Cultural heritage protection: the authority and functions of municipalities

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> Start now. Start where you are. Start with fear. Start with pain. Start with doubt. Start with hands shaking. Start with voice trembling but start. Start and don't stop. Start where you are, with what you have. Just... start.— Ijeoma Umebinyuo

Thank you Yahweh! Only by Your grace and mercy.

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Abstract

Historically, the heritage sector in South Africa was primarily focused on the preservation of architecture, monuments and buildings. The threat to tangible manifestations of heritage was also globally acknowledged. The scope of protection of cultural heritage has broadened, however, since the enactment of the *National Heritage Resources Act* 25 of 1999 (the NHRA). Cultural heritage resources subsequently include objects, items or expressions, including traditional and religion-affiliated practices. Cultural heritage is therefore viewed in a broad context that is not limited to the arts, customs and traditions, but incorporates anything and everything about life pertaining to human experiences. The management and protection of *heritage resources* are governed according to the provisions of the NHRA. Cultural heritage resources are increasingly threatened by factors such as external environmental pressures, urban development, warfare, poverty and a lack of awareness, which are especially encountered on a local level. This raises the question on what the role of state governments and specifically, local authorities are in cultural heritage management.

This study explores the authority and functions of local government in relation to cultural heritage resources management and protection. In terms of the schedules of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*), the matter of culture is not a function of local government. This is a function assigned to the national and provincial spheres in terms of Schedules 4A and 5A of the *Constitution*. However, it can be argued that in the collective, municipalities (as the government sphere closest to the community), have a responsibility to execute any aspects of this function that are incidental to other typical local government affairs. This view finds support in the interpretation of other rights in the *Constitution* as well as the heritage, environmental and local government framework legislation and policy documents of South Africa. The study further unpacks the cultural governance instruments that have been used by a selected number of municipalities to enable them to protect and manage cultural heritage resources.

Key words: cultural heritage, cultural law, environment, local government law

Opsomming

Die erfenissektor in Suid-Afrika was histories primêr gefokus op die behoud van argitektuur, monumente en geboue. Die bedreiging aan die tasbare manifestasies van erfenis was ook wêreldwyd erken. Die omvang van die beskerming van kultuurerfenis het egter sedert die inwerkingtreding van die *Wet op Nasionale Erfenishulpbronne* 25 van 1999 (*Wet op Nasionale Erfenishulpbronne*) uitgebrei. Kultuur erfenishulpbronne sluit nou ook voorwerpe, items of uitdrukkings en tradisionele en godsdienstige geaffilieerde praktyke, in. Kultuur erfenis word dus in 'n breë konteks gesien wat nie beperk is tot kuns, gebruike en tradisies nie, maar die lewe in sy totaliteit insluit wat menslike ervarings betref. Die bestuur en beskerming van spesifiek *erfenishulpbronne* word gereguleer ooreenkomstig die bepalings van die *Wet op Erfenishulpbronne*. Kultuur erfenishulpbronne word toenemend bedreig deur verskeie faktore soos eksterne omgewingsverandering, stedelike ontwikkeling, oorlogvoering, armoede en gebrekkige bewustheid, veral op 'n plaaslike vlak. Dit laat die vraag ontstaan oor watter rol die staat en spesifiek plaaslike regerings het betreffende die bestuur van kultuur erfenishulpbronne.

Hierdie studie ondersoek die bevoegdhede en funksies van plaaslike regering met betrekking tot die bestuur en beskerming van kultuur erfenishulpbronne. Ingevolge die skedules tot die *Grondwet van die Republiek van Suid-Afrika*, 1996 (die *Grondwet*), is kultuur aangeleenthede nie 'n funksie van plaaslike regering nie. Hierdie is wel 'n funksie wat deur Bylaes 4A en 5A van die *Grondwet* aan die nasionale en provinsiale sfere van die regering toegewys word. Daar kan egter geargumenteer word dat munisipaliteite tesame en as die sfeer van regering die naaste aan mense, 'n verantwoordelikheid het om daardie aspekte van hierdie funksie uit te voer wat verband hou met ander tipiese plaaslike regeringsake. Hierdie siening vind ondersteuning in die interpretasie van ander regte in die Grondwet, erfenis-, omgewings- en plaaslike regeringraamwerkwetgewing en beleidsdokumente. Hierdie studie pak verder die kultuur bestuursinstrumente uit wat deur spesifieke munisipaliteite gebruik word om hulle in staat te stel om kultuur erfenishulpbronne te beskerm en te bestuur.

