</sup> The *NHRA* refers to tangible and intangible cultural heritage as forming parts of the national estate which are of special value for the present community and for future generations.<sup>86</sup> To determine what may or should constitute cultural significance, the *NHRA* gives guidelines to identifying places or objects of cultural significance.<sup>87</sup>

There is consensus in both international<sup>88</sup> and national<sup>89</sup> legal instruments that cultural heritage is worthy of preservation for its significance to the present and future generations. These legal instruments also emphasise the need to nurture and conserve heritage resources so as to bequeath them to future generations.<sup>90</sup> The *NHRA* specifies what constitutes "cultural significance". Section 2(vi) of the *NHRA* states that "cultural significance" refers to aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance. Furthermore, the Act identifies that a place or object is deemed to be of cultural significance or of special value because of its importance to the community;<sup>91</sup> that it has the potential to promote information that allows a rich and comprehensive understanding of South Africa's natural or cultural heritage;<sup>92</sup> that it is relevant to the country's natural or cultural history;<sup>93</sup> that it possesses rare aspects of the world's resources;<sup>94</sup> or that it has strong affiliations or special associations with a particular cultural group for social, cultural or spiritual reasons.<sup>95</sup>

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85 See the Preamble of the *NHRA*.

86 S 3(1) of the *NHRA*.

87 See s 3(1)(2)(3) of the *NHRA*.

88 A 4 of the *World Heritage Convention*.

89 S 3(1) of the *NHRA*.

90 See the preamble of the *NHRA*; S 5(7)(e) of the *NHRA*.

91 S 3(1)(g) of the *NHRA*.

92 S 3(1)(c) of the *NHRA*.

93 S 3(1)(a)-(b) of the *NHRA*.

94 S 3(1)(a)-(b) of the *NHRA*.

95 S 3(1)(g) of the *NHRA*.



The above features of a place or object of cultural significance as outlined by the *NHRA* assist in ascertaining places or objects of cultural significance that must be considered by decision-makers in the promotion of sustainable development. The salient points to note are that such places or objects must be recognised by the community to be of aesthetic value, must contribute to the furtherance of local indigenous knowledge, must form part of endangered cultures or the natural environment, and must be strongly connected to the history of the people.

As previously discussed,<sup>96</sup> the *NEMA* recognises that cultural interests are relevant in development discourse and in the subsequent pursuit of sustainable development in the short and long term.<sup>97</sup> To this end, section 2(4)(a) of the *NEMA* provides that sustainable development requires the consideration of all relevant interests which include culture. This prompts the need to balance the relevant competing interests that are connected to a development project, for instance.

With regards to development projects in the South African context, Du Plessis and du Plessis<sup>98</sup> note that it is often during the planning phase of a project<sup>99</sup> that a balancing of interests by decision-makers is necessary. Such balancing is required, for example, when a proposed development activity is listed in terms of the *NEMA* and an environmental authorisation is required to be obtained.<sup>100</sup> An environmental authorisation would be issued by the decision-makers only if an environmental impact assessment (EIA) had been carried out and the report had been accepted by the relevant authority.<sup>101</sup> An EIA is an environmental planning tool which is employed by

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96 See the discussion in para 2.6.3.3.

97 See s 2(2) of the *NEMA*, which provides that environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, *cultural* and social interests equitably. Emphasis added.

98 Du Plessis and Du Plessis "Striking the Sustainability Balance in South Africa" 447.

99 See Nel and Kotzé "Environmental Management: An Introduction" 14-16 for more insight into the project lifecycle from an environmental law perspective.

100 *National Environmental Management Act: Amendments to the Environmental Impact Assessment Regulations, 2014* GN R324-327 GG 40772 7 April 2017 (hereafter referred to as GN R324-327 GG 40772 07 April 2017). Also see the detailed discussion and analysis of environmental instruments and tools pertaining to the project lifecycle in Du Plessis and Nel "Driving Compliance to and Enforcement of South African Legislation by Means of a Hybrid of 'New' Environmental Governance Instruments" 259-285.

101 See s 24(1)(a)-(c) of the *NEMA*, which states that "In order to give effect to the general objectives of integrated environmental management laid down in this chapter the potential impact on-(a) the environment; (b) socio-economic conditions; and (c) the cultural heritage, of activities that require

environmental authorities in reaching decisions aimed at balancing interests as demanded by the concept of sustainable development and recognised by the *NEMA*. The *ECA*<sup>102</sup> set out the first legislated EIA requirements. EIA is now governed by sections 23 and 24 of the *NEMA*, together with a series of Government Regulations.<sup>103</sup> The courts have been approached in disputes between environmental authorities and developers on how to satisfactorily and reasonably balance environmental, social, and economic considerations. They have had to consider for example an EIA submitted by one of the parties to ascertain what kind of development is being considered and the impact of such a development, if any.<sup>104</sup> It is necessary to understand how competing interests are assessed by decision-makers in this context.

### 3.2.3.1.1 The relevance of EIA in the pursuit of sustainable development

The Integrated Environmental Management (IEM)<sup>105</sup> principle in the *NEMA* recognises that the social interests of human life and the changes that they undergo due to development projects and plans must be considered by decision-makers.<sup>106</sup> The objectives of the IEM are laid out in section 23(2)(b)-(f)<sup>107</sup> of the *NEMA*. The section spells out the objectives of the IEM to include the identification, prediction, and evaluation of a perceived and actual impact of development projects on the environment, socio-economic conditions and cultural heritage.<sup>108</sup> The risks and

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authorisation or permission by law and which may significantly affect the environment, must be considered. Investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorizing, permitting, or otherwise allowing the implementation of an activity”.

102 73 of 1989.

103 These regulations are found in GN R324-327 GG 40772 07 April 2017.

104 Some of such cases are discussed in para 5.4.1.

105 S 23(2) of the *NEMA*.

106 Van Heerden *Social Impact Assessment (SIA) as a tool for the Protection of Children's Socio-Economic Rights* 38.

107 S 23(2)(b)-(f) of the *NEMA* provides: “(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimizing negative impacts, maximizing benefits, and promoting compliance with the principles of environmental management set out in section 2; (c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them; (d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment; (e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and (f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2.”

108 S 23(2)(b) of the *NEMA*.

consequences, alternatives and options to reduce or minimise the negative impacts of development while maximising the benefits and promoting compliance with the principles of environmental management are set out in section 2 of the *NEMA*.

Section 2(1)(a) of the Act<sup>109</sup> requires compliance by all state organs whose activities impact on the environment. "Environment" is used here to include aspects of culture such as cultural heritage and traditional knowledge. Section 23(2)(b)-(f) read in conjunction with this section demonstrates the extent to which public authorities must address the authorisation of development activities that pose threats to the environment and overall well-being of people, which includes social, economic and cultural well-being. In giving effect to the general objectives of the IEM, section 24(1) of the *NEMA* provides that the potential consequences of or the impact of listed activities<sup>110</sup> must be considered, investigated, assessed and reported to the decision-making authority.

The essence of the EIA is thus to ensure that development activities are carefully considered in the planning phase, and that the interests of the environment, social, economic and cultural issues are balanced and harmful impacts mitigated in the pursuit of sustainable development.<sup>111</sup> The EIA process is theoretically integrative and holistic and is aimed at addressing social, economic, environmental and cultural issues concurrently.<sup>112</sup> An EIA involves the evaluation of inter-related socio-economic,

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109 S 2(1)(a) of the *NEMA* provides: "(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and – (a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the 1996 Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination."

110 According to the definition section of the *NEMA Implementation Guidelines: Sector Guidelines for Environmental Impact Regulations* GN 654 in GG 33333 of 29 June 2010, listed activities are activities identified in terms of s 24 of the *NEMA*, which must obtain environmental authorisation before they commence.

111 See the *National Environmental Management Act: Environmental Impact Assessment Regulations* GN R982 GG 38282 of 4 December 2014 and the *National Environmental Management Act: Amendments to the Environmental Impact Assessment Regulations* GN R326 GG 40772 7 April 2017.

112 See *National Environmental Management Act: Environmental Impact Assessment Regulations* GN R982 GG 38282 of 4 December 2014 and the *National Environmental Management Act: Amendments to the Environmental Impact Assessment Regulations* GN R326 GG 40772 7 April 2017.

cultural and human health impacts.<sup>113</sup> This evaluation of the potential impact of a development activity is aimed at guiding decision-makers in balancing cultural interests in reaching sustainable development decisions. A key function of the EIA is to evaluate and predict how a project could potentially cause harm to people, affected communities, their cultural affiliations, their sense of place and livelihoods.<sup>114</sup> Interestingly, the impact of a proposed development on a sense of place is defined as:<sup>115</sup>

The impact or potential impact that an activity has, has had, or may have on the mix of natural and cultural features in the landscape that provide a strong and unique identity and character that is deeply felt by local inhabitants and/or visitors.

The heritage impact of a proposed development is defined to mean the impact or potential impact that an activity may have on an object or place of cultural or archaeological significance, paleontological remains or a paleontological site, living heritage, public monuments and memorials, or a place declared to be a national or provincial heritage site by the relevant authority.<sup>116</sup>

The EIA Regulations<sup>117</sup> include social impact assessment (SIA)<sup>118</sup> procedures which are useful tools to use in ensuring that the social interests of sustainable development are actively considered as an outcome of the EIA process.

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113 See *National Environmental Management Act: Environmental Impact Assessment Regulations* GN R982 GG 38282 of 4 December 2014 and the *National Environmental Management Act: Amendments to the Environmental Impact Assessment Regulations* GN R326 GG 40772 7 April 2017.

114 See *National Environmental Management Act: Environmental Impact Assessment Regulations* GN R982 GG 38282 of 4 December 2014 and the *National Environmental Management Act: Amendments to the Environmental Impact Assessment Regulations* GN R326 GG 40772 7 April 2017. Also see Van Heerden *Social Impact Assessment (SIA) as a Tool for the Protection of Children's Socio-Economic Rights* 45.

115 Reg 1 of *NEMA: Section 24G Fine Regulations* GN R698 GG 40994 of 20 July 2017.

116 Reg 1(a)-(e) of *NEMA: Section 24G Fine Regulations* GN R698 GG 40994 of 20 July 2017.

117 See *National Environmental Management Act: Environmental Impact Assessment Regulations* GN R982 GG 38282 of 4 December 2014 and the *National Environmental Management Act: Amendments to the Environmental Impact Assessment Regulations* GN R326 GG 40772 7 April 2017; Aucamp *Social Impact Assessment as a Tool for Social Development in South Africa* 3.

118 The relevance of SIA is further discussed in para 3.1.3.1.2.

### 3.2.3.1.2 *The relevance of social impact assessment in assessing the impact of development decisions on culture*

SIA generally refers to the consideration of the impact of development activities on a diverse range of social issues.<sup>119</sup> As social issues are diverse, social impacts will vary from project to project, and the weight assigned to each impact will vary from community to community.<sup>120</sup> Van Heerden argues that social considerations are usually left until late in the process of the proposed activity. By the time a SIA is requested, the proposed activity will already be approved for commencement.<sup>121</sup> Therefore, it appears that the decision-makers lack the necessary awareness of the social impacts of proposed developments.

The diverse range of possible social impacts of development means that it is impossible to formulate a list of all possible social impacts which the authorities must assess in considering the approval of development project. According to Vanclay,<sup>122</sup> there are several arguments against the formulation and use of a checklist to guide social considerations. One such argument hinges on the rationale that a checklist will preclude the use of a proper scoping process such as community participation.<sup>123</sup> This might result in underestimating the social impacts that communities experience when development plans are executed.

On the other hand, there is the suggestion that a comprehensive list of impacts may increase awareness of the full range of social impacts likely to occur, leading to improved assessments.<sup>124</sup> Most social impacts are regarded as situation-specific and as such are dependent on the social, cultural, political, economic and historic context

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119 SIA is a useful assessment tool in the assessment of the impact of development on various socio-cultural issues. For example, Van Heerden's research centred on how the environmental impacts of development affect the socio-economic rights of children. Social impact assessment is thus a useful tool available for decision-makers to utilise in assessing outcomes, and guides them in putting in place mitigating measures. See Van Heerden *Social Impact Assessment (SIA) as a Tool for the Protection of Children's Socio-Economic Rights* 1-84.

120 Vanclay 2002 *Environmental Impact Assessment Review* 184.

121 Van Heerden *Social Impact Assessment (SIA) as a Tool for the Protection of Children's Socio-Economic Rights* 45.

122 Vanclay 2002 *Environmental Impact Assessment Review* 184.

123 Community participation was an effective tool in *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 1 SC 333 (SCA) as discussed in Chapter 5.

124 Juslén 1995 *Project Appraisal* 163-170.

of the community where the development project is set to be executed, as well as on the nature of the proposed development project and the mitigation measures under consideration by the authorities.<sup>125</sup>

The SIA is a useful tool in ensuring that the social and cultural interests of sustainable development are actively considered as an outcome of the EIA process. This thesis argues that SIAs conducted independently of the EIAs would serve as guides to decision-makers in the integration of cultural interests in reaching development decisions. SIAs would by implication be of benefit in the assessment of incidental cultural interests such as cultural heritage, traditional knowledge systems, and other risks associated with the protection of such interests in the planning phase of a development project.

The *NEMA* also includes the recognition of cultural concerns in the principles that guide environmental management. One such environmental management principle is the non-disruption of landscapes and sites that constitute cultural heritage. Disruption must be totally avoided or minimised and remedied where it happens.<sup>126</sup> The *NEMA* also specifically accommodates the consideration of cultural issues in environmental management by stating in section 2(4)(b) that:

Environmental management must be integrated. Acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.

The above provision, read together with section 2(4)(a)(iii), suggests that the accommodation of cultural heritage issues is viable and relevant in reaching development decisions. Therefore, the provisions of the *NHRA* must be consulted, as the provisions specifically provide for how cultural heritage resources might be managed for the present and future generations.

The *NHRA* in defining “cultural heritage resources” in the definitional section describes it as any place or object of cultural significance. This makes it possible to suggest that culturally relevant geographical locations (which include landscapes and sites) and

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<sup>125</sup> Vanclay 2002 *Environmental Impact Assessment Review* 188.

<sup>126</sup> S 2(4)(a)(iii) of the *NEMA*.

cultural objects in such areas fall within the scope of the *NEMA*'s protection as well. The *NHRA* is framed to promote sustainable development. This is evident in the preamble of Act, which not only promotes the good management of the national estate but also encourages communities to nurture and conserve their legacy so that it may be bequeathed to future generations. Arguably, this is an indication that the management principles for heritage resources contained therein might be applied in development decisions.<sup>127</sup> For example, in sections 5 and 6 the Act specifies management principles that should guide the management of heritage resources by resource management authorities in the national, provincial and local spheres to aid them in the execution of their management duties. These principles include the following amongst others:

- a) heritage resources are valuable, finite, non-renewable and irreplaceable and should therefore be managed carefully to ensure their survival;<sup>128</sup>
- b) the identification, assessment and management of heritage resources must take account of all relevant cultural values and indigenous knowledge systems;<sup>129</sup>
- c) heritage resources must be managed in the interest of all South Africans;<sup>130</sup>
- d) heritage resources form an important part of the history and belief of communities and must be effectively managed to acknowledge the right of affected communities to be consulted and to participate in their management;<sup>131</sup>
- e) heritage resources contribute significantly to research, education, and tourism and as such should be developed and catered for in a way that ensures respect and dignity for cultural values;<sup>132</sup>

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127 S 5 of the *NHRA*.

128 S 5(1)(a) of the *NHRA*.

129 S 5(7)(a) of the *NHRA*.

130 S 5(1)(b) of the *NHRA*.

131 S 5(4) of the *NHRA*.

132 S 5(5) of the *NHRA*.

- f) it is expected that the management of cultural heritage will yield socio-economic benefits, in this case, socio-economic development;<sup>133</sup> and
- g) management should safeguard the options of present and future generations.<sup>134</sup>

The *WHCA* defines sustainable development within the context of the underlying principle that cultural and natural heritage may collectively promote reconciliation, understanding and respect, and ultimately contribute to the development of a unifying South African identity.<sup>135</sup> The immediate implication of this definition of sustainable development is that cultural heritage management does not permit the use of heritage as a political tool to threaten equality, freedom or personal security.<sup>136</sup> This is in line with the objectives and principles of the *NHRA* and the *Constitution*.

In furtherance of its objectives the *WHCA* lists fundamental principles in section 4(1)(a)-(p). The principles are subject to the *NHRA* and the *NEMA*, however, and in the event of any conflict between the principles of the *WHCA* and the aforementioned Acts, the provisions of the *NHRA* and the *NEMA* will prevail.<sup>137</sup> However, a close examination of the principles contained in the *WHCA* reveals that those contained therein mirror the principles contained in the *NHRA* and *NEMA*, specifically, in terms of the need to promote development that is culturally sustainable, the promotion of citizens' participation, community well-being and empowerment facilitated through cultural and natural heritage education.

Although the *WHCA* was enacted primarily to implement the *World Heritage Convention*, the promotion of domestic cultural heritage is one of its fundamental principles towards the actualisation of its objectives. As a result, the *WHCA* functions as a supplementary regime for cultural heritage resources protection and

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133 S 5(7)(d) of the *NHRA*.

134 S 5(7)(e) of the *NHRA*.

135 S 4(2)(i) of the *WHCA*.

136 S 4(2)(j) of the *WHCA*.

137 S 4(1) of the *WHCA*.



management. In effect, its provisions may serve as guidelines when interpreting the application possibilities of the *NHRA* and closely related laws.

In addition to the robust legislative framework afforded to cultural heritage to foster the protection, conservation and management of intangible cultural heritage in South Africa, the policies which give recognition to cultural heritage are also worth considering. The policy framework for cultural heritage in South Africa includes *inter alia* initiatives that foster the protection, conservation and management of tangible and intangible cultural heritage.

### 3.2.3.2 Policy framework for sustainable development: cultural heritage

Several policy documents have emerged in the cultural sector promoting the recognition of cultural heritage. It is important to note that policy direction is informed by the *Constitution* and the commitment of government through its institutions to give substance to the Bill of Rights. One of foremost policy documents promoting cultural heritage under the new constitutional dispensation is the *White Paper on Arts, Culture and Heritage* (4 July 1996)<sup>138</sup> published by the Department of Arts and Culture.<sup>139</sup>

The *White Paper on Arts, Culture and Heritage* is aimed at realising the full potential of arts, culture, science and technology in social and economic development, nurturing creativity and innovation, and promoting the diverse heritage of South Africa. The policy is based on principles such as access to, participation in, and enjoyment of the arts, cultural expression, and the preservation of cultural heritage. The policy likens

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138 Department of Arts and Culture *White Paper on Arts, Culture and Heritage* <https://www.dac.gov.za/content/white-paper-arts-culture-and-heritage-0#CHAP3> accessed 9 June 2014. The *White Paper* has undergone a few revision processes. It was revised in 2013, in 2015, in 2016 and in 2017. The 2013 and 2016 *Revised White Papers* are referred to as the *2013 Revised White Paper* and the *2016 Revised White Paper* respectively in the remainder of this thesis. It is important to note that the *2013 Revised White Paper* has been set aside. See a critique of the *2013 Revised White Paper* by Mike Van Graan, the Executive Director of the African Arts Institute (AFAI) in Van Graan 2015 <http://www.afai.org.za/wordpress/wp-content/uploads/WHITE-PAPER-REVIEW-Mike-van-Graan.pdf> accessed on 25 June 2017. The *White Papers* along with their revised versions are available at <http://www.dac.gov.za/white-papers>, accessed on 17 October 2017.

139 The role of the Department of Arts and Culture (DAC) is further discussed in Chapter 4.

the preservation of cultural heritage to basic human rights, as provided in section 16<sup>140</sup> and section 30<sup>141</sup> of the *Constitution*.

The *White Paper on Arts, Culture and Heritage* makes recommendations about institutions and the mechanisms needed to redirect the arts and culture budget to serve the entire nation.<sup>142</sup> The recommendations are aimed at facilitating the shifting of funds away from serving the needs of only the minority to other areas that include exploring the arts, culture and heritage of the majority as a means of realising the transformation agenda and redressing the inequality of the previous political dispensation. Although the 1996 *White Paper* and the revised versions do not cover the interaction between culture and the environment as concerns the tangible aspects of cultural heritage, they do, however, provide an indication of the impact of culture on the intangible aspects of cultural heritage.

The 2016 *Revised White Paper*, unlike its predecessors, includes an acknowledgement of the existence of a South African national heritage.<sup>143</sup> The 2016 *Revised White Paper* recognises that the national heritage of South Africa is made up of tangible and intangible heritage resources as well as a living culture in the form of cultural traditions, customs, oral history, performance, ritual, popular memory, social mores and knowledge of nature and diverse resources.<sup>144</sup> The national heritage system is listed as consisting of museums, monuments, heritage sites and heritage resources,

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140 S 16 provides: "(1) Everyone has the right to freedom of expression, which includes-(a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to-(a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

141 S 30 provides: "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

142 Several Acts on the national level set the framework and establish such institutions. For example, the *Cultural Institutions Act* 118 of 1998, the *NHRA*, the *Culture Promotion Amendment Act*, and the *National Heritage Council Act*. The relevant government institutions will be discussed in chapter 4.

143 Para 3.4 of the 2016 *Revised White Paper*.

144 The knowledge of nature and diverse resources links directly to indigenous knowledge systems as discussed in para 3.1.4.2.

geographical place names, heraldry and national symbols, archives and public records, and libraries and information services.

The 2016 *Revised White Paper* also resonates with the content of the resolution conveying the SDGs as discussed in para 2.4.2.<sup>145</sup> The resolution acknowledges the natural and cultural diversity of all people and the potential of all cultures and civilisations to contribute to and to be crucial enablers of sustainable development. Similarly, the 2016 *Revised White Paper* recognises the role of the NDP<sup>146</sup> in the pursuit of sustainable development, since the NDP is South Africa's overarching socio-economic framework for development. The NDP recognises the relevance of social cohesion as an integral method of building a common understanding and eliminating inequality, essentials in the process of fostering development.<sup>147</sup> The NDP also looks at promoting social cohesion<sup>148</sup> by promoting the arts and culture effectively, noting that if the arts and culture are effectively promoted, the creative and cultural industries can contribute substantially to small business development and job creation, as well as urban development and renewal.<sup>149</sup> The 2016 *Revised White Paper* reckons that the measures that are proposed in the NDP<sup>150</sup> to promote the arts and culture sector will enable the sector to respond to globalisation, environmental challenges, job creation and sustainable employment, arts, culture, and heritage infrastructure

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145 Para 36 of the Resolution Adopted by the General Assembly: Transforming Our World: 2030 Sustainable Development Goals UN Doc GA/RES/70/1 (2015).

146 National Planning Commission 2011 <http://bit.ly/2a5exJq>.

147 Para 2.3 of the 2016 *Revised White Paper*.

148 The Social Cohesion and Nation-Building project is a response to the ongoing and progressive national project which began with the transformation of South Africa into a constitutional democracy in 1994. The *uBuntu* philosophy has cultural and traditional roots and it is central to the Social Cohesion and Nation-Building project. See the discussion of *uBuntu* in para 2.6.3, para 2.3 of the 2016 *Revised White Paper* and para 1.4.8-1.4.9 of the 1994 *White Paper on RDP*.

149 "Our Future: Make It Work" the Executive Summary of the National Development Plan Vision 2030 (2011) 26.

150 The measures which the NDP has committed itself to, as noted by the 2016 *Revised White Paper* in para 2.3, include "providing financial and Information and Communication Technology support to artists to enable the creation of works expressing national creativity, while opening space for vibrant debate; strengthening the Independent Communications Authority of South Africa's mandate for nation-building and value inculcation; incentivising commercial distribution networks to distribute and/or host art; developing and implementing plans for a more effective arts and culture curriculum in schools with appropriate educator support; supporting income-smoothing for artists in a special unemployment insurance scheme and evaluating funding models for such initiatives; and developing sectoral determination legislation frameworks to protect arts-sector employees." National Planning Commission 2011 <http://bit.ly/2a5exJq>.

development, and will strengthen the links between the social, cultural and economic strategies.<sup>151</sup>

The cultural heritage sector legislation and policy framework discussed above give an indication of the extent to which cultural heritage issues and the environment intersect and are accommodated in the pursuit of sustainable development in South Africa.

The next issue that relates to culture in terms of the environment and sustainable development is biodiversity. The legal and policy framework guiding this sector and its interaction with culture is investigated below.

#### *3.2.4 Biodiversity law and policy framework acknowledging culture for sustainable development in South Africa*

The national legislative and policy framework for the regulation, protection and conservation of biodiversity comprises of the *Constitution*, the *IEL* (in terms of interpretation and application), the *NEMA*, the *National Forest Act (NFA)*,<sup>152</sup> the *National Water Act (NWA)*,<sup>153</sup> the *National Environmental Management: Protected Areas Act* (hereafter the *NEMPAA*),<sup>154</sup> the 1997 *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity*,<sup>155</sup> the *NEMBA*, and various pieces of sectoral environmental legislation that may be directly or indirectly applicable to biodiversity conservation and its connection to culture.<sup>156</sup> This section does not examine the legal framework based on any one specific piece of legislation. Instead, themes that intersect with culture are highlighted and discussed in the context of sustainable development. The same method is applied to the policy framework.

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151 Para 2.3 of the 2016 *Revised White Paper*.

152 84 of 1998.

153 36 of 1998 (hereafter referred to as the principal Act, where appropriate) as amended by 45 of 1999 and further amended by 27 of 2014.

154 57 of 2003 (hereafter referred to as the principal Act where appropriate) as amended by 31 of 2004 and further amended by 21 of 2014.

155 *White Paper on Conservation and Sustainable use of South Africa's Biological Diversity* GN 1095 in GG 18163 of 25 July 1997.

156 *Plant Improvement Act* 25 of 1996; *Animals Protection Act* 71 of 1962; *Plant Breeders Right Act* 22 of 1976; *Genetically Modified Organisms Act* 15 of 1997; and the *NHRA*.

### 3.2.4.1 Legislative framework acknowledging culture for sustainable development: biodiversity

In terms of the principles laid out in the *NEMA*,<sup>157</sup> engaging in sustainable development requires the consideration of all relevant interests. This can be interpreted to mean all development-related interests, such as biodiversity and culture. The principal legislation for biodiversity is the sector-specific Act, the *NEMBA*, which regulates the management, protection and conservation of biological diversity in South Africa. The Act provides in section 40 that one of the relevant factors for declaring a geographic region as a bioregion is if that region contains whole or several nested ecosystems and is characterised by its landforms (which include the cultural land scape), vegetation cover, human culture and history. Therefore, the intersection of culture with biodiversity is not limited to the value and use of the genetic, species and ecosystem sub-categories of biodiversity alone. Culture is a major factor in the protection of bioregions in the furtherance of the sustainable use of biodiversity.

Bioregional plans are made in support of bioregions. Section 41 of the *NEMBA* provides that such bioregional plans must contain measures for the effective management of biodiversity and the components of biodiversity in a region. They must also require the monitoring of the implementation of the plan and must be consistent with the Act, the national environmental management principles,<sup>158</sup> the national biodiversity framework and any relevant international agreements binding on the Republic. This in effect refers to the *CBD*, as discussed in paragraph 3.2.2 above.<sup>159</sup> The management of bioregions as declared by relevant authorities can by the provisions of section 41 of the *NEMBA* incorporate culture in biodiversity by engaging with indigenous knowledge and cultural practices that support biodiversity conservation.

Similarly, protected areas are also valuable for conserving natural and cultural heritage in South Africa.<sup>160</sup> Prior to 2003<sup>161</sup> the legal framework which supported the identification, declaration and management of most of the protected areas was fraught

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<sup>157</sup> S 2(4)(a)-(i) of the *NEMA*.

<sup>158</sup> S 7 of the *NEMBA*, which is effectively the same as s 2 of the *NEMA* discussed in para 3.4.2 above.

<sup>159</sup> Also see s 5 of the *NEMBA*.

<sup>160</sup> Paterson 2007 *SAPL* 1.

<sup>161</sup> 2003 signifies the year of commencement of the current protected areas legal framework.

with many flaws. One of the flaws<sup>162</sup> relevant to the discussion in this section as it relates to the effective incorporation of cultural interests, is the failure to link conservation imperatives with the needs of local communities.<sup>163</sup> The *NEMPAA* sought to combat the flaws found in the earlier legal framework. It attempts to give effect to the government's commitments under the *CBD* and other international environmental instruments. The objectives of the Act include promoting the sustainable utilisation of protected areas for the benefit of the people and promoting local community participation in the management of protected areas.<sup>164</sup> The inclusion of this objective arose from the need to develop a more people-centred approach to natural resource management, because the previous protected areas regime adopted an exclusionary approach. The exclusionary approach meant that as protected areas were being set up on land formerly owned or occupied by local communities, these communities were often displaced, denied access to the resources upon which they were dependent, and did not benefit from the establishment of protected areas.<sup>165</sup> The people-centred approach affords all sectors of society the opportunity to participate in the formation and management of protected areas and to enjoy the economic, social and cultural benefits that flow from them.

Section 17 of the *NEMPAA* lists a broad range of purposes for the declaration of protected areas.<sup>166</sup> Interestingly, one such purpose is that the protected area should

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162 Other flaws include divided administrative responsibilities, a profusion of laws, a lack of coordination, outdated regulatory approaches, inadequate planning, and insufficient resource allocation. See Paterson 2007 *SAPL* 1-33.

163 Paterson 2009 <http://bit.ly/2szApoA> 5 accessed on 2 July 2017.

164 Paterson 2009 <http://bit.ly/2szApoA> 5 accessed on 2 July 2017. Other objectives include providing a national framework for the declaration and management of protected areas, entrenching cooperative governance, integrating protected areas within broader national planning instruments, and providing for a representative network of protected areas on state, private and communal land. See s 2(a)-(f) of the *NEMPAA*.

165 Paterson 2009 <http://bit.ly/2szApoA> 7-9 accessed on 2 July 2017.

166 These purposes include protecting ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas, preserving the ecological integrity of those areas, conserving biodiversity in those areas, protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa; protecting South Africa's threatened or rare species, protecting an area which is vulnerable or ecologically sensitive, assisting in ensuring the sustained supply of environmental goods and services, providing for the sustainable use of natural and biological resources, creating or augmenting destinations for nature-based tourism, managing the interrelationship between natural environmental biodiversity, human settlement and economic development, generally contributing to human, social, cultural, spiritual and economic development, rehabilitating and restoring degraded ecosystems, and promoting the recovery of endangered and vulnerable species.

contribute to human, social, cultural, spiritual and economic development. The *NEMPAA* also supports the proclamation of a protected area to ease the conservation of both biological resources and cultural values. These provisions of the Act incorporate cultural interests extensively in the implementation of the protected areas regime, which in turn contributes to the promotion of sustainable development.

Other aspects of biodiversity conservation and management that intersect with cultural interests are bioprospecting, access and benefit-sharing.<sup>167</sup> Section 80 of *NEMBA*, *inter alia* regulates bioprospecting that involves indigenous biological resources. According to the Act, “indigenous biological resources” in the context of bioprospecting refers to any indigenous resource consisting of: <sup>168</sup>

- (i) any living or dead animal, plant or other organism of an indigenous
- (ii) any derivative of such animal, plant or other organism; or
- (iii) any genetic material of such animal, plant or other organism.

These resources are either retrieved from the wild or accessed from any other source, which includes any animals, plants or other organisms of an indigenous species<sup>169</sup> cultivated, bred or kept in captivity or cultivated or altered in any way by means of biotechnology. They could also refer to any other variety or strain of any of the plants and animals or other organism referred to above. Also, important to note is that the scope of indigenous biological resources extends to exotic animals and plants irrespective of the source they are gathered from including those that are accessed through biotechnology or any other scientific alteration.<sup>170</sup>

Furthermore, these identified diverse animals, plants and other organisms that can be exploited for research and innovation in the field of science are harvested from indigenous sources which are often located in indigenous communities.<sup>171</sup> Bearing in

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167 Chapter 6 of the *NEMBA*. Also see *Bio-prospecting, Access and Benefit Sharing Regulations* 2008 in GG 30739 of 8 February 2008 issued under *NEMBA*. Also see Myburgh 2011 *SAJB* 844-849.

168 S 1 of the *NEMBA*.

169 S 1 of the *NEMBA* defines indigenous species as “a species that occurs, or has historically occurred, naturally in a free state in nature within the borders of the Republic, but excludes a species that has been introduced in the Republic because of human activity”.

170 S 80(2)(a); s 80(2)(b) lists species that are not included as indigenous biological resources.

171 S 82(1)(a)(b) of the *NEMBA*.

mind the intellectual property law<sup>172</sup> connotation, the Act goes on to lay down conditions that must be fulfilled before a permit to carry out a bioprospecting project is issued.<sup>173</sup> Of the utmost relevance to this thesis is the protection granted to the interests of stakeholders such as a person, or organ of state or a community, providing or giving access to the indigenous biological resources<sup>174</sup> to which the application relates and:<sup>175</sup>

An indigenous community:

- a) whose traditional uses of the indigenous biological resources to which the application relates have initiated or will contribute to or form part of the proposed bioprospecting; or
- b) whose knowledge of or discoveries about the indigenous biological resources to which the application relates are to be used for the proposed bioprospecting.

It is rather curious that the term “indigenous community” is not defined in the Act. A suitable description of “indigenous community” might be gleaned from the *Constitution*. Reference to the culture of a specific group of people as intended by sections 30<sup>176</sup> and 31<sup>177</sup> of the *Constitution* simply refers to a community of people sharing the same cultural life or a specific way of life. Sections 30 and 31 thus imply an associative right shared by a group of people. “Indigenous”, on the other hand, may be used as a descriptive word to emphasise that such a community have rights that are based on their historical ties to the community with a set of cultural or historical distinctiveness that distinguishes them from other factions of the population. Indigenous communities, which are the custodians of the indigenous biological resources through traditional uses spanning many years, deserve to be protected,

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172 See generally *Intellectual Property Laws Amendment Act 38 of 1997*; s 30 *Patents Act 57 of 1978*, as amended by the *Patents Amendment Act 20 of 2005*.

173 S 82(1) of the *NEMBA*.

174 S 82(1) of the *NEMBA*.

175 S 82(1)(a)(b) of the *NEMBA*. Traditional knowledge has been defined as knowledge held and used by people who identify themselves as indigenes of a place based on cultural distinctiveness, prior territorial occupancy, and the possession of a distinct and dominant culture. See generally Dountio 2011 *SAJAH* 10-22.

176 S 30 provision reads that “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

177 S 31 (1)(a)(b)–(2) reads that “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community — (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations with other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”



preserved and given consideration as provided in the *NEMBA*. Such protection may fall under the ambit of indigenous knowledge systems and deserve protection in the IKS Bill being contemplated.<sup>178</sup> It is also contemplated that acknowledging indigenous knowledge systems could guide decision-makers in reaching decisions concerning sustainable development, especially as they relate to the application of the variation approach.<sup>179</sup>

Another related legislation which could accommodate and promote the relevance of culture to biodiversity is the *NFA*. The Act was enacted *inter alia* to promote the sustainable use of forests for environmental, economic, educational, recreational, *cultural*, health and spiritual purposes.<sup>180</sup> According to section 1 of the *NFA*, the term “forest” includes a natural forest, a woodland and a plantation, the forest produce in it, and the corresponding ecosystems. The section goes further to define forest produce to mean anything which appears or grows in a forest, like inanimate objects of mineral, historical, anthropological or cultural value.<sup>181</sup> As earlier discussed in paragraph 3.2.1 above, forest produce plays a major role in the cultural life of communities in South Africa. Therefore, the provisions of this Act, in as far as they concern the promotion of culture while promoting sustainable development through sustainable practices, is a good projection of the extent to which existing legislation accommodates issues of culture. Such accommodation of cultural issues can be harnessed in the promotion of sustainable development that firmly recognises the cultural interest.

Forests form a large part of the biodiversity of South Africa and have cultural relevance to the communities living near them.<sup>182</sup> Decisions affecting forests will inevitably impact on sustainable development in the long run. For this reason, section 3(3) of the *NFA* lays down principles that can guide development decisions affecting forests. Two of these principles include:

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178 See the discussion of the IKS Bill in para 3.2.3.1.

179 See the discussion in para 2.7.

180 S 1 of the *NFA*. Emphasis added.

181 S 1 of the *NFA*.

182 Shackleton *et al* 2007 *Forest Policy and Economics* 571; Cocks 2006 *Human Ecology* 190.

- a) natural forests must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferred in terms of its economic, social or environmental benefits;<sup>183</sup> and
- b) the development and management of forests is aimed at, *inter alia*, conserving biodiversity, ecosystems and habitats; sustaining the potential yield of their economic, social and environmental benefits; promoting the fair distribution of the economic, social, health and environmental benefits of forests; and conserving heritage resources, promoting aesthetic, cultural and spiritual values.

The principle in (a) above denotes that where a choice is to be made between saving a forest for its cultural benefit and saving a forest for its economic or environmental benefits, the economic or environmental benefits will be preferred by decision-makers. Although the reference to social benefits may denote a consideration for culture, the framing of the principles does not equate social benefits to cultural benefits, as seen in the Act's objective of promoting the sustainable use of forests for environmental, economic, educational, recreational, *cultural*, health and spiritual purposes.<sup>184</sup> On the other hand, the principle in (b) above presents an opportunity for decision-makers to conserve heritage resources that are situated in a trust forest, state forest or natural forest.<sup>185</sup>

Apart from forests, the waterways (rivers, dams and wetlands) in South Africa also count as cultural heritage resources. This is because rivers, lakes, natural springs, catchments areas and other similar waterways are often significant to specific communities. According to a desktop report conducted by the former Department of Water Affairs (DWAF),<sup>186</sup> it is noted that water plays a central role in many cultural

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<sup>183</sup> S 3(3)(a) of the *NFA*.

<sup>184</sup> S 1 of the *NFA*. (Emphasis added).

<sup>185</sup> S 1 defines the different categories of forests, and s 7(1)(a)(b), (2) and (3) of the *NFA* restricts the cutting, disturbing, damage or destruction of any indigenous tree in a natural forest or of any of its forest product. Also see s 8 of the *NFA* with respect to protected areas. Protected areas under the Act may be in three categories, namely forest nature reserve, forest wilderness area or any other type of protected area which is recognised in international law or practice to the extent that such a protected area is not already declared so by existing legislation.

<sup>186</sup> Department of Water Affairs and Forestry (DWAF) 2005 <http://bit.ly/2tEdOXx> 1-18 accessed on 3 July 2017 now Department of Water Affairs and Sanitation.

beliefs in South Africa. Communities and indigenous peoples have assigned religious and cultural values to water for generations, as water has often been used as a key element in cultural ceremonies and religious rites.<sup>187</sup> The report goes further to show that many rural communities link water to both physical and spiritual health. For example, Lake Fundudzi in the Northern Province of South Africa is sacred to the Vhavenda people. It is South Africa's largest inland lake and situated along the Mutale River. Several beliefs are upheld about Lake Fundudzi. One of them is that it is inhabited by the god of fertility in the form of a python.<sup>188</sup>

The *NWA*<sup>189</sup> identifies eleven different ways in which water is used.<sup>190</sup> Although no separate category is assigned for cultural purposes, cultural communities fall under "Schedule 1" users. This group of users, according to the *NWA*, consists of people who use small amounts of water and as such do not need to register or apply for licences.<sup>191</sup> Often the water used for cultural purposes is small in quantity, but there are also instances where the activities of cultural communities involving the use of water may impact on water quality and compromise health standards. For example, Lake Funduzi is also the final resting place of deceased members of the Vhavenda tribe. Deceased members are first buried in a grave at the kraal, and following several years their bones are exhumed, cremated and thrown into the lake. This cultural practice impacts on the water quality of the lake.

The *NWA*<sup>192</sup> also encourages decision-makers to proactively consider the impact of development projects on the water sources of communities and to engage communities in the management of rivers, dams, wetlands, the surrounding land and underground water. Also, the *National Water Resources Strategy (NWRS)* 2004<sup>193</sup> states that water management is not only about ensuring that there will be water for

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187 DWAF 2005 <http://bit.ly/2tEdOXx> 1 accessed on 3 July 2017.

188 DWAF 2005 <http://bit.ly/2tEdOXx> 11 accessed on 3 July 2017.

189 36 of 1998.

190 S 21 of the *NWA*.

191 S 22 of the *NWA*.

192 See ss 12, 13, and 21 of the *NWA*.

193 The text of the *NWRS* is available at <http://bit.ly/2tjASZg> accessed on 3 July 2017. The *NWRS* is the legal instrument for implementing or operationalising the *NWA*. The *NWA* requires that the *NWRS* is reviewed every five years. See also the *NWRS2* 2013 available at <http://bit.ly/2AbItMV> accessed on 3 July 2017.

basic human needs and environmental sustainability, but also about creating opportunities. The implication of this is that state agencies have an affirmative duty to take into consideration the impact of development plans on places of cultural and historical significance to communities, including water sources.<sup>194</sup>

Similarly, the way land is used is relevant in the discussion about ensuring that cultural interests are considered by decision-makers in reaching development decisions. The framework legislation with regards to the use and management of land is the *Spatial Planning and Land Use Management Act*<sup>195</sup> (hereafter the *SPLUMA*). The Act aims to correct *inter alia* the past spatial planning and land use laws which were based on racial inequality, segregation, and unsustainable settlement patterns through improved access to and use of land.<sup>196</sup> The use of land for development in terms of the Act is limited to the erection of buildings or structures on land, or the change of use of land, including township establishment, the subdivision or consolidation of land or any deviation from the land use or uses permitted in terms of an applicable land use scheme.<sup>197</sup>

The Act recognises that the sustainable development of land requires the integration of social, economic and environmental considerations in the way land is currently used and managed and how it should be done in the future to ensure that development of land serves present and future generations.<sup>198</sup> Development principles emanating from the Act are applicable to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land.<sup>199</sup> The principles that apply to land development include the principles of spatial justice,<sup>200</sup> spatial sustainability,<sup>201</sup> efficiency,<sup>202</sup> spatial resilience,<sup>203</sup> and good administration.<sup>204</sup>

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194 Para 2.1.2 of the *NWRS2* 2013 available at <http://bit.ly/2AbItMV> accessed on 3 July 2017; DWAF 2005 <http://bit.ly/2tEdOXx> 1 accessed on 3 July 2017.

195 16 of 2013.

196 See the Preamble and s 7(a)(i) of the *SPLUMA*.

197 See s 1 (definitional section) of the *SPLUMA*.

198 See the preamble of the *SPLUMA*.

199 See the preamble of the *SPLUMA*.

200 S 7(a)(i)-(vi) of the *SPLUMA*.

201 S 7(b)(i)-(vi) of the *SPLUMA*.

202 S 7(c)(i)-(iii) of the *SPLUMA*.

203 S 7(d) of the *SPLUMA*.

204 S 7(e)(i)-(v) of the *SPLUMA*.

The principle of spatial justice speaks to *inter alia* inclusion of former homeland areas. These homeland areas were previously mostly occupied by persons of the same cultural affiliations. Thus, the Act requires spatial development frameworks and policies at all spheres of government to address the inclusion of the cultural interests of the people dwelling in these homeland areas. It goes to affirm that the cultural interests of the people must be considered in reaching development-related decisions within the context of sustainable development.<sup>205</sup> This speaks to spatial justice and spatial sustainability. These concepts are not defined in depth in the Act, and there has been limited academic research into what they mean conceptually and contextually. Therefore, a wide scope for the interpretation of these concepts is open in the context of planning which is outside the scope of this thesis. However, in the face of the fact that different cultures use and manage land differently, it is argued that expecting a land use and planning framework Act to meet all cultural interests in the regulation of land use, management and development will prove problematic. For example, the Xhosa culture of the Eastern Cape of the country, is described by Williams<sup>206</sup> to be a cultural community that views access to land and access to resources on the land as a birth right. Access to land for cropping or livestock is a communal right as well as access for spiritual uses. In this scenario, the planning authorities in the spatial planning space need to be more aware of such cultural complexities and cater for them by recognising that a system that adopts cultural interests as a part of the development matrix is necessary to meet the demands of sustainable developmental.

The references to culture in the various laws discussed above focus mostly on the tangible aspects of cultural heritage. Intangible cultural heritage deserves to be protected, conserved and managed just as tangible cultural heritage is. This is because most of the features of tangible cultural heritage impinge on social cohesion and national identity and, in this sense, they intersect with intangible cultural heritage. Intangible cultural heritage includes cultural expressions and practices that form a body of knowledge over time, cultural tradition, oral history, performance, rituals,

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<sup>205</sup> S 7(b)(i)-(vi) of the *SPLUMA*.

<sup>206</sup> Williams *A Framework for a Sustainable Land Use Management System* 37-40.

modern memory, indigenous knowledge systems, language, skills and techniques, and its protection requires that the authorities should adopt a holistic approach to the environment, society, and social relationships, all of which contribute to cultural diversity and cultural identity. The existing legislation catering for intangible cultural heritage includes the *NHCA* and the *National Library of South Africa Act*,<sup>207</sup> which seeks to collect, preserve and make available national documentary heritage with a view to creating an awareness of intangible cultural heritage.<sup>208</sup>

In addition, the *Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill* (the IKS Bill) 2016<sup>209</sup> seeks to afford protection to indigenous cultural expression shared by communities by introducing a *sui generis* approach to the legislative protection and commercialisation of indigenous knowledge systems. The IKS Bill defines indigenous cultural expressions to mean such expressions that have cultural content that has been developed within indigenous communities and assimilated into their cultural disposition or essential character, which might include phonetic or verbal expressions, musical or sound expressions, expressions by action, and tangible expressions. Indigenous knowledge, on the other hand, is referred to as any knowledge of a scientific or technical nature, knowledge of natural resources and indigenous cultural expressions. The IKS Bill seeks an Act to protect indigenous knowledge in the forms described, irrespective of whether they are functional or cultural or both, including medical, agricultural or scientific practices. All that is required is that they have been passed down from generation to generation, have been developed within an indigenous community, and are associated with the cultural disposition and social identity of the concerned indigenous community. According to the protection regime proposed for indigenous knowledge systems by the IKS Bill, the preservation of natural resources and indigenous cultural expressions is encouraged. Since indigenous communities depend on renewable natural resources for their economic, social and cultural activities, the sustainable and productive use of natural

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207 92 of 1998.

208 S 3 of the *National Library of South Africa Act* provides that the main object of the National library is to contribute to socio-economic, cultural, educational, scientific and innovative development.

209 The Bill can be found at [http://www.parliament.gov.za/live/commonrepository/Processed/20160415/615036\\_1.pdf](http://www.parliament.gov.za/live/commonrepository/Processed/20160415/615036_1.pdf) accessed on 17 March 2017. An explanatory summary of the Bill is published in GG No 39910 of 8 April 2016.

resources is crucial. The implementation of the protection regime proposed by the IKS Bill may potentially serve as a valuable contribution to the promotion of sustainable development in indigenous communities in South Africa. In addition, promoting the sustainable and productive use of natural resources will potentially result in a system whereby medical, agricultural and scientific practices are preserved over time, which will assist in curbing the excessive exploitation of natural resources.

Apart from the legislation discussed in this section there is a vibrant policy framework, which is considered in the next section.

#### 3.2.4.2 Policy framework acknowledging culture for sustainable development: biodiversity

The 1997 *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* establishes the central policy for the conservation of biodiversity in South Africa.<sup>210</sup> The 1997 *White Paper* is a comprehensive policy consisting of six main goals and supporting objectives that follow the themes of the *CBD*. The six main goals<sup>211</sup> contain indications that the policy recognises the value of the diversity of communities, which is fuelled by cultural diversity in the conservation of biodiversity, most notably in relation to conserving the diversity of landscapes, ecosystems, habitats, communities, populations, species and genes in South Africa and expanding the human capacity to conserve biodiversity, to manage its use, and to address factors threatening it, thereby recognising that maintaining biodiversity as well as the cultural diversity of communities is a valuable tool in the conservation of biodiversity, which includes the sustainable use of resources for the present and future generations.

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210 *White Paper on Conservation and Sustainable use of South Africa's Biological Diversity* GN 1095 in GG 18163 of 25 July 1997; Wynberg 2002 SAJS 233-242.

211 The goals include the following: (a) to conserve the diversity of landscapes, ecosystems, habitats, communities, populations, species and genes in South Africa; (b) to use biological resources sustainably and minimize adverse impacts on biological diversity; (c) to ensure that benefits derived from the use and development of South Africa's genetic resources serve national interest; (d) to expand the human capacity to conserve biodiversity, to manage its use, and to address factors threatening it; (e) to create conditions and incentives that support the conservation and sustainable use of biodiversity, (f) to promote the conservation and sustainable use of biodiversity at the international level. *White Paper on Conservation and Sustainable use of South Africa's Biological Diversity* GN 1095 in GG 18163 of 25 July 1997.

However, the supporting objectives<sup>212</sup> fail to include strategic steps towards actualising the diversity of communities as a tool in the conservation of biodiversity. This oversight disregards the value of culture in biodiversity conservation in the context of sustainable development.

The next theme where culture and sustainable development intersect in the pursuit of sustainable development is in relation to the economy with specific emphasis on trade. As it is impossible to give a detailed account of this theme in the confines of a thesis such as this, it is discussed only briefly in the next section.

### **3.3 Culture and the economy**

South Africa is a signatory to the 2005 *Cultural Diversity Convention*, which protects expressions that result from the creativity of individuals, groups and societies and have cultural content.<sup>213</sup> Cultural content is defined as “the symbolic meaning, artistic dimension and cultural values that originate from cultural identities”.<sup>214</sup> In this sense, the cultural industry may be described as an industry “producing goods and services”, in which case it possesses a dual nature – culture and the economy.<sup>215</sup> This is an indication of the connection between culture and trade.

As discussed in Chapter 2, culture contributes to economic growth in South Africa and is recognised as a contributor to human development by way of job creation.<sup>216</sup> Studies have also revealed that the arts and creative industries in South Africa have created

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212 The supporting objectives include the following: “(a) developing an action plan through which detailed implementation strategies can be developed in reaching the set out goals; (b) developing an action plan through which detailed implementation strategies can be developed; (c) obtaining a political commitment from all relevant ministers and senior provincial representatives towards achieving the goals of the policy (such as through approved sectoral plans and budgets for relevant central and provincial departments and institutions); (d) addressing concerns that relate to the fragmentation amongst nature conservation agencies; (e) securing the necessary funding for implementation; (f) strengthen and rationalize South Africa’s protected-area system; (g) establishing legal and administrative mechanisms to control access to South Africa’s genetic resources; (h) instituting a national biodiversity education and awareness plan; and (i) participating in the development of an international Biosafety Protocol and instituting appropriate measures for biosafety.” The text is accessible at [www.environment.gov.za](http://www.environment.gov.za) accessed on 24 September 2016.

213 A 4(3) of the 2005 *Cultural Diversity Convention*.

214 A 4(2) of the 2005 *Cultural Diversity Convention*.

215 Neuwirth “The Convention on the Diversity of Cultural Expressions: A Critical Analysis of the provisions” 56.

216 See the discussion in para 2.6.3.



between 162,809 and 192,410 jobs, which equate to about 1.08 per cent to 1.28 per cent of employment in the country, including contributing 2.9 per cent to the GDP.<sup>217</sup> The arts and creative industry contributed R90.5 billion directly to the country's GDP in the 2013/2014 financial year and accounted for a total number of 562, 726 jobs in the same period.<sup>218</sup> According to the reports, the design and creative services and cultural and natural heritage cluster attained the highest employment impact, contributing a combined 54 per cent to total employment. Indeed, the creative industry has become the new economic growth point in the service industry.<sup>219</sup>

Therefore, culture impacts on the economy through trade in cultural goods and services. It is contended by cultural practitioners like Van Graan<sup>220</sup> that viewing the creative industry solely for its economic value impacts on art forms like theatre and opera, which are forms of artistic expression, but their funding is reduced because they do not generate income and their potential to create jobs and contribute to human development is overlooked. His line of argument may carry some valid points in the overall sense of ensuring that the value of culture in the promotion of sustainable development extends beyond its economic value.

Other art expressions which do not produce huge economic outputs should, however, not be disregarded. Be that as it may, the focus of this paragraph is on the contribution of culture and the interaction of culture with trade. In this light, the purpose of this section is to investigate the trade law and policy landscape in South Africa with a view to ascertaining the extent to which the existing laws accommodate culture. Decision-makers must adjust to the notion that the trade in cultural products and services has a significant contribution to make to sustainable development.

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217 Snowball <http://bit.ly/1NtlnPa> accessed on 14 July 2016.

218 South African Government News Agency 2016 <http://www.sanews.gov.za/south-africa/creative-economy-contributes-r905bn-gdp> accessed on 19 March 2017.

219 South African Government 1998 [http://www.gov.za/sites/www.gov.za/files/mso1ba\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/mso1ba_0.pdf) 10 accessed on 23 March 2017; Department of Labour 2008 <http://bit.ly/2x1becN> accessed on 23 March 2017.

220 Van Graan 2015 <http://www.afai.org.za/wordpress/wp-content/uploads/WHITE-PAPER-REVIEW-Mike-van-Graan.pdf> accessed on 25 June 2017. Also see Van Graan 2013 16(3) *PER* 23-34.

It is now necessary to interrogate the legislative and policy framework as the basis for decision-making in the context of the intersection between sustainable development and the trade in cultural products.

### *3.2.1 Trade law and policy framework acknowledging culture for sustainable development in South Africa*

It is argued that the cultural industry is a part of a broad sector of the South African economy known as the creative economy.<sup>221</sup> However, this thesis chooses to identify and interpret the relevant aspect of the economy that interacts with culture as the cultural industry, in recognition of the definition preferred by the 2005 *Cultural Diversity Convention* mentioned in para 3.2 above. Thus, the national legislative and policy framework for trade is investigated here as being relevant to culture in the promotion of sustainable development.

It must be noted that the cultural industry in South Africa has several commercially active sectors that have the potential to contribute to economic growth. The sectors identified for this thesis include, but are not limited to, the film and video sector, the craft sector (including traditional African art, designer goods and souvenirs), the music sector, the visual arts and the publishing sector, which produces books, magazines and newspapers.<sup>222</sup>

The promotion and the protection of the cultural products emanating from these sectors are regulated by sector-specific legislation including intellectual property laws such as the *Films and Publications Act*,<sup>223</sup> the *Copyright Act*,<sup>224</sup> the *Designs Act*<sup>225</sup> and the *Broadcasting Act*.<sup>226</sup> As it relates to the promotion of trade in cultural goods, the trade regime is the point of departure in assessing the extent to which culture is

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221 Department of Labour 2008 <http://bit.ly/2x1becN> 12 accessed on 23 March 2017; Van Graan 2015 <http://www.afai.org.za/wordpress/wp-content/uploads/WHITE-PAPER-REVIEW-Mike-van-Graan.pdf> accessed on 25 June 2017.

222 Department of Labour 2008 <http://bit.ly/2x1becN> 16 accessed on 23 March 2017; South African Government 1998 [http://www.gov.za/sites/www.gov.za/files/mso1ba\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/mso1ba_0.pdf) accessed on 23 March 2017.

223 65 of 1996.

224 98 of 1978.

225 195 of 1993.

226 14 of 1999.

allowed a legislative basis to exert its influence through the cultural industry in the promotion of sustainable development.

The existing trade laws in South Africa cut across different aspects of trade from competition regulation to import and export control. The following section analyses a cross-section of trade legislation in terms of its purpose and its potential relevance in the recognition of the interaction of culture with trade in relation to the promotion of economically sustainable development. It includes the *International Trade Administration Act*,<sup>227</sup> the *Competition Act*,<sup>228</sup> the *Broad-Based Black Economic Empowerment Act*<sup>229</sup> and the *Special Economic Zones Act*.<sup>230</sup>

### *3.3.1 Legislative framework acknowledging culture for sustainable development: culture-trade nexus*

To effectively harness the value of culture in promoting sustainable development in the production and trade of cultural goods in South Africa, attention must be had to trade-related laws. The trade-related laws discussed in this paragraph contain provisions that may be harnessed or exploited in the regulation of trade in cultural goods and services that may contribute to economic growth.

#### 3.3.3.1.1 International Trade Administration Act<sup>231</sup>

The main objective of the Act is to foster economic growth and development with the aim of raising incomes and promoting investment and employment.<sup>232</sup> The Act does not specify if the raising of incomes applies to government income or family household incomes. However, the Act may be applied in the governing of the cultural industry to generate incomes for individuals and households as well. In this way, the various

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227 71 of 2002.

228 89 of 1998.

229 53 of 2003.

230 16 of 2014.

231 This piece of legislation is administered by the International Trade Administration Commission of South Africa. The Commission is also known as ITAC. ITAC serves in an advisory capacity to the Department of Trade and Industry. It is also responsible for import and export control, international trade instruments and technical advice, tariff investigation and trade remedy solutions. See Department of Trade and Industry Date Unknown <http://bit.ly/2gjeWeT> accessed on 25 March 2017.

232 S 2 of the *International Trade Administration Act*.

sectors of the cultural industry are accounted for as both income generating and employment access points at the national level.

The Act also applies to import and export controls which apply to cultural goods that are exported outside South Africa as well as imported cultural products. The Act enforces a permit system to regulate the import and export of goods specified by regulation.<sup>233</sup> Such regulation is envisaged to be relevant in the control of cultural goods exported from South Africa while ensuring that the cultural products exported are globally competitive.<sup>234</sup> In a similar vein, the Act may contribute to the regulation of the influx of imported foreign cultural products so that a balance may be struck between domestic and foreign cultural products.<sup>235</sup>

### 3.3.1.2 Competition Act

The *Competition Act* is potentially useful in the promotion of the culture-trade link through the economic advancement of the cultural industry as gleaned from its legislative objectives listed in section 2 of the Act.

The core objectives of the Act are to promote and maintain competition in the trade industry and to promote the efficiency, adaptability and development of the economy; to promote employment and advance the social and economic welfare of South Africans; and to ensure that small- and medium-sized enterprises have an equitable opportunity to participate in the economy.<sup>236</sup>

The core objectives are aligned with the potential of the cultural industry to contribute to economic development through job creation, as recognised by the *Mzansi's Golden Economy: Contribution of the Arts, Culture and Heritage Sector to the New Growth Path* initiative<sup>237</sup> discussed in paragraph 2.6.1.

It is noteworthy that the Act applies to all economic activity within South Africa. Therefore, it is possible to envision small- and medium-sized cultural sectors which

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<sup>233</sup> S 6 of the *International Trade Administration Act*.

<sup>234</sup> See Rautenbach and Du Plessis 2009 *SAYIL* 141.

<sup>235</sup> Rautenbach and Du Plessis 2009 *SAYIL* 141.

<sup>236</sup> S 2 of the *Competition Act*.

<sup>237</sup> Department of Arts and Culture (DAC) 2011 <http://bit.ly/29TveOq> 6 accessed on 14 July 2016.

engage in economically relevant cultural production as falling within the purview of this Act.

### 3.3.1.3 Broad-Based Black Economic Empowerment Act<sup>238</sup>

This Act is relevant to the link between culture and trade in the context of its relevance in promoting the cultural industry in furtherance of broad-based black economic empowerment. The rationale behind promoting economic empowerment aimed at the black<sup>239</sup> populace is that the apartheid administration excluded black people from sharing in the economic growth of South Africa.

One of the objectives of the Act is to empower rural and local communities by enabling access to economic activities, land, infrastructure ownership and skills.<sup>240</sup> The cultural industry is potentially a catalyst for the actualisation of this objective and should be promoted as such in furtherance of the sustainable development end-goal envisaged by the Act.<sup>241</sup>

The core objectives of the Act are also aligned with the social cohesion perspectives of the NDP as part of the socio-economic strategies towards development in South Africa.<sup>242</sup> Thus, this Act is suited to promoting sustainable development by using the cultural industry as a tool for skills development and human development.

The next Act is the *Special Economic Zones Act*,<sup>243</sup> which is a rather interesting Act in terms of trade and culture. The relevance of the Act is that it has the potential to

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238 53 of 2003.

239 According to s 1 of the *Broad-Based Black Economic Empowerment Act* as amended by s 1(b) of the *Broad-Based Black Economic Empowerment Amended Act* 46 of 2013, "black people" is a generic term which means Africans, Coloureds and Indians – (a) who are citizens of the Republic of South Africa by birth or descent; or (b) who became citizens of the Republic of South Africa by naturalization – (i) before 27 April 1994; or (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date."

240 S 2(f) of the *Broad-Based Black Economic Empowerment Act*.

241 S 2(e) of the *Broad-Based Black Economic Empowerment Act* has the object of "promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity."

242 See the discussion on social cohesion in para 3.2.4.2.

243 16 of 2014.

further highlight how trade and culture intersect in ways that are relevant for sustainable development.

#### 3.3.1.4 Special Economic Zones Act

This Act establishes economic zones as an economic development tool to promote national economic growth and exports by using support measures to attract targeted foreign and domestic investments and technology.<sup>244</sup>

The Act states in section 2 that its aims amongst others include promoting economic development in designated regions<sup>245</sup> in South Africa by facilitating the creation of an industrial complex which will have strategic national economic advantage for targeted investments<sup>246</sup> and industries in the manufacturing sector and tradeable services. The term “tradeable services” is not defined, but it may be sufficient to describe tradeable services as services that yield an economic benefit to the Republic.

Therefore, it may be postulated that in consideration of the economic value and benefits of the cultural industry, it should be considered as among “tradeable services”, to the end that the provisions of the Act promote economic growth on a provincial and local government level and should appropriately incorporate the cultural industry. This is also in line with the promotion of sustainable development, which is also a government developmental goal as well as part of the *NDP* strategy.

The legislation discussed in this section provides an avenue for trade in culture to the extent that cultural industry goods and services play a role in the promotion of economically sustainable development. The next section examines existing trading policies that allow for the same in the promotion of sustainable development in South Africa.

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<sup>244</sup> S 1 of the *Special Economic Zones Act*.

<sup>245</sup> See s 4(3)(a) of the *Special Economic Zones Act* defines regional development as “linkages to, or integration with, the host province’s growth strategies, local economic development of the host municipality and any other relevant cross-provincial economic initiatives.”

<sup>246</sup> S 4(3)(b) of the *Special Economic Zones Act* defines targeted investments to include “investments in support of government’s economic and industrial development policies.”

### 3.3.2 Policy framework acknowledging culture for sustainable development: culture-trade nexus

“Trade policy” often refers to the premeditated use of interventionist measures within the country and at the country’s border to allocate resources to productive use.<sup>247</sup> Such interventionist measures may be aimed at changing the economy’s incentive structure in such a way as to induce a structural transformation that leads to economic growth and development through the more productive use of resources.<sup>248</sup> In this sense, harnessing the potential of the cultural and creative industries might serve as a productive use of resources in the furtherance of economic growth and development and also economic sustainable development.

The trade policy of interest as adopted by South Africa may be appropriately assessed against the backdrop of the development goals of the government, which feature prominently in the NDP<sup>249</sup> and which the government adopted as the strategic framework that guides policy.

The relevant aspects of the NDP<sup>250</sup> include the elimination of poverty and the reduction of inequality by 2030. This requires faster economic growth through the harnessing of diverse job-creating economic sectors and accelerated growth that is affected within a dynamic global environment that will require competitive participation in regional and global trade.<sup>251</sup>

Arguably, the trade in cultural goods and services provides a platform from which South Africa might compete in regional and global trade. In recognition of the potential of culture through the cultural and creative industry to contribute to economic growth and economically sustainable development, the *Mzansi’s Golden Economy: Contribution of the Arts, Culture and Heritage Sector to the New Growth Path* initiative<sup>252</sup> commits the government to injecting five million jobs into the economy in

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247 McCarthy 2015 <http://bit.ly/2o6w3Co> accessed on 27 November 2017.

248 McCarthy 2015 <http://bit.ly/2o6w3Co> accessed on 27 November 2017.

249 National Planning Commission 2011 <http://bit.ly/2a5exJq>.

250 National Planning Commission 2012 *National Development Plan 2030: Our Future - Make It Work* <http://bit.ly/1FBUGq5> accessed on 12 February 2015.

251 McCarthy 2015 <http://bit.ly/2o6w3Co> accessed on 27 November 2017.

252 Department of Arts and Culture (DAC) 2011 <http://bit.ly/29TveOq> 6 accessed on 14 July 2016.

twenty years beginning in 2010 through the exploration of the cultural and creative industries. This initiative acknowledges the role culture plays in economic development as well as in human development.

### ***3.4 Culture and social interests***

In Chapter 2<sup>253</sup> health is identified as a social interest that interacts with culture and is relevant in the pursuit of sustainable development. This section briefly analyses the law and policy framework that supports the integration of culture into health care and the country's health services from a legal perspective.

#### ***3.4.1 Culture and health in South Africa***

Health is a social need of the people and it is recognised as such within sustainable development thinking.<sup>254</sup> This thesis has established that the concept of health goes beyond the medical and transcends to the cultural<sup>255</sup> in the sense that issues of health relate with deeply held cultural values and cultural practices.<sup>256</sup>

In the South African context there appears to be gravitation towards traditional medicine and traditional health practice for primary health care<sup>257</sup> by the majority of rural people, as opposed to conventional health practice<sup>258</sup> for primary health care.<sup>259</sup> There are several reasons why traditional health practice is popular in rural areas, and some of those reasons include affordability and the connection it makes to spirituality.<sup>260</sup> The assertion that traditional health practice is preferred for its spiritual

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253 See the discussion in paras 2.3.1, 2.4.1, 2.4.3, and 2.6.1.

254 Donders 2015 18(2) *PER* 181.

255 See the discussion in para 2.6.1 under the sub-heading titled "Culture as a modality that identifies and binds groups of people".

256 See the discussion in para 2.6.1 under the sub-heading titled "Culture as a modality that identifies and binds groups of people". Also see Donders 2015 18(2) *PER* 181.

257 A broad meaning is ascribed to "primary health care" in this thesis. It includes all services aimed at delivering health care in a holistic manner. It is reported that a significant percentage of the South African population consults traditional practitioners daily. See Rautenbach 2011 *THRHR* 29 and generally Rautenbach 2007 *Obiter* 519-536.

258 Within the context of this thesis, the phrase "conventional health practice" is used in reference to the dominant allopathic model representing the mainstream model of healthcare and practice in South Africa. See Rautenbach 2011 *THRHR* 29

259 According to Truter's research, it is estimated that between 60 per cent and 80 per cent of South Africans consult a traditional healer before going to a primary health care practitioner. See Truter 2007 *SA Pharmaceutical J* 56.

260 Rautenbach 2011 *THRHR* 29; Truter 2007 *SA Pharmaceutical J* 59.



value alludes to earlier discussions in paragraph 2.6.1, suggesting that culture can tie to tradition and religion, as these also form part of the cultural life of communities.

According to Truter,<sup>261</sup> African traditional healing, the alternative term for traditional health practice, is intertwined with cultural and religious beliefs and is holistic in nature. It goes beyond physical well-being, extending to the psychological, spiritual and social aspects of individuals, families and communities. The concept of traditional medicine has its own connotation in the South African context.<sup>262</sup> Section 1 of the *Traditional Health Practitioners Act*<sup>263</sup> defines traditional medicine as “an object or substance” used in traditional health practice to diagnose, treat or prevent physical or mental illness; or to cure, treat, maintain or restore the physical or mental health or well-being of people. This is to the total exclusion of dependence-inducing or dangerous substances or drugs.

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261 Truter 2007 *SA Pharmaceutical* 156.

262 On an international level, the World Health Organisation (WHO) put forward a few definitions of the term “African traditional medicine” in its work at establishing international and domestic recognition of African traditional medicine. One of the first definitions put forward by the WHO describes traditional medicine as the sum of “Diverse health practices, approaches, knowledge and beliefs incorporating plant, animal, and/or mineral based medicines, spiritual therapies, manual techniques and exercises, applied singularly or in combination to maintain well-being, as well as to treat, diagnose or prevent illness.” See WHO 2002 <http://bit.ly/2otFgRW>. A later definition excluded “plant, animal, and/or mineral based medicines” and broadened the scope of the meaning of traditional medicine as “the knowledge, skills, and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness”. See Rautenbach 2011 *THRHR* 32. This latter definition highlights the intangible aspects of culture and it is in line with the cultural perspective on healthcare. However, the WHO’s definition is not the “be all and end all” as far as definitions of traditional medicine go. Cultural beliefs and traditions are peculiar to the communities they apply to. This thesis does not concern itself with the exact meaning in law of the term “traditional medicine”, although the value of pinning down the meaning of such words is noted, as is illustrated in the case of *Treatment Action Campaign v Rath* 2008 4 All SA 360 (C). Also see Rautenbach’s analysis of the case in Rautenbach 2011 *THRHR* 34. This thesis focuses on the links between culture and “traditional health practice” as opposed to dwelling on the generic meaning of “traditional medicine”. However, this thesis also recognises that traditional medicine is the tool of the traditional health practitioner and that traditional health practice and traditional medicine have been a part of South Africa’s history for a very long time. Therefore, this thesis groups and applies the terms “traditional medicine” and “traditional healers” under the umbrella term “traditional health practice.” See Rautenbach 2007 *Obiter* 521-522.

263 22 of 2007. The President signed the Act on 7 January 2008. However, it is only ss 7, 10, 11(3), 12-15, 47, 48 and 50 that have been in operation since 30 April 2008. These provisions cover administrative duties such as the setting up of the Interim Traditional Health Practitioners’ Council of South Africa and the power of the Minister of Health to issue regulations in terms of the Act. See *Traditional Health Practitioners Act: Traditional Health Practitioners Regulations* GN 1052 in GG 39358 of 3 November 2015.

Furthermore, it is important to note that in the South African context, traditional medicine is distinguished from alternative forms of health practice such as non-allopathic medicines used by chiropractors, homoeopaths, naturopaths, herbalists, and osteopaths. Non-allopathic medicine is termed “alternative” or “complementary” as opposed to “African traditional medicine”. The distinctiveness of traditional medicine *vis-à-vis* its conventional and non-allopathic counterparts lies in the fact that traditional health practice is based on a “traditional philosophy”.<sup>264</sup>

It is argued that the social aspect of sustainable development will be well served by the promotion of traditional healing practice which feeds into traditional knowledge as recognition of the interaction between culture and health.

#### 3.4.1.1 Health law and policy framework acknowledging culture for sustainable development in South Africa

As discussed in the previous paragraph, the area of healthcare that relates to culture issues in South Africa is traditional health practice. It has also been said that decision-makers must be guided by law and policy as they consider culture issues in health in reaching sustainable development decisions. The next section identifies and discusses the existing legislative and policy framework that might aid the recognition of the interaction between culture and health.

#### 3.4.1.2 Legislative framework acknowledging culture for sustainable development

It is important to note that the *Constitution* provides the core legal framework for the recognition of the traditional health care system. A concurrent reading of sections 15(1), 27(1)(a), 30, 31(1) and 9(3) of the *Constitution* illustrates the new tenet for tolerance when it comes to variance based on cultural affiliations and practices.

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<sup>264</sup> Traditional philosophy is defined by s 1 (under the heading “traditional philosophy”) of the *Traditional Health Practitioners Act* as “Indigenous African techniques, principles, theories, ideologies, beliefs, opinions, and customs and uses of traditional medicines communicated from ancestors to descendants or from generations to generations, with or without written documentation, whether supported by science or not, and which are generally used in traditional health practice.” This definition is indicative of indigenous knowledge, which is established as a part of intangible cultural heritage in South Africa. See the discussion in para 3.2.4.1.

In addition, the South African government adopted a robust legislative framework for health in general that impacts indirectly on traditional medicine, besides the *Traditional Health Practitioners Act*, which deals directly with traditional health practitioners. These Acts include:

- a) the *Medicines and Related Substances Act*.<sup>265</sup> This Act is instructive in providing a definition for medicine in the conventional health practice;<sup>266</sup>
- b) the *National Health Act*.<sup>267</sup> This Act makes indirect references to traditional health practices. For example, section 43(3) enables the Minister of Health to prescribe the conditions under which the traditional initiation circumcision of a person might be carried out;<sup>268</sup>
- c) the *NEMBA*: As discussed in paragraph 3.2.4.1 above, section 82 of the Act protects the interest of the traditional use of indigenous biological resources before permits for bioprospecting are issued; and
- d) the *Patents Act*.<sup>269</sup> The Act was amended in 2005 to require an applicant for a patent to provide information relating to any role played by an indigenous biological resource, a genetic resource or traditional knowledge or usage in an invention.<sup>270</sup>

The aforementioned is indicative of the fact that decision-makers cannot continue to ignore the impact on development of traditional healing practices that forms a part of the way of life of certain cultural groups.<sup>271</sup>

There are also developments in policy initiatives that promote culture's interaction with health, as identified by the traditional medicine and traditional health practices. The

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<sup>265</sup> 101 of 1965.

<sup>266</sup> See s 1 of the *Medicines and Related Substances Act*.

<sup>267</sup> 61 of 2003.

<sup>268</sup> S 43(3) reads: "The Minister may, subject to the provisions of any other law, prescribe conditions relating to traditional health practices to ensure the health and well-being of persons who are subject to such health practices".

<sup>269</sup> 57 of 1978

<sup>270</sup> See s 30(3)(a) of the *Patents Act*.

<sup>271</sup> Rautenbach 2011 *THRHR* 31.

policy framework as it relates to local circumstances is discussed in the next paragraph.

#### 3.4.1.3 Policy framework acknowledging the relevance of culture to sustainable development

As established in the preceding paragraph, traditional health practices allow for the inclusion of culture into the health sector. On the national level, there are three general policy initiatives aimed at improving the functioning of the health system. They are the 2008 health sector road-map,<sup>272</sup> the integrated support teams report,<sup>273</sup> and the Ministerial Advisory Committee on National Health Insurance.<sup>274</sup> The recommendation emanating from these initiatives focus mainly on improving the health delivery system in conventional medical practice and do not make overt without reference to or recognise traditional medicine.

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272 Development Bank of South Africa 2008 <http://bit.ly/2owMoNi> accessed on 29 March 2017. In 2008, the Health and Education Committee of the National Executive Council of the African National Congress (ANC) commissioned a "Health Road-map". This was in response to national concerns that the South African health sector has seen a profound deterioration in the health of the nation since the late 1990s. The purpose of the Road-map was to critically examine the challenges in the health system and outline, at a high-level, the strategic and institutional options that could contribute to improving the performance of the health system. For a detailed analysis and information on progress with the implementation of the recommendations of this policy initiative, see generally Rispel and Moorman 2010 *South African Health Review* 127-142.

273 Integrated Support Team 2009 <http://bit.ly/2owQlla>. The Integrated Support Teams (ISTs) were established in February 2009 by the former Minister of Health, Ms Barbara Hogan, following newspaper reports that the Free State Department of Health had stopped enrolling patients in their antiretroviral programme, allegedly due to a lack of funds. The review was intended to quantify the overspending and investigate the reasons for the chronic overspending in most provincial health departments. The concern was that continuous overspending undermines the capacity of the health sector to improve health outcomes. The review was undertaken by a group of public health, finance and management experts and funded by the United Kingdom's Government Department for International Development Rapid Response Health Fund, using the World Health Organization's Strengthening of Health Systems Framework. The ISTs made several finances, service delivery, human resources, information management, medical products and technology recommendations.

274 For a detailed analysis of the progress of implementation of the recommendations of this policy initiative, see generally Rispel and Moorman 2010 *South African Health Review* 127-142.

Prior to these policy initiatives, the subject of traditional health practice was given attention in the ANC national health agenda in 1994.<sup>275</sup> The *National Health Plan for South Africa* 1994 states that:<sup>276</sup>

Traditional healing will become an integral and recognised part of health care in South Africa. Consumers will be allowed to choose whom to consult for their health care, and legislation will be changed to facilitate controlled use of traditional practitioners.

The principal tenets of the policy include people having the right of access to traditional practitioners as part of their cultural heritage and belief system. Despite the early recognition of traditional medicine, it seems as though the health sector has chosen to ignore the relevance of integrating it into the public health sector or institutionalising it.<sup>277</sup> It is recognised that the institutionalising and integrating of traditional medicine into the public health sector will not only promote the realisation of section 27 and other connected constitutional rights, but will also equip South Africa in the pursuit of sustainable development.<sup>278</sup> The Department of Health has already embarked on a number of initiatives to effect the institutionalisation of traditional medicine.<sup>279</sup>

The 1996 *National Drug Policy for South Africa*<sup>280</sup> is amongst one of the first policy documents to recognise the potential role and attendant benefits of traditional medicine for the national health system. It is noteworthy that a Drug Policy Committee was appointed with one of its term of reference being to investigate traditional medicine in the drafting process of the policy. The policy's aim is the investigation of the use of effective and safe traditional medicines at the primary health care level.

The legislation and policies discussed above that recognise traditional health practice are instrumental to further developments in the institutionalisation of traditional health

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275 ANC 1994 <http://www.anc.org.za/content/national-health-plan-south-africa>.

276 Para 3 ANC 1994 <http://www.anc.org.za/content/national-health-plan-south-africa> under the heading "traditional practitioners" accessed on 29 March 2017.

277 The *White Paper on the Transformation of the Health System in South Africa* GN 667 in GG 17910 of 16 April 1997 recognised the importance of traditional practitioners but indicated that they should not form part of the public health service at that stage. The Department did, however, state that the investigation into the regulation and control of traditional practitioners was important to empower them legally. In addition, the Department suggested the development of criteria outlining standards of practice and an ethical code of conduct in the facilitation of their registration.

278 Rautenbach 2011 *THRHR* 40.

279 This government department is responsible for health and related matters in South Africa.

280 Department of Health 1996 <http://bit.ly/2kRf5Yv> accessed on 29 March 2017.

practice in South Africa.<sup>281</sup> It is submitted that the institutionalisation of traditional health practice will help to provide a guide for decision-makers in reaching sustainable development decisions for the following reasons:

- a) The promotion of traditional health practice, based on the increased gravitation of people towards this form of health delivery, will potentially lead to more options being available to people. In addition, it could contribute to the progressive realisation of the overall well-being of the people. Well-being is after all guaranteed under section 24(a) of the *Constitution*. Thus, the promotion of personal well-being is fully aligned with the promotion of sustainable development, as envisaged by the *Constitution*;
- b) It is also stated that more people are active in the traditional health care system than in the public health care system; and
- c) Economically, figures published in 2006 show that African traditional medicine contributes an estimated R2.9 billion annually to South Africa's economy.<sup>282</sup> According to Rautenbach,<sup>283</sup> this figure represents 5.6 per cent of the national budget. In addition, the high representation of over 133,000 people employed in the medicinal plant trade further illustrates the economic importance of traditional medicine. The integration of traditional medicine and traditional health practices into mainstream health care will lead to the realisation of the related fundamental rights entrenched in the Bill of Rights. These rights include: the right to have access to health care,<sup>284</sup> the right to a healthy environment,<sup>285</sup> and the right to the individual and collective enjoyment of culture.<sup>286</sup>

There are therefore good reasons to advocate the inclusion of culture in the promotion of sustainable development through the integration of traditional medicine and

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281 For a further discussion of the institutionalisation of traditional health practice in South Africa, see Rautenbach 2011 *THRHR* 28-46.