Sleutelwoorde: kultuur erfenis, kultuurreg, omgewing, plaaslike regeringsreg

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List of abbreviations

AU	African Union
CCTMM	City of Cape Town Metropolitan Municipality
CHRM	Cultural Heritage Resources Management
CMAS	Conservation and Management of Archaeological Sites
DAC	Department of Arts and Culture
EIA	Environmental Impact Assessment
HIA	Heritage Impact Assessment
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
IDP	Integrated Development Planning
IRRC	International Review of the Red Cross
LSDF	Local Spatial Development Framework
MTSF	Medium Term Strategic Framework
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
NHC	National Heritage Council
NHCA	National Heritage Council Act 19 of 1999

NHRA	National Heritage Resources Act 25 of 1999
NLHR	National Liberation Heritage Route
PELJ	Potchefstroom Electronic Law Journal
SAGNCA	South African Geographical Names Council Act 118 of 1998
SAHRA	South African Heritage Resources Agency
SAJCH	South African Journal for Cultural History
SAJELP	South African Journal of Environmental Law and Policy
SAPL	South African Public Law
SALGA	South African Local Government Association
SDF	Spatial Development Framework
SPLUMA	Spatial Land Use and Management Act 16 of 2013
UNESCO	United Nations Educational, Scientific and Cultural Organisation

1 Introduction

> Heritage is our legacy from the past, what we live with today, and what we pass on to future generations. Our cultural and natural heritages are both irreplaceable sources of life and inspiration.[1]

Over the years, environmental law in South Africa has gradually shifted from a relatively narrow focus on issues relating to nature conservation to recognition of the need to also protect the vast manifestations of cultural diversity.[2] The latter includes an abundance of heritage resources and traditional and cultural practices.[3] The legal recognition of cultural heritage as a component of environmental protection stems in part from the increasing loss, decay, damage and destruction of heritage resources.[4] Cultural heritage is often linked to some of the most pressing challenges that humanity faces as a whole. These challenges range from climate change and natural disasters, to issues such as access to education, health, marginalisation and socio-economic inequalities.[5] It is understood that the loss and destruction of heritage resources pose a significant threat to the health of the cultural diversity, economy and tourism sectors of South Africa.[6] The flipside is that the protection of heritage resources serves the interests of many sectors of the South African society.

Cultural heritage protection is highlighted in the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) in the form of entrenched rights to culture and religion (sections 30 and 31). Interests in heritage resources can potentially also be enforced through the reference to "human well-being" in the section 24(a) constitutional environmental right.[7] To safeguard cultural heritage resources and to preserve heritage in South Africa the *National Heritage Resources Act* 25 of 1999

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1 UNESCO date unknown http://whc.unesco.org/en/about/.

2 Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 1.

3 See the discussion on the link between cultural heritage and the environment in Rautenbach, Hart and Naudé "Heritage Resource Management" 825; Kotzé and Jansen van Rensburg 2003 *QUTLJJ 1*.

4 *Convention for the Protection of the World Cultural and Natural Heritage*, 1972.

5 UNESCO *Culture for Development Indicators "Heritage"* 132.

6 Section 5(5) of the *National Heritage Resources Act* 25 of 1999 provides that heritage resources contribute greatly to the education, research and tourism sectors, the loss and destruction thereof will have great impact on these and many more sectors in South Africa; National Heritage Council *Critical Reflections on Heritage* 24.

7 Section 24(a) of the *Constitution*.

(NHRA) was enacted. Cultural heritage since enjoys legislative protection and official statutory recognition.[8] The heritage resources which are considered to be of cultural significance for the community form part of the so-called national estate and fall within the framework of protection of the NHRA.[9] Most importantly, the provisions of the *Constitution* and the NHRA, read together with environmental legislation such as the *National Environmental Management Act* (NEMA)[10] and planning law legislation such as the *Spatial Planning and Land Use Management Act* (SPLUMA),[11] strongly suggest that there is an extended role for local government (municipalities)[12] in the protection and management of heritage resources.