282 Mander *et al* 2007 *South African Health Review* 189-196.

283 Rautenbach 2011 *THRHR* 39.

284 S 27(1)(a) of the *Constitution*.

285 S 24 of the *Constitution*.

286 Ss 30 and 31 of the *Constitution*.

traditional health practices into the South African medical system.<sup>287</sup> South Africa has made significant progress in including traditional health practice in the mainstream healthcare system by using law and policy initiatives as tools for formal integration. This is one of the ways in which the influence of culture in healthcare might be promoted in the pursuit of sustainable development.

### ***3.5 Summary of the chapter***

This chapter set out to examine and analyse in some detail the interaction between culture and the environmental, economic and social interests of sustainable development. The topics dealt with in the chapter were restricted to certain thematic areas such as cultural heritage and biodiversity, trade, and health.

This objective was carried out through a broad discussion of the existing national legislative and policy framework relevant to these themes, and how they accommodate the inclusion of culture. The most significant purpose of this exercise was to discover the extent to which the legislation and policy in these areas, if inclusive of culture, could provide a legislative basis for decision-makers to consider cultural issues in promoting sustainable development.

It was observed that South Africa has a rich and robust legislative and policy framework which amply provides a legitimising basis for the inclusion of culture in the pursuit of sustainable development. It was also observed based on the laws and policies discussed, that there are overlaps in the framework, with pieces of legislation containing provisions which apply to more than one sector.<sup>288</sup> This is indicative of the fact that the environmental, social, economic and cultural interests of sustainable development are interwoven and interdependent.

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<sup>287</sup> Although an in-depth discussion of the integration of traditional medicine into mainstream public healthcare in South Africa is not embarked on at this stage of this thesis, it suffices to note that the government has come to realise that traditional healing is deeply interwoven in the fabric of the cultural and spiritual life of many South Africans. See Rautenbach 2011 *THRHR* 45; Rautenbach 2007 *Obiter* 518-536.

<sup>288</sup> See for instance certain provisions in the *NEMBA* that apply to both biodiversity and health.

The nexus between cultural heritage and biodiversity demonstrates that cultural interests are closely woven into environmental interests,<sup>289</sup> and that the interests of biodiversity preservation and protection are influenced by cultural practices which may have both negative and positive impacts on sustainable development. The positives are aligned, for example, with traditional conservation measures which contribute to the preservation of certain rare biological species, and the negatives are aligned to *inter alia* the over-cultivation of other species which have traditional and cultural significance to the community. It is therefore imperative that environmental interests and cultural interests in this context are acknowledged and balanced in development decisions.

This chapter also recognised the relevance of EIA and other policy tools in the practical application of the integration element of sustainable development in relation to the consideration of environmental and cultural interests in reaching decisions on development. However, it is noted that where an EIA is not applicable but there are underlying social and economic impacts of the development that need to be assessed, then SIAs are better suited.

The primary legislation dealing with cultural heritage, the *NHRA*, lists tangible heritage as including typical environmental items such as geological sites, archaeological and palaeontological sites which are of cultural significance.<sup>290</sup> Such sites are related to the peoples' sense of place, which has both environmental and cultural implications for sustainable development, which decision-makers must take into account in planning processes and in reaching development decisions.

Similarly, with regards to the culture and trade nexus<sup>291</sup> it was found that cultural interests lie in the economic value of cultural goods and services. It is noted that the cultural industry provides a source of revenue for the national government.<sup>292</sup> The trade laws in South Africa show a potential for the inclusion of cultural interests beyond generating government revenue to generating incomes for individuals and households

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289 See the discussion in paras 3.2 and 3.2.1.

290 See the discussion in para 3.2.3.

291 See the discussion in para 3.3.

292 See the discussion in para 3.3.



as well. In this way culture serves as an enabler for the empowerment of the people to expand the choices available to them in the furtherance of their development. However, more recognition must be given to other areas of culture that may not be revenue generating as such, but nevertheless play an important role in promoting other cultural interests such as social cohesion and an increased recognition of cultural diversity.

With reference to culture and health, it is observed that the gravitation towards traditional medicine is the performance of an aspect of the traditional life of members of the indigenous communities in South Africa. The interaction of culture with health in this sense may not be applicable to conventional medicine and so not to mainstream conventional health practices. However, traditional medicine is seen as a legitimate alternative to conventional medicine which deserves recognition in legislation in the context of expanding the development choices available to people. Therefore, the lawmakers and decision-makers ought to consider traditional medicine as a cultural interest that deserves to be included in the sustainable development equation.

This chapter shows that although the existing legislative and policy framework accommodates issues of culture, it is yet to be seen how this legitimate basis for the inclusion of culture may be applied in the pursuit of sustainable development. This is because the government does not currently give priority to cultural interests as opposed to environmental, economic and social interests in the pursuit of sustainable development. What institutional government arrangements are in place to facilitate the increased recognition and inclusion of culture in the pursuit of sustainable development? The next chapter attempts to answer this question.

## CHAPTER 4

### INSTITUTIONAL GOVERNMENT ARRANGEMENTS

#### ***4.1 Introduction***

This chapter investigates the existing government structures (decision-making bodies) that may assist with the implementation of legislative and policy frameworks that could promote the inclusion of culture as discussed in Chapter 3.

“Institutional arrangements in government” alludes to how government is structured to carry out its primary function of governing as dictated by the *Constitution* and other applicable legislation. For this thesis, “government” refers to the structures or branches of government established for cooperative governance,<sup>1</sup> and the traditional authorities<sup>2</sup> but excludes the judiciary.<sup>3</sup> The judiciary is an independent branch of government, distinct and separate from the executive and legislative branches of government, since they are not formally part of the policy-making or implementation machinery of government. The independence of the judiciary is a cornerstone of constitutional democracy so that courts can protect citizens without being influenced or pressurised by government. This guarantees the supremacy of the *Constitution*. The contribution of the judiciary to the theme of this thesis is discussed in more detail in chapter 5.

“Governance”, on the other hand, simply refers to the process of governing by the government through which officials are held accountable for executing the fiduciary duties with which they are entrusted by the public.<sup>4</sup> In the context of culture, cultural governance as referred to in this study is limited to how government structures are arranged to manage, administer and implement the governance of cultural interests. The emphasis in this case is on the capacity of the existing institutional government

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1 Such as the three spheres of government discussed in para 4.2 to 4.7.

2 See the discussion in para 4.9.

3 S 165(2) of the *Constitution*.

4 See Bray 2008 *SAJELP* 9; Bosman, Kotzé and Du Plessis 2004 *SAPL* 412.

arrangement to coordinate, integrate and manage the inclusion of culture when engaged in development-related decisions.

The manifestation of cooperative governance as a governance tool that seeks to establish and maintain good governing relations among the organs of state within the three spheres of government is interrogated.<sup>5</sup> This thesis argues that intergovernmental relations and the principle of cooperative governance<sup>6</sup> applicable to the national,<sup>7</sup> provincial<sup>8</sup> and local<sup>9</sup> spheres of government may assist in the implementation of the inclusion of culture in the pursuit of development in South Africa.

Furthermore, according to the principle of subsidiarity,<sup>10</sup> the local sphere of government (municipalities)<sup>11</sup> and traditional authorities<sup>12</sup> are the closest to the people in terms of delivering the targets and outcomes of sustainable development. Therefore, the developmental mandate of the municipalities<sup>13</sup> and the functions of the traditional councils as established by legislation<sup>14</sup> are particularly relevant in the context of this study.

This chapter is divided into three parts. The first part is an overview of the general structure of the South African government, including the functions and roles of each sphere of government and the branches of government.

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5 See discussion in para 4.11.2.

6 S 41 of the *Constitution*.

7 Chapters 4 and 5 of the *Constitution*.

8 Chapter 6 of the *Constitution*.

9 Chapter 7 of the *Constitution*.

10 The *Constitution* firmly establishes the subsidiarity principle. The principle operates to the effect that a matter that would most effectively be administered locally and which the local authority has the power to administer must compulsorily be assigned to the local authority by the national or provincial government. Developmental issues and culture issues should therefore be dealt with at the lowest level in the hierarchy at which they can be effectively managed. Although, this is yet to be seen as shown in the rest of this chapter. See s 156(4) of the *Constitution*; De Visser *Developmental Local Government* 79.

11 Chapter 7 of the *Constitution*.

12 See the *Traditional Leadership and Governance Framework Act* 41 of 2003; also see para 4.9.

13 See the discussion in para 4.7.2. Also see s 153 of the *Constitution*, the *Local Government White Paper* GN 423 in GG 18739 of 13 March 1998, and the preambles of the *Municipal Systems Act* and the *Local Government: Municipal Structures Act* 117 of 1998 (hereafter *the Municipal Structures Act*).

14 *Traditional Leadership and Governance Framework Act*.

The second part discusses the government departments and internal structures in the national, provincial and local spheres, which are responsible for matters of culture. This part focuses on national departments and their provincial counterparts as well as the local government departments that cater for cultural interests. The specific cultural interests to be discussed have arisen from the themes identified in Chapter 3.<sup>15</sup> There are other institutions that are established to be “watchdogs” of the country’s democracy. The functions of these institutions are argued to be relevant where government’s balancing of cultural and other sustainable development interests seem hard, unfair or unreasonable. Two of such institutions discussed are the South African Human Rights Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

The third part explains the importance of the principles of cooperative governance in the institutional government arrangements outlined in the second part, in relation to sustainable development as required by the *Constitution*, and extended in national legislation such as the *Intergovernmental Relations Framework Act* (the *IGRFA*).<sup>16</sup> The prominence of cooperative governance as explained lays the basis for the consideration of cooperative cultural governance in government decisions that require an inclusive and holistic approach to sustainable development. The aim of this analogy is to show how cooperative governance might be used as an instrument to facilitate the inclusion of cultural interests in the balancing of interests in development-related decision-making. It is envisaged that cooperative cultural governance may be adapted to be a sector specific form of cooperative governance which may assist the government and the organs of state responsible for cultural matters to work together in mainstreaming culture into sustainable development thinking.

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<sup>15</sup> See the discussion in para 3.1.

<sup>16</sup> 13 of 2005.

## **4.2 South Africa's government structure**

The government of South Africa consists of national, provincial and local spheres.<sup>17</sup> Each sphere consists of executive and legislative branches. The judiciary is the third branch.

The executive branch of the national sphere of government is made up of the president, the deputy president, and cabinet ministers.<sup>18</sup> It also includes government departments.<sup>19</sup> The legislative branch of the national sphere of government is known as the legislature. The national legislature is the Parliament.<sup>20</sup> The Parliament is made up of two houses: The National Assembly<sup>21</sup> and the National Council of Provinces (NCOP).<sup>22</sup>

In the provincial sphere, there are nine provinces.<sup>23</sup> They are autonomous to a very large extent, regarding both the legislature and the executive. The executive authority is vested in the Premier and members of the executive councils.<sup>24</sup> The provincial legislative authority is vested in the provincial legislature.<sup>25</sup> The residents of the province elect members of the provincial legislature according to a system of proportional representation.<sup>26</sup> The legislature may adopt a constitution for the province, provided it is consistent with the national constitution.<sup>27</sup>

Local government is a complex and independent sphere of government. It is not a function of provincial or national government.<sup>28</sup> South African local government

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17 S 40(1) of the *Constitution*; the term "sphere" is used rather than the term "level" to deliberately move away from the previous hierarchical order of national, provincial and local levels of government in the apartheid era. See Devenish *A commentary on the South African Constitution* 105.

18 S 85(2) of the *Constitution*.

19 S 85(2)(c) of the *Constitution*.

20 Chapter 4 of the *Constitution*.

21 S 42(1)(a) and (3) of the *Constitution*.

22 S 42(1)(b) and (4) of the *Constitution*.

23 S 103 of the *Constitution*; the provinces are the Eastern Cape, Free State, North-West, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Northern Cape, and Western Cape.

24 S 125(1)(2) of the *Constitution*.

25 S 104 of the *Constitution*.

26 Ss 104(1) and 105(1) of the *Constitution*.

27 S 104(1)(a) of the *Constitution*. For example, the *Constitution of the Western Cape 1997*, 1 of 1998; also see *In re: Certification of the Constitution of the Western Cape 1997* 9 BCLR 1167(CC).

28 Para 5 of the *Policy Process on the System of Provincial and Local Government* GN 936 in GG 30137 of 27 August 2007; Bekink *Principles of South African Local Government Law* 41.

consists of 205 local municipalities, 8 metropolitan municipalities<sup>29</sup> and 44 district municipalities<sup>30</sup> that were established, each with its own demarcated area, and the areas cover the whole territory of South Africa.<sup>31</sup> This means that municipalities govern the whole of South Africa through so-called “wall-to-wall” local government, including the rural areas formerly under the rule of traditional authorities.<sup>32</sup> Traditional authorities no longer rule independently but are included in the system of local government as outlined in the *Constitution*<sup>33</sup> and other legislation.<sup>34</sup>

The three spheres are “distinctive, interdependent and inter-related”.<sup>35</sup> “Distinctive” here means that each sphere has its own unique area of operation. Distinctiveness is suggestive of exactness, in this instance with respect to the allocation of responsibilities and functions to appropriate arms of government,<sup>36</sup> as in each sphere having distinctive legislative and executive competencies, as discussed below.

The three spheres of government are “interdependent”, which means that they are required to cooperate and acknowledge their respective areas of jurisdiction,<sup>37</sup> although each sphere exercises its assigned responsibilities to the common good of the country.<sup>38</sup> Malan<sup>39</sup> refers to the interdependence of the spheres of government as signalling the duty of the spheres to empower one another. Ile<sup>40</sup> further infers that the interdependence of the spheres of government marks the extent to which one sphere depends on another for the proper fulfilment of its constitutional functions. Therefore,

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29 The eight metropolitan municipalities are: Johannesburg, Cape Town, eThekweni, Nelson Mandela Bay, Tshwane, Mangaung, Ekurhuleni and Buffalo City.

30 De Visser and Steyler *Electing Councillors* 10.

31 S 151 of the *Constitution*.

32 Van der Waldt “The Statutory and Regulatory Framework for Local Government” 48.

33 S 211 of the *Constitution*.

34 *Traditional Leadership and Governance Framework Act* 41 of 2003.

35 S 40(1) of the *Constitution*; Devenish *A commentary on the South African Constitution* 105.

36 Nzimakwe and Ntshakala 2015 *JPA* 831; Rautenbach 2013 *Rautenbach-Malherbe Constitutional Law* 116-120.

37 See s 41(1)(h) of the *Constitution*, which provides: “All spheres of government and all organs of state within each sphere must – (h) co-operate with one another in mutual trust and good faith by – (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.”; see also De Villiers 1994 *SAPL* 430.

38 Coetzee 2010 *Journal for Contemporary History* 87.

39 Malan 2005 *Politeia* 227.

40 Ile 2010 *Journal of US-China Public Administration* 54; Woolman and Roux “Co-operative Government and Intergovernmental Relations” 14-3b(i).

the term “interdependent” suggests that no sphere can operate in isolation, as all spheres are inter-reliant, mutually dependent and supportive of one another.<sup>41</sup> This is especially relevant in terms of capacitating the provincial and local spheres of government. These two spheres are meant to be closely supervised and monitored to ensure that national objectives are met by the appropriate institutions, subject to the provision of section 41(1)(g) of the *Constitution*.<sup>42</sup> However, it is noteworthy that the provinces and municipalities have autonomous governing powers by virtue of the *Constitution*.<sup>43</sup>

On the question of whether national government may prescribe to provincial departments how their administration should be structured,<sup>44</sup> the court found in *Premier of the Province of the Western Cape v President of the RSA*<sup>45</sup> that such action by the national government does not infringe section 41(1)(g) of the *Constitution*.<sup>46</sup>

“Interrelated” on the other hand means that there should be a system of cooperative governance and intergovernmental relations among the three spheres.<sup>47</sup> All three spheres have legislative and executive authority.<sup>48</sup> The principles of cooperative governance<sup>49</sup> is constitutionally provided and is binding on all spheres of government.<sup>50</sup>

It is important to note that the institutional interaction of the spheres of government is critical in the pursuit of sustainable development in South Africa.<sup>51</sup> It is for this

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41 Nzimakwe and Ntshakala 2015 *JPA* 832.

42 S 41(1)(g) of the *Constitution* provides: “(1) All spheres of government and all organs of State within each sphere must ... (g) exercise their powers and functions in a manner that does not encroach on the geographical, functional and institutional integrity of government in another sphere.”

43 Schedules 4 and 5 of the *Constitution*.

44 In this case, whether national government could prescribe that a director-general of a provincial department should deal with inter-governmental relationships. It is argued that a province should be given the freedom to appoint the relevant functionary in this regard. See *Premier of the Province of the Western Cape v President of the RSA* 1999 4 BCLR 382 (CC) para 67.

45 *Premier of the Province of the Western Cape v President of the RSA* 1999 4 BCLR 382 (CC).

46 *Premier of the Province of the Western Cape v President of the RSA* 1999 4 BCLR 382 (CC) para 74.

47 De Visser *Developmental local government* 54; Bray 2008 *SAJELP* 9.

48 S 44 (National government); s 104 (Provincial government) and s 156 (Local government) of the *Constitution*.

49 S 41 of the *Constitution*.

50 This is further discussed in para 4.8.1.

51 See generally Du Plessis and Alberts 2014 *SA Public Law* 446.

reason, that the role of the executive and legislative branches of government of the three spheres is discussed in the following paragraphs, to reflect on their cultural mandates. Thereafter, the government departments responsible for implementing the legislative mandates are explored for the three spheres.

### ***4.3 National government: executive and legislative authority***

The executive and the legislative branches of the national sphere of government are the functional institutions. Their powers and functions are relevant to the inclusion of culture in sustainable development discourse because they play a role in the making of culture-related laws and the implementation of such laws. Thus, the executive and legislative branches of the national government are relevant to assess the extent to which government powers and functions facilitate the inclusion of culture in the pursuit of sustainable development.

#### ***4.3.1 Executive powers and functions***

The executive authority of the national government is vested in the president.<sup>52</sup> The president is the designated head of state,<sup>53</sup> who exercises this authority together with the other members of the Cabinet.<sup>54</sup> The president is elected by the National Assembly from amongst its members.<sup>55</sup> Upon election, the president ceases to be a member of the national assembly. The cabinet members are individually and collectively accountable to parliament, whose motion of no confidence would result in their resignation.<sup>56</sup> The cabinet consist of the president, who is the head of cabinet, the deputy president and the ministers.<sup>57</sup>

The responsibility of the executive as a collective is to run the country and to make policy in the best interests of its citizens in terms of the *Constitution*.<sup>58</sup> The executive is empowered to implement legislation, develop and implement policy, direct and

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52 S 83 of the *Constitution*.

53 S 83(a) of the *Constitution*.

54 S 85 of the *Constitution*.

55 S 86(1) of the *Constitution*.

56 Ss 92(2) and 102 of the *Constitution*.

57 S 91(1) of the *Constitution*.

58 S 85 of the *Constitution*.



coordinate the functions of government departments, prepare and initiate legislation, and perform the other functions required by the *Constitution* or relevant legislation.<sup>59</sup> The *Constitution* grants the national executive intervening powers such that in case of a failure to fulfil an executive obligation, the national executive may intervene by issuing directives or, under certain conditions, assume responsibility for the obligation(s).<sup>60</sup>

The ministers are appointed by the president and assigned powers and functions to oversee and supervise specific responsibilities known as “portfolios”. There are thirty-three portfolios.<sup>61</sup> The state departments are named after the titles of the portfolio they are responsible for. Some of the portfolios directly relevant to culture are Arts and Culture, Economic Development, Environmental Affairs, Tourism, Trade and Industry, Small Business Development, Social Development, Sport and Recreation, Transport, Water and Sanitation and Cooperative Governance and Traditional Affairs.

The ministers of the state departments directly relevant to culture are responsible for the powers and functions assigned to them by the president. They are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.<sup>62</sup>

#### *4.3.2 Legislative powers and functions*

The legislative authority of the national sphere of government is vested in Parliament.<sup>63</sup> Parliament consists of a National Assembly (NA) that is elected according

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59 S 85(2)(a)-(e) of the *Constitution*.

60 S 100 of the *Constitution*.

61 These portfolios are: Agriculture, Forestry and Fisheries, Arts and Culture, Basic Education, Communications, Defence and Military Veterans, Economic Development, Energy, Environmental Affairs, Finance, Health, Higher Education and Training, Human Settlements, International Relations and Cooperation, Justice and Correctional Services, Labour, Police, Public Enterprises, Public Services and Administration, Public Works, Rural Development and Land Reform, Science and Technology, Small Business Development, Social Development, Sport and Recreation, State Security, Telecommunications and Postal Services, Tourism, Trade and Industry, Transport, Water and Sanitation, and Cooperative Governance and Traditional Affairs.

62 S 92(1)(2) of the *Constitution*.

63 S 43 and 44 of the *Constitution*.

to a system of proportional representation and a National Council of Provinces (NCOP), with delegations from each province.<sup>64</sup>

The Parliament is empowered to legislate over any matter including those designated in Schedule 4,<sup>65</sup> apart from matters listed within a functional area listed in Schedule 5.<sup>66</sup> Schedule 4 contains matters on which national and provincial parliaments can legislate. It includes matters such as cultural matters, the environment, health services, trade, welfare services<sup>67</sup> and some local government matters<sup>68</sup> such as municipal planning, municipal health services, local tourism, and water and sanitation services.<sup>69</sup> For example, both the national and provincial legislature may pass legislation on cultural matters as culture is a concurrent function of both the national and provincial governments. An example of such cultural legislation is the *NHRA* in the national sphere and in the Kwa-Zulu Natal provincial sphere it is the *KwaZulu-Natal Heritage Act*.<sup>70</sup>

To avoid conflicts, the *Constitution* stipulates that national legislation prevails when conditions pertaining to the need for uniformity and the necessity for “higher” national goals such as security and economic unity must be met.<sup>71</sup> With regards to matters not listed on either Schedule, the general principle is that the national sphere has exclusive power in respect of such matters.<sup>72</sup>

Flowing from the discussion above, it is established that cultural matters currently fall under the functional areas of concurrent national and provincial legislative competence, as well as under the functional areas of exclusive provincial legislative competence.<sup>73</sup> The implication of this ties to the potential overlap and proliferation of

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64 Ss 42(1), 43(a), 46, and S 60(1) of the *Constitution*; see para 4.2.

65 Schedule 4 of the *Constitution*. Matters in this schedule are fields of concurrent legislative competence of both national and provincial legislatures.

66 Schedule 5 of the *Constitution*; s 44(1)(ii) of the *Constitution*. Matters in this schedule are within the exclusive legislative competence of the provincial legislatures. The legislative powers of the provincial legislative branch of government are discussed in para 4.5.

67 These matters are listed in Schedule 4A of the *Constitution*.

68 Subject to s 155(6)(a) and (7) *Constitution*.

69 These matters are listed in Schedule 4B.

70 10 of 1997. It is interesting to note that of the nine provinces, only one has an Act on heritage.

71 S 146 of the *Constitution*.

72 See *In re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) para 335.

73 See the discussion in para 4.3 above.

laws catering to the same subject matter at the national and provincial spheres. This in turn results in the fragmentation of mandates to the national and provincial departments. The national departments responsible for the implementation of the cultural mandate of the national sphere are discussed below.

#### **4.4 National government structures**

The national line departments, as mentioned earlier, are each responsible for the portfolio assigned to them. Some of these line functionaries have clear cultural mandates, such as the Department of Arts and Culture, which facilitates the promotion of culture for sustainable development. The national departments are typically categorised into five main clusters, based on the mandates flowing out of their designated portfolios. These clusters are Central Government Administration,<sup>74</sup> Justice and Protection Services,<sup>75</sup> Finance and Administration Services,<sup>76</sup> Economic and Infrastructure Development<sup>77</sup> and Social Services.<sup>78</sup> Some of the clusters include other

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74 The central government administration cluster is made up of the Parliament, the office of the President, the Department of Cooperative Governance (COGTA), the Department of Traditional Affairs, the Department of Home Affairs, and the Department of Public Works. Each national department is constituted of constitutional bodies like the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (established by virtue of s 181(1)(c) of the *Constitution*) and other public entities like the South African Reserve Bank and subsidiaries under the public entities, like the Corporation for Public Deposits. For a full list of the national departments, constitutional bodies, public entities and subsidiaries see National Government of South Africa 2017 <http://bit.ly/2y9BiU2> accessed on 14 September 2017.

75 The Justice and Protection Services cluster is made up of national departments, public entities, and judicial institutions. Examples are the Department of Defence, public entities such as Legal Aid South Africa and judicial institutions like the Land Claims Court and the Constitutional Court of South Africa. For a full list of the national departments, public entities and judicial institutions under this cluster, see National Government of South Africa 2017 <http://bit.ly/2x4pOTh> accessed on 14 September 2017.

76 The Finance and Administration Services cluster is made up of national departments such as the Department of National Treasury and the Department of Public Enterprises (DPE), one constitutional body (the Financial and Fiscal Commission (FFC) established by virtue of s 220 of the *Constitution*), and public entities such as the Development Bank of Southern Africa and Alexkor. For a full list of the national departments, public entities and the constitutional bodies under this cluster, see National Government of South Africa 2017 <http://bit.ly/2eZsxUu> accessed on 14 September 2017.

77 The Economic and Infrastructure Development cluster is also up of national departments and public entities such as the Department of Agriculture, Forestry and Fisheries (DAFF) and the Competition Commission. For a full list of the national departments and public entities, see National Government of South Africa 2017 <http://bit.ly/2wssve7> accessed on 14 September 2017.

78 The Social Services cluster is made of national departments like the Department of Arts and Culture, to which public entities like the National Heritage Council South Africa and the South Africa Heritage Resources Agency report; and the Department of Health, with public entities such as the Council for Medical Schemes and the Health Professions Council of South Africa. For a full list of

institutions such as constitutional bodies (for example, the South African Human Rights Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities), public entities (for example, the International Trade Administration Commission of South Africa (ITAC)) and other relevant bodies such as galleries, museums and theatres under the Department of Art and Culture (DAC). The national departments and the public entities in each cluster are organs of state set up by national legislation to oversee the implementation of the objectives of the *Constitution*.

Although none of these clusters deals exclusively with cultural interests, it is argued in Chapter 3<sup>79</sup> that culture interacts with certain areas of the environmental, economic and social interests of sustainable development, and that the relevant legal framework allows for the inclusion of cultural interests in the mandates of some of the components of these clusters. The sections below analyse the government departments responsible for cultural matters discussed in Chapter 3.<sup>80</sup>

#### *4.4.1 Structures relevant for the cultural and environmental interest interface*

As already explained, the principal legislation for the management of environmental affairs is the *NEMA*. The *NEMA* lists national departments whose function may affect the environment<sup>81</sup> as including the Department of Environmental Affairs (DEA), the Department of Rural Development and Land Reform (DRDLR), the Department of Agriculture, Forestry and Fisheries (DAFF), the Department of Water and Sanitation (DWS), the Department of Human Settlement (DHS), the Department of Trade and Industry (DTI), the Department of Transport (DT) and the Department of Defence (DD). The DEA, the DAFF, the DWS, the DRDLR, the Department of Mineral Resources (DMR), the Department of Energy (DME), the Department of Health (DH), and the

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the national departments and public entities, see National Government of South Africa 2017 <http://bit.ly/2xnOSW0> accessed on 14 September 2017.

79 See the discussion in paras 3.2, 3.2.1 and 3.2.4.

80 Chapter 3 deals with the interaction between cultural interests and environmental, economic and social interests, as manifested in the selected themes. Therefore, reference is made extensively to the sections discussed in Chapter 3 where relevant; also see discussion in para 3.2, 3.3, and 3.4.

81 See s 11(1) of Schedule 1 of the *NEMA*. It is important to note that the designated names of the national departments have changed from those listed in the *NEMA*. They are known here by their most recent names as at 16 September 2017.

Department of Labour (DL) are the departments mandated by the *NEMA* to exercise functions that involve the management of the environment.<sup>82</sup> The DEA and the DWS are required to be custodians of the environment<sup>83</sup> and of water<sup>84</sup> respectively. Certain aspects of the management of the environment and water that impact on culture fall within their sphere of governance. It is imperative that cultural interests must be included when the departments are carrying out decisions that affect sustainability.

The section 2 principles of the *NEMA* are applicable to the country (government, individuals, corporate bodies and communities alike) in terms of adherence to environmental management principles and more specifically to the decision-making machinery in government. The environmental management principles further contain relevant principles that are applicable to culture, which in turn requires that specific departments in government are responsible to enforce them. The relevant principles within the context of culture are set out in sections 2(2) and (4)(a) of the *NEMA*.<sup>85</sup> A joint reading of both sections shows that the national departments whose activities affect the environment and those which are responsible for managing the environment must consider all relevant interests in the pursuit of sustainable development. These relevant interests include cultural interests such as the disturbance of the nation's cultural heritage.<sup>86</sup> Both natural and cultural heritage resources are treated as integral components of the environment.<sup>87</sup>

The national department primarily tasked with the responsibility of cultural affairs is the Department of Arts and Culture (DAC). The DAC's constitutional and legislative mandate emanates from sections 16, 30 and 31 of the *Constitution*, which spreads

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82 See s 11(2) of Schedule 2 of the *NEMA*.

83 S 2(4)(o) of the *NEMA* provides: "The environment is held in public trust for the people. The beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage."

84 S 3 of the *NWA* provides: "The environment is held in public trust for the people. The beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage."

85 See the discussion about these sections in para 2.6.2.2.

86 S 2(4)(a)(iii) of the *NEMA*; also see the discussion in para 3.2.3.1.

87 Rautenbach, Hart and Naudé "Heritage Resources Management" 829.

over a range of institutions<sup>88</sup> and legislation.<sup>89</sup> In furtherance of the DAC's legislative mandate, the management of the nation's cultural heritage is governed by the *NHRA* and the *NHCA*.<sup>90</sup>

The *NHRA* offers a list of what constitutes the national estate in section 3(1)-(3).<sup>91</sup> The list contains components of the environment such as landscapes and archaeological sites. A system of the grading of places and objects which form part of the national estate is established by the *NHRA* in section 7.<sup>92</sup> The *NHRA* sets out a

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88 Declared Cultural Institutions are so declared according to the *Cultural Institutions Act* 119 of 1998. These are corporate bodies receiving annual subsidy from the Department; also see Rautenbach "Implementation of the Convention on the Diversity of Cultural Expressions in South Africa" 422; Owosuyi 2015 18(5) *PER* 2041.

89 The Acts that have been promulgated in furtherance of the DAC's legislative mandate include the *NHRA*, and the *National Heritage Council Act* 11 of 1999; see Rautenbach "Implementation of the Convention on the Diversity of Cultural Expressions in South Africa" 422.

90 11 of 1999.

91 S 3(1)-(3) of the *NHRA* provides: "(1) For the purposes of this Act, those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities. (2) Without limiting the generality of subsection (1), the national estate may include - (a) places, buildings, structures and equipment of cultural significance; (b) places to which oral traditions are attached or which are associated with living heritage; (c) historical settlements and townscapes; (d) landscapes and natural features of cultural significance; (e) geological sites of scientific or cultural importance; (f) archaeological and palaeontological sites; (g) graves and burial grounds, including - (i) ancestral graves; (ii) royal graves and graves of traditional leaders; (iii) graves of victims of conflict; (iv) graves of individuals designated by the Minister by notice in the Gazette; (v) historical graves and cemeteries; and (vi) other human remains which are not covered in terms of the Human Tissue Act, 1983 (Act No. 65 of 1983); (h) sites of significance relating to the history of slavery in South Africa; (i) movable objects, including - (i) objects recovered from the soil or waters of South Africa, including archaeological and palaeontological objects and material, meteorites and rare geological specimens; (ii) objects to which oral traditions are attached or which are associated with living heritage; (iii) ethnographic art and objects; (iv) military objects; (v) objects of decorative or fine art; (vi) objects of scientific or technological interest; and (vii) books, records, documents, photographic positives and negatives, graphic, film or video material or sound recordings, excluding those that are public records as defined in section 1(xiv) of the National Archives of South Africa Act, 1996 (Act No. 43 of 1996). (3) Without limiting the generality of subsections (1) and (2), a place or object is to be considered part of the national estate if it has cultural significance or other special value because of-(a) its importance in the community, or pattern of South Africa's history; (b) its possession of uncommon, rare or endangered aspects of South Africa's natural or cultural heritage;(c) its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage; (d) its importance in demonstrating the principal characteristics of a particular class of South Africa's natural or cultural places or objects; (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group; (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period; (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons; (h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and (i) sites of significance relating to the history of slavery in South Africa."

92 S 7 of the *NHRA* provides: "(1) SAHRA, in consultation with the Minister and the MEC of every province, must by regulation establish a system of grading of places and objects which form part

three-tier system of heritage resource management at the national, provincial and local spheres of government.<sup>93</sup>

The South African Heritage Resources Agency (SAHRA) is the statutory organisation established by the *NHRA* as the national administrative body responsible for the protection of South Africa's cultural heritage. The SAHRA with the assistance of the SAHRA Council<sup>94</sup> is responsible for national cultural heritage resources management functions. The SAHRA is the only government institution tasked with grading and declaring heritage sites in accordance with the provisions of the *NHRA*.<sup>95</sup> The mandate of the SAHRA is to identify, protect and promote heritage resources which are categorised as Grade I heritage resources.<sup>96</sup> These are heritage resources that are deemed to be of national significance and must be formally protected by the SAHRA in terms of section 27 of the *NHRA* as national heritage sites. The SAHRA is also charged with the authorisation of development that is to occur around any heritage site by way of issuing a permit before such development is approved.<sup>97</sup>

On the other hand, the National Heritage Council is tasked with transforming, protecting and promoting South African heritage for sustainable development.<sup>98</sup> The composition of the council is provided for in section 5 of the *NHCA*. It consists of at

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of the national estate, and which distinguishes between at least the categories-(a) Grade I: Heritage resources with qualities so exceptional that they are of special national significance; (b) Grade II: Heritage resources which, although forming part of the national estate, can be considered to have special qualities which make them significant within the context of a province or a region; and (c) Grade III: Other heritage resources worthy of conservation, and which prescribes heritage resources assessment criteria, consistent with the criteria set out in section 3(3), which must be used by a heritage resources authority or a local authority to assess the intrinsic, comparative and contextual significance of a heritage resource and the relative benefits and costs of its protection, so that the appropriate level of grading of the resource and the consequent responsibility for its management may be allocated in terms of section 8. (2) A heritage resources authority may prescribe detailed heritage assessment criteria, consistent with the criteria set out in section 3(3), for the assessment of Grade II and Grade III heritage resources in a province."

93 S 8(1) of the *NHRA*.

94 The SAHRA Council is a governing body established in terms of s 14 of the *NHRA* to control, manage and direct the SAHRA. The functions, powers and duties of the NHC are set out in ss 14 - 16 of the *NHRA*.

95 Ss 25 and 27 of the *NHRA*.

96 See s 7 of the *NHRA*.

97 S 27(18) of the *NHRA* provides: "[N]o person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site."

98 S 4(a) of the *NHCA* provides: "The objects of the Council are-(a) to develop, promote and protect the national heritage for present and future generations".

least five members appointed by the Minister of Arts and Culture, a representative of each province as nominated by the member of the executive council (MEC) of the relevant province responsible for cultural matters, and the chairpersons of the Council of the SAHRA, the National Archives Commission, the Heraldry Council, the Board of the National Library, the Council of the Northern Flagship Institution, the Council of the Southern Flagship Institution, and any other body or institution the Minister of Arts and Culture considers relevant.<sup>99</sup>

One of the core functions of the Council is advising the Minister of Arts and Culture on national policies about heritage matters, including indigenous knowledge systems, treasures, restitution and other matters concerning cultural heritage which the Minister may from time to time determine. This function of the Council connected to the governance of indigenous knowledge systems, when read together with the definition of indigenous knowledge in the IKS Bill,<sup>100</sup> infers that the *NHCA's* function with regards to indigenous knowledge systems potentially intersects with the function of the DEA with regards to indigenous knowledge that relates to biodiversity. Such an intersection may be clear in development projects which require that biological resources that are indigenous to communities and connected with their culture are compromised. It is also interesting to note that indigenous knowledge forms a part of intangible cultural heritage in the South African context.<sup>101</sup>

Furthermore, with respect to the management of cultural heritage resources, the Department of Public Works' (DPW) mandate is to be the custodian and manager of all national governments' fixed assets, for which no other legislation makes another department or institution responsible. Therefore, the function of efficiently managing the asset life cycle of immovable government assets<sup>102</sup> brings immovable cultural heritage resources such as monuments within the department's authority.

The Department of Traditional Affairs is also tasked with the promotion of culture, heritage and social cohesion. Although the *Traditional Leadership and Governance*

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<sup>99</sup> S 5 of the *NHCA*.

<sup>100</sup> See discussion in para 2.5.3.

<sup>101</sup> S 2 of the *NHRA*.

<sup>102</sup> Department of Public Works 2009 <http://bit.ly/2fkWyR> accessed on 25 September 2017.



*Framework Act* does not allocate any specific roles and function for traditional leaders, section 20(1) of the Act gives national and provincial governments the discretion to allocate additional roles and functions to traditional leaders and traditional councils by means of legislation or other measures.<sup>103</sup> Thus, the Department of Traditional Affairs coordinates such traditional affairs activities across government, through the development of appropriate policies, norms and standards, systems, and a regulatory framework governing traditional affairs.<sup>104</sup>

#### *4.4.2 Structures relevant for the culture and economic interest interface*

Chapter 3 highlighted the link between culture and the economy with an emphasis on the contribution of the trade in cultural products to the economy.<sup>105</sup>

The functions of several state departments have a bearing on the trade in cultural products. The most prominent of these departments is the DAC. The DAC plays a leading role in the arts and culture sector by developing policy objectives and priorities in all spheres of government dealing with cultural issues.<sup>106</sup> The DAC is also key in ensuring the implementation of the 2005 *Cultural Diversity Convention*, which protects expressions that result from the creativity of individuals, groups and societies that has cultural content.<sup>107</sup> The DAC is also responsible for the contribution of the cultural sector to the economy. Other departments who also deal with cultural issues within the context of trade include the Department of Trade and Industry (DTI), the Department of Communications (DOC), the Department of Small Business Development (DSBD) and the Economic Development Department (EDD).

The DTI plays a critical role in the promotion of economic development and encourages export. In this sense, the department's functions extend to the export of cultural products from the Republic to other countries in the African region and

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103 Mdakane 2014 <http://bit.ly/2fkk91Z> accessed on 25 September 2017.

104 National Government of South Africa 2017 <http://bit.ly/2wN5zeF> accessed on 25 September 2017.

105 See the discussion in para 3.2.

106 Rautenbach "Implementation of the Convention on the Diversity of Cultural Expressions in South Africa" 423.

107 A 4(3) of the 2005 *Cultural Diversity Convention*. Also see the discussion in para 3.2 and Rautenbach "Implementation of the Convention on the Diversity of Cultural Expressions in South Africa" 422.

beyond. The DTI, along with its agencies such as the Companies and Intellectual Property Commission and the National Empowerment Fund, seeks to increase the contribution of small, medium and micro enterprises in the cultural sector to the South African economy through financial, administrative and other relevant support.<sup>108</sup> The DTI and its agencies also ensure the implementation of the Broad-Based Black Economic Empowerment (B-BBEE) policy in the cultural sector of the economy.<sup>109</sup>

As previously mentioned in Chapter 3, the cultural industry in South Africa has several commercially active sectors that contribute to economic growth.<sup>110</sup> Such sectors, as already mentioned, include the film and video sector, the craft sector (including traditional African art, designer goods and souvenirs), the music sector, the performing arts, the visual arts and the publishing sector, which includes books, magazines and newspaper.

The national department whose functions cover these sectors is the DOC. The mandate of the DOC includes creating an enabling environment for the provision of inclusive communication services to all South Africans in a manner that promotes socio-economic development and investment. In the furtherance of its mandate, the DOC uses broadcasting, news media, print media and other modern technologies to brand the country locally and internationally.<sup>111</sup> These various forms of publication also serve as platforms to promote cultural products locally and internationally, thereby promoting economically sustainable development. The reporting entities within the DOC include the Film and Publication Board, the Media Development and Diversity Agency, and the South African Broadcasting Corporation.

The function of the DOC and its reporting entities impacts on small cultural enterprises whose activities are governed by the DSBD. The mandate of the department is to support the radical transformation of the economy through the promotion and development of sustainable and competitive entrepreneurs, small businesses and

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108 Department of Trade and Industry Date Unknown <http://bit.ly/2wfnztv> accessed on 25 September 2017.

109 Department of Trade and Industry Date Unknown <http://bit.ly/2wfnztv> accessed on 25 September 2017; see the discussion on the *Broad-Based Black Economic Empowerment Act* in para 3.2.1.

110 See the discussion in para 3.2.1.

111 Department of Communication 2015 <http://bit.ly/2hqKijS> accessed on 25 September 2017.

cooperatives that contribute to job creation and economic growth.<sup>112</sup> It is noted that the arts and creative industries in South Africa have created between 162,809 and 192,410 jobs, which equates to about 1.08 per cent to 1.28 per cent of employment in the country, contributing 2.9 per cent to GDP.<sup>113</sup> The DSBD should therefore be encouraged to contribute to the further promotion of the cultural sector in the pursuit of sustainable development that is inclusive of culture.

The EDD has a unique role in the co-ordination of economic development. The department's core aim is to promote economic development through participatory, coherent and co-ordinated economic policy and planning for the benefit of all South Africans. The EDD further strengthens government efforts at implementing economic programmes such as the NDP. As previously noted in paragraph 3.3.2, the relevant aspects of the NDP<sup>114</sup> which lean towards trade, include the elimination of poverty and the reduction of inequality by 2030. These require faster economic growth through the harnessing of diverse job-creating economic sectors and accelerated growth.<sup>115</sup>

#### *4.4.3 Structures relevant for the culture and social (health) interest interface*

Regarding the social interests of sustainable development, the health sector was identified in Chapter 3 as one of the areas where cultural interests manifest.<sup>116</sup> Cultural interest feature for example in traditional health practice<sup>117</sup> as one area of the health sector where cultural interests are manifest.

The main national department responsible for health management is the Department of Health (DH). The overall mission of the department is to improve the health status of the people through the prevention of illnesses and the promotion of healthy lifestyles while consistently improving the healthcare delivery system by focusing on

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112 Department of Small Business Development (DSBD) 2014 <http://www.dsbd.gov.za/> accessed on 25 September 2017.

113 Snowball <http://bit.ly/1NtlnPa> accessed on 14 July 2016; also see the discussion in para 3.3.

114 National Planning Commission 2012 <http://bit.ly/2Af5iiX> accessed on 27 November 2017.

115 McCarthy 2015 <http://bit.ly/2jq6JDa> accessed on 27 November 2017.

116 See the discussion in para 3.3.1. This paragraph alludes to the concept of health that goes beyond the medical and transcends to the cultural in the sense that issues of health relate with deeply held cultural values and practices.

117 Traditional medicine feeds from traditional knowledge; see the discussion on the link between culture and health in paras 2.6.1.3 and 3.3.1.

access, equity, efficiency, quality and sustainability.<sup>118</sup> As earlier discussed,<sup>119</sup> the primary legislation governing healthcare in South Africa, the *National Health Act*,<sup>120</sup> makes a subtle inference to traditional health practices. Section 43(3) of the *National Health Act* enables the Minister of Health to prescribe the conditions under which the traditional initiation circumcision of a person might be carried out.<sup>121</sup> Furthermore, there is gravitation towards traditional medicine and traditional health practice for primary healthcare,<sup>122</sup> as opposed to conventional health practice<sup>123</sup> for primary healthcare.<sup>124</sup> The DH ought therefore to include traditional health practices in the scope of its strategies aimed at ensuring access to healthcare in South Africa. The DH may employ the services of other entities whose functions can contribute to improved healthcare delivery, like the South African Medical Research Council (SAMRC).

Against this background, there are national departments that are engaged with governance of matters that affect culture in the context of sustainable development. The provincial government's executive and legislative branches of government and how they accommodate cultural issues are the focus of the next paragraph.

#### **4.5 Provincial government: executive and legislative authority**

As with the national sphere of government,<sup>125</sup> the provincial executive and the provincial legislature are the functional branches of the provincial government. Their powers and functions are relevant to the inclusion of culture in sustainable development discourse on a provincial level. This is because their powers and their

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118 National Government of South Africa 2017 <http://bit.ly/2y2wZ00> accessed on 27 of September 2017.

119 See the discussion in para 3.3.1.

120 61 of 2003.

121 S 43(3) reads: "The Minister may, subject to the provisions of any other law, prescribe conditions relating to traditional health practices to ensure the health and well-being of persons who are subject to such health practices".

122 "Primary healthcare" in this thesis is given a broad meaning which includes all services aimed at delivering health care in a holistic manner. See Rautenbach 2011 *THRHR* 29 and Rautenbach 2007 *Obiter* 519-536.

123 Within the context of this thesis, the phrase "conventional health practice" is used in reference to the dominant allopathic model, which is the mainstream model of healthcare and practice in South Africa. See Rautenbach 2011 *THRHR* 29.

124 According to Truter's research, it is estimated that between 60 to 80 per cent of South Africans consult a traditional healer before going to a primary health care practitioner. See Truter 2007 *S4 Pharmaceutical J* 56.

125 See the discussion in para 4.3.

functions are relevant in the making of culture-related laws and the implementation of them. The discussion hereunder aims to assess the extent to which their powers and functions coincide with the more prominent inclusion of culture in development decisions and other activities that may have a bearing on sustainable development.

#### *4.5.1 Executive powers and functions*

The executive authority of the provinces is exercised by its Premier together with the other members of the executive council.<sup>126</sup> The Premier is elected by the provincial legislature from amongst its members.<sup>127</sup> The Premier appoints the members of the executive council and assigns their powers and functions.<sup>128</sup> The MECs are accountable to their legislatures. As with the ministers of national departments, the MECs are responsible for departments<sup>129</sup> dealing with the same portfolios as the national ministers. The provincial departments relevant for culture are discussed in paragraph 4.6. It is the function of provincial executives to implement not only provincial legislation in the province, but also all national legislation within the functional areas listed in Schedule 4 or 5 (except where the *Constitution* or an Act of Parliament provides otherwise).

The provincial legislature can by passing a vote of no confidence force the entire executive council to resign.<sup>130</sup> Provincial governments are permitted to intervene in the affairs of local governments that are not performing properly. The NCOP is responsible for monitoring such an intervention.<sup>131</sup>

#### *4.5.2 Legislative powers and functions*

As alluded to in paragraph 4.3 above, the provincial legislatures can legislate on matters listed in Schedule 4 together with the national parliament. Matters listed in Schedule 5 are reserved for provinces, thus the provincial legislatures are empowered to legislate over such matters. They include matters such as provincial cultural

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<sup>126</sup> S 125 of the *Constitution*.

<sup>127</sup> S 128 of the *Constitution*.

<sup>128</sup> Ss 132(2) and 133 of the *Constitution*.

<sup>129</sup> S 133(1) of the *Constitution*.

<sup>130</sup> Ss 128(1), 130(3) and 141 of the *Constitution*.

<sup>131</sup> S 139 of the *Constitution*.

matters, markets, street trading, public places and local sports facilities. However, section 44(2) of the *Constitution* permits Parliament to make laws with respect to the functional areas of exclusive provincial legislative competence. This overriding authority of Parliament might only be exercised where national legislation is necessary to maintain national security, maintain economic unity, maintain essential national standards, establish minimum standards required for the rendering of services, or prevent an unreasonable action which might be prejudicial to the interests of another province or the country as a whole.<sup>132</sup> Furthermore, section 104(1)(b)(iii) of the *Constitution* read together with section 44(1)(iii) gives a province legislative competence over any matter that falls outside Schedules 4 and 5, if legislative competence over those matters is expressly assigned to the province by national legislation. In principle, such residual matters are within the legislative competence of the national legislature. One example is the *Sea-shore Act*.<sup>133</sup> In addition, the administration of a national area of competence might be assigned to a province.<sup>134</sup>

The next paragraph turns to the provincial departments under the executive branch that are responsible for matters of culture in the provincial sphere.

#### **4.6 Provincial government structures**

The section focuses on the provincial line departments relevant to the interaction between cultural interests and environmental, economic and social interests. The first thing to note is that every province is responsible for the matters assigned to it by Schedules 4 and 5 of the *Constitution*, of which cultural matters is one. This thesis does not intend to discuss all the provincial departments in terms of each of the categories discussed in paragraph 4.4 in each of the nine provinces. The national departments discussed above,<sup>135</sup> to the extent that they relate to culture and its

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<sup>132</sup> S (2)(a)-(d) of the *Constitution*.

<sup>133</sup> 21 of 1935. This Act was assigned to the Province of the Eastern Cape with effect from 7 April 1995.

<sup>134</sup> S 99 of the *Constitution*.

<sup>135</sup> See the discussion in paragraphs 4.4.1 to 4.4.3.1.

interaction with the environment, economic and social interests of sustainable development are replicated at the provincial level.<sup>136</sup>

As previously stated,<sup>137</sup> the national departments responsible for the various sustainable development interests discussed<sup>138</sup> may allow for the inclusion of cultural matters. The implication of the provincial functions of these departments is that where matters that border on culture arise in the provincial sphere, the provincial departments have jurisdiction over such matters. The provincial departments may therefore also recognise the interaction between culture and environmental, economic and social interests in reaching decisions which impact on sustainable development at the provincial level. For example, the MECs of the provincial departments for health are required by section 25(1) of the *National Health Act* to ensure the implementation of national health policy, norms and standards in their provinces. Provincial health plans are also required to conform to national health policy. Thus, the same overarching mandate of ensuring access to healthcare in the national sphere applies to the provincial sphere. It follows, therefore, that traditional medicine and traditional health practice for primary healthcare, which forms the basis of the cultural health nexus in the national sphere, is replicated at the provincial sphere as well. Such that the discussions relating to the mandate of the national DH to include traditional health practices in the scope of its strategies aimed at ensuring access to healthcare is also extended to the provincial counterparts. The same applies to cultural heritage and the culture and arts sector.

Thus, with regards to cultural heritage, the Provincial Heritage Resources Authorities (PHRAs) are responsible for provincial functions of cultural heritage resources management, subject to competency assessment by the SAHRA.<sup>139</sup> The PHRAs are

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<sup>136</sup> The provinces have different needs in terms of cultural, environmental, economic and social interests. These needs are reflected in their different mandates and the names by which their national government department counterparts are called. For example, the North-West provincial department for arts and culture is known as the Provincial Department of Culture, Arts and Traditional Affairs, while the Gauteng department is called the Department of Sport, Arts, Culture and Recreation. In the Western Cape Province, it is the Department of Cultural Affairs and Sports.

<sup>137</sup> See the discussion in para 4.4.

<sup>138</sup> See the discussion in para 4.4.1.

<sup>139</sup> See para 4.4.1; S 23 of the *NHRA* sets out the procedure for the establishment of PHRAs. Their functions, powers and duties are also set out in s 24 of the *NHRA*; also see Rautenbach, Hart and Naudé "Heritage Resources Management" 835. Examples of cases where a PHRA has dealt with

responsible for the identification and management of Grade II heritage resources and other heritage resources that are deemed to be a provincial competence in terms of the *NHRA*.<sup>140</sup> Sites of provincial or regional significance that are of Grade II status should be declared as provincial heritage sites. The PHRAs are also charged with the authorisation of development that is to occur around any heritage site by way of issuing a permit before such development is approved.<sup>141</sup>

The PHRAs also have special functions and duties with regards to local government. The PHRAs determine the competence of municipalities to manage heritage resources according to the national system for heritage grading as provided in section 8(6) of the *NHRA*.<sup>142</sup> The PHRAs are tasked with coordinating and monitoring the performance of local authorities in the implementation of their responsibilities in terms of the *NHRA* and other provincial legislation.<sup>143</sup> The PHRAs are also obliged to assist municipalities to manage heritage resources within their areas of jurisdiction.<sup>144</sup> The PHRA does not only play a supervisory role with regards to the municipalities, but also an intervening role, such that a PHRA may accept responsibility and perform functions in terms of section 8(6) of the *NHRA* whenever a municipality is not competent or lacks the capacity to perform such functions.<sup>145</sup>

The supervisory role of the PHRA is subject to the principles of cooperative governance, which require all spheres of government to respect the autonomy of each other sphere. Therefore, in exercising its supervisory and intervening role, the provincial government may not erode the autonomy of the municipalities. In other words, the power to supervise or intervene does not entitle the provincial government

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balancing culture interests against other competing interests are discussed in Chapter 5. The nine PHRAs in South Africa are Eastern Cape Provincial Heritage Resources Authority; Heritage Free State; Provincial Heritage Resources Authority, Gauteng; Amafa aKwaZulu-Natali; Limpopo Heritage Resources Authority; Mpumalanga Provincial Heritage Resources Authority; North West Provincial Heritage Resources Authority; Northern Cape Province: Northern Cape Heritage Resources Authority; and Western Cape Province: Heritage Western Cape.

140 S 8(1) and (3) of the *NHRA*; see the discussion in Chapter 3.

141 S 27(18) of the *NHRA* provides: "[n]o person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site."

142 This section is read together with s 24(1)(h) of the *NHRA*.

143 S 24(1)(i) of the *NHRA*.

144 S 24(1)(j) of the *NHRA*.

145 S 24(1)(k) of the *NHRA*.



to compete with the local municipality for the exercise of such powers. Rather, the supervisory or intervening role requires the provincial government to co-ordinate its activities with the local government in addressing all deficiencies that may exist in the functioning of the local government.<sup>146</sup> The supervisory role of the provincial government over local municipalities applies with regards to all matters listed in Schedules 4 and 5 of the *Constitution*, which include all cultural matters. However, the role must be performed according to the provisions of the *Constitution*.

It is noted that the principles of cooperative governance and intergovernmental relations discussed in paragraph 4.11.2 foster interrelatedness among the government spheres. This interrelatedness also applies to the different organs of state situated within the national and provincial levels, to the effect that the replication of organs of state at the national and provincial levels with similar mandates over the governance of cultural matters does not negate effective governance for example, by way of integrated and coordinated decision-making on proposed developments.

The executive and legislative powers of the local government and the competent authority at the local level responsible for cultural matters are discussed below.

#### ***4.7 Local government executive and legislative authority***

A detailed discussion of the nature and functioning of municipalities<sup>147</sup> falls outside the scope of this thesis; but it must be noted that municipalities are important in easing the implementation of the inclusion of culture in the pursuit of sustainable development in South Africa. Thus, a general discussion is necessary.

A municipality as a legal entity<sup>148</sup> is an organ of state within the local sphere of government with legislative and executive authority within the specific demarcated area of jurisdiction. It consists of political structures which administer the municipality

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<sup>146</sup> See Mathenjwa 2014 *LDD* 179-184. For further discussions on the scope of supervision and monitoring see De Visser *Developmental Local Government* 169-170; also see S 106(1) of the *Municipal Systems Act* and s 139 of the *Constitution*.

<sup>147</sup> See para 4.2 above.

<sup>148</sup> S 2 of the *Systems Act*. As a legal entity, a municipality has a separate personality that excludes liability on the part of its community for the actions of the municipality.

and the community.<sup>149</sup> A municipality has a geographic area as determined by the *Local Government: Municipal Demarcation Act*.<sup>150</sup> Three categories of municipalities are established by the *Constitution*,<sup>151</sup> these categories are Category A,<sup>152</sup> B<sup>153</sup> and C.<sup>154</sup>

#### 4.7.1 Executive powers and functions

The *Constitution* does not support the separation of powers between the legislative and the executive branches of local government.<sup>155</sup> Both powers are vested in the municipal council and members of the executive councillors.<sup>156</sup> The municipal council is made up of elected councillors.<sup>157</sup> The executive in a municipality could be an elected executive committee,<sup>158</sup> elected by the council amongst its members. Following the constitutional provisions in section 160(8) of the *Constitution*, section 43 of the *Municipal Structures Act* requires municipalities with an executive committee to ensure that their composition reflects the council. One member of the committee is elected as mayor by the council.<sup>159</sup> Municipal executive power could also be vested in the

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149 Van der Waldt "The Statutory and Regulatory Framework for Local Government" 48.

150 27 of 1998.

151 S 155(1) of the *Constitution*.

152 S 155(1)(a) of the *Constitution*. Category A municipalities are the single-tiered "metropolitan municipalities". Metropolitan municipalities (metros) have the exclusive municipal executive and legislative authority over their areas of jurisdiction.<sup>152</sup> This category of municipalities must be established in densely populated areas with extensive development, multiple business districts and industrial areas, and high demand for goods and services. Also see De Visser *Developmental Local Government* 74; S 2 of the *Municipal Structures Act* provides: "An area must have a single category A municipality if that area can reasonably be regarded as (a) a conurbation featuring-(i) areas of high population density: (ii) an intense movement of people, goods and services: (iii) extensive development: and (iv) multiple business districts and industrial areas; (b) a centre of economic activity with a complex and diverse economy: (c) a single area for which integrated development planning is desirable: and (d) having strong interdependent social and economic linkages between its constituent units"; Van der Waldt "The Statutory and Regulatory Framework for Local Government" 54.

153 S 155(1)(b) of the *Constitution*. Category B municipalities are also known as local municipalities. Local municipalities share their authority with Category C-district municipalities. Also see s 155(1)(c) of the *Constitution*.

154 S 155(1)(c) of the *Constitution*.

155 S 151(2) of the *Constitution*.

156 De Visser *Developmental Local Government* 77; s 151(2) of the *Constitution*; s 18(1) of the *Local Government: Municipal Structures Act* 117 of 1998 (hereafter *Municipal Structures Act*); s 1 of the *Municipal Systems Act*.

157 S 157(2) of the *Constitution*.

158 Van der Waldt "The Statutory and Regulatory Framework for Local Government" 55-57.

159 S 48 of the *Municipal Structures Act*; Van der Waldt "The Statutory and Regulatory Framework for Local Government" 57.

executive mayor elected by the council from amongst its members.<sup>160</sup> The council as a unit may also act as the municipal executive.

Municipal councils may make and administer by-laws for the administration of local government matters listed in Schedule 4B (for example building regulations, municipal health services and trading regulations) and Schedule 5B (for example the control of public nuisances, fencing and fences, local amenities and street trading) of the *Constitution*. However, no municipality may exercise executive and legislative authority beyond its boundaries, except as it permitted by chapter 5 of the *Municipal Structures Act* or any other applicable national legislation.<sup>161</sup>

The exercise of legislative or executive authority by a municipality is structured around matters such as developing and adopting policies, plans, strategies and programmes, including setting targets for their delivery;<sup>162</sup> promoting and undertaking development;<sup>163</sup> implementing applicable national and provincial legislation as well as its by-laws;<sup>164</sup> providing municipal services to the local community, or appointing appropriate service providers in accordance with set down criteria and process;<sup>165</sup> promoting a safe and healthy environment;<sup>166</sup> and passing by-laws and taking decisions on any matter incidental to the fulfilment of the developmental mandate of local government.

As far as it concerns the total governance effort towards sustainable development in South Africa, the above suggests that the local government sphere of government is structured to be capable of primarily running its own affairs. This is subject to the exceptional cases of intervention to the extent permitted by the *Constitution*. Subsequently development-related decisions may be exercised by the local government subject to its legislative powers and functions as discussed below.

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160 S 55 of the *Municipal Structures Act*.

161 S 11(2) of the *Municipal Systems Act*.

162 S 11(3)(a) of the *Municipal Systems Act*.

163 S 11(3)(b) of the *Municipal Systems Act*.

164 S 11(3)(e) of the *Municipal Systems Act*.

165 Ss 11(3)(f) and 78 of the *Municipal Systems Act*.

166 S 11(3)(l) of the *Municipal Systems Act*.

#### 4.7.2 Legislative powers and functions

With regards to the legislative powers of the local sphere of government, the *Constitution* recognises a municipality's right to govern the affairs of its community,<sup>167</sup> subject to national and provincial legislation, as provided for in the *Constitution*.<sup>168</sup> Local authorities may make by-laws on any matter listed in Schedules 4B and 5B of the *Constitution*<sup>169</sup> and any other matter assigned to them by national or provincial legislation.<sup>170</sup> For example, the *NHRA* assigns the management of Grade III heritage resources to local government to the extent set out in section 8(4) of the *NHRA*.<sup>171</sup>

The power to legislate in respect of the local government matters listed in Schedules 4B and 5B is the most significant of municipal powers, and is a fundamental feature of local government's institutional integrity. It is noted that none of the matters listed relates to culture. Therefore, local government does not have original powers with respect to cultural matters. They can act only in terms of powers assigned to them by the national or provincial government or where and to the extent that some aspects of culture are incidental to the core functions of municipalities.

Assigned powers or subsidiarity may take the form of general assignments to local government or an individual assignment to municipalities by the national and provincial governments.<sup>172</sup> As mentioned in paragraph 4.1 above, the subsidiarity principle makes it compulsory for the national and provincial government to assign a matter in Schedules 4A or 5A, if the matter would be most effectively administered locally and the municipality has the capacity to administer it.<sup>173</sup>

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167 Also see s 11(3)(d) of the *Municipal Systems Act*.

168 S 151 of the *Constitution*.

169 Such matters include, air pollution, building regulations, child care facilities, electricity and gas reticulation, firefighting services, local tourism, municipal airports, municipal planning, municipal health services, and municipal public transport; also see s 156(1) and (2) of the *Constitution*; Du Plessis and Du Plessis "Striking the Sustainability Balance in South Africa" 422.

170 S 156(1) of the *Constitution*.

171 S 8(4) of the *NHRA* provides: "A local authority is responsible for the identification and management of Grade III heritage resources and heritage resources which are deemed to fall within their competence in terms of this Act."

172 De Visser *Developmental Local Government* 138-140.

173 S 156(4) of the *Constitution*.

The subsidiarity principle as set out in section 156(1) and (2) of the *Constitution*<sup>174</sup> read together with Schedules 4B and 5B means that the municipality has executive authority in respect of and the right to administer any matter assigned to it by national or provincial legislation. Therefore, where any cultural matter is assigned to local government by the provincial or national government, the local government has the executive authority to administer such a matter. For example, the *NHRA* assigns the protection of Grade III cultural heritage resources to local government, subject to its competencies being assessed and approved by the provincial government.<sup>175</sup>

It is noteworthy that none of the powers in Schedules 4B and 5B have been given to the exclusive jurisdiction of local government. National and provincial governments share the power to pass legislation on the matters listed in Schedules 4B and 5B along with the municipalities. It follows that national and provincial governments can also legislate on those matters and any local government legislation that conflicts with existing national or provincial legislation is invalid.<sup>176</sup>

However, the power to pass legislation shared by the three spheres with regards to Schedules 4B and 5B functional areas does not extend to the administration and implementation of these laws. The power of the national and provincial governments with regards to passing laws under the two schedules is limited by section 155(7) of the *Constitution*, which provides that:

[T]he national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Section 155(6)(a) of the *Constitution*, provides that:

[E]ach provincial government ... by legislative and other measures, must provide for the monitoring and support of local government in the province

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174 See para 4.1.

175 See the discussion in para 4.6.

176 S 156(3) of the *Constitution*.

Furthermore, section 151(4) of the *Constitution* is a fundamental provision that guides the exercise of national or provincial powers over local government. The section states:

The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

The core aims and functions of local government include: ensuring service delivery in a sustainable manner; promoting social and economic development; and promoting a safe and healthy environment.<sup>177</sup> The developmental duties of local government are outlined in section 153 of the *Constitution*. The duties require that municipalities must structure and manage their administrations, budgeting and planning processes in such a way that preference is given to the basic needs of the community. They ensure that the basic needs of the community as well as the social and economic development of the community are promoted.<sup>178</sup> The municipalities are also required to participate in national and provincial development programmes.<sup>179</sup> It is argued that the developmental duties of the local authorities:

(a) reiterate the need to balance social, economic, environmental and cultural interests in the governance efforts of municipalities – including decision-making and planning; and

(b) feed into South Africa's overall pursuit of the sustainable development.

Within the framework of the *Constitution*, the *White Paper on Local Government*<sup>180</sup> explains developmental local government.<sup>181</sup> It states that municipalities have a central responsibility to work together with local communities to find sustainable ways to meet the needs of members of the community and improve their quality of life.<sup>182</sup> The *White Paper* further outlines a series of developmental outcomes and proposes several

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177 S 152(1)(b)-(d) of the *Constitution*; Du Plessis and Du Plessis "Striking the sustainability balance in South Africa" 422.

178 Also see s 23 of the *Municipal Systems Act*.

179 S 153(b) of the *Constitution*.

180 GN 423 in GG 18739 of 13 March 1998.

181 Regs 17 of GN 423 in GG 18739 of 13 March 1998; Van der Waldt "The Statutory and Regulatory Framework for Local Government" 52.

182 Regs 17-18 of GN 423 in GG 18739 of 13 March 1998.

mechanisms that can assist local government to fulfil its developmental mandate.<sup>183</sup> The *Municipal Systems Act* sets out core principles, mechanism and processes that give meaning to developmental local government and empower municipalities to move progressively towards the social and economic upliftment of the communities and provide basic services to all people.<sup>184</sup> The *Municipal Systems Act* requires that all local government planning must be developmentally orientated and be aligned with and complement development plans of national and provincial government as well as those of other municipalities.<sup>185</sup> In a nutshell, municipalities are not only expected to provide basic services to the community and be developmental, but they must also along with other organs of state contribute to the pursuit of sustainable development in the interest of the communities that they serve.

Furthermore, local government core functions do not expressly include cultural matters and as such the municipalities may not expressly legislate over cultural interests as part of their core developmental mandate. However, a combined reading of sections 152 and 156 of the *Constitution* is indicative of the incidental administrative powers<sup>186</sup> which the local government might exercise in the fulfilment of its constitutional developmental mandate, as long as such action is not illegal and it does not infringe on the functions and responsibilities of the other spheres of government, in line with the principle of cooperative governance.<sup>187</sup> Therefore, it is plausible to contend that these constitutional provisions might permit local governments to cater for cultural interests. This was the implicit reasoning of the court in the case of *Le*

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183 Reg 22 of GN 423 in GG 18739 of 13 March 1998; Bekink *Principles of South African Local Government Law* 70-72. For more discussion on the policy contribution of the *White Paper* to the understanding of the framework for local government, see section A of the *White Paper*; also see Van der Waldt "The Statutory and Regulatory Framework for Local Government" 52-54 for a summary.

184 See the preamble to the *Municipal Systems Act*; Van der Waldt "The Statutory and Regulatory Framework for Local Government" 58.

185 Ss 23 and 24 of the *Municipal Systems Act*. The developmental mechanisms that accommodate cultural interests in development are discussed in para 4.4.3.

186 See s 156(5) of the *Constitution*, which provides: "(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions." Also see Fuo 2015/2016 *CJLG* 27-30.

187 This argument follows the argument made by Fuo regarding the exercise of environmental functions by local government and the role of the courts in helping the municipalities fulfil their environmental responsibilities under s 24 of the *Constitution*, where the lists in the Schedules tend to make this difficult for local government in other environmental matters such as biodiversity conservation. See Fuo 2015/2016 *CJLG* 32.

*Sueur v eThekweni Municipality*,<sup>188</sup> where it was held that the municipality's legislating over environmental matters through its Town Planning Scheme<sup>189</sup> did not in any way transgress upon the exclusive purview of the national and provincial governments in respect of environmental legislation.

Bearing in mind that the definition of the environment in the *NEMA* includes "cultural properties,"<sup>190</sup> the decision of the court in the *Le Sueur* case applies directly and otherwise by way of analogy to the theme of culture in the pursuit of sustainable development. Subsequently, it is submitted that the incidental administrative powers of local government (for example, in respect of conservation or cultural heritage protection) may be exercised through local governance instruments such as the integrated development planning tools,<sup>191</sup> by-laws, zoning schemes and policies, where issues of cultural interests may arise in reaching sustainable development decisions. Municipal planning is a core function of local government.<sup>192</sup> Municipalities are constitutionally bound to structure their planning processes in such a way that they reflect and give priority to the basic needs of their communities. In addition, municipalities must promote the social and economic development of their communities.<sup>193</sup> Thus, it may be deduced that local government is due to its developmental mandate required to consider cultural interests in its decision-making processes.

In addition, internal municipal structures are being utilised by local government in carrying out its cultural related services to the community. The following discussion provides an overview of how internal municipal structures can contribute to the inclusion of cultural interests.

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188 *Le Sueur v eThekweni Municipality* 2014 JOL 31891 (KZP) para 20 (hereafter *Le Sueur* case); also see Humby 2014 17(4) *PER* 1660-1689; Freedman 2014 17(1) *PER* 567-594; Du Plessis and Van der Berg 2014 *Stellenbosch L. Rev* 580-594.

189 Town planning or municipal planning is one of the items in Schedule 4B of the *Constitution* which the local government may legislate.

190 See discussions in para 1.1.

191 Local government relevant instruments which can further the inclusion of cultural interest in the fulfilment of the developmental mandate of the local government and which impact on the pursuit of sustainable development are discussed further in para 4.4.3.

192 Schedule 4B of the *Constitution*.

193 S 153(a) of the *Constitution*.



## **4.8 Municipal departments/internal structures**

### *4.8.1 Structures relevant for the interplay between cultural, environmental, economic and social interests*

#### 4.8.1.1 Introduction

Generally, internal municipal structures coordinate their activities with those of the provincial and national departments in the pursuit of cooperative governance.<sup>194</sup> Therefore, municipal departments are set up according to the needs of each municipality to carry out functions related to the areas of competence listed in Schedule 4B and 5B of the *Constitution* and incidental administrative matters as discussed.<sup>195</sup> For example, with regards to cultural heritage protection, Rautenbach, Hart and Naudé<sup>196</sup> suggest that the obligations under the *NHRA* must be carried out by specific departments within a municipality. The responsibility of such a department with regards to cultural heritage management must be set out in a by-law or a zoning scheme. By-laws are generally used in the administration and management of municipal affairs as listed in Schedules 4B and 5B of the *Constitution*.<sup>197</sup>

Bearing in mind the executive and legislative powers of local government as discussed in this chapter, it is also noted that the municipalities have different needs, which is evidentially so judging by the basis for categorisation of municipalities.<sup>198</sup> Therefore,

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194 The principle of cooperative governance is discussed in para 4.11.2.1.

195 See para 4.7.2.

196 Rautenbach, Hart and Naudé "Heritage Resources Management" 855.

197 S 156(2) of the *Constitution*.

198 Category A municipalities are the single-tiered "metropolitan municipalities". Metropolitan municipalities (metros) have the exclusive municipal executive and legislative authority over their areas of jurisdiction. This category of municipalities must be established in densely populated areas with extensive development, multiple business districts and industrial areas, and high demand for goods and services. See De Visser *Developmental Local Government* 74; s 2 of the *Municipal Structures Act* provides: "An area must have a single category A municipality if that area can reasonably be regarded as (a) a conurbation featuring-(i) areas of high population density: (ii) an intense movement of people, goods and services: (iii) extensive development: and (iv) multiple business districts and industrial areas; (b) a centre of economic activity with a complex and diverse economy: (c) a single area for which integrated development planning is desirable: and (d) having strong interdependent social and economic linkages between its constituent units"; Van der Walddt "The Statutory and Regulatory Framework for Local Government" 54. Category B municipalities are also known as local municipalities. Local municipalities share their authority with Category C-district municipalities. Put simply, several local municipalities make up a district municipality. See s 155(1)(b) of the *Constitution*.

the internal municipal structures of the municipalities vary from one to another with regards to the competent authorities whose mandate speaks to the interaction between cultural interests and other sustainable development interests.

To assess an existing internal structure available in the local government sphere, the City of Cape Town metropolitan municipality (hereafter the City) is selected to determine the extent to which its internal structure supports the consideration of cultural interests in the pursuit of sustainable development. The City is chosen because it is arguable one of the most advanced municipalities in the country in terms of the range of services it administers and manages and the extensive list of by-laws and policies it employs in carrying out its functions. In addition, the City's *Arts, Culture and Creative Industries Policy*<sup>199</sup> is indicative of its commitment to cultural matters.

#### 4.8.1.2 The example of City of Cape Town

The municipality is structured according to the requirements of the *Constitution* and the *Municipal Structures Act*, with a municipal council and executive committees.<sup>200</sup> For administrative ease, there are departments catering to matters such as Arts and Culture.

As already alluded to, municipalities such as the City are not constitutionally mandated to deal with cultural matters. The *Arts, Culture and Creative Industries Policy* attests to cultural matters being important city assets that can be mobilised to achieve social cohesion and increased economic opportunities.<sup>201</sup> However, the municipalities may engage in cultural matters by agreement or assignment with provincial government, subject to section 156(1(b) of the *Constitution*. For example, with regards to the City, the implementation protocol between the City and the Western Cape Provincial Government through the Provincial Department of Cultural Affairs and Sport gives the

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199 City of Cape Town "Arts, Culture and Creative Industries Policy" Policy number 29892 in C22/12/14 3 December 2014. In addition, the City's commitment to take arts and culture programmes to the most vulnerable residents in the city is evident in its recently approved two-million-rand worth of grant-in-aid funding to the Artscape Theatre in support of the Audience Development and Education Programme, see City of Cape Town Media Office 2017 <http://bit.ly/2A6ys3M> accessed on 20 October 2017.

200 S 157 of the *Constitution* and s 18 of the *Municipal Structures Act*.

201 Para 2(2)(i) of the *Arts, Culture and Creative Industries Policy*.

City the permission to develop cultural policies and strategies and implement various arts and culture programmes.<sup>202</sup>

Furthermore, the *Arts, Culture and Creative Industries Policy* reports that the City has engaged in various initiatives that are related to arts, culture and the creative industries. These initiatives have been carried out across a wide range of departments such as departments dealing with urban planning, social development, sports and recreation, parks and forests, environment and heritage, tourism and economic development.<sup>203</sup>

The initiatives are indicative of the recognition of the relationship between cultural interests and the other interests represented by the departments. For example, the department dealing with urban planning is the Department of Urban Integration. The mandate of the department is to prepare for a city-wide spatial development framework as part of the City's IDP.<sup>204</sup> This mandate requires that the department integrates and balances the requirements of different sectors that affect and influence the spatial growth, form and performance of Cape Town.<sup>205</sup> It is expected that since one of the cornerstones of the *NHRA* is that heritage resources management becomes part of municipal planning, then it is conceded that the urban integration department of the City ought to consider cultural interests in development planning.

Regarding cultural affairs generally, the Department of Arts and Culture is responsible for marketing and developing Cape Town's arts and culture in ways that celebrate the city's rich diversity. The Department sets out to achieve its mandate through programmes building culture and public life, community cultural development and promoting cultural events, places and people.<sup>206</sup> The acting executive director of the City's Department of Social Development and Early Childhood Development

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202 Para 2(2)(i)(ii) of the *Arts, Culture and Creative Industries Policy*.

203 Para 2(2)(n)(i) of the *Arts, Culture and Creative Industries Policy*.

204 City of Cape Town 2017 <http://bit.ly/2iKYKkE> accessed on 20 October 2017.

205 City of Cape Town 2017 <http://bit.ly/2iKYKkE> accessed on 20 October 2017.

206 City of Cape Town 2017 <http://bit.ly/2A23FH9> accessed on 20 October 2017.

Directorate aptly summarises the context of the Department of Arts and Culture's mandate as follows:<sup>207</sup>

The ability to create opportunities to unlock the associated benefits of arts, culture, creative industries and heritage in ever-increasingly complex city ecosystems is non-negotiable. To this end, the City of Cape Town's Arts and Culture Department will focus on establishing an enabling environment for arts and culture as a driver of social cohesion; catalyst for economic development; and an enabler for innovation for all of Cape Town's people.

This description of the mandate of the Department of Arts and Culture indicates that the Department is a potential player in the inclusion of cultural interests in the pursuit of sustainable development. This is because the mandate of the Department is structured to integrate social and economic interests into development strategies.

The internal structure of the City of Cape Town municipality is indicative of the potential capacity of local government to cater to the cultural interests of the people considering the discussions on subsidiarity canvassed above.

Furthermore, section 152(1)(e) of the *Constitution* states that the community should be involved in matters of local government which offer a basis for the recognition of traditional authorities. The *Constitution*,<sup>208</sup> as well as academic commentary,<sup>209</sup> point out that issues on the balancing of competing interests in the pursuit of sustainable development feature most prominently in the local government sphere, as it is the sphere of government closest to the communities. To this end, local government in fulfilling its constitutional mandate of providing services to communities in a sustainable manner might enlist the traditional authorities to identify some of the cultural needs of their communities where decisions on sustainable development are deliberated in the national or provincial spheres and need the municipality to support such a development programme.<sup>210</sup> One applicable example is where a development

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207 City of Cape Town 2017 <http://bit.ly/2A23FH9> accessed on 20 October 2017.

208 S 152(1)(a) of the *Constitution*.

209 Du Plessis and Du Plessis "Striking the Sustainability Balance in South Africa" 422; Van der Waldt "The Statutory and Regulatory Framework for Local Government" 50-55; Bekink *Principles of South African Local Government Law* 70.

210 Indeed, it is one of the developmental duties of municipalities to participate in national and provincial development programmes. See s 153(b) of the *Constitution*.

project requires that the provisions of the *NEMA*<sup>211</sup> as regards the EIA principle are applied to assess the cultural heritage impact of development projects.<sup>212</sup>

It is argued in this thesis that traditional authorities represent a unique and distinctive unit of culturally diverse members of communities such as rural communities, and that they should also be explicitly recognised in matters of local government for example in decision-making processes that concern matters of sustainable development. The legal recognition of traditional authorities to take part in the performance of the developmental mandate of local government is considered in the following section.

#### **4.9 Traditional authorities**

As indicated earlier, in strict legal terms, there is no definition of “traditional authority” in South African law. However, the *Constitution* recognises the institution of traditional leadership in sections 211 and 212.<sup>213</sup> The sections refer to the operation of traditional leadership within a social sphere and the participation of traditional leaders in the public sphere respectively.<sup>214</sup> The systems of law practised by traditional authorities are recognised subject to the condition that they may be amended or repealed by legislation. Therefore, it is averred that the *Constitution* not only supports the role and powers of traditional leaders, but allows national legislation to regulate their position even further.<sup>215</sup> Apart from recognising the role of traditional authorities, the

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211 See s 24 of the *NEMA*.