The NHRA accordingly provides for a three-tiered system of heritage resource management, allowing for the protection and management of cultural heritage in all three spheres of government.[13] The Act divides heritage resources on a Grade I to Grade III scale, with local government being tasked with the protection of Grade III cultural heritage resources.[14] In making sense of the division of authority and responsibility, it is important to note that South African law provides for the principle of subsidiarity, which highlights the idea of the devolution of public governance functions and powers to different sub-national governmental structures.[15] In addition,

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8 The objectives of the NHRA are to provide for the effective management, identification, assessment and preservation of heritage resources in South Africa, as seen from the long title of the NHRA read together with the preamble of this Act.

9 Section 3(2) of the NHRA provides a descriptive list of the national estate.

10 *National Environmental Management Act* 25 of 1999. Although heritage resource legislation has developed distinctively from environmental law, cultural heritage forms part of the total environment. See section 2 of NEMA for the definition of the "environment".

11 *Spatial Planning and Land Use Management Act* 16 of 2013.

12 In the context of this study a municipality is defined as "an organ of state within the local sphere of government exercising legislative and executive authority within a determined area" as per section 2 of the *Local Government: Municipal Systems Act* 32 of 2000. The terms local government, local authorities and municipalities will often be used interchangeably in this discussion. However, it must be understood that they all refer to the local sphere of government (comprising of metropolitan, district and local municipalities).

13 Section 7(1)(a)-(c) of the NHRA provides for the heritage assessment criteria and grading.

14 Section 7(1)(a)-(c) of the NHRA.

15 The principle of subsidiarity is not contained expressly in legislation but is best described in Du Plessis 2010 *PELJ* 1850. However, section 40 of the *Constitution* makes provision for a system of co-operative governance between the different organs of state. Section 156(4) of the *Constitution* addresses the matter of institutional subsidiarity.

the legal concept of co-operative government[16] recognises that local government as one such sub-national government construct is co-responsible together with provincial and national government for the realisation and protection *inter alia* of cultural heritage-related rights and duties.

In general, local government derives its powers and functions from the provisions in the *Constitution* and from the *Local Government: Municipal Systems Act*.[17] The *Constitution* provides a list of functional areas for which local government is responsible in Schedules 4B and 5B. The *Constitution* further provides municipalities with the necessary legislative and executive powers to administer and fulfil these listed functions.[18] In addition to the allocated functions of municipalities, the *Constitution* makes provision for the assignment of a function to local government by the national and provincial authorities.[19] Adding to these important provisions is section 156(4), which creates the possibility of a Schedule 4A and 5A matter to be assigned to a municipality.[20] Despite this potential devolution of functions among the three spheres, this study focuses only on local government's "primary" authority in the protection of specific aspects of cultural heritage resources.

In the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Another*,[21] the protection, conservation and importance of cultural heritage resources was judicially confirmed. The case dealt with the development of a township in Cape Town which a Muslim community opposed due to the presence of burial sites on land which they regarded as sacred. The court held that having regard to the religious, cultural and environmental rights of the community the City of Cape Town could not allow the development to continue as these rights should be regarded as "integral to land

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16 Chapter 3 of the *Constitution*. Also see the discussion in Olivier "Co-operative Government and the Intergovernmental Division of Environmental Powers and Functions" 346.

17 32 of 2000 (*Systems Act*).

18 Sections 156(1) (a) and 156(2) of the *Constitution*. The implication is that if a function falls within local government's jurisdiction, it will have the authority and responsibility to fulfil such a function.

19 Section 15(1)(b) of the *Constitution*.

20 Section 156(4)(a) and (b) of the *Constitution*. This would occur only where it would be more effective and efficient for the matter to be dealt with locally, and if the municipality has the capacity to administer the matter.

21 2010 1 SA 333 (SCA) (*Oudekraal* case).

development". [22] The outcome of this case illustrates the importance of local government's duty in a) identifying and managing local heritage resources and b) taking into account the cultural and religious rights and needs of local communities.