212 See the discussion in paras 3.2.3.1 and 3.2.3.1.2.

213 S 211 provides: “(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the *Constitution*. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law. S 212 provides: “(1) National legislation may support a role for traditional leadership as an institution at local level on matters affecting local communities. (2) To deal with matters relating to traditional leadership, the role of traditional leaders, and the customs of communities observing a system of customary law-(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and (b) national legislation may establish a council of traditional leaders.”

214 Rautenbach “Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Traditional Governance” (forthcoming publication, used with the permission of the author) 9.

215 Bekink *Principles of South African Local Government Law* 200; Mathenjwa and Porsche 2017 *LDD* 205; Rautenbach “Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Traditional Governance” (forthcoming publication, used with the permission of the author) 9.

*Constitution* determines that national legislation may support a role for traditional authorities as an institution at local level on matters affecting local communities.<sup>216</sup>

The blueprint for traditional governance in South Africa is the *Traditional Leadership and Governance Framework Act*.<sup>217</sup> Although there is also no definition of “traditional authority” in the Act, it refers to the word “authority” several times. Noteworthy is the fact that the preamble of the Act states that the institution of leadership must “derive its mandate and *primary authority from applicable customary law and practices*.”<sup>218</sup> The scope and extent of the “authority” thus needs to be found in customary law and would be different in the various traditional communities depending on the practices of the community.

Whilst on the topic of the preamble, it is also important to note that the responsibilities of the institution of traditional leadership are set out as follows:

- (a) to promote freedom, human dignity and the achievement of equality and non-sexism;
- (b) derive its mandate and primary authority from applicable customary law and practices;
- (c) strive to enhance tradition and culture;
- (d) promote nation building and harmony and peace amongst people;
- (e) promote the principles of co-operative governance in its interaction with all spheres of government and organs of state; and
- (f) promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice, as envisaged in applicable legislation.

All these duties are reconcilable with the notion of sustainable development, and the institution of traditional leadership is suited to furthering this pursuit. Traditional leadership is defined in section 1 of the *Traditional Leadership and Governance Framework Act* as:

Customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practised by traditional communities

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<sup>216</sup> S 212(1) of the *Constitution*. Provincial legislation is not allowed to support the role of traditional leadership. Only through national legislation is a uniform role for traditional leadership established.

<sup>217</sup> 41 of 2003.

<sup>218</sup> Emphasis added.

Traditional leadership<sup>219</sup> is widespread across South Africa.<sup>220</sup> During the apartheid era, traditional leaders were given an array of governance functions.<sup>221</sup> These functions eroded their autonomy as they acted under the supervision of magistrates, homeland departments or national departments.<sup>222</sup>

Although the *Constitution* recognises the leadership and authority of traditional leaders, most of the powers they had during the apartheid era have been traded off. One of the ways that their powers have been curtailed is the erosion of their jurisdictional authority with the establishment of wall-to-wall municipalities throughout the country, as mentioned in paragraph 4.2.3 above. Traditional leadership is no longer an autonomous institution that functions separately from the general governmental structure of South Africa.<sup>223</sup> In theory, traditional authorities are not directly part of the government structure created by the *Constitution*. In rural areas, the legislative and executive powers are vested in the jurisdiction of the municipal councils the traditional authorities fall under.<sup>224</sup> This is because all areas in the country fall under the jurisdiction of a municipal government which applies to all rural areas and traditional areas. An overlap of duties is also eminent in this arrangement as the

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219 According to Rautenbach and Bekker, traditional leadership is a much wider concept than the notion of a "traditional leader". A traditional leader is but one of the elements of traditional leadership, which encompasses other elements such as "the identification of, and processes of legitimising the ruler; the system of, and conditions for, consultation; and the functions of the various domains and levels of authority (legislative, executive and judicial; community and local level)." Rautenbach and Bekker *Introduction to Legal Pluralism in South Africa* 201.

220 It is estimated that about 15-20 million South Africans live under a system of traditional leadership. South Africa recognises seven kings or queens, 773 traditional leaders (chiefs) and 1640 headmen. See Rautenbach "Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Traditional Governance" (forthcoming publication, used with the permission of the author) 1.

221 Such functions were assigned *via* legislation such as the *Black Administration Act* 38 of 1927; the *Black Authorities Act* 68 of 1951; and the Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen-Proclamation 110 of 1957 published in GG 5854 of 18 April 1957 issued in terms s 2 of the *Black Administration Act*. Also see Rugege 2003 *LDD* 172-173.

222 Mathenjwa and Porsche 2017 *LDD* 200; Rugege 2003 *LDD* 184. For more historical accounts of the nature of traditional African government in South Africa from the pre-colonial period to the apartheid era, see Bekink *Principles of South African Local Government Law* 196-179; Rugege 2003 *LDD* 173; Mathenjwa and Porsche 2017 *LDD* 202-203.

223 S 8 of the *Municipal Structures Act*.

224 Bekink *Principles of South African Local Government Law* 210.

local government now assumes some of the responsibilities which the traditional authorities had before the constitutional democratic dispensation came about.<sup>225</sup>

Thus, it is only in the local sphere, to the exclusion of the national and the provincial spheres, that the *Constitution* supports a role for traditional leadership. It is in following this constitutional provision that the *Municipal Structures Act* provides for the participation of traditional leaders in municipal councils.<sup>226</sup> According to the Act, traditional authorities that observe a system of customary law in the jurisdiction of a municipality may attend and participate through their traditional leaders in the proceedings of the municipal council.<sup>227</sup> The number of traditional rulers that are allowed to participate may not exceed 20 per cent of the total number of councillors in that council. Participation is not passive but requires that the views of traditional leaders be heard and gives the traditional leaders an opportunity to address members of the local council on issues that affect a traditional area under a traditional authority. The traditional leaders who may take part are named by the provincial MEC responsible for local government in accordance with Schedule 6 of the *Municipal Structures Act*. The MEC is required to publish<sup>228</sup> the choice by notice in the relevant Provincial Gazette.

In addition to the *Municipal Systems Act*, the *Traditional Leadership and Governance Framework Act*<sup>229</sup> fulfilled the constitutional mandate to provide for the role and functions of traditional authorities through relevant national legislation.<sup>230</sup> The main purpose of the Act is to provide for the functions and roles of traditional leaders, therefore defining the place and role of traditional leadership within the new system of democratic governance and constitutional supremacy in South Africa.<sup>231</sup> The Act also provides for the recognition of traditional communities,<sup>232</sup> the establishment,

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225 Some of the functions of the traditional authorities were like the functions of local government and were prescribed by the *Black Administration Act* 38 of 1927, the *Black Authorities Act* 68 of 1951 and other related legislation issued in the various former "independent" states and self-governing territories in the apartheid era. Bekink *Principles of South African Local Government Law* 205.

226 S 81 of the *Municipal Structures Act*.

227 Bekink *Principles of South African Local Government Law* 208.

228 S 81(2) of the *Municipal Structures Act*.

229 Enacted in 2003.

230 S 211 of the *Constitution*.

231 See the preamble to the *Traditional Leadership and Governance Framework Act*.

232 S 2 of the *Traditional Leadership and Governance Framework Act*.



recognition<sup>233</sup> and function of traditional councils,<sup>234</sup> and the establishment of a statutory framework for leadership positions within the institution of traditional leadership.<sup>235</sup> In the words of Bekink,<sup>236</sup> the Act generally seeks to fulfil and enhance the broad constitutional protection of the institution of traditional leadership.

The most significant aspect of the Act that makes traditional authority relevant to the theme of this thesis is the guiding principles for the allocation of the roles and functions of traditional leadership. The national or provincial government may through legislative or other measures offer a role for traditional councils or traditional leaders<sup>237</sup> in respect of arts and culture, land administration, agriculture, health, welfare, the administration of justice, safety and security, the registration of births, deaths and customary marriages, economic development, environment, tourism, disaster management, the management of natural resources, the dissemination of information relating to government policies and programmes; and education.<sup>238</sup> The Act further states that whenever an organ of state within the national or provincial government considers allocating a role for traditional councils or traditional leaders, that organ of state must, among other things,<sup>239</sup> promote the ideals of cooperative governance, integrated development planning, sustainable development and service delivery through the allocation of roles and functions.<sup>240</sup>

In this regard, it is submitted that the above-mentioned roles may be assigned to traditional authorities in the areas mentioned in furtherance of sustainable development in the local communities they represent. This perceived role of the traditional authorities is relevant for the inclusion of cultural interests such as the promotion of indigenous knowledge systems, taking part in the development of cultural policy at local level in the pursuit of sustainable development at the grass-root level in South Africa.

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233 S 3 of the *Traditional Leadership and Governance Framework Act*.

234 S 4 of the *Traditional Leadership and Governance Framework Act*.

235 See the long title of the Act.

236 Bekink *Principles of South African Local Government Law* 202.

237 S 20(1) of the *Traditional Leadership and Governance Framework Act*.

238 S 20(1)(a)-(o) of the *Traditional Leadership and Governance Framework Act*.

239 S 20(2)(a)-(f) of the *Traditional Leadership and Governance Framework Act*.

240 S 20(2)(g) of the *Traditional Leadership and Governance Framework Act*.

However, apart from the three spheres of government and the traditional authorities discussed above, the *Constitution* assigns matters of culture to other bodies whose responsibility centres around promoting democracy in South Africa. Their roles and functions also contribute to the enhancement of the options available to people within the development matrix. It is for this reason that these state institutions promoting democracy are relevant in the promotion of the inclusion of cultural interests in sustainable development.

#### ***4.10 Other government institutions and their cultural relevance***

##### *4.10.1 Introduction*

The *Constitution* is premised on the fundamental principles of democracy, freedom and equality. The constitutionally protected rights to which people are entitled within the framework of the philosophy and practice of constitutionalism are grounded in the principles of law and justice.<sup>241</sup> To give substance to the constitutionally protected rights and to support the practice of constitutionalism within a system of constitutional democracy, independent institutions have been established.

These institutions are established by Chapter 9 of the *Constitution*, and they are:<sup>242</sup>

- (a) the Public Protector;
- (b) the South African Human Rights Commission;

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241 Devenish *A commentary on the South African Constitution* 243.

242 S 181 of the *Constitution*. These institutions are often referred to as "Chapter 9 institutions". The *Constitution* further mandates that a national legislation should establish an independent authority to regulate broadcasting in the interest of the public and to ensure fairness and diversity of views broadly representative of South African society see s 192 of the *Constitution*. The national legislation enacted to fulfil this mandate is the *Independent Broadcasting Authority Act* 153 of 1993; also see the *Independent Communication Authority of South Africa Amendment Act* 13 of 2000. The broadcasting authority is the Independent Communication Authority of South Africa (ICASA). The Authority is responsible for regulating the telecommunications, broadcasting and postal industries in the public interest and for ensuring affordable services of a high quality for all South Africans. The Authority also issues licenses to telecommunications and broadcasting service providers, enforces compliance with rules and regulations, protects consumers from unfair business practices and poor-quality services, hears and decides on disputes and complaints brought against licensees and controls and manage the effective use of the radio frequency spectrum.

- (c) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- (d) the Commission on Gender Equality;
- (e) the Auditor-General; and
- (f) the Electoral Commission.

Each Chapter 9 institution is tasked with promoting and protecting the rights within the Bill of Rights which fall within their mandate. These institutions are independent, impartial and subject only to the *Constitution* and the law. They must exercise their powers and functions without fear, favour or prejudice.<sup>243</sup> Other government departments are obliged, through legislative and other measures, to protect and facilitate the operation of these institutions to ensure their independence, impartiality, dignity and effectiveness.<sup>244</sup>

In consideration of the constitutional recognition of the notion of culture and the concept of sustainable development, the institutions most relevant for culture are the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities<sup>245</sup> and the South African Human Rights Commission.<sup>246</sup>

The functions of these state institutions and their relevance to culture in the pursuit of sustainable development are discussed below.

#### *4.10.2 Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities*

This Commission is tasked with the responsibility of promoting respect for the rights of cultural, religious and linguistic communities, and is required to:<sup>247</sup>

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<sup>243</sup> S 181(2) of the *Constitution*.

<sup>244</sup> S 181(3) of the *Constitution*.

<sup>245</sup> See s 185 of the *Constitution*.

<sup>246</sup> See s 184 of the *Constitution*.

<sup>247</sup> S 185(a) of the *Constitution*.

- a) promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, based on equality, non-discrimination and free association;<sup>248</sup> and to
- b) recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.<sup>249</sup>

The Commission is also responsible for deepening the appreciation of South Africans for the wide array of cultures, religions and languages found in the country, and for contributing meaningfully and constructively to social transformation and nation-building.

In addition to the above, the Commission has other related functions<sup>250</sup> set out in its enabling statute, the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act* (hereafter, the *Commission's Act*).<sup>251</sup> One such function which is directly relevant to the inclusion of culture in the pursuit of sustainable development is set out in section 5(1)(k) of the *Commission's Act*. It entitles the Commission to bring any relevant matter to the attention of the appropriate authority or organ of state and, where appropriate, to make recommendations to such an authority or organ of state in dealing with such a matter. The Commission is also required to report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation, where it believes the matter requires such investigation.<sup>252</sup>

This function entitles the Commission to monitor certain aspects of development where a proposed development might infringe on certain cultural interests and cultural rights of people. This infringement may relate to a loss of cultural life by the activities

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248 S 185(b) of the *Constitution*.

249 S 185(c) of the *Constitution*.

250 See ss 4-5 of the *Commissions' Act*.

251 19 of 2002.

252 S 185(3) of the *Constitution*; s 6(3) of the *Commissions' Act*.

of the proposed development or a loss of a sense of place.<sup>253</sup> In this way, the Commission may potentially aid in the advancement of cultural interests.

#### *4.10.3 The South African Human Rights Commission*

The South African Human Rights Commission (SAHRC) is an independent<sup>254</sup> institution established to promote respect for human rights and a culture of human rights.<sup>255</sup> The promotion, protection, development and attainment of human rights, along with monitoring and assessing the observance of human rights in South Africa, fall within the purview of the institution's functions.<sup>256</sup>

The key function of the SAHRC that is relevant for the inclusion of culture in the pursuit of sustainable development is constitutionally provided.<sup>257</sup> The function relates to the requirement for relevant organs of state to provide the SAHRC with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.<sup>258</sup>

Cultural rights are recognised in the Bill of Rights.<sup>259</sup> To the extent that they interact with the listed areas, the SAHRC's function must extend to the cultural interests which arise there. The effect of this responsibility is that the SAHRC serves as a monitoring body in assessing if the decision-makers have extended consideration to cultural interests in reaching decisions in the pursuit of sustainable development.

Apart from the SAHRC's obvious "watchdog" function, it is also empowered in appropriate cases to grant financial assistance to a complainant and any other affected person to empower such a person to seek redress in an appropriate adjudicatory forum. Therefore, the SAHRC has the capacity to aid persons or communities whose cultural rights have been neglected by the relevant authorities when development

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253 See the discussion in Chapter 3 and Chapter 5 regarding the relevance of a sense of place in a cultural and environmental context.

254 S 4 of the *South African Human Rights Commission Act* 40 of 2013.

255 S 184(1)(a) of the *Constitution*.

256 S 184(1)(b)-(c) of the *Constitution*.

257 S 184(1)(b)-(c) of the *Constitution*.

258 S 184(3) of the *Constitution*.

259 See the discussion in para 2.6.1.2.

decisions were being made, to seek redress through an appropriate adjudicatory forum. The role of the SAHRC in this regard is therefore of cardinal significance in those instances where government's balancing of cultural and other sustainable development interests seems to be hard, unfair or unreasonable.

#### ***4.11 A government responsive to people's cultural interests***

##### *4.11.1 Introduction*

The spheres of government and the organs of state discussed in the preceding paragraphs have various responsibilities with regards to cultural matters. In consideration of sustainable development thinking, they are each required to include cultural interests when they engage in any development-related decisions. However, as seen at the national sphere departments catering to culture, more than one department might be involved where a proposed development is planned. This results in a fragmentation of responsibilities. Also, each department's goal or core function might for the proposed development be separate from culture.

Coetzee<sup>260</sup> argues that the distinct functions of the three spheres of government impede cooperation between them and cause unnecessary tension, which results in fragmentation. Rautenbach and Du Plessis<sup>261</sup> further argue that the fragmentation of cultural governance roles between the national, provincial and local spheres of government may hold for the duplication of and/or overlap in culturally relevant functions and mandates for different organs of state. The nature of cultural interests for sustainable development is such that its interaction with the other environmental, social and economic interests is diversified. This diversity of cultural interests is also reflected in the array of departments whose functions directly or indirectly impact on cultural interests. Thereby creating a wide range of institutional structures (in this case the three spheres of government and organs of state) whose roles and functions accommodate the inclusion of culture when development-related decisions are contemplated.

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<sup>260</sup> Coetzee 2010 *Journal for Contemporary History* 91.

<sup>261</sup> Rautenbach and Du Plessis 2009 *SAYIL* 136.

This thesis argues that the fragmentation of cultural governance for sustainable development does not render the inclusion of cultural interests impossible. Rather the three spheres of government and organs of state can collectively harness their governing potential within the context of cooperative governance and intergovernmental relations. This possibility is further discussed in the paragraphs following.

#### *4.11.2 Cooperative governance*

##### 4.11.2.1 The constitutional principle of cooperative governance

The relationship between the three spheres requires close cooperation within a larger framework that recognises the distinctiveness of every sphere as well as the interrelatedness and interdependence of them all.<sup>262</sup> The *Constitution* further requires all organs of state across the national, provincial and local spheres of the government to cooperate in good trust and good faith.<sup>263</sup> The spheres of government and organs of state may be required to co-operate with regards to a plethora of issues affecting the life of the country, ranging from environmental issues, economic issues, social issues and as this thesis aims to show, cultural issues as well.

De Visser<sup>264</sup> explains that this close cooperation or intergovernmental relations between the three spheres hinges on the principle of cooperative governance. He describes the principle of cooperative governance as an instruction to the three spheres of government to act in good faith and mutual trust.<sup>265</sup> Cooperative governance is characterised by obligations to the various spheres of government to respect one another's institutional integrity, and to co-operate in mutual trust and good faith by fostering friendly relations, supporting, co-ordinating actions and legislation.<sup>266</sup> Thus, government decision-makers must co-operate with each other by

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<sup>262</sup> Bray 2008 *SAJELP* 9.

<sup>263</sup> S 41 of the *Constitution*; see also Du Plessis and Alberts 2014 *SA Public Law* 449.

<sup>264</sup> De Visser *Developmental Local Government* 81.

<sup>265</sup> De Visser *Developmental Local Government* 81.

<sup>266</sup> De Visser *Developmental Local Government* 82; s 41(1) of the *Constitution* provides as follows: "1) All spheres of government and all organs of state within each sphere must: a) preserve the peace, national unity and the indivisibility of the Republic; b) secure the well-being of the people of the Republic; c) provide effective, transparent, accountable and coherent government for the Republic as a whole; d) be loyal to the Constitution, the Republic and its people; e) respect the

assisting and consulting one another on matters of common interest such as the cultural implication or impact of a proposed development<sup>267</sup> and at the same time not encroach on each other's geographical, functional and institutional integrity.<sup>268</sup> Malan<sup>269</sup> explains that close intergovernmental relations is one way in which the values of cooperative governance<sup>270</sup> may be given institutional and statutory expression.

Thus, the concept of intergovernmental relations is an essential part of cooperative governance. The principles of cooperative governance are extended in the national legislation governing intergovernmental relations-the *IGRFA*.<sup>271</sup> The Act was enacted to establish a framework<sup>272</sup> for the national, provincial and local spheres of

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constitutional status, institutions, powers and functions of government in the other spheres; f) not assume any power or function except those conferred on them in terms of the Constitution; g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and h) co-operate with one another in mutual trust and good faith by : i) fostering friendly relations; ii) assisting and supporting one another; iii) informing one another of, and consulting one another on, matters of common interest; iv) co-ordinating their actions and legislation with one another; v) adhering to agreed procedures; and vi) avoiding legal proceedings against one another." ; see also Bray 2008 *SAJELP* 9.

267 *Van Wyk v Uys* 2002 5 SA 92 (C) para 11; see also Bekink *Principles of South African Local Government Law* 92.

268 Du Plessis and Alberts 2014 *SA Public Law* 450.

269 Malan 2005 *Politeia* 230.

270 As provided in s 41(1)(2)(3)(4) of the *Constitution* as follows: "(1) All spheres of government and all organs of state within each sphere must-(a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole; (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of government in the other spheres; (f) not assume any power or function except those conferred on them in terms of the Constitution; (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (h) co-operate with one another in mutual trust and good faith by-(i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another. (2) An Act of Parliament must – (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute. (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

271 13 of 2005.

272 See s 4 of the Act which provides: "The object of this Act is to provide within the principle of cooperative government set out in Chapter 3 of the *Constitution* a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including-



government to promote and ease intergovernmental relations and to offer mechanisms and procedures to facilitate the settlement of intergovernmental disputes.<sup>273</sup> The Act further acknowledges the potential for intergovernmental tension and a potential lack of integration in multi-sector, multi-stakeholder development projects and programmes that require different government spheres or different departments.<sup>274</sup> Thus, the Act makes provision for mandatory implementation protocol guidelines<sup>275</sup> to be used in projects or programmes that deal with the execution of authority on issues of national priority.<sup>276</sup> The mandatory implementation protocol may also be used to assist, where necessary, with inter-governmental coordination.<sup>277</sup> It is important to note that the guidelines do not set a criteria for what constitutes a project national priority, the implication is that the protocol may in fact become optional rather than mandatory. However, the benefits of the protocol in fostering intergovernmental relations makes the protocol relevant to the topic of development that caters to cultural interests.

The mandatory implementation protocol is relevant in brokering an agreement where the implementation of a policy or the exercise of a public power or function requires that more than one organ of state in different government spheres, participate in the decision-making process for the development planning, strategies and implementation. For example, different national and provincial departments are responsible jointly for the administration, regulation and approval of a proposed development. In general terms, an implementation protocol is a formal agreement between the various departments and serves as a code of conduct in joint projects where the aim is to achieve a government objective such as sustainable

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(a) coherent government; (b) effective provision of services; (c) monitoring implementation of policy and legislation; and (d) realisation of national priorities.”

273 See s 41 (1) and (4) of the *Constitution* and s 40 of the *Intergovernmental Relations Framework Act* provide to the effect that any organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by mechanisms on the political level such as negotiation, mediation and conciliation and must exhaust all remedies before it approaches a court to resolve the dispute. This requirement does not however, oust the jurisdiction of the court. See *In re: Certification of the Constitution of RSA, 1996* 1996 4 SA 744 (CC) at 855.

274 See chapter 3 of the *IGRFA*.

275 *Implementation Protocol Guidelines and Guidelines on Managing Joint Programmes* GN 696 in GG 30140 of 3 August 2007 (hereafter the Guidelines)

276 S 35(2) of the *IGRFA*.

277 S 35(2) of the *IGRFA*.

development.<sup>278</sup> The protocol can be used by the various government departments involved in the joint project to determine, agree and dictate the institutional mechanisms, including the composition and functions that are necessary for effective management and implementation.<sup>279</sup> The institutional mechanisms include decision-making mechanism and measures for the management of possible conflicts that may arise as each department executes its mandate in the joint programme. The provision of a decision-making mechanism makes an implementation protocol relevant in the inclusion of cultural interests in development related decisions.

The above discussions provide an opportunity for the consideration of a cooperative cultural governance framework. The aim of this concept is to promote a level of certainty with regard to decision-making by organs of state on matters that affect cultural interests in reaching development-related decisions.

#### 4.11.2.1 The concept of cooperative cultural governance

The concept of cooperative cultural governance is hinged on the principles of cooperative governance and intergovernmental relations discussed in the preceding paragraph. This thesis seeks to articulate the complexities involved in requiring the various organs of state to consider cultural interests in their balancing of interests in reaching development-related decisions aimed at sustainable development.

The current design of South African law demands that where a proposed development is planned, different departments are responsible for the authorisation, regulation or approval of such development. A good example is where a mining development is planned for instance in a community with undocumented indigenous knowledge related to certain species of biodiversity (both flora and fauna), the national departments and other organs of state whose mandates relate to mineral resources (DMR), environmental protection including the protection of biodiversity (the DEA), water conservation (DWS), the protection of indigenous knowledge (the DAC), economic development (EDD) and the protection of cultural communities (the Commission) will be responsible for decision-making in this regard. The Commission's

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<sup>278</sup> Para 3 of the *Guidelines*.

<sup>279</sup> Para 4.8 of the *Guidelines*.

role will be limited to monitoring, investigating and giving recommendations with regards to the protection of cultural communities therein and not decision-making. What is expected of these departments in terms of sustainable development is to in addition to authorising, regulating, and approving this proposed development, balance the competing interests of environmental, economic, and social needs. The inclusion of cultural interests in sustainable development thinking implies recognising that the cultural communities and the indigenous knowledge possessed and passed down from generations regarding the flora and fauna imbedded in that community, also deserve to be protected and preserved for present and future generations.

Finding and maintaining the sustainability balance between the various intersecting and interdependent environmental, economic, social and cultural interests is, as observed by Du Plessis and Alberts, a difficult one.<sup>280</sup> The difficulty is posed on the premise that their mandates, core mission, and departmental values do differ. However, they are all required to pursue sustainable development. The requirement to pursue sustainable development flows from the principles of cooperative governance which summarily demands that all organs of state bonded together by a common loyalty to the country, its people and the *Constitution*, work together to secure the well-being of people.<sup>281</sup>

To assist the three spheres of government and organs of state in reaching decisions that consider cultural interests, the implementation protocol discussed in para 4.8.1 is a relevant governance tool. In addition, some of the legislation discussed in Chapter 3 provide guides to aid the decision-maker to include cultural interests in its development-related decisions. For example, the *NEMA* provides in clear terms the need to include cultural interests such as cultural heritage in the management of the environment.<sup>282</sup>

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280 See Du Plessis and Alberts 2014 *SA Public Law* 446.

281 Du Plessis 2008 *SAPL* 90.

282 See s 2 of the *NEMA*.

#### ***4.12 Summary of the chapter***

This chapter has investigated the existing institutional arrangements in the national, provincial and local spheres of government that are responsible for the governance of cultural interests in the face of the pursuit of sustainable development.

The national and provincial government departments are structured to allow many opportunities to include cultural interests in the fulfilments of their mandates. However, it is yet to be seen in the way sustainable development decisions are reached in South Africa. It is argued in this thesis that there needs to be an increased focus on the cultural interest of sustainable development by the various government departments responsible for cultural matters as well as those whose mandates interact with cultural interests expressly or by implication.

It is further found that the national and provincial government structure in South Africa presents a fragmented government structure for the governance of cultural interests. However, it is observed that in relation to cultural interests and their interaction with the other interests of sustainable development such as environmental, economic and social interests, a diversified structure serves the purpose. This is because the nature of the interaction with other interests of development which cultural interests requires that different organs of state are involved in the advancement of culture in the pursuit of sustainable development.

In addition, the constitutional principle of cooperative governance and the concept of cooperative cultural governance aid the consideration of cultural interests by relevant organs of state. As it relates to the role of traditional authorities, the absence of an express cultural mandate and legislative authority permitting the local government to delegate cultural matters to traditional authorities dilutes the effectiveness of traditional authorities in this regard.

The Chapter 9 institutions also need to be proactive in monitoring, investigating and making recommendations regarding development decisions that impinge on people's cultural rights. Their doing so would help to incorporate cultural interests into the main stream of sustainable development thinking.

The local sphere of government's lack of legislative competence over cultural matters hinders the legislative recognition of cultural matters at the grassroots. However, the administrative and executive authority of the local sphere provided by section 156 of the *Constitution* enables local government to promote cultural interests. The use of by-laws and other relevant local governance instruments such as IDPs and zoning schemes can aid in the promotion of cultural interests at that level.

The next phase of investigation in this thesis turns to the judiciary. The purpose of the next chapter is to assess how the courts approach issues of culture. In addition, it will be asked if the judiciary's existing interpretation of the notion of sustainable development accommodates cultural interests.

## CHAPTER 5

### THE JUDICIAL INTERPRETATION OF SUSTAINABLE DEVELOPMENT IN SOUTH AFRICA: CULTURE INCLUDED?

#### ***5.1 Introduction***

Since the dawn of the new democratic constitutional era in South Africa the state has been anchored in the principles of human dignity, equality and the advancement of human rights and freedoms, as manifested in the Bills of Rights entrenched in the *Constitution*.<sup>1</sup> Thus, the right to culture as guaranteed under the *Constitution* deserves to be protected, preserved and given consideration when development plans and strategies are set out.<sup>2</sup>

The interpretation of the right to culture and the recognition of cultural interests of people within the sustainable development context, demands that the judiciary reflects on constitutional provisions and relevant applicable legislation which cumulatively espouses the values<sup>3</sup> that underlie an open and democratic society based on human dignity, equality and freedom.<sup>4</sup> These values are specifically meant to embody the spirit and purport of the fundamental rights in the *Constitution*. Therefore, these values should be considered in legislative interpretation of culture-related legislation.

A purely textual approach to the interpretation of issues that border on cultural interests in development-related decisions and the balancing of competing interests seem to have given way to a contextual approach.<sup>5</sup> In addition to the contextual approach to legislative interpretation, is the transformative constitutionalism ethos adopted by the Constitutional Courts in the interpretation of the rights entrenched in the Bill of Rights. The contextual and transformative constitutionalism approaches to legislative interpretation requires the courts to make value judgements by considering

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1 See the brief discussion on the principles underlying the democratic constitutional state of South Africa after years of apartheid rule in para 2.5.

2 See the discussion in para 2.6.1.3.

3 See s 1 of the *Constitution*; also see the discussion on "defining development" in the South African context in para 2.5.2.1.

4 S 39(2) of the *Constitution*.

5 Kotzé 2003 6(2) *PER* 83; the relevance of the approach to statutory interpretation by the judiciary is discussed further in para 5.3.

political, socio-economic and cultural interests in the interpretation of a concept such as sustainable development.<sup>6</sup> It is argued that these approaches enrich the law and sets precedents<sup>7</sup> involving legal principles. Such legal principles might aid public authorities in identifying sustainable and justifiable ways to promote sustainable development.<sup>8</sup> The role of the courts may for one be to guide understanding of the duties as well as the powers and functions of different organs of state in relation to what is required for sustainable development. The role of the courts in setting precedents in judicial adjudications is relevant in the pursuit of sustainable development. This is because such precedents become legal principles<sup>9</sup> which can be employed by the other branches of government in reaching administrative decisions.

To assess the courts' approach to cultural issues and whether they give sufficient recognition to cultural interests to allow for its inclusion into the legal interpretation of sustainable development, this chapter is divided into four main parts. The first part gives a brief overview of the courts and *locus standi* (requisite standing) in South Africa. The issue of how *locus standi* is determined when the courts adjudicate over environmental, economic, social and cultural issues within the context of sustainable development is investigated. This is done to ascertain who may approach the courts *as per* the provisions of the *Constitution* and other relevant legislation and common law. The second part analyses how the courts interpret relevant legislation in resolving competing environmental, economic, social and cultural interests and how the different methods of interpretation employed inform the decisions reached by the judiciary.

The third and fourth parts explore case law that illustrates how the courts' understanding and interpretation of the notion of sustainable development has

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6 See the discussion on defining sustainable development in para 2.5.2.2.

7 The principle of judicial precedent or *stare decisis* applies to court rulings and decisions, such that lower courts are in general bound by the decisions of higher courts, and higher courts are bound by their own decisions. The exception to the principle of precedent is where the decision was subject to a material error.

8 Kotzé 2003 6(2) *PER* 92.

9 The law-making responsibility of the court does not infringe on the separation of powers doctrine entrenched in the *Constitution*. Rather, it enforces the existing laws and guides the executive in the execution of laws. The sole responsibility for law-making rests with the legislature. See ss 43, 84, 85 and 165 of the *Constitution*; also see Langa 2006 *Stellenbosch L. Rev* 357.

evolved. The cases discussed focus on the interpretation and application of the concept of sustainable development, with an emphasis on how interrelated environmental, social, economic and cultural interests are balanced. The third part focuses mainly on how environmental interests are balanced against competing social and economic interests. The aim of the extensive review of environmental cases is to show how the courts have approached environmental interests and have interpreted sustainable development along the lines of environmental protection. The subsidiary aim is to show that interpreting sustainable development in the context of environmental protection alone soon gave way to the inclusion of social and economic interests. The fourth part's focus on culture related cases aims to demonstrate the approach the courts have taken in giving recognition to cultural interests against competing environmental, economic and social interests.

The cases further examine how the courts have interpreted existing legislation that supports the inclusion of culture in decisions that impact on sustainable development. The chapter draws conclusions derived from the cases examined, the object of which is to ascertain the extent to which the courts in South Africa give recognition to and accommodate cultural interests in the judicial interpretation of sustainable development.

## **5.2 *South Africa's courts and locus standi***

The judicial authority in South Africa is vested in the courts.<sup>10</sup> The courts are independent and subject only to the *Constitution* and the law.<sup>11</sup> The courts' independence and functioning is protected by the *Constitution* from interference by

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<sup>10</sup> S 165(1) of the *Constitution*.

<sup>11</sup> S 165(2) of the *Constitution*. The following courts are creations of the *Constitution* and other Acts of parliament: the Constitutional Court; the Supreme Court of Appeal; the High Court of South Africa, and any other high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa; Magistrates' Courts; and other courts and specialist high courts established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.



any person or organ of state.<sup>12</sup> Court decisions are generally binding on all organs of state and the people to whom they apply.<sup>13</sup>

It is also of grave importance to the rule of law for adjudication to identify the people or persons that are eligible to bring a matter before the court. The question of jurisdiction to hear a matter and who can bring a matter before the court (*locus standi*), especially in public interest litigation, has been dealt with extensively by the courts<sup>14</sup> and various academic scholars.<sup>15</sup>

The Constitutional Court, the Supreme Court of Appeal (SCA) and the High Court of South Africa have the inherent power to protect and regulate their own processes and to develop common law, while considering the interests of justice.<sup>16</sup> Therefore their decisions are important sources of law, as they set down legal principles capable of enforcing existing statutes and creating new legal norms.

According to Kotzé and Du Plessis,<sup>17</sup> the role of the courts is to uphold the laws in practice by carefully considering rights and interests and then making reasonable, just, lawful and equitable findings, and to solve disputes between litigants by interpreting and applying the law, thereby giving effect to one of the basic functions of law, which is to keep order and social control. Although the authors refer to the role of the courts in relation to the enforcement of South Africa's environmental right, this understanding of the role of the courts may also be applicable to other constitutionally protected rights.

The *Constitution* makes provision for access to justice and the judiciary, which is facilitated by means of access to courts and *locus standi* (requisite standing) as

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12 S 165(3)-(4) of the *Constitution*.

13 S 165(5) of the *Constitution*.

14 *Ferreira v Levin* 1996 1 SA 984 (CC); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E); *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC).

15 Murombo 2010 *LEAD* 163-178; Scott 2009 *TSAR* 405-419; Mqingwana *An analysis of locus standi in public interest litigation* 26-48.

16 S 173 of the *Constitution*.

17 Kotzé and Du Plessis 2010 *JCI* 159-160.

enunciated in sections 34<sup>18</sup> and 38<sup>19</sup> of the *Constitution*. The *Constitution* makes it clear that an extensive list of persons has *locus standi* to approach a court for relief where a right in terms of the Bill of Rights<sup>20</sup> has been infringed.<sup>21</sup> This is also the case where socio-economic rights have been infringed.<sup>22</sup> These rights include environmental rights<sup>23</sup> as well as social, economic<sup>24</sup> and cultural rights.<sup>25</sup> For the purpose of this thesis, it is argued that section 24(b) of the *Constitution* supports the balancing of environmental, social and economic interests, in rights jargon.

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18 S 34 of the *Constitution* provides that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum."

19 S 38 of the *Constitution* states that "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."

20 See chapter 2 of the *Constitution*.

21 S 38 of the *Constitution*; Mbazira *Litigating Socio-economic Rights in South Africa* 168-172.

22 See generally, *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC). In this socio-economic rights case where the Constitutional Court issued a mandatory interdict, the parties to the case were not persons who were direct victims of the infringement of the right to access to healthcare services.

23 S 24(a) of the *Constitution*; also see the extensive *locus standi* provision in s 32 of the *NEMA*, which provides: "(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources-(a) in that person's or group of person's own interest; (b) in the interest of, or on behalf of, a person who is for practical reasons, unable to institute such proceedings: (c) in the interest of or on behalf of a group or class of persons whose interests are affected; (d) in the public interest; and (e) in the interest of protecting the environment. (2) A court may decide not to award costs against a person who, or group of persons which fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought. (3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act or any other statutory provision concerned with the protection of the environment, a court may on application— (a) award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings: and (b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings."

24 Ss 25(5), 26, 27, 29(1)(b) of the *Constitution*.

25 Ss 30 and 31 of the *Constitution*.

In the interest of the enforcement of the rights entrenched in the *Constitution* which are directly connected to the pursuit of sustainable development (environmental rights, cultural rights, and social and economic rights), the courts' structure, jurisdiction and the *locus standi* regime serves as a legal safeguard in the pursuit of sustainable development. This is because the *locus standi* regime allows litigants to approach the court in the interest of the public where any of the rights is being infringed.<sup>26</sup> This gives the court the opportunity to analyse, interpret, explain and refine existing laws with regards to the diverse competing interests that need balancing in the pursuit of sustainable development.

### ***5.3 The relevance of judicial interpretation to sustainable development***

As stated throughout this thesis,<sup>27</sup> sustainable development is not exclusively an environmental concept. It is applicable in non-environmental contexts as well, and extends to the enhancement of the quality of peoples' lives<sup>28</sup> *inter alia* through the governance efforts of government.<sup>29</sup>

The *Constitution* makes the Bill of Rights applicable to "all law, and binds the legislature, the executive, the judiciary and all organs of the state". In this context, Rautenbach and Du Plessis<sup>30</sup> argue that the constitutional mandate of the courts to promote "the spirit, purport and objects of the Bill of Rights" when interpreting any legislation or developing the common and customary law is a further indication that constitutional law will almost always be applied by a court to any case in hand. The Constitutional Court, through its juridical responsibilities-interpretation and adjudication-over constitutional matters<sup>31</sup> potentially plays a vital role in the assessment and balancing of developmental issues and the pursuit of sustainable development. Therefore, the methods of interpretation used by the judiciary in interpreting and adjudicating competing interests may provide guidance to both the

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26 *Ferreira v Levin* 1996 1 SA 984 (CC).

27 See the discussion in para 2.6.2.2.

28 See para 2.5.2.2.

29 Kotzé 2003 6(2) *PER* 81.

30 Rautenbach and Du Plessis 2017 "The Constitutional Court of South Africa" 579.

31 Kotzé 2003 6(2) *PER* 82.

executive and the legislative authority in reaching decisions that promote sustainable development.