The research question to be answered in this study is what the authority and functions of municipalities entail in as far as it concerns cultural heritage protection. Against the background of the above, the aim of this study is therefore to discuss the authority (legislative and executive) and functions of municipalities in relation to cultural heritage resource protection. Specific attention is paid to local heritage resources such as burial grounds, landmarks and architecture, and to living heritage such as initiation schools and religious practices. A literature survey of relevant textbooks, case law, law journals, legislation, by-laws (dealing with cultural practices and heritage) and electronic resources dealing with the authority and functions of municipalities in the conservation and protection of cultural heritage resources has been undertaken.

In chapter 2 of this study the concept of cultural heritage protection is discussed from the perspectives of international, African regional and South African law. The chapter reviews available literature in order to serve as the background and theoretical foundation for the remainder of the discussion. This is followed in chapter 3 by a critical analysis of the legal framework for cultural heritage protection. Chapter 4 follows with a discussion of the authority and functions of local government as prescribed by the statutory and policy framework of South Africa, with reference to the protection of specific cultural heritage resources, before the study is concluded in chapter 5.

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22 *Oudekraal* case paras 75 and 76.

2 The concept of cultural heritage resources

This chapter seeks to provide clarity on the concept of cultural heritage resources as it is characterised under international, regional and South African law.[23] This includes an analysis of the various concepts as entrenched under the relevant conventions, legislation and policy documents, and in the definitions proposed by scholarly writers in the field of cultural heritage management. Nafziger[24] states that when viewing the term cultural heritage from a broad perspective it is deemed to refer to the "myriad manifestations of culture that human beings have inherited from their forebears". Using this statement as a point of departure, this chapter considers heritage resources in a number of their various manifestations e.g. buildings, art, landscapes and language, amongst others.

2.1 Cultural heritage defined from an international perspective

2.1.1 *Background*

Cultural heritage is defined and described in a multitude of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Council of Monuments and Sites (ICOMOS) documents, amongst others. The instruments, as will be discussed below, have legal relevance in South African law in terms of sections 233 and 39 of the *Constitution* respectively which provides that a reasonable interpretation of legislation is required which is consistent with international law.[25] Furthermore, that international law must be considered when any court, tribunal or forum interprets any rights contained in the Bill of Rights.[26] The body of international law applicable to the conservation and protection of cultural heritage resources has to be taken into account in order to give effect to the cultural

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23 Whilst a great number of legal instruments, policy papers and literature are available on culture, heritage and cultural heritage, this chapter will be refined to include only the definitions relevant in answering the legal question. For a more comprehensive discussion of this topic please see Kotzé and Jansen van Rensburg 2003 *QUTLJJ*, Roodt *Protection of Cultural Heritage*, and Keitumetse *African Cultural Heritage Conservation and Management*, amongst others.

24 Nafziger "Introduction" xiii.

25 Section 39(1)(b) provides that international law must be considered in the interpretation of the Bill of Rights, while section

26 Sections 233 and 39(1) (b) of the *Constitution*.

rights of every individual, group or community in South Africa.[27] This chapter also explores the definitions of cultural heritage as proposed by international authors and scholarly writers in the field of cultural heritage management.

2.1.2 *International conventions and policy documents*

2.1.2.1 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954

The very first notable recognition of cultural heritage in international law was based purely on the need to protect cultural property during wars.[28] Resulting from this recognition, the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*[29] was entered into in 1954. The *Hague Convention* explicitly addresses the concept of "cultural property". In article 1 cultural property is said to cover:

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

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27 See section 231(2) of the *Constitution* which provides that the Republic is bound by an international agreement after both houses of Parliament have approved it. South Africa has ratified various international instruments related to cultural heritage and heritage resources, which means that these instruments must be incorporated into national legislation in order to become domestically enforceable law by virtue of section 231(4) of the *Constitution*. However, many other relevant international and regional agreements have not been ratified or enacted into law. They are, however, relevant in terms of developing and interpreting our own domestic legislation and to enforce and give effect to the contents of the internationally recognised environmental, religious and cultural rights. International law therefore serves as a legal and political guideline in the governance of cultural heritage related issues in South Africa. This occurs by virtue of the country's membership of international and regional organisations. See sections 231, 233 and 39 of the *Constitution*; Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 5; Owosuyi 2015 *PELJ* 2038.

28 Blake 2000 *ICLQ* 61.

29 The *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 1954 (the *Hague Convention*). This Convention has been ratified by South Africa.

(c) Centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'.[30]

These provisions of the *Hague Convention* are relevant in so far as they indicate that state authorities have generally leaned more towards the protection and management of their tangible (movable and immovable) heritage resources. This highlighted the fact that the threats to tangible forms of cultural heritage were of such a nature that their preservation was reliant on the successful acceptance and ratification of the *Hague Convention*. This illustrates why member states generally have express national laws prohibiting the destruction, damage to, and removal or relocation of their tangible heritage resources without the consultation of the responsible state authority.[31]

2.1.2.2 Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972

The *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1972 (*World Heritage Convention*)[32] defines the concept of cultural heritage resources to include both tangible and intangible forms of culture.[33] The 1972 Recommendation formed the foundation of how the concept of cultural and natural heritage has been perceived by the *World Heritage Convention*.[34] The *World Heritage Convention* describes the notion of cultural heritage by referring to the categories of monuments, groups of buildings and sites.[35] These three categories consist of every single tangible object which is considered to be of outstanding value from an historical, artistic, scientific, aesthetic, ethnological or anthropological point of view,

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30 Article 1(a)-(c) of the *Hague Convention*.

31 In the context of South Africa this is illustrated by the multitude of heritage laws and policies.

32 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1972. The predecessor of this instrument is the *Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage*, 1972 (the 1972 Recommendation), which was the first legal instrument to refer to the concept of cultural heritage and the foundation of one of the most popular international instruments concerning cultural heritage resources.

33 National Heritage Council *Critical Reflections on Heritage* 11.

34 It must be noted that South Africa ratified the Convention on the 10 July 1997. The Convention has been incorporated into national legislation and can be enforced domestically.

35 Article 1 of the *World Heritage Convention*.

with the exclusion of museums, archives and libraries.[36] It further describes natural heritage as consisting of natural features (physical and biological formations), geological and physiological formations (including the habitat of threatened species of animals and plants), natural sites or areas specifically of value from the scientific, conservationist and natural beauty point of view.[37] An aspect of importance arising from the definition under the Convention is the fact that the concept of natural heritage also includes the biological component i.e. the natural environment.[38] This is emphasised by the inclusion of natural sites and delineated areas (the habitat of threatened species of animals and plants).[39] In terms of this, conservation areas may be considered to be areas of natural heritage.[40] Natural heritage refers to both areas and objects of cultural significance, and also addresses biodiversity and protected areas. [41] The relevance here is that heritage legislation in conjunction with environmental laws can be used to strengthen the argument that municipalities have a responsibility to regulate and manage cultural matters. This argument is further developed in chapter 3 of this study.[42]

Furthermore, in terms of the *World Heritage Convention*, state parties have a wide discretion with regard to identifying and delineating their own natural and cultural heritage from the properties on their territories.[43] This identification, of course, must be consistent with the definitions of natural and cultural heritage as provided by the Convention. Once they have delineated the objects of cultural significance, these

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36 Article 1 of the *World Heritage Convention*. Also see National Heritage Council *Critical reflections on heritage* 12.

37 Article 2 of the *World Heritage Convention*. Also see National Heritage Council *Critical reflections on heritage* 12.

38 Article 2 of the *World Heritage Convention* provides that natural heritage consists of the following, amongst others: natural features consisting of physical and biological formations or groups of such formations, and the geological and physiographical formations and previously delineated areas which constituted the habitat of threatened species of animals and plants, natural sites or previously delineated natural areas. All of these have to be of outstanding value from the aesthetic or scientific point of view.

39 Alberts *Biodiversity Conservation in Southern and South Africa* 22.

40 Alberts *Biodiversity Conservation in Southern and South Africa* 22.

41 See the provisions of the NEMA and the *National Environmental Management Biodiversity* Act 10 of 2002.

42 See paragraph 3.4 specifically for a discussion on the relevance of environmental legislation.

43 Article 3 of the World Heritage Convention; Alberts *Biodiversity Conservation in Southern and South Africa* 22-23.

objects must be afforded the necessary protection and managed accordingly.[44] This means that each country must therefore conserve and protect its national heritage through legal and administrative measures and by integrating the protection of heritage into planning programmes, for example.[45] This establishes a direct link between the environment, cultural heritage and planning law sectors.