It is important to note that prior to the advent of constitutional democracy in South Africa, the supremacy of parliament excluded the competence of the judiciary to oversee the legitimacy of legislation. This meant that parliament had the free will, based on its sovereignty, to pass discriminatory legislation if it followed the correct procedure. During this period, the primary rule of interpretation as set out in the classic case of *Venter v R*,<sup>32</sup> was that if the words of the statutes were clear, they had to be put into effect regardless of their negative impact.<sup>33</sup> This approach is known as the literal approach to interpretation. The only exception to this imprimatur is if the literal or plain meaning of a legislative provision would lead to absurdity, repugnancy or inconsistency with the rest of the piece of legislation or statute under adjudication.<sup>34</sup>

With the passing of the 1993 *Constitution* (also known as the interim *Constitution*),<sup>35</sup> the approach to interpretation changed considerably. The interpretation, implementation and adjudication of legislation and other legal texts underwent a transformation requiring the courts to apply constitutional values. These values are intended to embody the spirit and purport of the fundamental rights in the *Constitution*<sup>36</sup> and must be considered by the courts when interpreting any legislation in South Africa. To this end, section 39(2) of the *Constitution*<sup>37</sup> implies that a purely textual approach to the interpretation of legislation is no longer viable. It has been replaced by a contextual approach requiring courts on all levels to make value judgements by considering issues of a political, socio-economic and cultural nature.<sup>38</sup>

However, the courts have continued to utilise the purely textual approach to the interpretation of legislation, albeit as a starting point in the judicial reasoning process.

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32 1907 TS 910.

33 1907 TS 910 paras 913, 918-919.

34 Mdumbe 2004 19 *SAPL* 473.

35 The final *Constitution* repealed the interim *Constitution* in 1996.

36 S 39(2) of the *Constitution*; Kotzé 2003 6(2) *PER* 83.

37 S 39(2) of the *Constitution* provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

38 Kotzé 2003 6(2) *PER* 83; Rautenbach and Du Plessis 2017 "The Constitutional Court of South Africa" 584.

As illustrated by Rautenbach and Du Plessis, nuanced versions of literalism are still being applied in the Constitutional Court.<sup>39</sup> For example, Kentridge JA in the case of *S v Zuma*<sup>40</sup> maintained that while the courts must always be conscious of the values underlying the Constitution, it is nonetheless the task of the courts to interpret a written instrument. He further stated that if the language used by the lawgiver is ignored in favour of a general resort to values, the result will not be interpretation, but divination.<sup>41</sup>

It is submitted that the supremacy clause of the *Constitution*,<sup>42</sup> read together with the provisions of section 39 of the *Constitution*,<sup>43</sup> specifically at section 39(2) and the application clause in section 8,<sup>44</sup> makes it a requirement to consider the underlying values of the *Constitution*. Therefore, the courts' approach to legislative interpretation must be informed by the new legal order created by the *Constitution*.

Furthermore, the concept of transformative constitutionalism<sup>45</sup> has found considerable resonance in the jurisprudence of especially the Constitutional Court.<sup>46</sup> In the case of

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39 Rautenbach and Du Plessis 2017 "The Constitutional Court of South Africa" 580.

40 1995 2 SA 642 (CC).

41 1995 2 SA 642 (CC) paras 17-18. For a more detailed discussion of the persistence of literalism in the courts' reasoning see Rautenbach and Du Plessis 2017 "The Constitutional Court of South Africa" 580-581 and Mdumbe 2004 19 *SAPL* 476-477.

42 S 2 of the *Constitution*.

43 S 39(1)-(3) of the Constitution provides: "(1) When interpreting the Bill of Rights, a court, tribunal or forum-(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

44 S 8(1)-(4) of the *Constitution* provides: "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

45 See Klare 1998 14 *SAJHR* 146-188.

46 Rautenbach and Du Plessis 2017 "The Constitutional Court of South Africa" 584

*Hassam v Jacobs*<sup>47</sup> the process of transformative constitutionalism was explained as follows:<sup>48</sup>

In assessing the constitutional validity of the impugned legislative provisions in this case, regard must also be had to the diversity of our society which provides a blueprint for our constitutional order and influences the interpretation of our supreme law- the Constitution- which in turn shapes ordinary law. The interpretive approach enunciated by this court will ensure the achievement of the progressive realisation of our “transformation constitutionalism”.

Langa CJ notes that there is no accepted definition of the concept of transformative constitutionalism, perhaps because it is in keeping with the spirit of transformation that there is no one agreed interpretation of the concept.<sup>49</sup> However, Klare<sup>50</sup> describes transformative constitutionalism, in this context, as a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Similarly, Albertyn and Goldblatt<sup>51</sup> make the point that transformative constitutionalism requires a complete reconstruction of the state and society. The state and society must be severed from systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality so that the development of opportunities which allow people to realise their full human potential within positive social relationships can be cultivated.

This thesis takes the view that transformative constitutionalism connotes a revolution that continuously explores new ways of meeting the needs of society while constantly embracing the deconstruction of existing institutions that do not uphold the values of substantive equality, freedom and dignity which the *Constitution* strives to achieve.<sup>52</sup> Recognising cultural interests when reaching development-related decisions should speak to the values of freedom to share, use and enjoy culture and inclusivity that

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47 2009 5 SA 572 (CC).

48 2009 5 SA 572 (CC) para 27-28.

49 Langa 2006 *Stellenbosch L. Rev* 351.

50 Klare 1998 *SAJHR* 150.

51 Albertyn and Goldblatt 1998 *SAJHR* 248-249.

52 See s 1 of the *Constitution*, which provides: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

seeks to ensure that people are considered when such decisions are being made. Therefore, promoting cultural interests potentially meets the demands of transformative constitutionalism. The role of the courts in the realisation of transformative constitutionalism demands that the judiciary employs a broad interpretative approach to legislation and concepts embedded in law that speak to the values of the *Constitution*.

#### ***5.4 Judicial considerations of environmental interests against economic and social interests***

The courts have been instrumental in enforcing and realising the evolution of sustainable development as a concept that contributes to the realisation of constitutional rights such as the right to an environment that is not harmful to the people,<sup>53</sup> other socio-economic rights<sup>54</sup> and cultural rights through judicial interpretation.<sup>55</sup> A few examples of such cases are discussed in this chapter.<sup>56</sup> The relevance of these cases for this thesis is that the courts give us some guidance on how to deal with questions connected to the balancing of competing interests in the context of sustainable development, such as the protection of cultural heritage,<sup>57</sup> environmental interests,<sup>58</sup> social interests such as property rights<sup>59</sup> and economic interests,<sup>60</sup> versus the broader sustainable development paradigm, as opposed to measuring development against solely environmental objectives or priorities.<sup>61</sup>

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53 For example, the *Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA).

54 For example, the *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC); Kotzé 2003 6(2) PER 88-94.

55 For example, the *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 1 SC 333 (SCA).

56 See paras 5.4.2 and 5.5.2.

57 See the *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* 2007 1 All SA 638 (C) (hereafter, the *Qualidental Laboratories* case); *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 1 SC 333 (SCA) (hereafter, the *Oudekraal* case); and the *Heritage Collection (Pty) Ltd v Minister of Finance* 1981 3 All SA 266 (CC) (hereafter, the *Heritage Collection* case); and *Chairperson's Association v Minister of Arts and Culture* 2007 2 All SA 582 (SCA) (hereafter the *Chairperson's Association* case).

58 See the *Sasol Oil* case, the *BP* case, the *Bato Star Fish* case, the *Fuel Retailers'* case, and the *Save the Vaal* case.

59 See the *Qualidental Laboratories* case.

60 See the *Bato Star Fish* case, *Sasol Oil* case, the *BP* case, and the *Heritage collection* case.

61 For example, the court in the case of *Sasol Oil (Pty) Ltd v Metcalfe* 2004 5 SA 161 (W) sought to interpret sustainable development exclusively from an environmental perspective. Also see Du Plessis and Du Plessis "Striking the Sustainability Balance in South Africa" 429.

Some of the cases explore how recognition should be given to other interests of development beyond the environment to include cultural interests, social interests, and economic interests in reaching decisions relevant to development. Furthermore, as noted above, transformative constitutionalism requires that new ways of meeting the socio-economic needs of society are explored. The judicial interpretation of concepts embedded in law, such as sustainable development, must therefore be approached through the lens of the contextual approach and may consider the ethos of transformative constitutionalism. By so doing, the balancing of interests will go beyond the environmental, social, and economic interests to include cultural interests. The following section explores the reasoning of the courts in balancing environmental interests against other competing interests.

#### *5.4.1 Discussion of cases dealing with environmental interests*

The environmental law cases discussed hereunder are indicative of how the concept of sustainable development has evolved from an environmental law perspective which promotes environmental interests over other competing interests. Therefore, the discussions proceeding out of these cases aim to demonstrate how other competing interests have often been side-lined in favour of environmental interests.

In most of the selected cases dealing with the EIA<sup>62</sup> and sustainable development, the judiciary was engaged with the notion of sustainable development mostly in the context of the balancing of the interests of the environment against social and economic interests. These cases include:

- *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (the *Save the Vaal* case);<sup>63</sup>
- *Sasol Oil (Pty) Ltd v Metcalfe* (the *Sasol Oil* case);<sup>64</sup>

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62 See the discussion on EIA in para 3.2.3.1.1. The EIA guides decision-makers in reaching decisions aimed at environmental protection in fulfilment of the constitutional mandate in s 24 of the *Constitution*.

63 1999 2 SA 709 (SCA).

64 2004 5 SA 161 (W).



- *BP Southern Africa Pty Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* (the *BP* case);<sup>65</sup>
- *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province* (the *Fuel Retailers'* case);<sup>66</sup> and
- *Bato Star Fishing (Pty) Ltd v Minister Environmental Affairs* (the *Bato Star Fish* case).<sup>67</sup>

In the discussion of these specific cases, two main queries will be addressed as relevant for this discussion, namely:

- (a) whether the mandate of environmental authorities to protect the environment extends beyond environmental interests to social and economic interests; and
- (b) if the mandate of the authorities to protect the environment extends to socio-economic interests, can the mandate be extended to other competing interests such as culture?

#### 5.4.1.1 *Save the Vaal* case<sup>68</sup>

This case concerned an application made by Sasol Mining (the second appellant in the case) to obtain a mining licence for an open-cast mine close to the southern bank of the Vaal River. The application was made to the Director of Mineral Development, Gauteng Region.<sup>69</sup> Sasol Mining held mineral rights in the area.

The first applicant was the Director of Mineral Development for the Gauteng Region (the Director) and the respondent was SAVE. SAVE is an unincorporated association made up mostly of property owners within the affected area.<sup>70</sup> SAVE has a written constitution which provides that its purpose is to aid its members in protecting the

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<sup>65</sup> 2004 5 SA 124 (W).

<sup>66</sup> 2007 10 BCLR 1059 (CC).

<sup>67</sup> 2004 7 BCLR 687 (CC).

<sup>68</sup> *Save the Vaal* case 1999 2 SA 709 (SCA).

<sup>69</sup> *Save the Vaal* case 1999 2 SA 709 (SCA) at 714A, para 3.

<sup>70</sup> *Save the Vaal* case 1999 2 SA 709 (SCA) at 714B, para 4; Couzens 2008 *SAJELP* 24.

environmental integrity of the area. SAVE objected to the proposed open-cast mining operations, raising environmental concerns.<sup>71</sup> Five of the concerns as summarised by the court included that:

- (a) the proposed mining would destroy, beyond hope of restoration, the Rietspruit wetland;
- (b) it would pose a serious threat to both fauna and flora as the area supports 254 bird species, 44 endemic mammal species, and 33 species of reptiles and amphibians, as well as 15 plant taxa, including some red data species;
- (c) noise, light, dust and water pollution, as predicted, would destroy the “sense of place” of the area;
- (d) the envisaged 20 years of open-cast mining would lead to a serious loss of water quality, with concomitant losses of aesthetic value; and
- (e) there would be a permanent negative effect on property value in the area.<sup>72</sup>

SAVE’s attempts to be heard (through their legal representative) in opposition to Sasol’s mining application was denied by the Director of Mining in February and March 1997. The Director’s reasons for refusing SAVE a hearing were that such a hearing would be premature because the mining activities still needed to be authorised by section 39 of the *Minerals Act*<sup>73</sup> before a hearing on the grounds canvassed by SAVE

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71 *Save the Vaal* case 1999 2 SA 709 (SCA) at 714B-C, para 4; Couzens 2008 *SAJELP* 24.

72 *Save the Vaal* case 1999 2 SA 709 (SCA) para 6; Couzens 2008 *SAJELP* 24.

73 S 39 of the *Minerals Act* 50 of 1991 provides: “(1) An environmental management programme in respect of the surface of land concerned in any prospecting or mining operations or such intended operations, shall be submitted by the holder of the prospecting permit or mining authorization concerned to the Director: Mineral Development concerned for his approval and, subject to subsection (4), no such operations shall be commenced with before obtaining any such approval. (2) The Director: Mineral Development may-(a) on application in writing and subject to such conditions as may be determined by him, exempt the holder of any prospecting permit or mining authorization from one or more of the provisions of subsection (1) or grant an extension of time within which to comply with any such provision; (b) approve an amended environmental management programme on such conditions as may be determined by him; or (c) without application being made therefore, but after consultation with such holder, amend any approved environmental management programme. (3) Before the Director: Mineral Development-(a) approves any environmental management programme referred to in subsection (1) or any amended environmental management programme referred to in subsection (2)(b); or (b) grants any exemption or extension of time under subsection (2)(a) or any temporary authorization under subsection (4); or (c) effects an amendment under subsection (2)(c), he or she shall consult as to

can take place. The Director of Mining went ahead to issue the mining licence to Sasol Mining in May 1997. The decision of the Director of Mining who had refused to give the respondents a hearing was successfully taken on review in the Witwatersrand Local Division.<sup>74</sup>

On appeal to the SCA by the Director of Mineral Development for the Gauteng Region, one of the issues for determination bordered on whether SAVE was entitled to be heard based on the nature of the objections raised. SAVE argued that it was entitled to be heard because the *audi alteram partem* rule (the 'hear both sides'- rule) applied to a situation where a person might be affected by an act done or a decision made by a public official. The rule can be set aside only where a statute expressly or by necessary implication indicates to the contrary, or a court finds that exceptional circumstances justify not giving effect to the rule.<sup>75</sup> SAVE further argued that the constitutional rights to the environment as provided for in section 24 of the *Constitution* gave the primary substantive rights or interests on which SAVE was entitled to rely; and the *Minerals Act*<sup>76</sup> did not, either expressly or by necessary implication, exclude the *audi alteram partem* rule. In addition, there were no considerations of public policy which acted against the rule in the present case.

On the other hand, the appellants argued that the *audi alteram partem* rule was excluded by necessary implication. They argued that section 9(3)(a)-(e) of the *Minerals Act*<sup>77</sup> was peremptory and provided that the Director must issue the mining

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that with the Chief Inspector of Mines and each department charged with the administration of any law which relates to any matter affecting the environment. (4) The Director: Mineral Development may, pending the approval of the environmental management programme referred to in subsection (1), grant temporary authorization that the prospecting or mining operations concerned may be commenced with, subject to such conditions as may be determined by him. (5) (a) The Director-General may, pending the approval of an environmental management programme referred to in subsection (1), require that an environmental impact assessment be carried out in respect of the intended prospecting or mining operations by a professional body designated by the Director-General. (b) Any costs in respect of an environmental impact assessment referred to in paragraph (a) shall be borne by the holder of the prospecting permit or mining authorization referred to in subsection (1)."

74 *Save the Vaal* case 1999 2 SA 709 (SCA) paras 1-2.

75 Couzens 2008 *SAJELP* 25.

76 50 of 1991.

77 S 9(3)(a)-(e) of the *Minerals Act* provides: "(3) No mining authorization shall be issued in terms of subsection (1), unless the Director: Mineral Development is satisfied-(a) with the manner in which and scale on which the applicant intends to mine the mineral concerned optimally under such mining authorization; (b) with the manner in which such applicant intends to rehabilitate

licence if satisfied with the manner and scale of the proposed mining operation, with the proposed rehabilitation measures, with the applicant's ability to carry out such rehabilitation, and with there being sufficient quantities of the mineral which it was proposed to mine.<sup>78</sup> The appellants went on to concede that the *audi alteram partem* rule did apply to these considerations, but argued that these considerations formed a *numerus clausus* (bound by a limited number of considerations), which by necessary implication excluded the application of the rule where the objections sought to be raised by the respondent were solely environmental concerns.<sup>79</sup>

Furthermore, the appellants argued that the issuing of a mining licence by the Director in terms of section 9 of the *Minerals Act* could not by itself have any "tangible, physical effect" on the environment. Therefore, the refusal to grant a hearing did not result in the infringement of any rights. The argument added that mining could not start until the approval of an environmental management programme in terms of section 39 of the *Minerals Act*.<sup>80</sup> Thus, it was only after the approval that it was possible for rights to be infringed and for there to be a case for a hearing.<sup>81</sup>

In dealing with the question whether the *audi alteram partem* rule was excluded by necessary implication, the SCA found that the so-called *numerus clausus* considerations which the Director of Mining had to consider in fact included environmental issues. The SCA found that considerations of damage and rehabilitation would need to be considered, and that these were environmental matters about which SAVE had legitimate concerns. Therefore, SAVE was entitled to the right to a hearing, unless other statutory provisions needed these concerns to be heard only at a later

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disturbances of the surface which may be caused by his mining operations; (c) that such applicant has the ability and can make the necessary provision to mine such mineral optimally and to rehabilitate such disturbances of the surface; and (d) that the mineral concerned in respect of which a mining permit is to be issued-(i) occurs in limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or (ii) will be mined on a limited scale; and (iii) will be mined on a temporary basis; or (e) that there are reasonable grounds to believe that the mineral concerned in respect of which a mining licence is to be issued-(i) occurs in more than limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or (ii) will be mined on a larger than limited scale; and (iii) will be mined for a longer period than two years."

78 *Save the Vaal* case 1999 2 SA 709 (SCA) para 11; Couzens 2008 *SAJELP* 25.

79 *Save the Vaal* case 1999 2 SA 709 (SCA) para 12.

80 S 39 of the *Minerals Act*.

81 *Save the Vaal* case 1999 2 SA 709 (SCA) para 16.

stage.<sup>82</sup> The SCA further rejected firmly the appellant's contention that the environmental considerations were in a fact a *numerus clausus* as it could not have been the intention of the legislature to exclude a fundamental principle such as the *audi alteram partem* rule. To exclude the rule in the present circumstances would imply the exclusion of the rule whenever socio-economic interests which an official ought to consider, were enumerated. Such an approach would "emasculate the principles of natural justice".<sup>83</sup>

On whether the granting of a hearing was premature in the light of section 9 of the *Minerals Act* stage and whether it would be proper only at the section 39 of the *Minerals Act* stage, the SCA held that the granting of a mining licence in terms of section 9 opened the door to the licence holder and set in motion a chain of events which had the potential in the ordinary course of events to lead to the commencement of mining operations.<sup>84</sup> Therefore it was pertinent that the respondent's concerns be addressed at the section 9 of the *Minerals Act* stage.

The SCA further noted that it was trite that a mere preliminary decision could have dire consequences in certain cases, especially where it lay the necessary foundation for a final decision. Thus, the issuing of the licence would, for instance, allow the holder to begin preparing an environmental management programme which would, if approved, allow the start of mining operations.<sup>85</sup> Therefore, on the point that it would lead to duplicity to apply the *audi alteram partem* rule at the section 9 stage and not at the section 39 stage, the SCA found that this contention confused the aims of the two stages. Section 9 involved an enquiry into whether a mining licence should be granted or not, while the section 39 stage involved a consideration of the environmental management programme. The SCA pointed out that the granting of a licence in terms of section 9 would in fact enable the holder to apply to the Director to be exempted from the obligation to submit an environmental management programme. Pending the approval of the environmental management programme, the Director might give temporary authorisation to start mining. The SCA concluded that

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82 *Save the Vaal* case 1999 2 SA 709 (SCA) para 13.

83 *Save the Vaal* case 1999 2 SA 709 (SCA) paras 14-15.

84 *Save the Vaal* case 1999 2 SA 709 (SCA) para 17.

85 *Save the Vaal* case 1999 2 SA 709 (SCA) para 17.

a hearing granted in terms of section 39 might not address the objector's basic concerns and might in fact never take place at all, or might take place only after mining had already begun.<sup>86</sup>

The SCA came to the conclusion that the *audi alteram partem* rule applies when an application for a mining licence is made in terms of section 9, and that interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing.<sup>87</sup> The SCA therefore dismissed the appeal.<sup>88</sup>

On the considerations of public policy inherent in its finding, that no rules of public policy exclude the application of the *audi alteram partem* rule when a section 9 decision is reached and impliedly when other decisions affecting the environment are made by public officials, the SCA noted a few salient points with regard to environmental interests.<sup>89</sup> The SCA remarked that the application of the *audi alteram partem* rule was indicated strongly by virtue of the enormous damage mining can do to the environment and ecosystem. The SCA went on to explain that when an application for a mining licence is submitted, it needs to be ensured that "development which meets present needs will take place without compromising the ability of future generations to meet their own needs".<sup>90</sup> The SCA also explained that the *Constitution*:<sup>91</sup>

[b]y including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country.

However, Couzens<sup>92</sup> notes that the outcome of the case was a referral to the Director of Mineral Development to reconsider the application for the mining licence with a hearing given to SAVE in respect of environmental objections, with the necessary implication being that proper consideration must be given to these objections before a decision could be made. Despite the SCA's noting the concerns of and the acceptance

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86 *Save the Vaal* case 1999 2 SA 709 (SCA) para 19.

87 *Save the Vaal* case 1999 2 SA 709 (SCA) para 20.

88 *Save the Vaal* case 1999 2 SA 709 (SCA) para 20.

89 *Save the Vaal* case 1999 2 SA 709 (SCA) para 20.

90 *Save the Vaal* case 1999 2 SA 709 (SCA) para 20.

91 *Save the Vaal* case 1999 2 SA 709 (SCA) para 20

92 Couzens 2008 *SAJELP* 29.

of the undesirability of the potential impacts of mining in the area, the court did not give specific guidance to the environmental decision-makers on the environmental concerns that must be considered when environmental decisions are made.

It is argued that current developments in the law would have required the SCA to consider the “sense of place” issue raised by SAVE. The impact on the sense of place is currently one of the criteria for use in determining the significance of the negative impacts of development.<sup>93</sup> The “sense of place impact” is defined<sup>94</sup> to mean the impact or potential impact flowing from an activity on the mix of natural and cultural features in the landscape that provide a strong and unique identity and character that are deeply felt by local inhabitants and/or visitors.<sup>95</sup> The definition of “sense of place impact” in the determination of penalties for contravention of section 24 of the *NEMA* dealing with impact assessment, is evidence that cultural interests have a legitimate basis to be considered in pursuance of sustainable development.

Therefore, in protecting environmental interests the environmental authorities must consider other interests such as social and cultural interests. Therefore, in balancing competing interests within the context of sustainable development, the environmental authorities must endeavour to assess the social and cultural impacts of development along with the environmental impacts.

There are other cases which are outside of the mining sector where the court has had to balance environmental issues against economic issues in the sphere of development. These cases are discussed in paragraphs 5.4.1.2.1 to 5.4.1.2.3. This set of cases is popularly referred to by scholars as the “filling station jurisprudence”.<sup>96</sup>

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93 See item 4.8 of *National Environmental Management Act: Implementation Guidelines, Sector Guidelines for Environmental Impact Regulations* GN R654 GG 33333 of 29 June 2010.

94 See the *National Environmental Management Act: Section 24G Fine Regulations* GN R698 GG 40994 of 20 July 2017. This regulation relates to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of section 24G

95 See item 1 of the *National Environmental Management Act: Section 24G Fine Regulations* GN R698 GG 40994 of 20 July 2017.

96 See generally the various contributions by scholars on the *Fuel Retailers* case in the special edition of 2008 *SAJELP*, like Couzens 2008 *SAJELP* 23-56 and Murombo 2008 *SALJ* 488-504.

#### 5.4.1.2 Filling station jurisprudence

##### 5.4.1.2.1 *Sasol Oil* case<sup>97</sup>

In this case the applicant was Sasol Oil (Pty) Ltd and the respondent was the MEC Gauteng Provincial Government, Department of Agriculture, Conservation, Environment and Land Affairs (the MEC for DACE). The applicant sought to declare certain provisions of the General Departmental Guidelines of the EIA Administrative Guideline issued by the Department of Agriculture, Conservation, Environment and Land Affairs of the Gauteng Provincial Government ("the department") as *ultra vires* the *ECA*, and therefore invalid and unenforceable. In addition, the applicant prayed that the decision of the department to deny authorisation to construct a filling station under the *ECA* be reviewed and set aside.

The applicant sought to set up a filling station and convenience store on the outskirts of Johannesburg. The provisions of the governing environmental statute at the time, section 22(2) of the *ECA*<sup>98</sup> read in conjunction with the EIA Regulations,<sup>99</sup> required that certain "listed activities"<sup>100</sup> complete an EIA before they could obtain authorisation from the provincial environmental authorities. The applicant appointed consultants to conduct an EIA on their behalf, and forwarded the EIA report to the department. The proposed filling station was categorised as constituting a listed activity because there was a proliferation of filling stations in the area which fell into the category of an urban, residential or built-up area.

Since the filling station was set to be situated within the Gauteng province, the Gauteng division of the department had authority to issue authorisation for the proposed development. The department developed guidelines to aid its decision-making. These guidelines stipulate that development must be socially, environmentally

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<sup>97</sup> *Sasol Oil* case 2004 5 SA 161 (W).

<sup>98</sup> S 22(2) of the *ECA* provides: "The authorization referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed."

<sup>99</sup> *ECA: Regulations Regarding Activities Identified Under Section 21 (1)* GN 1182-1184 in GG 18261 of 5 September 1997.

<sup>100</sup> One such listed activity relates to the construction, erection or upgrading of manufacturing, storage, handling, treatment and processing facilities for dangerous or hazardous substances.



and economically sustainable, and as such the department did not approve the applicants' request to construct a filling station in an urban, residential or built-up area as it would be situated within three kilometres of an existing filling station. The department's decision was in line with the set guidelines.<sup>101</sup> The applicant appealed this decision to the respondent. The respondent also applied the guidelines and similarly refused the application. The High Court was approached by the applicants for a declaration that the distance requirement contained in the guidelines was *ultra vires*<sup>102</sup> the *ECA* and therefore invalid and unenforceable. An alternative prayer was for an order reviewing and setting aside the respondent's decision to reject their application.

The applicant contested the respondent's decision on two main grounds. First, the applicant argued that the proposed construction of a filling station did not constitute a listed activity and as such did not trigger the need to carry out an EIA. Although the applicant acknowledged the respondent's power to authorise the construction of structures for the storage or handling of hazardous substances at filling station, the applicants contended that the power did not extend to the construction of the "physical structure", being the filling station. The applicant insisted that the respondent's consideration of the guidelines was therefore irrelevant and inappropriate. Second, the applicant argued that the department's mandate was restricted to environmental issues, to the exclusion of socio-economic issues. Therefore, if the activity required authorisation, the department ought not to develop and apply the guidelines, as the said guidelines were based on socio-economic considerations. In response, the respondent contended that the construction of a filling station did in fact constitute a listed activity requiring authorisation under the *ECA*. Therefore, the department's mandate did extend to socio-economic as well as environmental considerations. The guidelines were therefore within the exercise of their mandate under the *ECA* and had been reasonably applied.

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101 Environmental Impact Assessment Administrative Guideline — Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations, March 2002.

102 Beyond the powers of the department.

In considering the applicant's first ground, the Court promoted a narrow interpretation of the listed activity under contention. The Court acknowledged the department's power to regulate the environmental aspects of the construction of structures used for storing or handling petroleum products (considered hazardous substances) at the premises of filling stations. However, the Court held<sup>103</sup> that the respondent's authority did not extend to the environmental aspects of the construction of filling stations *per se*. Therefore, the applicants were not required to obtain authorisation under the *ECA* before constructing the filling station.

Following a precursory analysis, the Court held that the sustainable development principles listed did not extend the department's mandate to consider socio-economic interests in considering applications under the *ECA* in addition to environmental interests.<sup>104</sup> Willis J<sup>105</sup> held that the environmental management principles listed in section 2 of the *NEMA*<sup>106</sup> highlight sustainable development principles of ensuring that the environment is protected for present and future generations. He further argued that the principles serve only to restrain authority and they cannot confer power on an organ of state beyond that which the Act mandates. The Court went on to set aside the respondent's decision not to authorise the construction of the filling station, stating the following two reasons:

- (a) the decision was arrived at based on a reason that is not authorised in the empowering legislation; and
- (b) the application of the guidelines represented irrelevant considerations which should have not been considered.

By this decision, the Court made the assertion that the principles of environmental management and sustainable development set out in the *NEMA* should apply only to environmental management, so that the principles of sustainable development would be interpreted narrowly from an environmental perspective. The Court's reasoning in respect of the interpretation and application of the principles of sustainable

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103 *Sasol Oil* case 2004 5 SA 161 (W) at para 171J-172B.

104 *Sasol Oil* case 2004 5 SA 161 (W) at para E-172B.

105 *Sasol Oil* case 2004 5 SA 161 (W) at para 1711.

106 See the discussion in para 5.4.1 above.

development in this case is flawed for two main reasons. First, the Court did not give due regard to several relevant legislative provisions in reaching its decision. For instance, section 24(b)(iii) of the 1996 *Constitution* compels the state to take “reasonable legislative and other measures” that amongst other things “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. The interpretation of the words “other measures” have been held in the context of the constitutional right to housing<sup>107</sup> to include well-directed policies and programmes aimed at realising the right under consideration. In the context of the present case, the intended result of the guidelines would be ecologically sustainable development, which expressly involves balancing environmental, economic and social considerations. Therefore, the department clearly had a constitutional mandate to develop the guidelines which considered socio-economic interests.

Secondly, the principles in section 2(4)(i) of the *NEMA* specifically require environmental authorities to consider, assess and evaluate the social, economic and environmental impacts of development activities before reaching decisions that are appropriate following such consideration, assessment and evaluation. Section 2(1)(c) of the *NEMA* also provides that the principles “serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of any statutory provision concerning the protection of the environment”. Furthermore, section 23(2)(a)(b) of the *NEMA*<sup>108</sup> outlines the integrated environmental management goals which reiterate the need to promote compliance with the said principles and “to identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage”. Therefore, it is argued

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<sup>107</sup> See generally *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>108</sup> S 23(2)(a)(b) of the *NEMA* provides: “2) The general objective of integrated environmental management is to-(a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment: (b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage the risks and consequences and alternatives and options for mitigation of activities, with a view to minimizing negative impacts maximizing benefits and promoting compliance with the principles of environmental management set out in section 2.”

that the department in the present case had a mandate to consider environmental, social, economic and cultural interests when making decisions.

On appeal, in the case of *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* (hereafter *MEC for Agriculture case*),<sup>109</sup> the appellants (MEC for Agriculture Conservation, Environment and Land Affairs) appealed the decision of Willis J to set aside its decision to reject Sasol Oil's (the respondent) application to establish a filling station. The respondent cross-appealed the Court's *status quo* decision to uphold the validity of the guidelines. The SCA considered the provisions of the *Constitution*, the *NEMA*, and the *ECA* to define the scope of the activities identified in the EIA Regulations<sup>110</sup> and held that:<sup>111</sup>

To attempt to separate the commercial aspects of a filling station from its essential features is not only impractical but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development... The adoption of a restricted and literal approach ... would defeat the clear purpose of the enactment.

The main issue in the appeal was whether the Department of Agriculture, Conservation, Environment and Land Affairs and the MEC had the power to regulate the environmental aspects of the construction of filling stations *per se*. The department's broad mandate to regulate listed activities that have an effect on the environment was considered to include regulating the environmental aspects of the construction of filling stations. Therefore, its decision to develop and apply the guidelines to inform this process was ruled by the SCA to be within its legislative mandate.<sup>112</sup>

Cachalia AJA<sup>113</sup> held that the adoption of policy guidelines to aid decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and desirable particularly where the decision is complex and requires the balancing of a range of competing interests or considerations by decision-makers with specific expertise. The Court reasoned that where it has been established that the policy is compatible with the enabling legislation, in this case the *ECA*, the application

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<sup>109</sup> *MEC for Agriculture case* 2006 2 All SA 17 (SCA).

<sup>110</sup> *MEC for Agriculture case* 2006 2 All SA 17 (SCA) paras 13-15.

<sup>111</sup> *MEC for Agriculture case* 2006 2 All SA 17 (SCA) para 16.

<sup>112</sup> *MEC for Agriculture case* 2006 2 All SA 17 (SCA) para 17.

<sup>113</sup> *MEC for Agriculture case* 2006 2 All SA 17 (SCA) para 19.

of the policy must be based on flexibility as opposed to rigidity and affected parties such as the respondent should be made aware of it.<sup>114</sup> An affected party will be entitled to redress of any nature only if it can be proved that there is something exceptional in the application that calls for a departure from the policy.<sup>115</sup>

The decision of the SCA on the use of policy guidelines<sup>116</sup> in effecting the legislative and constitutionally derived mandate of the department is significant in the pursuit of sustainable development that is inclusive of culture. This decision of the SCA can be applied to where there are other conflicting interests such as cultural heritage issues and cultural issues in general. The broad interpretation of the notion of sustainable development which the contemporary understanding demands requires sustainable development to reflect the balancing of issues beyond the environment to include social, economic and cultural issues.

This case illustrates how the courts struggle to ascertain the extent to which environmental authorities must give effect to their mandate to protect the environment where there are competing social and economic interests. However, the SCA's willingness to consider environmental departmental policy guidelines made their development in effecting the department's constitutional mandates a worthwhile exercise. Encouraging such administrative practice is progressive as it assists in guiding environmental authorities and decision-makers to integrate sustainable development considerations into their decision-making processes. This in turn allows for economic and social considerations to be catered for.

#### 5.4.1.2.2 *BP case*<sup>117</sup>

The applicant in this case was BP Southern Africa (Pty) Ltd and the respondent was the MEC for Agriculture, Conservation, Environment and Land Affairs representing the

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<sup>114</sup> See *MEC for Agriculture case* 2006 2 All SA 17 (SCA) para 19.

<sup>115</sup> See *MEC for Agriculture case* 2006 2 All SA 17 (SCA) para 19; Environmental Impact Assessment Administrative Guideline – Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations, March 2002.

<sup>116</sup> Such as the Environmental Impact Assessment Administrative Guideline – Guideline for The Construction and Upgrade of Filling Stations and Associated Tank Installations, March 2002.

<sup>117</sup> *BP case* 2004 5 SA 124 (W).

Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs (the department).

The applicant sought the review and setting aside of a decision of the department to refuse the applicant's application in terms of section 22(2) of the *ECA*<sup>118</sup> for authorisation to construct a filling station on one of its properties. The provincial department's guidelines for EIA administration stipulated that any filling station proposed to be situated within three kilometres of an existing station would not be approved.<sup>119</sup> In the present case, two filling stations already existed within three kilometres of the proposed site of the new filling station. However, the proximity of the existing filling stations was not the sole reason for the refusal of authorisation to the applicant. The department also cited several significant environmental reasons for the refusal to grant authorisation.<sup>120</sup> Upon failure to secure the requisite approval, the applicants sought to review and set aside the respondent's decision to apply the guidelines in considering its application. In addition, the applicant sought an order remitting the application to the department for reconsideration.

It was common cause in the *BP* case as opposed to the *Sasol* case<sup>121</sup> that the construction of a filling station involved the erection of a structure for the storing and handling of hazardous substances and as such was a listed activity which required authorisation under the *ECA* prior to commencement. The applicant challenged the respondent's refusal to approve its application. The applicant argued that the department's mandate set out in the *ECA* and EIA Regulations did not include applying guidelines based on socio-economic considerations. The applicant further argued that its application had been refused because of the department's desire to prioritise economic interests and protect the commercial interests of existing filling stations, which was beyond its lawful mandate.<sup>122</sup>

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118 S 22(2) of the *ECA* provides: "The authorization referred to in subsection (1) shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment, which shall be compiled and submitted by such persons and in such manner as may be prescribed."

119 *BP* case 2004 5 SA 124 (W) at 129A-C.

120 *BP* case 2004 5 SA 124 (W) at 133A-135F.

121 As discussed in para 5.4.1.2.1 above.

122 *BP* case 2004 5 SA 124 (W) at 136B-G.

The respondent based its response on legislative provisions, citing that it had a broad mandate rooted in the *Constitution*, the *ECA*, the EIA Regulations, and the *NEMA* to balance and take into consideration socio-economic and environmental interests where proper in reaching decisions.<sup>123</sup> The Court addressed the issue of whether the respondent had acted fairly in refusing the application. The Court found in deciding the fairness of the respondent's decision that the respondent's legislative mandate was a contentious issue that must first be resolved. The Court considered all relevant legislation in this enquiry. The statement of Claassen J on the role of the *Constitution* in resolving this enquiry is noteworthy.

Claassen J noted<sup>124</sup> that the constitutional right to an environment that is not harmful to health and well-being must be regarded as being on equivalence with the rights to freedom of trade, occupation, profession and property as entrenched in the *Constitution*. He further noted that where competing rights are in contention, a Court is required to balance the rights in line with the dictates of section 24(b)(iii) of the *Constitution*,<sup>125</sup> requiring that ecologically sustainable development and the use of natural resources be promoted jointly with justifiable economic and social development.<sup>126</sup> The Court further interpreted the concept of sustainable development as reflected in section 24(b)(iii) of the *Constitution* as being on a par with the rights to freedom of trade, occupation, profession and property, embodied in sections 22 and 25 of the *Constitution*, and these rights had to be balanced against one another in any situation in which all of them came into play. None of them enjoyed priority over any other.<sup>127</sup> The Court held further that the definition of "environment" as contained in section 1 of the *ECA* meant that the environmental right was a composite right, which included social, economic and cultural issues, consideration of which should ultimately result in a balanced environment.<sup>128</sup>

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123 *BP* case 2004 5 SA 124 (W) at 140A-D.

124 *BP* case 2004 5 SA 124 (W) at 143B-C.

125 S 24(b)(iii) of the *Constitution* provides: "(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

126 *BP* case 2004 5 SA 124 (W) at 143C-D.

127 *BP* case 2004 5 SA 124 (W) at 143B-D.

128 *BP* case 2004 5 SA 124 (W) 144H - 145A.

The Court held<sup>129</sup> that the department's mandate included socio-economic interests as an integral part of its environmental responsibility. It rejected<sup>130</sup> the applicant's contention that socio-economic considerations fell outside the purview of the department's mandate. The Court also rejected the contention that the department was not allowed to apply the *NEMA* principles, stating that such reasoning was contrary to section 2(1)(e) of the *NEMA*, which obliges all organs of state to apply the principles when implementing the provisions of the Act and any other law concerned with the protection of the environment.<sup>131</sup> The court concluded<sup>132</sup> that the adoption and application of the policy guidelines by the department was legal, permissible, utterly practical and desirable, given that the guidelines were compatible with the enabling legislation, and were disclosed to the applicant before the decision was taken.

It is seen in this case that the court is willingly to recognise that the environmental authorities may consider economic and social interests in the pursuit of environmental protection. It is this line of thinking that the Constitutional Court explored in the *Fuel Retailers* case that follows.

#### 5.4.1.2.3 *Fuel Retailers* case<sup>133</sup>

In this case the Court dealt extensively with the process of weighing the different interests that influence the understanding of sustainable development. The applicant was the Fuel Retailers Association of Southern Africa (the Fuel Retailers Association) and the respondent was the Director-General of Environmental Management at the Department of Agriculture Conservation and Environment, Mpumalanga Province (the DACE).

In relation to the notion of sustainable development and specifically with regards to the section 24 environmental right, the foremost case where the Constitutional Court actively engaged with the interpretation, contextualisation and scope of the concept

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129 *BP* case 2004 5 SA 124 (W) at paras 151D-E.

130 *BP* case 2004 5 SA 124 (W) at para 151F.

131 *BP* case 2004 5 SA 124 (W) at para 151H.

132 *BP* case 2004 5 SA 124 (W) at paras 153C-D and 154F-G.

133 *Fuel Retailers* case 2007 10 BCLR 1059 (CC).



of sustainable development<sup>134</sup> is the *Fuel Retailers* case. This case has been extensively dealt with by the critical eyes of environmental law scholars in South Africa.<sup>135</sup> The majority judgment in this case dispelled the growing and legitimate perception that South African environmental laws, especially the EIA<sup>136</sup> regulations pursuant to section 24 of the *NEMA*, are overly informed by an environmentalist paradigm that negates the idea of sustainable development.<sup>137</sup>

In this case, the applicant initially approached the High Court seeking a review of the decision of the environmental authority to authorise the development of a filling station in White River, Mpumalanga.<sup>138</sup> Upon appeal to the Supreme Court, the authority's decision was upheld.<sup>139</sup> The Fuel Retailers appealed the decision of the SCA to the Constitutional Court and argued that the environmental authorities are obliged to consider the socio-economic impact of constructing the proposed filling station. The applicant submitted that this obligation requires the environmental authorities to assess, among other things, the cumulative impact on the environment brought about by the proposed filling station and all existing filling stations that are near the proposed one. The demand of this obligation required that the environmental authorities assess the demand or necessity and desirability, not the feasibility, of the proposed filling station. Such an assessment should be aimed at fulfilling the needs of the targeted community, and the impact of the proposed building of a filling station on the sustainability of the existing filling stations.<sup>140</sup>

The Court considered the allegation that the decision-making authority (the DACE) had not considered the socio-economic impact of the construction of the filling station.<sup>141</sup> The argument put forward by the DACE was that it was not necessary for it to consider the socio-economic impact of the proposed development because that

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134 Feris 2008 *CCR* 244.

135 See the various contributions on the *Fuel Retailers*' case in the Special Edition of 2008 *South African Journal of Environmental Law and Policy*.

136 See the discussion on EIA in para 3.2.3.1.1.

137 Muroombo 2008 *SALJ* 488-489.

138 *Fuel Retailers Association of South Africa (Pty) Ltd v Director General, Environmental Management Mpumalanga* Case number 35064/2005, judgment granted on 28 July 2005 per Webster J in the High Court of South Africa Transvaal Provincial Division.

139 *Fuel Retailers* case 2007 2 SA 163 (SCA) para 26.

140 *Fuel Retailers* case 2007 10 BCLR 1059 (CC) para 10.

141 Feris 2008 *CCR* 238.

consideration had already been included in the need and desirability factors assessment which had previously been considered by the local authority when it approved the rezoning of the property.<sup>142</sup> The DACE claimed that “rezoning forms part and parcel of the process of an application for authorisation in terms of section 22 of the *ECA*”<sup>143</sup> and as such the requirement to consider the socio-economic impact of the construction of the filling station had already been met.

In response, the Court stated that an integral part of the responsibilities of environmental authorities is to consider socio-economic interests as per the provisions of the *NEMA*.<sup>144</sup> Therefore the DACE ought to have carried out the social and economic impact assessment of the proposed development along with or as part of the EIA being carried out. The Court held that sustainable development provides a framework for reconciling socio-economic development and environmental development.<sup>145</sup> The Court viewed sustainable development as the key to balancing the competing interests of socio-economic, environmental and cultural interests of development. The Court concluded that the environmental authority cannot rely on the local authority’s need and desirability decision to satisfy the requirement to consider the social and economic impact of the proposed development.<sup>146</sup> It set aside the decision of the court *a quo* and referred the case back to the DACE on the grounds that it is the responsibility of the authorities to ensure that environmental, socio-economic and cultural issues as envisaged by chapter 5 of the *NEMA* are addressed and considered in reaching decisions that impact on sustainable development.

Furthermore, the Constitutional Court in the *Fuel Retailers* case extensively considered the application of the principle of integration within the concept of sustainable

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142 The local authority is responsible for the planning and rezoning of an area under consideration as required by the relevant Ordinance 15 of 1996 which governs rezoning.

143 *Fuel Retailers* case 2007 10 BCLR 1059 (CC) para 31.

144 Ss 2, 3 and 4 of the *NEMA*. Specifically, at ss 2(2)-(4) of the *NEMA* which states that “(2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably. (3) Development must be socially, environmentally and economically sustainable. (4) (a) Sustainable development requires the consideration of all relevant factors”.

145 *Fuel Retailers* case 2007 10 BCLR 1059 (CC) para 55. This view of the role of sustainable development was further endorsed and fortified by the court in *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 2 SA 319 (CC) para 61.

146 *Fuel Retailers* case 2007 10 BCLR 1059 (CC) para 62; also see the discussion in para 2.6.3.4.

development with a view to interpreting, contextualising and applying it in South African law.<sup>147</sup> The Court recognised the existing tensions inherent in balancing the need to protect the environment and the need for socio-economic development, and argued that the:<sup>148</sup>

[n]ature and scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined in the light of the concept of sustainable development and the principle of the integration of socio-economic development and the protection of the environment.

It is noted that Ngcobo J, in the Constitutional Court appeal, argued that if the relationship and the tensions between socio-economic conditions and the environment are accepted, it follows that socio-economic conditions have a direct impact on the environment.<sup>149</sup> Although the Court in the *Fuel Retailers* case made a case for the consideration of socio-economic interests in reaching decisions that impact on sustainable development, the Court did not make a specific reference to the tools that may be employed in this regard.

The dissenting opinion of Sachs J of the Constitutional Court is instructive in providing a guide on how social and economic interests, including culture, may be integrated into the sustainable development equation. Sachs J noted that concerning the application of the preamble and the principles of the *NEMA*, the sustainability of economic interests should not be “treated as an independent factor to be evaluated as a discrete element in its own terms.”<sup>150</sup> Rather, the interrelationship between economic and environmental sustainability should be interrogated.<sup>151</sup> As earlier discussed,<sup>152</sup> Sach J’s approach to the interpretation of sustainable development seeks to integrate all relevant competing interests in the pursuit of sustainable development in South Africa.

The three filling station cases discussed above centred on the relevance of considering economic interests along with environmental interests in the balancing of issues that

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147 Also see Feris 2008 CCR 236.

148 *Fuel Retailers* case 2007 6 SA 4 (CC) para 71.

149 Also see the discussion on the *Fuel Retailers* case in para 2.6.3.4.

150 Feris 2008 CCR 252.

151 *Fuel Retailers* case 2007 6 SA 4 (CC) para 113.

152 See the discussion in para 2.6.3.4.

promote sustainable development. It is noted that in the present case, the Court acknowledged the interconnectedness of the environment and other competing social and economic interests. Therefore, the mandate of the environmental authorities to protect the environment is not an isolated mandate but a composite one. The mandate is by implication extended to other aspects of development that are inextricably tied to the environment which includes social, economic and cultural interests. For example, the recognition of cultural heritage resources<sup>153</sup> as a component of the environment implies that the inclusion of culture in development-related decisions should be engaged by the decision-making authorities, thus, creating the opportunity for judicial consideration and interpretation of cultural interests within the context of sustainable development.

The courts' interpretation of sustainable development does not flow from development projects alone. Other subject matter such as fish quotas also warrants the application of sustainable development thinking. Thus, the *Bato Star Fish* case<sup>154</sup> dealing with fish quotas becomes relevant to this thesis.

#### 5.4.1.3 *Bato Star Fish* case<sup>155</sup>

This case relates to the allocation of quotas in the fishing industry. The quantity of fish that may be caught by a deep-sea fishing trawler is limited by a quota system.<sup>156</sup> The applicant in this case was Bato Star Fishing (Pty) Ltd, and the first respondent was the Minister of Environmental Affairs and Tourism (the Minister), while the second respondent was the Chief Director in the Department of Environmental Affairs and Tourism (the Director) responsible for marine and coastal management. The second respondent had made the allocation decision being challenged in this case.

The applicant was dissatisfied with the allocation of fishing quotas that it had received in the 2001 allocation process for the 2002-2005 fishing seasons. It had sought a review of that allocation decision in the High Court (as one of the applicants along with Phambili Fisheries (Pty) Ltd, another dissatisfied recipient of the fish quota) which

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<sup>153</sup> S 2(4)(a)(iii) of the NEMA.

<sup>154</sup> *Bato Star Fish* case 2004 7 BCLR 687 (CC).

<sup>155</sup> *Bato Star Fish* case 2004 7 BCLR 687 (CC).

<sup>156</sup> S 18 of the *MLRA*.

had succeeded.<sup>157</sup> However, on appeal by the respondent, the Minister, the SCA had overturned the judgment.<sup>158</sup> The appellant sought special leave to appeal to the Constitutional Court against the judgement of the SCA.

According to the allocation process, the quota which each trawler can catch is determined by the Minister in terms of the *Marine Living Resources Act (MLRA)*.<sup>159</sup> Section 18 of the *MLRA* deals specifically with the allocation of fishing quotas. Section 18(5)<sup>160</sup> states that the Minister must make allocations that will achieve the objective contemplated in section 2. The objectives of the *MLRA* are set out in section 2 of the Act, which provides that:

The Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles:

- a) The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;
- b) the need to conserve marine living resources for both present and future generations;
- c) the need to apply precautionary approaches in respect of the management and development of marine living resources;
- d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;
- e) the need to protect the ecosystem, including species which are not targeted for exploitation;
- f) the need to preserve marine biodiversity;
- g) the need to minimise marine pollution;
- h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;
- i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and
- j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry

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157 *Bato Star Fish* case 2004 7 BCLR 687 (CC) 690.

158 In the case of *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* 2003 2 All SA 616 (SCA). The applicant in the present case was one of the respondents in this case.

159 18 of 1998.

160 S 18(5) provides: "In granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section 2 have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society." S 18(1) provides: "No person shall undertake commercial fishing or small-scale fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister."

According to the Court<sup>161</sup> the maintenance of the hake fish population as a sustainable living resource is a central tenet of the legislative scheme. The need to achieve sustainable development, to further biodiversity, and to meet the social demands of restructuring the fishing industry to address historical imbalances and achieve equity made the equitable distribution of fishing rights via the quota allocation system challenging for the department, especially as the total allowable catch could not simply be increased to accommodate more participants.

The grounds of appeal brought by the applicant before the Constitutional Court included that:

- (a) the SCA had misconstrued the nature of the objectives in section 2 of the *MLRA*;
- (b) the SCA had incorrectly concluded that the Chief Director's decision should not be set aside because he did not apply his mind to the quantum of hake applied for by the applicant and its ability to catch such a quantum; and
- (c) that the SCA had erred in finding that an "undisclosed policy change" by the department did not infringe the applicant's right to procedural fairness.<sup>162</sup>

The focus of the discussion in this case is the issue of the misconstruction of the nature of the aims in section 2 of the *MLRA*. However, the discussion is to analyse how the Court interpreted the balancing of competing interests that the department was faced with in this case. The applicant's argument was that the Director did not consider section 2(j), which required that regard be had to "the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry." In making this argument, the applicant relied on section 18(5) of the *MLRA*.<sup>163</sup> In the High Court it had been held that the peremptory provisions of section 2 had been ignored by the Director, and that, as a result, the decision was fatally flawed.<sup>164</sup> The SCA had not agreed with this conclusion. It had held that,

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161 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 689.

162 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 689.

163 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 691.

164 *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 2 All SA 616 (SCA) para 26.

properly construed, the purpose of the two provisions (sections 2 and 18 of the *MLRA*) was "to guide and not to fetter" the decision-maker. On the facts before it, the Court held that it was clear that the Chief Director had taken the provisions of section 2 into account.<sup>165</sup>

The applicant argued that the Chief Director had paid insufficient attention to the requirements of section 2(j), as repeated in section 18(5) of the Act. This raised the question of the proper interpretation of section 2(j), taking into consideration section 18(5). The Court observed the wide number of aims and principles contained in section 2 of the *MLRA*, amongst which are the conservation of the marine ecosystem,<sup>166</sup> the sustainable use of marine living resources<sup>167</sup> and the need to utilise marine living resources to achieve economic growth, to build capacity in the industry and to create employment.<sup>168</sup>

The Court noted that all the aims and principles could not apply to every decision taken under the *MLRA*.<sup>169</sup> Thus, in deciding the quantity of the total allowable catch, for instance, the sustainable use of marine resources and the need to conserve the marine ecosystem was relevant to the present case.<sup>170</sup> Those factors became less relevant with regard to the process of the allocation of fishing rights. In addition, the other aims and principles in section 2 might conflict with one another as they could not all be fully realised simultaneously. There might, in any case, be a myriad of ways of achieving each of the aims individually. Section 2 was not explicit in offering guidance on which way might be best suited or how to balance the conflicting issues.<sup>171</sup>

The Court further said that<sup>172</sup> the provisions of section 2 and section 18 of the *MLRA* simply showed that the obligation upon the decision-maker was an obligation only to

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165 *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 2 All SA 616 (SCA) para 72-75; *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 692.

166 S 2(b) of the *MLRA*.

167 S 2(a) of the *MLRA*.

168 S 2(d) of the *MLRA*.

169 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 706.

170 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 704.

171 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 707.

172 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 707.

“have regard to” the factors mentioned in section 2, and in addition to “have particular regard to” the factor mentioned in the case of section 18(5). The repetition of the requirement of the factor of social and economic transformation showed the importance of and the need for special attention to be given to the questions of restructuring and redress in the fishing industry,<sup>173</sup> the historical imbalances of the past and how to redress them, especially in the fishing industry.<sup>174</sup> The importance of restructuring to redress these imbalances was emphasised by the *MLRA*.<sup>175</sup> The Act was in this respect in consonance with the *Constitution*, which recognised in its preamble the injustices of the past, and the declaration of equality<sup>176</sup> as a foundational value. The Director was therefore obliged to give special attention to redressing imbalances in the industry with the goal of achieving transformation in the industry. The Court approached the interpretation of the legislative provisions under consideration through the lens of transformative constitutionalism<sup>177</sup> in the interpretation of the responsibilities of the Director. Such an approach allows the judiciary to offer guidance to decision-makers where competing interests require balancing in the pursuit of sustainable development.

Furthermore, with regard to the importance of transformation in the context of the *MLRA* and the interpretation of section 2(j) of the Act, Ngcobo J stated<sup>178</sup> that section 39(2) of the *Constitution* introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the “spirit, purport and objects of the Bill of Rights”.<sup>179</sup> Thus, section 2(j) must be interpreted in the context<sup>180</sup> of the statutory commitment to redressing the imbalances of the past and, more importantly, the constitutional commitment to the achievement of equality.<sup>181</sup>

This case illustrates the application of transformative constitutionalism by demonstrating that in balancing conflicting interests, the judiciary must seek to

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173 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 707.

174 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 707.

175 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 707.

176 Ss 1 and 9(2) of the *Constitution*.

177 See the discussion in para 5.3.

178 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 714-734.

179 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 726.

180 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 726.

181 *Bato Star Fish* case 2004 7 BCLR 687 (CC) page 725.



advance social and economic interests that promote the spirit, purport and objects of the Bill of Rights. Thus, the authorities ought to advance social and economic interests along with environmental interests in the pursuit of sustainable development. Integrating sustainable development into the decision-making process in this case is more aligned with promoting the spirit, purport and objects of the Bill of Rights, which speaks to both equality and environmental protection. By way of analogy the application of the ethos of transformative constitutionalism in this case paves the way for the inclusion of cultural interests for and in sustainable development. This case demonstrates that to the extent that culture is constitutionally recognised and protected, the cultural interests of people must also find relevance where development-related decisions are made by the decision-makers.

#### *5.4.2 Sustainable development: a balancing act*

Flowing from the cases discussed above, it is observed that the courts consider it an integral part of making decisions that impact on sustainable development to consider social and economic interests as well as environmental interests. It is also evident that the Integrated Environmental Management regime contained in the *NEMA* serves as a useful tool for public officials tasked with making such decisions.<sup>182</sup>

It is also evident from the discussion of the cases above that public authorities must address the authorisation of development activities that are potentially detrimental to the environment and the overall well-being of the people, which includes their social, economic and cultural well-being.

The next section interrogates how the courts interpreted the balancing of cultural interests against competing interests such as social, environmental and economic interests. The cultural interests which the courts dealt with, as described in the next section, did not arise out of sustainable development contentions. Rather, the cases bordered on the protection of cultural interests, more specifically the protection of cultural resources like cultural heritage resources and culture-related issues like geographical name changes. The aim of the exercise is to show the courts' approach

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182 See the discussion in Chapter 3 regarding integrated environmental management tools.

to cultural matters and what can be gleaned from this approach, from the perspective of sustainable development.

### ***5.5 Judicial considerations of cultural interests against environmental, economic and social interests***

The *Constitution* does not make explicit reference to culture in advocating a balancing of interests in the pursuit of sustainable development, but section 24(b) is instructive. Du Plessis and Du Plessis<sup>183</sup> observe that in the South African context, the promotion of well-being “requires that a balance be struck at the individual and community levels between economic and social needs and the protection of cultural and environmental resources.” Although the courts have not yet clarified the notion of well-being, they have made remarkable efforts in recognising cultural interests as relevant in reaching decisions related to development.<sup>184</sup>

This thesis argues that the links between economic and social needs and the protection of the environment and culture are relevant in the pursuit of sustainable development.<sup>185</sup> Therefore the courts ought to uphold the protection of cultural issues in the protection of the environment, along with economic and social issues, in the context of the recognition afforded to these interests of sustainable development in the Bill of Rights.<sup>186</sup>

The courts have laid valuable precedent in holding that socio-economic considerations are as important as environmental considerations.<sup>187</sup> However, the *Fuel Retailers* case also provides an avenue for the consideration of issues of culture based on the principle of integration in the balancing of interests towards the pursuit of sustainable development in South Africa.

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183 Du Plessis and Du Plessis “Striking the Sustainability balance in South Africa” 428-429 (emphasis added).

184 See the *Oudekraal* case in para 5.4.2.

185 See the discussion in chapter 3.

186 2009 ZASCA 85 para 38.

187 See the discussion in the *Sasol* case, the *BP* case and the *Fuel Retailers* case in para 5.4.1.

### 5.5.1 Cases dealing with specific cultural interests

There is indeed a plethora of cases which border on culture-related matters and others on cultural heritage resources. Some of the selected cases that are discussed below focus on issues that go beyond the administrative requirements of the public officials to the cultural impact of developments on targeted communities. Others border on how cultural interests are of legitimate importance in reaching decisions that influence sustainable development.

The interpretation of cultural heritage by the court in some of the cases offers a valuable guide to public officials tasked with reaching decisions that promote sustainable development. These cases include:

- *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* (the *Qualidental Laboratories* case);<sup>188</sup>
- *Heritage Collection (Pty) Ltd v Minister of Finance* (the *Heritage Collection* case);<sup>189</sup>
- *Chairperson's Association v Minister of Arts and Culture* (the *Chairperson's Association* case);<sup>190</sup> and
- *Oudekraal Estates (Pty) Ltd v The City of Cape Town* (the *Oudekraal* case).<sup>191</sup>

These cases illustrate how cultural interests intersect with environmental, economic and social interests. Such interaction necessitates the balancing of interests in the pursuit of sustainable development by the relevant decision-makers and government authorities. It is noted that most of these cases did not set out to interpret the notion of sustainable development. However, the application of relevant culture-related legislation like the *NHRA* called on the judiciary to apply various methods of legislative and constitutional interpretation which reflect sustainable development thinking. Thus,

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188 2008 1 All SA 550 (SCA).

189 1981 3 All SA 266 (C).

190 2007 2 All SA 582 (SCA).

191 2010 1 SA 333 (SCA).

the cases under discussion reflect the courts' approach to cultural matters and illuminate the courts' approach to cultural matters.

#### 5.5.1.1 *Oudekraal* case<sup>192</sup>

The Court in this case was approached to review and set aside the decision by the then Provincial Administrator of the Cape of Good Hope to grant approval for the establishment of the Oudekraal Township in an area with religious and cultural significance to a community in 1957.

Table Mountain is an iconic cultural landscape in South Africa. Areas surrounding it include the Table Mountain National Park (the Park) falling under the *National Parks Act*.<sup>193</sup> The Park borders the northeast corner of portion 7 of the farm Oudekraal (portion 7) and surrounds it on its eastern and southern sides.<sup>194</sup>

The development of portion 7 as a township by the appellant, Oudekraal Estates (Pty) Ltd (the Estates), was in issue in the present case. The local authority within whose authority portion 7 is located and which is responsible for urban planning was the first respondent, the City of Cape Town (the City).<sup>195</sup> The second respondent was the South African Heritage Resources Agency (SAHRA).<sup>196</sup> The third respondent was the South African National Parks (SANPARKS).<sup>197</sup> One of the goals of SANPARKS was to establish and consolidate the Park to ensure its long-term ecological, economic and social sustainability.<sup>198</sup> The attainment of this goal was premised on a number of objectives, the first of which was to incorporate the Park and all land within the Cape Peninsula Protected Natural Environment (CPPNE), as well as other conservation-worthy areas outside of it.<sup>199</sup>

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<sup>192</sup> *Oudekraal* case 2010 1 SA 333 (SCA).

<sup>193</sup> 57 of 1976.

<sup>194</sup> *Oudekraal* case 2010 1 SA 333 (SCA) para 1.

<sup>195</sup> *Oudekraal* case 2010 1 SA 333 (SCA) para 1.

<sup>196</sup> SAHRA is established in terms of section 11 of the *NHRA* and is statutorily charged with the responsibility of protecting South Africa's heritage resources which are of cultural significance or other special value for the present community for future generations.

<sup>197</sup> SANPARKS is a statutory body charged with the protection of our country's natural and cultural heritage; *Oudekraal* case 1 SC 333 (SCA) para 3.

<sup>198</sup> *Oudekraal* case 2010 1 SA 333 (SCA) para 3.

<sup>199</sup> *Oudekraal* case 2010 1 SA 333 (SCA) para 3.

Portion 7 also contained valuable biodiversity consisting of flora and fauna which could be found only in that region and were worth conserving and preserving for present and future generations. The geological formations present in the area were also valuable to the protection of the natural environment.<sup>200</sup> In addition, parts of the land around Table Mountain, particularly the ravines below the Twelve Apostle peaks, are of great historical, cultural and religious significance to the Muslim community in the area.<sup>201</sup>

Oudekraal Properties (Pty) Ltd applied for the establishment of Oudekraal Township in 1954. In terms of the then prevailing legislation, it was envisaged to be an area designed for white people only with an area close by reserved for domestic workers.<sup>202</sup> The building regulations in force at the time required an applicant for township development to disclose all physical features such as watercourses, dongas, pipelines as well as any other noteworthy features. It is of significance to the present case that, although all other important physical features of the land were set out in the application, the existence of two kramats<sup>203</sup> and of many other graves on the land was not disclosed.<sup>204</sup>

The application to develop the Township was approved in 1957, but the actual development did not commence until 1996, when the Estates announced to the media that it intended developing a township on portion 7 of Oudekraal.<sup>205</sup> This announcement led to a public outcry which led to the formation of a coalition called the "Environmental and Mazaar Action Committee". The coalition included members of the Save the Mountain Campaign, the Wildlife and Environmental Society of South Africa, the Muslim Judicial Council, the Islamic Council of South Africa, the Islamic Unity Convention, the Cape Mazaar Society and other organisations.<sup>206</sup> The Muslim Community and environmental groups appealed for a united action against the

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200 *Oudekraal* case 2010 1 SA 333 (SCA) para 5-8.

201 *Oudekraal* case 2010 1 SA 333 (SCA) para 9-10.

202 *Oudekraal* case 2010 1 SA 333 (SCA) para 12.

203 Kramats, also known as Mazaars, are the holy shrines of Islam. They mark the graves of Holy Men of the Muslim faith who died at the Cape. See SA History 2017 <http://bit.ly/2ysd5f4> accessed on 27 November 2017.

204 *Oudekraal* case 2010 1 SC 333 (SCA) para 13.

205 *Oudekraal* case 2010 1 SC 333 (SCA) para 17.

206 *Oudekraal* case 2010 SA 333 (SCA) para 25.

development of portion 7 on religious, cultural and environmental grounds.<sup>207</sup> This commenced the journey that led to protracted litigation culminating in the appeal case. The development rights granted to the Estates were subsequently withdrawn by the City and the Cape Metropolitan Council (CMC), and one of the grounds was that the Administrator had acted outside of his powers in granting an extension of the right to develop portion 7 after the development period had elapsed.<sup>208</sup> The other ground was the non-disclosure of the presence of graves and kramats on the land.

The Estates appealed to the High Court, seeking *inter alia* an order declaring that the development rights granted by the administrator had been lawfully granted and further declaring the development rights for portion 7 to be of full force and effect.<sup>209</sup> The Estates further averred that that there were no graves and kramats on portion 7 and that the graves and shrines were located on other portions of the farm.<sup>210</sup> This averment prompted an investigation by the City, SAHRA and SANPARKS into the question of the graves and kramats on portion 7.<sup>211</sup>

The findings of the investigation indicated that that the area intended for development (including portion 7) held graves and kramats that form an integral part of the cultural history of the Cape Muslim community. Five graves were located on the area intended for the building of roads, four on the erf reserved for a school, 11 on the residential development erven, and 37 on the area intended as public open space.<sup>212</sup>

On the discovery of the above, SANPARKS raised the defence that the approval by the Administrator in 1957 was invalid because of the non-disclosure of the kramats and graves that are of religious and cultural significance to the Muslim community.<sup>213</sup> The City and SAHRA aligned themselves with this defence. The High Court dismissed the appeal, holding that the former administrator had acted beyond his powers in extending the development rights. The Estates appealed the decision of the High Court

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207 *Oudekraal* case 2010 SA 333 (SCA) para 25-26.

208 *Oudekraal* case 2010 SA 333 (SCA) para 21.

209 *Oudekraal* case 2010 SA 333 (SCA) para 24.

210 *Oudekraal* case 2010 SA 333 (SCA) para 24.

211 *Oudekraal* case 2010 SA 333 (SCA) para 24.

212 *Oudekraal* case 2010 SA 333 (SCA) para 25.

213 *Oudekraal* case 2010 SA 333 (SCA) para 21.

to the SCA, reported as *Oudekraal Estates (Pty) Ltd v The City of Cape Town*.<sup>214</sup> The SCA decided the matter based on the non-disclosure of the kramats and graves.<sup>215</sup>

In reaching the decision to set aside the administrator's decision, the Court took into consideration the right to freedom of religion and culture of members of the Muslim community, as well as the right of the broader community to have a heritage and environmental area of high significance preserved. Van Reenen J held that the decision of the former administrator to approve the Township without reference to these sensibilities was nothing less than shocking.<sup>216</sup>

Furthermore, in balancing the Estate's asserted rights in relation to portion 7 against the invalid decision by the administrator, the Court also considered the fact that Muslims have since time immemorial paid homage to the kramats and grave sites that are sacred to Muslims and that the Muslim faith abhors exhumation.<sup>217</sup> The appeal of the Estates against the decision of the High Court in this present case was subsequently dismissed.

In dismissing the appeal, the Court placed the cultural needs of the community above the intended township development that had prior approval. In this way, the Court demonstrated that the cultural interests of a community are aligned with their well-being, which is in line with the rights contained in section 24 of the *Constitution*. However, the Court did not give firm guidance to public authorities on how to include cultural interests in further decisions that border on environmental protection, economic growth and social interests.

In this case, although the cultural interests intersected with the environmental interests, in reaching the decision to permit the development the authorities had in the first instance ignored these cultural considerations. However, the Court's approach upon appeal sought to recognise that cultural interests are relevant to development matters. Therefore, although this case did not specifically rule on the notion of sustainable development, it is integrated in the reasoning of the Court in connecting

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214 2004 6 SA 222 (SCA).

215 *Oudekraal* case 2010 SA 333 (SCA) para 28.

216 *Oudekraal* case 2010 SA 333 (SCA) para 39.

217 *Oudekraal* case 2010 1 SA 333 (SCA) para 41.

cultural needs to well-being, which is a component of sustainable development as per section 24(b) of the *Constitution*.

In other cases, the courts have been inclined to decide in favour of cultural interests where they are in conflict with a property developer's economic interests. One such case is discussed below.

#### 5.5.1.2 *Qualidental Laboratories* case<sup>218</sup>

This case illustrates the balancing of cultural interests against economic interests and perceived property rights in the protection of cultural heritage resources for present and future generations within the context of sustainable development.

In this case, the applicant was the owner of certain immovable property and the respondent was the Provincial Heritage Resource Authority (PHRA) established in terms of section 23<sup>219</sup> of the *NHRA*. When the applicant sought to demolish certain old buildings on the property to erect an apartment block on the property, the respondent was approached because a permit was required for the demolition of the property, as they were structures older than 60 years.<sup>220</sup> The PHRA granted a conditional demolition permit which imposed restrictions on the works intended to be done on the property. The conditions included<sup>221</sup> submitting plans for the new development to the local authority for approval and the inclusion of the building in a heritage register, because the building had intrinsic quality and contextual value and was sited in a Grade 3 area (in other words, in a local authority jurisdictional area). Disregarding the conditions imposed on the application for the permit, the applicant proceeded to demolish the old building and, despite the lack of final approval for its building plans by the first respondent, commenced with the construction of the apartment block on

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218 *Qualidental Laboratories* case 2008 1 All SA 550 (SCA).

219 S 23 provides "An MEC may establish a provincial heritage resources authority which shall be responsible for the management of the relevant heritage resources within the province, which shall be a body corporate capable of suing and being sued in its corporate name and which shall be governed by a Council constituted as prescribed by regulations published in the Provincial Gazette: Provided that the members of the Council shall be appointed in a manner which applies the principles of transparency and representivity and takes into account special competence, experience and interest in the field of heritage resources."

220 S 34(1-4) of the *NHRA*; also see regs 7-9 of the *NHRA 1999 Regulations* GN R548 GG 21239.

221 See *Qualidental Laboratories* case 2008 1 All SA 550 (SCA) para 5.



the property. News of the construction soon reached the respondent, which led to the issuance of a stop works order on the appellant. The order stated that it had come to the respondent's attention that there had been an alleged illegal alteration to a structure older than 60 years, without the fulfilment of permit conditions in terms of section 48(2)(c)<sup>222</sup> of the *NHRA*, and that a failure to comply with the stop works order could result in the criminal prosecution of the appellant.<sup>223</sup>

The applicant sought the review and setting aside of the decision to impose conditions on the permit application,<sup>224</sup> arguing that the PHRA had no power to impose conditions for a demolition order. The respondent, in a counter application, sought to interdict the applicant from continuing with certain building work pending *inter alia* the finalisation of the application. The Court stated that the *NHRA* had been introduced with the intention of establishing a system of management of national heritage resources. A heritage resource is defined by the *NHRA* as meaning "any place or object of cultural significance which refers to aesthetic, architectural, historical, scientific, linguistic or technological value or significance."<sup>225</sup> The Court went on to set out the various relevant provisions of the Act highlighting its purpose and scope. Section 34<sup>226</sup> of the *NHRA* was highlighted. The Court held that the first respondent had been acting within its powers and duties in making the determination which it had. The application

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222 S 48(2)(c) provides "(2) On application by any person in the manner prescribed under subsection (1), a heritage resources authority may in its discretion issue to such person a permit to perform such actions at such time and subject to such terms, conditions and restrictions or directions as may be specified in the permit, including a condition- (c) stipulating that design proposals be revised".

223 *Qualidental Laboratories* case 2008 1 All SA 550 (SCA) para 7.

224 The first case is reported as *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* 2007 1 All SA 638 (C).

225 S 2(xvi) of the *NHRA*.

226 S 34 provides "(1) No person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority. (2) Within three months of the refusal of the provincial heritage resources authority to issue a permit, consideration must be given to the protection of the place concerned in terms of one of the formal designations provided for in Part 1 of this chapter. (3) The provincial heritage resources authority may at its discretion, by notice in the Provincial Gazette, make an exemption from the requirements of subsection (1) within a defined geographical area, or for certain defined categories of site within a defined geographical area, provided that it is satisfied that heritage resources falling into the defined area or category have been identified and are adequately provided for in terms of the provisions of Part 1 of this chapter. (4) Should the provincial heritage resources authority believe it to be necessary it may, following a three-month notice period published in the Provincial Gazette, withdraw or amend a notice under subsection (3)."

to review and set aside the PHRA's decision was dismissed but leave to appeal to the Supreme Court was granted to the appellant.

On appeal, the applicant argued that section 34 of the *NHRA* does not empower the respondent to impose conditions and to refuse permission to demolish structures that are older than 60 years. In addition, the applicant contended that the action of the respondent was geared towards controlling the development. The Court disagreed with the applicant's contention and interpretation of the provisions of the *NHRA*. Mlambo J stated that:<sup>227</sup>

The condition imposed by the first respondent ... accords with the principles of heritage resources management set out in ss 5 and 6. The imposition of the condition is also within the parameters, not only of the Act but is consonant with the overall scheme of the Act. The first respondent's power to impose conditions in my view is not as narrowly circumscribed as contended for by the appellant. I may add that the purpose and effect of the condition is designed to enable the first respondent to exercise a power vested in it in terms of the Act and which, as pointed out, is consonant with the overall objective of the Act i.e. the conservation of a heritage resource. Therefore, the condition, rather than being one aimed at controlling development, as contended by the appellant, was in actual fact a condition with a conservation objective. It must also follow that, the condition having been validly imposed, the stop works order is also unimpeachable.

The imposition of the condition was within the parameters of the Act. In deciding that the requirements of the *NHRA* superseded the economic benefit of the new development, the Court demonstrated the prioritisation of cultural interests above economic interest.

In the next case discussed below, the court was faced with deciding whether the government regulation allowing goods of historical interest to be exempt from sales duty is applicable to items with historical value.

#### 5.5.1.3 *Heritage Collection case*<sup>228</sup>

The applicant in this case was the Heritage Collection (Pty) Ltd, a company that collects objects of cultural value. The respondent was the Minister of Finance. The question for determination in this case was whether certain sets of silver spoons were "collectors' pieces of historical interest" and so exempt from sales duty in terms of

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<sup>227</sup> *Qualidental Laboratories case* 2008 1 All SA 550 (SCA) para 19-20.

<sup>228</sup> *Heritage Collection case* 1981 3 All SA 266 (C).

tariff heading 99.05<sup>229</sup> of the First Schedule to the *Customs and Excise Act*.<sup>230</sup> The applicant sought a declaratory order to that effect.

The sets of silver spoon which gave rise to the dispute are half-scale reproductions of a unique set of silver spoons which was made in London, England in 1592 during the reign of Elizabeth I. These reproductions were made in South Africa by a well-known firm of engravers situated in Cape Town. The original set was of great historical value<sup>231</sup> and no other such set of spoons existed or has survived since then.

Upon examination of the facts, the Court decided that the half-scale reproductions of the original set of spoons did not qualify as "collectors' pieces of historical interest" as they were modern reproductions of a semblance, and as such did not qualify to be exempted from sales duty in terms of the Act. The application was subsequently dismissed. Although the applicants did not succeed, this case highlights that the economic interests of sales tax may be set aside where historical artefacts of cultural relevance are in issue, thus promoting the preservation of cultural resources.

In this case the Court highlighted the rationale for exempting goods that are of historical interest and have cultural value attached to them. Such goods qualify for exemption because they form a part of cultural heritage which must be preserved for the present and future generations.<sup>232</sup> Therefore the preservation of cultural heritage is also relevant to movable objects of cultural significance that are not directly attached to the landscape. This illustrates that the protection of cultural heritage goes beyond cultural landscapes to cultural items of historical value.

The courts have also considered the changing of geographic names within a cultural context where a failure to include the community in the process flawed the decision to affect the name change. This case is discussed below.

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229 Chapter 99.05 of the First Schedule of the Customs and Excise Act provides: "Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest".

230 91 of 1964.

231 *Heritage Collection* case 1981 3 All SA 266 (C) at 267-269.

232 S 5(7)(e) of the *NHRA*.

#### 5.5.1.4 *Chairperson's Association case*<sup>233</sup>

The appellant in this case was the Chairperson's Association. The first respondent was the Minister of Arts and Culture while the second respondent was the South African Geographical Names Council (hereafter Names Council). Although the appeal before the SCA centred on administrative law, the facts of the case draw on the relevance of community engagement in matters that have a cultural relevance to the community. In this case the subject matter was a change of geographical names.

The court recognised that geographical names are part of the historical, cultural and linguistic heritage of the nation, which it is more desirable to preserve than to destroy.<sup>234</sup> The *South African Geographical Names Council Act (SAGNC)*<sup>235</sup> sets out the requirements for effecting name changes.<sup>236</sup> The Act established the South African Geographical Names Council (hereafter Names Council) to facilitate, among other things, the transformation process for geographical names, and to promote awareness of the economic and social benefits of the standardisation of geographical names.<sup>237</sup> To effect its objects, the Names Council is empowered, amongst other things, to recommend geographical names falling within the national competence to the Minister for approval<sup>238</sup> and to liaise with cultural, historical and linguistic organisations<sup>239</sup> in performing its duties under the Act. According to the "policies, principles and procedures formulated in terms of the *SAGNC*,<sup>240</sup> determining a name for a place requires balancing historical and linguistic considerations, communicative convenience, the spirit of a community and the spirit of the nation."<sup>241</sup>

The change of Louis Trichardt's name to Makhado (the disputed geographical location in this case) was a matter within the national competence.<sup>242</sup> It was shown by the facts of the case and as contended by the appellant that the Names Council had not

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<sup>233</sup> *Chairperson's Association case* 2007 2 All SA 582 (SCA).

<sup>234</sup> *Chairperson's Association case* 2007 2 All SA 582 (SCA) para 11.

<sup>235</sup> 118 of 1998.

<sup>236</sup> *Chairperson's Association case* 2007 2 All SA 582 (SCA) para 2.

<sup>237</sup> S 2 of the *SAGNC*.

<sup>238</sup> S 9(1)(d) of *SAGNC*.

<sup>239</sup> S 9(1)(h) of *SAGNC*.

<sup>240</sup> *Chairperson's Association case* 2007 2 All SA 582 (SCA) para 10-12.

<sup>241</sup> *Chairperson's Association case* 2007 2 All SA 582 (SCA) para 11.

<sup>242</sup> S 9(1)(d) of *SAGNC*; *Chairperson's Association case* 2007 2 All SA 582 (SCA) para 1.

made a recommendation to the first respondent as required by the Act for the change of the name of Louis Trichardt to Makhado.<sup>243</sup> In addition, the change of name application had not been preceded by proper consultation with all interested parties, as a significant portion of the Louis Trichardt community had been left out of the consultation process.<sup>244</sup> Therefore the Court allowed the appeal.

It is submitted that the relevance of consultation in this context ties in with the SIA. This is because consultation processes are used to ease the transformation process for geographical names, which is an object of the *SAGNC*. This process facilitates the balancing of historical and linguistic considerations, communicative convenience, the spirit of a community and the spirit of the nation before a geographical name change is effected.

This case highlights the relevance of community engagement in decisions that impact on social development. The case also emphasises the need for decision-makers to be guided by legislation and where necessary the judiciary in interpreting the cultural impact of decisions.