2.1.2.3 Convention for the Safeguarding of Intangible Cultural Heritage, 2003

In terms of the *Convention for the Safeguarding of Intangible Cultural Heritage* (hereafter ICH Convention)[46] the concept of intangible cultural heritage denotes:

> The practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.[47]

Intangible cultural heritage therefore not only covers immaterial manifestations of culture and heritage but also the material (tangible) dimensions. This indicates a close interaction between people with nature, the environment and their history. This Convention further emphasises the role that museums and local stakeholders can take on, in promoting the awareness of intangible cultural heritage and the importance thereof for humanity.[48] It must be noted that intangible cultural heritage is to be regarded as a people's heritage only when it has been recognised as such by the communities, groups or individuals that create, maintain and transmit it. In the absence of such recognition, it is impossible for anybody else to decide on their behalf that a given expression or practice constitutes their heritage.[49] This highlights the important function that public participation should have in local governance efforts.

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44 Article 4 of the *World Heritage Convention*.
45 Article 5(1)-(5) of the *World Heritage Convention*; Department of Arts and Culture *Review of Heritage Legislation* 232.
46 *Convention for the Safeguarding of Intangible Cultural Heritage*, 2003 (the ICH Convention).
47 Article 2 of the ICH Convention.
48 Article 10(a) of the ICH Convention.
49 UNESCO *Intangible Cultural Heritage* 5.

2.1.2.4 Concluding remarks

In the international legal instruments discussed above it can be seen that cultural property is used as the term of choice to denote the protection and preservation not only of movable but also of immovable cultural material.[50] In addition, cultural property is seen to constitute a part or form of cultural heritage (and not the whole). This indicates that cultural heritage extends beyond mere cultural property and should also include cultural practices i.e. intangible forms such as cultural expressions and rituals. The international instruments discussed here aim to ensure that the living expressions and traditions as perceived by an individual or a community are given adequate protection for the present and future generations across the world.[51] What seems to be a recurring notion is the emphasis placed on the significance or the value attached to a specific tangible or intangible form of cultural heritage. This signifies the importance of the community's or the individual's perception of that particular form of heritage resource or the expression of such culture.

2.1.3 *International literature*

There are many authors in the cultural heritage sector who have different views on the concept of cultural heritage resources. Forrest[52] for example suggests that culture is society, and points to the values, beliefs and ideologies that are expressed in its languages, practices and objects, whilst heritage, from his perception, denotes all that which is received from predecessors, and attaches itself easily to anything considered cultural.[53] Forrest contends that, in consideration of the 1968 Recommendation,[54] cultural heritage is deemed to give reflection to value, and intuitively gives rise to notions of significance, reflected both in tangible and intangible manifestations of a culture.[55] The author further elaborates that the

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50 Roodt *Protection of Cultural Heritage* 231.
51 UNESCO *Intangible Cultural Heritage* 12.
52 Forrest *International Law and the Protection of Cultural Heritage* 2.
53 Forrest *International Law and the Protection of Cultural Heritage* 2.
54 *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private works*, 1968.
55 Forrest *International Law and the Protection of Cultural Heritage* 2.

manifestations of cultural heritage may include almost anything man-made or given value by man, and that cultural heritage may be embodied in the tangible as well as the intangible (e.g. in both the music of a people and the instrument on which it is played; in a landscape and a people's belief in that landscape; and in their oral traditions).[56] The concept of culture as contemplated here suggests that culture is not constant and that what we are able to classify and define as culture will be dependent on how a particular individual or community perceives, interacts with and values it. In essence, when heritage and culture unite we find a live, multi-dimensional manifestation of the context of human nature, which is attributable to a person's natural and cultural heritage (whether built, natural, material or immaterial).

From the perception of Frigo,[57] cultural heritage, when viewed against cultural property, is broader in scope. This is because it "expresses a form of inheritance to be kept in safekeeping and handed down to future generations."[58] In Frigo's view cultural property is deemed to be inappropriate and inadequate for the range of matters that are covered by cultural heritage. It is assumed, therefore, that the concept of cultural property does not have the wide reach to intangible, immaterial and living heritage dimensions that are attributable to cultural heritage.