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<sup>243</sup> *Chairperson's Association* case 2007 2 All SA 582 (SCA) para 36.

<sup>244</sup> *Chairperson's Association* case 2007 2 All SA 582 (SCA) para 46.

### *5.5.2 Accommodating culture in the judicial interpretation of sustainable development*

The cases discussed above show that the interaction between cultural interests and environmental, economic and social interests has found its way before the courts. The courts have directly or indirectly interpreted sustainable development within the context of balancing environmental, economic and social interests. In the cases where cultural interests have come to the fore, it has often been in connection with cultural heritage. Cultural heritage is recognised as a part of the environment that deserves to be preserved, conserved and managed for the present and future generations. It is seen (and inspiring) that the courts are willing to recognise cultural interests independently of environmental, economic and social interests.

However, where the opportunity has arisen to explicitly direct public authorities to include cultural interests in the contemplation of development decisions, the court seems to have been reluctant to do so. This is demonstrated in the *Oudekraal* case. Cultural interests have been neglected despite the legislative provisions that require public authorities to consider all relevant interests in reaching decisions that impact on sustainable development.<sup>245</sup>

## **5.6 Summary of the chapter**

This chapter set out to assess the courts' approach to cultural issues and whether they give sufficient recognition to cultural interests to allow for its inclusion into the legal interpretation of sustainable development. To carry out this exercise, the chapter gave a brief overview of the courts and *locus standi* in South Africa. The relevance of constitutional interpretation to sustainable development was investigated. Thereafter, a selection of cases was described, analysing how in arriving at their decisions the courts have interpreted and implemented the need to balance competing environmental, economic and social interests in the context of sustainable development. The interrogation went further to enquire into whether the courts'

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<sup>245</sup> See the discussion on development impact assessments in Chapter 3, especially the EIA and the SIA.

approach to cultural issues supports and accommodates the current understanding of the concept of sustainable development, which is that it includes cultural interests.

It is observed that South Africa's court structure and *locus standi* regime allow for a wide range of persons to approach the courts on any of the issues that impact on the pursuit of sustainable development. The law-making role of the courts is valuable in the pursuit of sustainable development that is inclusive of cultural interests. The methods of interpretation adopted by the courts in reaching decisions that impact on sustainable development have contributed in enriching the interpretation of sustainable development in non-environmental contexts.

Through the discussion of the selected cases in this chapter, this thesis shows that the concept of sustainable development has gone beyond purely environmental considerations to include social, economic and cultural issues as well. With regard to the judicial rulings on culture selected and discussed, it is evident that cultural interests intersect and interact with social, economic and environmental interests.

However, despite the seemingly obvious intersection and interaction between cultural interests and other interests which impact on development decisions, the courts have been reluctant to consider cultural interests as part of the sustainable development equation. This can be seen in the *Oudekraal* case,<sup>246</sup> where the court recognised that cultural interests should be taken into consideration when development projects are being considered. However, the court missed the opportunity in this case to recognise that the protection of the cultural rights of the community and the immovable cultural heritage constituted two different cultural interests. The first issue concerned the cultural value of the kramats to the community, while the protection of the kramats constituted the protection of immovable cultural heritage resource. Drawing this distinction is significant in accommodating the inclusion of cultural interest in the interpretation of sustainable development.

Similarly, in the *Save Vaal* case<sup>247</sup> the court missed the opportunity to consider the objections which had cultural connotations raised by the appellant in the case. One of

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<sup>246</sup> See the case discussion in para 5.5.1.1.

<sup>247</sup> See the case discussion in para 5.4.1.1.

the objections which was raised concerned the impact of the proposed mining activity on the sense of place, which is a culturally significant impact of development. The court in that case failed to recognise the cultural implications of the loss of a sense of place.

It is apposite to speculate on why the courts may be reluctant to give cultural interests the same recognition as that given to environmental, economic, and social interests in reaching development decisions. One possible reason might be the fluid nature of the concept of culture and the diverse range of issues which can come under the category of cultural interests, some of which may be beyond the scope of this thesis. Another possible reason is that litigants do not provide the necessary legal arguments to enable the courts to deal with matters of culture in a meaningful way. However, if the contemporary understanding of sustainable development as being inclusive of culture, as put forward in the discussion in Chapter 2, were to be applied by the courts, then the opportunity to include cultural interests which impact on development could be taken on a case-by-case basis. This would allow the court to streamline the range of issues that could be considered cultural interests while allowing the inclusion of culture into sustainable development thinking.

The final chapter of this thesis draws conclusions from the research carried out regarding the theoretical understanding of the link between culture and sustainable development, national law and policy, institutional government arrangements, and the role of the judiciary in recognising cultural interests relevant to sustainable development thinking. The conclusions show the extent to which the current legal, institutional and judicial landscape in South Africa allows for the advancement of culture in sustainable development. Furthermore, recommendations are proposed on how cultural interests may be included in the pursuit of sustainable development in South Africa.



## CHAPTER 6

### CONCLUSION

#### ***6.1 Background***

In development discourse the discussion has progressed from being only about protecting and preserving environmental interests to being about protecting and preserving other interests of development as well, such as economic, social and cultural interests.<sup>1</sup> The recognition of culture in sustainable development thinking has been made accessible by the work of UNESCO and the SDGs, for example.<sup>2</sup>

The recognition of culture in this context has not been without complication. Culture is a fluid concept. It reaches into a multitude of different contexts, and has different interpretations in those contexts.<sup>3</sup> One such interpretation is culture as a way of life representing expressions of traditional practices, heritage and religion. Culture in this context may have counterproductive results, such as the over-use of environmental resources like plants in traditional practices or the disregard for human rights and the freedom of religion in extreme cases. It might be difficult to champion the cause of culture as against that of development in such cases.<sup>4</sup>

However, the relevance of culture as an enabler for peace and development is the interpretation emphasised at the international level, as evident in UNESCO's promoting the protection of cultural heritage, cultural diversity and the important contribution of culture to sustainable development.<sup>5</sup> Thus, the role of culture as a positive contributor to the goal of sustainable development has been the theme of this thesis.

The concept of sustainable development is recognised constitutionally in South Africa within the scope of a substantive environmental right. However, some scholars argue convincingly that sustainable development is not exclusively an environmental idea as

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1 See the discussion in para 2.2.3.

2 See the discussion in paras 2.3.1, 2.4.2 and 2.4.3.

3 See the discussion in para 2.3.

4 See the discussion in para 2.2.2.

5 See the discussion in para 1.2.1; also see The UNESCO Courier 2017 <http://bit.ly/2mh6v5O> 7-11, accessed on 13 November 2017.

it is applicable in non-environmental contexts as well.<sup>6</sup> For example, sustainable development is relevant in the economic, social and cultural contexts, to such an extent that the balancing of the competing interests they represent is often the essence of its pursuit.

## ***6.2 Revisiting the research question and objectives***

The research question that underpins this study has to do with the extent to which and the manner in which existing national law, policy and institutional government arrangements facilitate the inclusion of cultural interests in South Africa's pursuit of sustainable development

To explore the research question, and to test the stated hypothesis,<sup>7</sup> the following secondary objectives were formulated:<sup>8</sup>

- (a) to investigate the conceptual basis of the link between culture and sustainable development by examining the relevance of culture in the context of the contemporary meaning of sustainable development;
- (b) to interrogate the inclusion of culture in matters of sustainable development in South Africa by analysing how the existing national legislative and policy framework facilitates the inclusion of culture in the sustainable development equation;
- (c) to critically analyse the institutional arrangements in government relevant to the implementation of the sustainable development ideal which facilitate the inclusion of culture in the pursuit of sustainable development;
- (d) to interrogate the courts' approach to cultural issues and whether they give sufficient recognition to cultural interests to allow for its inclusion into the legal interpretation of sustainable development; and

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6 See the discussion in para 2.6.2.2.

7 See the discussion in para 1.3.3.1.

8 See the discussion in para 1.3.2.

- (e) to assess and reach a logical conclusion based on the findings in objectives (a)-
- (d) that support the making of recommendations aimed at optimising the value of culture in the pursuit of sustainable development in South Africa.

To deliver on the above objectives, the thesis has been structured into chapters, the purpose of which is described below.

### ***6.3 Structure and method of the analysis***

Each chapter of this thesis focused on an objective of this study and the methodology followed was based on a desktop review and critical analysis of relevant legal, and para legal scholarship.

Chapter 2 explored the link between culture and sustainable development.<sup>9</sup> The purpose of this exploration was to establish the normative foundation upon which an exploration of the research question could be conducted.

Chapter 3 interrogated the inclusion of cultural interests in the balancing of competing interests by analysing how the existing national legal framework facilitates the inclusion of culture in the sustainable development equation.<sup>10</sup> For this purpose, the legislative and policy framework pertaining to some aspects of the environmental, economic and social spheres was selected to unpack how cultural interests interact and intersect with the other interests of sustainable development.

Chapter 4 analysed the institutional arrangements in the South African government system that are relevant to the more expressed inclusion of culture in the sustainable development equation. The purpose of this analysis was to determine how the current governance arrangements might assist with the implementation of relevant law and policy as being able to promote the inclusion of culture.

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<sup>9</sup> See the discussion in chapter 2.

<sup>10</sup> See the discussion in chapter 3.

Chapter 5 assessed the courts' approach to cultural issues and whether they have, to date, judicially elevated cultural interests to form part of the set of interests that are legally protected in the name of sustainable development.

Following the above investigations, the following central findings provoked specific recommendations, as discussed in the paragraphs below.

## ***6.4 Central findings***

The following findings are used to draw conclusions and to inform the knowledge and discourse on the legal recognition of culture in the sustainable development equation:

### *6.4.1 Linking culture and sustainable development*

In linking culture with sustainable development, the analysis in chapter 2 found that assessing economic benefits as the only way in which to measure the success of development has proven to be inappropriate and unsustainable. Thus, it became relevant to seek for a balance between social and economic benefits and maintaining the integrity of the environment for present and future generations.

#### **6.4.1.1 Contemporary understanding of sustainable development – a global and regional perspective**

On an international level the following findings emerged:

- (a) The adoption of the concept of sustainable development by states worldwide led to the incorporation of the concept into their development planning strategies domestically. The ideal aim of sustainable development is to meet essential needs, merging environmental, economic and social interests in decision-making with an emphasis on human development, participation in decisions, and equity in the distribution of the benefits.

Thus, decision-makers tasked with development-related decisions must seek to balance environmental, social and economic interests. In this context, sustainable development is understood as a developmental goal which has no finite end but which states must nevertheless strive to attain.

(b) The balancing of environmental, social and economic interests has been extended to include cultural interests. Contemporary global trends have drawn attention to the inclusion of culture in the development equation, and the new international agenda (the SDGs) is instrumental in firmly recognising culture within the framework of sustainable development.<sup>11</sup> The SDGs identified critical areas in which culture can play a crucial role in development matters. The areas identified include where cultural interests interact with environmental, economic and social interests.<sup>12</sup>

(c) On a regional level, a plethora of AU treaties recognises the right to development and by extension to sustainable development.<sup>13</sup> Most notable is the recognition of culture in the sustainable development equation by the *Charter for African Cultural Renaissance*<sup>14</sup> which articulates the fundamental principles of cultural policy. Despite the recognition of culture in the sustainable development equation, the African Commission in the *Endorois* case<sup>15</sup> was hesitant to recognise that the content of the right to development includes a right to culture. Instead, the Commission based its decision on the community participation element of the right to development, although, given that there was little guidance at the time on how to incorporate culture in development thinking, the acknowledgement of the element of community participation held out a glimmer of hope that the cultural rights of the community might eventually be recognised. In the more recent *Ogiek* case,<sup>16</sup> the African Commission laid down clear directives on the right to culture as enshrined in the *Banjul Charter*, and how the state must promote and protect such rights against any proposed development that threatens such a right.<sup>17</sup> This decision

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11 See the discussion in paras 2.3, 2.4, and 2.4.3.

12 See the discussion in para 2.6.

13 See the discussion in para 2.5.

14 See the discussion in para 2.5.

15 Communication 276/2003, see African Commission, 27th Activity Report, 2009.

16 *African Commission of Human and People's Rights v The Republic of Kenya Application No. 006/2012* 26 May 2017.

17 See the discussion in para 2.5.1.

is a significant advancement that further inserts cultural interests into the mainstream of sustainable development on a regional level.

Upon the premise that sustainable development is now understood to be the balancing of development interests by decision-makers in reaching development-related decisions, the question which then arose was what the promotion of sustainable development entails and if culture should be linked with sustainable development in a South African context.

#### 6.4.1.2 Sustainable development in the South African context

In view of the theoretical understanding underpinning this thesis, culture is essential to the over-all human development of people in the sustainable development context.<sup>18</sup>

The international and regional approaches to the inclusion of culture in balancing sustainable development interests give guidance to rethink the inclusion of culture as a legitimate interest in pursuance of sustainable development in South Africa.<sup>19</sup> With respect to sustainable development in South Africa, it is found that cultural interests should not be approached in terms of cultural practices, cultural products and the arts alone. Culture should be recognised as the summation of the diverse ways culture manifests and interacts with environment, social and economic interests beyond cultural practices, culture products and the arts to the total cultural representation of on any given community.

Subsequently, cultural interests would in addition to cultural practices, products and the arts include issues such as the preservation of cultural heritage and the recognition of the cultural diversity of a given community. Such cultural interests should be balanced against environment, social and economic interests in reaching development-related decisions.

Bearing in mind that development is broadly framed in South Africa to include not only the use and management of land and the natural resources it provides for planning

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<sup>18</sup> See the discussions in paras 2.4.2 and 6.4.1.2.

<sup>19</sup> See the discussion in paras 1.2.2, 2.8 and 6.4.1.

and development, but also socio-economic, financial, cultural, political and ancillary factors that would aid the transformation and reconstruction of society.<sup>20</sup> The central finding in this respect is that the *Constitution* with its vision of transformative development is instructive in promoting human development and addressing development concerns. The constitutional understanding of sustainable development is grounded in section 24(b). Framing the concept in clear ecological terms does not restrict its application to the cultural interests of development. An example of this is the recognition in existing legislation of cultural heritage as a part of the environment (in the *NEMA*).<sup>21</sup>

It was also found that the *NEMA* and its recognition of inclusive sustainable development is instructive in guiding all decision-makers in government to consider the inclusion of other relevant interests of sustainable development beyond environmental interests. By so doing, the transformative purpose of the *Constitution* will be promoted to the extent that social, cultural and economic interests influence equity and social justice beyond environmental dictates. The *NEMA*<sup>22</sup> meaningfully defines sustainable development as the integration of all relevant factors into the planning, implementation and evaluation of decisions to ensure that development serves the needs of present and future generations.

Another notable finding is that sustainable development cannot be restricted to the triple bottom line interpretation.<sup>23</sup> The integration of the diverse interests of sustainable development serves the social justice and transformation agenda of the *Constitution*, which demands that they must be considered holistically.

The international global agenda discussed above<sup>24</sup> sets a precedent in relating the preservation and promotion of culture to human development and equity. Thus, providing the background against which the inclusion of the promotion of culture as an interest in sustainable development is conceptualised.

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20 See the discussion in para 2.6.1.

21 See the discussion in para 2.6.2.2.

22 See the discussion in para 2.6.2.

23 See the discussion in para 2.4.

24 See the discussion in 6.4.1.1.

#### 6.4.1.3 Conceptualising culture for and as part of sustainable development in South Africa

Flowing from the findings in the preceding paragraph, linking culture to sustainable development hinges on the constitutional recognition of culture.<sup>25</sup> As is to be expected, there is no definition of culture in explicit terms in the *Constitution*. However, there are many inferences to the cultural diversity of the South African society.<sup>26</sup> The protection against unfair discrimination on the grounds of religion, conscience, belief and culture afforded under sections 9(3), 15, 30 and 31 of the *Constitution*, guarantees the rights of traditional, religious, cultural and linguistic communities. The protection of the rights of these groups of people is an unmistakable link to the protection of their traditional, religious, linguistic and cultural interests and perhaps especially so in the face of development.

Furthermore, this thesis found two distinct ways in which the term “culture” is engaged in scholarly literature, existing legislation and the *Constitution*<sup>27</sup> which are relevant to linking sustainable development to culture.

The first is the understanding of culture as a collective term for aesthetic expression, given the potential contribution of the arts and the creative industry to economic growth.<sup>28</sup> Culture in this form was found to engage with people’s environment. For example, maintaining the integrity of the environment is crucial to the availability of raw materials used in the creation of cultural products. The creation of such cultural products, in turn, stimulates trade in cultural products locally and globally.<sup>29</sup> Therefore development-related decisions must consider the effect of development on the environment upon which people depend for creative endeavours. The question might therefore be, if maintaining the integrity of the environment in terms of law can take care of such concerns, why should there be any additional or explicit emphasis on matters of culture? In giving an answer to the question it must be noted that the concept of sustainable development does not offer protection to the environment to

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25 See the discussion in para 2.6.1.2

26 See for example the Preamble to the *Constitution*.

27 See the discussion in para 2.6.1.

28 See the discussion in para 3.3.

29 This was also discussed in para 2.6.3 and chapter 3.



the exclusion of other interests. Section 24(a) of the *Constitution* entrenches a substantive environmental right which aims to ensure the protection and enjoyment of the environment along with the health, quality of life and overall well-being of the present and future generations. This constitutional guarantee is anthropocentric in its interpretation of the interests that people hold in the environment. This interpretation of environmental rights places people and their needs at the forefront of concerns in the realisation of ecologically sustainable development. People's needs in this context include their physical, psychological, developmental, cultural and social needs which must be equitable. In this context, decision-makers are expected to approach the balancing of interests from a holistic perspective. They must put into consideration the effect of cultural interests intersecting with components of the environment by integrating these interests.

Therefore, maintaining the integrity of the environment creates benefits for social and economic development and at the same time creates opportunities for cultural expression. Thus, on the one hand cultural creativity through the production of goods contributes to economic development. On the other hand, the preservation of aspects of the environment fosters the protection of cultural rights as envisaged by the *Constitution*. In this way, the protection of the cultural rights of the people intersects with the protection of their environmental rights.

The second is the understanding of culture as contributing to individual and collective identity, as it inseparably relates to a person's sense of self-worth and hence to human dignity. Culture in this form engages with social interests such as health. In section 27(1)(a), the *Constitution* entrenches a right to have access to health care services and places a duty on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The *raison d'être* for a right of access to health is to have a healthy citizenry, which in turn, promotes human development. The promotion of human development contributes to sustainable development.

The fact that health generally links with peoples' behaviour, for example peoples' lifestyle might have a negative impact on their health, it follows that other factors

beyond the control of the state can influence the progressive realisation of the right to health.<sup>30</sup> Thus, in giving effect to the right to health, the state must recognise that the right goes beyond the right of access to conventional healthcare or health goods and services. Alternative health care services such as traditional health practices which over-time form the culture of a defined group of people, can be recognised by the state in the progressive realisation of the right to have access to health. In this way, the cultural identity and integrity of individuals and communities are important factors which the state must be sensitive to in giving effect to the right to health. For example, some communities may prefer access to traditional preventive care or healing practices than to have access to conventional medicine and practices. In such scenario, the state law and policy tools giving effect to the right to health must be culturally sensitive and culturally appropriate. Therefore, development-related decisions that may impact on human development must not jeopardise the right of access to the health care service preferred by such communities.

It is found, therefore, that on the one hand culture intersects with the already established interests of sustainable development,<sup>31</sup> and on the other hand it features as a potentially autonomous interest, to be considered in reaching development-related decisions. Therefore, the typology adopted by this thesis in articulating the inclusion of culture in sustainable development is a hybrid of both approaches to culture for and as part of sustainable development. This typology is anchored in the normative aims of sustainable development which speak to equity, social justice and the transformation agenda of the *Constitution*. Such equity seeks the well-being, improved living conditions and overall human development of people, both now and in the future.

The three broad themes on which the typology rests speak to the interdependency, interrelatedness and inextricable link between cultural interests and the competing environmental, social and economic interests of sustainable development. These themes include:

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30 See discussion in para 2.6.1.3.

31 See the discussion in 2.4.2.

- (a) Culture in environmental interests, with an emphasis on biodiversity and cultural heritage;<sup>32</sup>
- (b) Culture in economic interests, with an emphasis on trade in cultural goods and services;<sup>33</sup> and
- (c) Culture in social interests, with an emphasis on health.<sup>34</sup>

In applying the above typology to regulation and life in a culturally diverse South African society, cultural interests permeate and cut across various aspects of human existence. Thus, justifying the potential applicability of this typology in guiding decision-makers in development-related decisions that affect where and how people live and make a living.

The final part of this chapter found that the application of this typology in promoting the inclusion of culture in development-related decisions is dependent on the design and content of law and policy. The reason for this as found in this research is that law and policy offer the legitimising basis for the recognition of cultural interests in the actions of government and other decision-makers. The thesis thus moved on to the next issue in Chapter 3. This chapter explored the scope and some of the content of the applicable law and policy framework.

#### *6.4.2 Accommodating cultural interests in law and policy*

The dilemma with recognising culture as an integral element in sustainable development from a legal perspective is identifying a legitimising basis in law and policy.<sup>35</sup> This thesis found that the existing national law and policy instruments that reflect the way cultural interests interact with environmental, social and economic interests<sup>36</sup> provide a sufficient legislative basis to enable decision-makers to consider cultural issues in the pursuit of sustainable development.

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32 See the discussion in chapter 3.

33 See the discussion in chapter 3.

34 See the discussion in chapter 3.

35 See the discussion in paras 2.6.3.4 and 2.7.

36 The selected themes include cultural diversity, cultural heritage, biological diversity, trade and health; see paras 3.1, 3.2, 3.3 and 3.4.

Due to the nature of the themes that make up the typology informing the interrogation of the law and policy framework, this thesis identified and analysed the national law and policy instruments pertaining to biodiversity, cultural heritage, trade and health. These themes interact with culture, and the body of legislation examined was found to contain provisions that recognise cultural interests either directly or indirectly. A few of these findings are highlighted in the following paragraphs.

One finding is that the culture and environment nexus is premised on the assumption that cultural heritage and biodiversity fall under the category of legal issues associated with conservation and the exploitation of natural resources.<sup>37</sup> By implication, cultural heritage ought to have the same level of legal protection afforded to it as that afforded to the components of the environment (such as biodiversity).<sup>38</sup> In giving credence to this proposition, several provisions of associated legislation such as the *NHRA* and the *NEMA* recognise that components of the environment are interrelated with cultural heritage. For instance, the *NHRA* which is the primary legislation dealing with cultural heritage, lists tangible heritage as including everyday environmental items such as geological sites, archaeological and paleontological sites as being culturally significant heritage.<sup>39</sup> This thesis also finds that in the furtherance of sustainable development cultural heritage resources must be protected, preserved and managed for the benefit of the present and future generations.<sup>40</sup>

In consideration of culture's accommodation in law and policy, it is found that planning law is one area where cultural interests intersect with environmental interests. The way land is used and managed is relevant to the discussion about ensuring that decision-makers consider cultural interests in reaching development decisions. *SPLUMA* is the framework legislation regarding the use of land, planning and management. *SPLUMA* aims to correct, among other things, past spatial planning and land use which were in direct opposition to the values of the current constitutional democratic state. The principles enunciated by the *SPLUMA*<sup>41</sup> speak to redressing the

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37 Glazewski "The nature and scope of Environmental law" 1-11.

38 See the discussion in paras 2.6.2.2 and 2.6.3.

39 See discussion in para 3.2.

40 See the discussion in para 3.2.3.

41 See discussions in para 3.2.4.

past spatial planning and land use decisions. One such principle is that of spatial justice, which speaks to the development of the former homelands. Spatial justice is a context-laden concept, and in applying it to the purposes of this thesis (including the recognition of cultural interests), one would relate it to the use of land in a way that promotes the values of the people. It is found that,<sup>42</sup> expecting a land use and planning framework Act to meet all the cultural interests involved in the regulation of the use, management and development of land would be expecting too much. Those who should implement these plans must be aware of the cultural complexities impinging on the decisions they take and cater for them by recognising that a planning system that adopts cultural interests as part of the development matrix, is likely to produce the most productive and sustainable results.

Furthermore, this thesis also found that the EIA and other policy tools can aid in the practical application of sustainable development when environmental and cultural interests are integrated in the process of reaching decisions on development. EIA is accompanied by SIA which focuses on the social impact of proposed developments. These policy tools are useful in guiding the decision-maker in issues such as assessing the value of the sense of place of a proposed development site, before issuing an approval for the commencement of the development. Considering Sach J's approach in the *Fuel Retailers* case, the EIA must not only concern itself with environmental issues, but also with socio-economic and cultural issues<sup>43</sup> to efficiently balance the relevant sustainability issues, as required by sections 23 and 24 of the *NEMA*. Furthermore, it has been found that the SIA may be complemented by a cultural impact assessment, which involves increased community participation as required by section 2(4)(f) of the *NEMA*. This section of the Act incorporates the principle of public participation in environmental decision-making and obliges the state to enable and encourage the participation of all affected and interested parties in the environmental governance efforts. It also requires affected and interested parties in communities to develop the understanding, skills, and capacity that are necessary for achieving equitable and active participation.

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42 See the discussion in para 3.2.4.

43 See the discussion in para 5.4.1.2.3.

Similarly, in the culture and trade nexus,<sup>44</sup> it was found that cultural interests lie in the economic value of cultural goods and services. The cultural industry provides a source of revenue for the national government.<sup>45</sup> The trade laws of South Africa show a potential for the inclusion of cultural interests beyond generating government revenue to generating incomes for individuals and households as well. The creation of income for individuals and households is found to be a viable avenue for cultural interests to serve as an enabling factor in the empowerment of the people to expand the choices available to them in the furtherance of their development.

Concerning the culture and health nexus, the gravitation towards traditional medicine is the performance of the desire for traditional life by members of the traditional communities in South Africa. In this context, tradition represents the common way of life amongst a defined community or group of people where certain traditional practices are a key part of their culture. Traditional practices may be a derivative of the culture of a defined group of people. Thus, traditional medicine is sometimes an offshoot of culture. The interaction of culture with health in this sense may not apply to conventional medicine and so not to mainstream conventional health practices. However, traditional medicine as a legitimate alternative to conventional medicine deserves recognition in legislation in the context of expanding the development choices available to people. Therefore, the lawmakers and decision-makers ought to consider traditional medicine as a cultural interest that deserves to be included in the sustainable development equation.

Although it is found that there exist an intricate mix of complexities in recognising cultural interests in the process of reaching a development-related decision, the robust national and policy framework provides a legitimate basis for the inclusion of culture in the sustainable development equation. The overlaps in the legislative and policy frameworks applying to various sectors suggest the need to recognise the interdependence of environment, economic, social and cultural interests in sustainable development.<sup>46</sup>

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44 See the discussion in para 3.3.

45 See the discussion in para 3.3.

46 See the discussion in para 3.5.

Even though the existing legislative and policy framework accommodates cultural interests, the government does not appear to give sufficient recognition to cultural interests as it currently does to environmental, economic and social interests in the pursuit of sustainable development.

#### *6.4.3 Insights from the institutional government arrangements*

The national and provincial government departments in South Africa are structured to allow the inclusion of cultural interests in the fulfilment of their legislative competences.<sup>47</sup> There are different line functionaries in each department in environmental interests (such as the DEA), social interests (such as the DH) and economic interests (such as the EDD). The departments are tasked with specific mandates covering their portfolios. Matters of culture are not their core mandates but can be said to be incidental to the fulfilment of their mandates. The department with an exclusive cultural mandate is the DAC. However, the DAC's mandate does not cover the diverse ways in which this thesis has shown culture to interact with the other competing interests of sustainable development.

It was found that the national and provincial structure in South Africa presents a fragmented institutional arrangement for the governance of cultural interests.<sup>48</sup> The way the legislative competences over cultural matters have been designed by the *Constitution* has impacted on the way the spheres of government and in turn the departments have approached the inclusion of culture in development-related decision-making.

Municipalities at the local level are merely compelled by section 23(2) of the *Traditional Leadership and Governance Framework Act* to allow participation of a traditional authority in its municipal council,<sup>49</sup> but it is not obliged in any way to incorporate any concern regarding culture or customary law that the traditional authorities may raise. This limits the level of contribution that the traditional authorities can bring to the table in terms of some of the cultural interests that may be peculiar to the traditional

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47 For example, see the discussion on the mandates of the national departments in paras 4.4 – 4.4.3.1.

48 See the discussion in para 4.3.2 and 4.5.2.

49 See the discussion in para 4.9.

community that they represent. This limitation is a setback in the inclusion of culture in development decision-making at the grassroots.<sup>50</sup> Also, the administrative and executive authority of the local sphere provided by section 156 (the subsidiarity principle)<sup>51</sup> of the *Constitution* enables local government to promote cultural interests. The use of by-laws and other relevant local governance instruments such as IDPs and zoning schemes can aid in the practical protection of cultural interests at the grassroots level.<sup>52</sup>

The diversity of the manifestations of culture in its interaction with the other environmental, social and economic interests is reflected in the array of departments whose functions directly or indirectly impact on cultural interests.<sup>53</sup> However, the different organs of state are not collectively involved in the advancement of culture in the pursuit of sustainable development.<sup>54</sup> It is found that the constitutional principle of cooperative governance and the concept of cooperative cultural governance amongst the three spheres of government have the potential to aid the consideration of cultural interests by relevant organs of state.<sup>55</sup>

#### *6.4.4 The judiciary and the interpretation of sustainable development that is inclusive of culture*

The law-making role of the courts is valuable in recognition of culture in the pursuit of sustainable development in South Africa.

The judiciary of South Africa recognises the concept of sustainable development. The court applied the concept in the adjudication of environmental law cases such as the *Fuel Retailers* case<sup>56</sup> and the *Save the Vaal* case.<sup>57</sup> Further analysis revealed that where there were cultural connotations the courts appeared to gloss over them and treat them as irrelevant issues that did not warrant adjudication. For example, in the

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50 See the discussion in para 4.7.2 and 4.7.3.

51 See the discussion in para 4.7.2.

52 See the discussion in para 4.7.2.

53 See the discussion in para 4.8.

54 See the discussion in para 4.8.1.

55 See the discussion in para 4.8 and 4.9.

56 *Fuel Retailers* case 2007 10 BCLR 1059 (CC).

57 *Save the Vaal* case 1999 2 SA 709 (SCA).



*Save the Vaal* case<sup>58</sup> the court missed the opportunity to consider the objections which had cultural connotations raised by the appellant in the case. One of the objections raised concerned the impact of the proposed mining activity on the sense of place, which is a culturally significant impact of development. The court in that case failed to recognise the implications of the loss of a sense of place.

In the analysis of culture-related cases, it was found that the courts have shown that cultural interests do have a niche in the legal interpretation of heritage. However, regarding the interaction of cultural interests with environmental, economic and social interests, the courts appeared to be hesitant to give meaning to culture as part of the sustainable development equation.<sup>59</sup> In the *Oudekraal* case<sup>60</sup> the court recognised that cultural interests should be taken into consideration when decision-makers are contemplating development-related decisions. However, the court missed the opportunity, in this case, to recognise that the protection of the cultural rights of the community and the immovable cultural heritage constituted two different cultural interests. The first issue concerned the cultural value of the kramats to the community, while the actual protection of the kramats constituted the protection of immovable cultural heritage. Drawing this distinction is significant in accommodating the inclusion of cultural interest in the interpretation of sustainable development.

It is found that the courts are reluctant to give cultural interests the same recognition as that given to environmental, economic, and social interests in reaching decisions regarding development. One possible reason is the absence of a coherent legal framework catering to cultural interests. A second possibility is that the litigants do not provide the necessary legal arguments to enable the courts to deal with matters of culture in a meaningful way.

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58 See the case discussion in para 5.4.2.1.

59 See the discussion in paras 5.4.2 and 5.5.2.

60 See the case discussion in para 5.5.2.

## **6.5 Recommendations**

The findings discussed above prompts general and specific proposals directed at the South African law and policy makers, national government departments as well as the provincial departments and the municipal authorities with regards to the following;

- (a) shortcomings in recognising culture as a governance concept as demonstrated in the weakness of law and policy to coherently accommodate cultural interests;<sup>61</sup>
- (b) the institutional deficits in South Africa that limit the extent to which cultural interests may be considered in sustainable development thinking as seen in the absence of cooperative cultural governance;<sup>62</sup>
- (c) the absence of cultural impact assessment for development projects;<sup>63</sup> and
- (d) the judiciary accommodates the inclusion of cultural interest in the interpretation of sustainable development.<sup>64</sup>

### *6.5.1 Promoting culture as a governance concept by bridging the limitations of existing law and policy*

The findings in Chapter 3 recognise that the law and policy framework do offer opportunities for the inclusion of culture in the pursuit of sustainable development.<sup>65</sup> However, the absence of a coherent cultural legal framework that deals with cultural interests for sustainable development presents a significant limitation in the recognition of culture as a governance concept.

In the absence of a coherent cultural legal framework, it is suggested that to optimise the numerous opportunities that are in the existing law and policy framework accommodating cultural interests, these interests should be compiled and annotated as a regulatory instrument by Parliament at the national level for the purpose of

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61 See the discussion in para 6.4.2.

62 See the discussion in para 6.4.3.

63 See the discussion in paras 3.2.3.1.2 and 6.4.2.

64 See the discussion in paras 5.6 and 6.4.4.

65 See the discussion in paras 3.5 and 6.4.2.

providing guidance to decision-makers. Such regulatory instrument will be useful during the planning stages of development projects where the cultural impact of the said development must be assessed along with its social impact.<sup>66</sup> In this way, evaluating and assessing the cultural impact of a proposed development to balance the interests of the sustainable development equation will be more effective.

Furthermore, a planning policy that adopts cultural interests as part of the development matrix can be incorporated into a planning instrument like *SPLUMA* to further aid decision-makers. Policy makers must recognise that sustainable development will differ among traditional communities. For some communities their cultural interests may survive the upheaval caused by mineral development on their traditional lands for example. For others, it might be that the intended development project offers other benefits that they are willing to explore while discarding their culturally sustaining economic subsistence activities. Whichever might be the case, it is important that for traditional communities to survive the impact of development decisions, their rights and culture are respected.

#### *6.5.2 Optimising the potential of cooperative cultural governance*

The municipalities' powers and function over cultural matters should be reviewed by delegating the governance of cultural interests to the local government sphere using the potential of the subsidiary principle<sup>67</sup> and section 156 of the *Constitution*.<sup>68</sup> It is recommended that a bottom up approach in the governance of cultural interests will aid in the promotion of culturally sensitive sustainable development.

Since each municipality has unique cultural interests, a system of consultation with the traditional authorities and the designated indigenous knowledge custodian is recommended to aid in finding the cultural interests of traditional communities in the planning stages of developments. The outcome of such consultations should also feed into progressive cultural by-laws that will direct local communities and municipal authorities alike.

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66 See the discussion in paras 3.2.3.1.1, 3.2.3.1.2 and 6.4.2.

67 See the discussion in para 4.7.2 and s 156(4) of the *Constitution*.

68 See the discussion in paras 4.7.2.

In addition, the cooperation of all spheres of government and organs of state in mainstreaming cultural interests into development plans with the aid of the implementation framework<sup>69</sup> would guide the national and provincial departments as well as the municipal authorities in reaching decisions that promote sustainable development while giving greater recognition to cultural interests. One way to achieve this is to use the regulatory framework recommended in para 6.5.1 above at the national level and the outcome of consultations at the municipality level to guide the decision-makers at the national and provincial departmental levels that are involved in reaching development-related decisions.

Furthermore, the Chapter 9 institutions discussed in paragraph 4.10 (the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the SAHRC) need to be proactive in monitoring, investigating and making recommendations regarding development decisions that impinge on people's cultural rights. Their doing so would help to incorporate cultural interests into the main stream of sustainable development thinking.

### *6.5.3 Optimising cultural impact assessments for sustainable development*

To optimise the potential of cultural impact assessments in the sustainable development equation, it is proposed that the requirement to conduct cultural impact assessments before development projects commence should not be merged into the SIA or the EIA requirement.<sup>70</sup> Rather, cultural impact assessments should be conducted independently of the SIA or the EIA. This will ensure that an objective assessment that is focused on verifying the outcome of the consultations for each development project as recommended in para 6.5.2 above is executed. Such cultural impact assessment must also be carried out by qualified and trained government officials from the relevant government departments directly involved in the development project and are responsible for decision-making about the intended development project. For example, in the case of a mining project to be in a traditional community, the relevant government department that should carry out a cultural

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<sup>69</sup> See the discussion in para 4.11.2.1.

<sup>70</sup> See the discussion in paras 3.2.3.1.1, 3.2.3.1.2 and 6.4.2.

impact assessment will be the DEA, the DWS, the DRDLR, the DAC, the DHS and the DMR may access the report of the cultural impact assessment in reaching decisions where the development intersects with their core competencies, such as water management, rural development, human settlement and the exploration of mineral resources.

It is envisaged that such cultural impact assessment independently conducted alongside the environmental and social impact assessment will generate information on the relevant cultural interests which the government department must take into consideration in the planning, execution and post-execution stages of the development cycle. It is proposed that such information should be used to guide decision-makers in reaching culturally sensitive decisions in pursuance of sustainable development. For example, the *Oudekraal* case would have benefitted from such a cultural impact assessment that would have given the decision-makers an opportunity to deliberate on the impact of the proposed development on the kramats which were located on the site.<sup>71</sup>

#### *6.5.4 Optimising judicial consideration of cultural interests*

The judiciary should approach cultural interests through the lens and ethos of transformative constitutionalism. If this approach were adopted, adjudicating over cultural interests would have the purpose of fulfilling the social justice and transformation values of the *Constitution*, which also inform the interpretation of sustainable development. Alternatively, if the current understanding of sustainable development as being inclusive of culture, as suggested during the discussion in Chapter 2, were to be applied by the courts, then the opportunity to include cultural interests in the consideration of development could be taken on a case-by-case basis. Adopting this approach would assist the courts to streamline the range of issues that could be considered cultural interests, while allowing the inclusion of culture into sustainable development thinking.

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<sup>71</sup> See the discussion in paras 5.5.1.1 and 6.4.4.

## **6.5 Future research**

This thesis has shown that the concept of sustainable development is firmly established in South Africa and has continued to gain attention within the environmental protection paradigm.

However, the limited scope of the research mapped out in this thesis means that there are other specific areas of research which deserve further scholarly investigation. Such areas include but are not limited to:

- (a) advancing the role of civil society through the principles of public participation in the governance of cultural interests at the local level;
- (b) the regulation of the inflow and outflow of cultural goods and services with reference to South Africa's obligations under the 2005 *Cultural Diversity Convention*;
- (c) the potential of indigenous knowledge systems in identifying specific cultural interests that are adversely affected by development projects such as mining projects in South Africa;
- (d) the extent to which foreign investors such as multinational companies might contribute to culturally sensitive development in South Africa through their corporate social responsibility obligations; and
- (e) a legal inquisition into the duty of the state to respect, protect, promote, and fulfil the constitutionally guaranteed right to enjoy one's culture at the interface of the concepts of human vulnerability and sustainable development in South Africa.

Overall, the thesis sought to create a legal awareness on how cultural interests fit into the mainstream of sustainable development thinking. The rich cultural diversity and cultural heritage of South Africa gives a wealth of resources that can be used to advance culturally sensitive sustainable development. The current legal landscape in South Africa, if it is applied as a governance and decision-making tool, may promote

rather than limit the ability of cultural interests to flourish as a relevant and productive contributor to sustainable development.

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