Merryman[59] suggests that cultural property can be viewed as a component of human culture without taking into account its origins, present location, property rights or national jurisdiction. Evans, however, indicates that the concept of heritage is one that transforms in order to suit its relevance to circumstances.[60] He states further that the idea of a common heritage of mankind, as described under the World Heritage Convention, can be seen to not only fuse cultural and natural heritage but also to link to ideas about the past, present and future.[61] He adds that this common heritage of mankind shifts the relationship between animate and inanimate biosphere

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56 Forrest *International Law and the Protection of Cultural Heritage* 2-3.
57 Frigo 2004 *IRRC* 369.
58 Frigo 2004 *IRRC* 369.
59 Merryman "Two Ways of Thinking about Cultural Property" 831.
60 Evans *Principles of Environmental and Heritage Law* 19.
61 Evans *Principles of Environmental and Heritage Law* 19.

from asserted sovereignty to a co-operative sustainability and a furthering of a present and future common good.[62]

As Evans suggests,[63] the concept of heritage can be seen as a creature of international law, municipal law and local custom, deemed as relating to the aspects of a community's shared inheritance which they choose to foster, protect and pass on to future generations. This localised view of heritage emphasises the importance of local authorities in the conservation of heritage by way of creating laws and policies to give effect to this protection. Lowenthal[64] emphasises that heritage denotes everything that we deem to have been handed down to us from the past. He continues that although heritage is not always uniformly desirable, "it is widely viewed as a precious and irreplaceable resource", and that it is essential to people's personal and collective identities. As he sees it, this inherited legacy originates from both nature and culture.[65] He states the following:

> Natural heritage comprises the lands and seas we inhabit and exploit, the soils and plants and animals that constitute the world's ecosystems, the water we drink, to the very air we breathe. To be sure, human action has profoundly reshaped all these elements of nature, but we nonetheless consider them as quite distinct from our cultural heritage— the buildings and engineering works, arts and crafts, languages and traditions, humans themselves have created out of nature's raw materials. Yet our natural and our manmade heritages exhibit remarkable parallels along with instructive differences, as do campaigns to conserve nature and to preserve remnants of antiquity.[66]

The author therefore acknowledges that heritage and the environment are often seen as two distinct and unrelated sectors and argues that they must instead be seen as complementary of each other. Lowenthal[67] avers that the popularity of cultural heritage has increased exponentially in recent years, despite or perhaps because of the lack of clarity over what it actually is, particularly in relation to ideas of intangible cultural heritage. This exponential increase can therefore be appropriated to the creations of international law on the issues of cultural property,

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62 Evans *Principles of Environmental and Heritage Law* 19.
63 Evans *Principles of Environmental and Heritage Law* 17.
64 Lowenthal "Natural and Cultural heritage" 79.
65 Lowenthal "Natural and Cultural heritage" 79.
66 Lowenthal "Natural and Cultural heritage" 80.
67 Lowenthal "Natural and Cultural heritage" 86.

culture and heritage broadly, cultural diversity and finally cultural heritage. Shi reiterates the statements that cultural diversity and biodiversity are inter-related, that cultural diversity can be seen to mirror biodiversity, and that human diversity and natural diversity are inseparable.[68] The author states that when cultural diversity is aligned with biodiversity they may maximise the role of all cultures in all their dimensions and expressions, and in all scenarios of human life.[69] This signifies a direct move to the alignment of the two sectors by recognising the importance of integrating biodiversity and cultural heritage in order to maximise the potential for conservation efforts.

2.2 Cultural heritage defined from an African regional perspective

2.2.1 *Background*

Africa is famously known for its diverse cultural heritage, which is accompanied by numerous traditions, artworks, monuments and culturally significant sites.[70] In most African countries, the approach and perspectives on cultural heritage resources have largely been shaped and influenced by international law.[71] The discussion below sets out the scope and content of some of the relevant legal instruments in the African region and reviews the definitions of cultural heritage by African scholars.

2.2.2 *Regional policies, conventions and documents*

2.2.2.1 Cultural Charter for Africa, 1976

The *Cultural Charter for Africa*, 1976 which has been adopted by various heads of state and governments, aims for the development of the continent by providing Africa with sound cultural policies.[72] This Charter encourages African Union member states:

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68 Shi *Free Trade and Cultural Diversity in International Law* 46. This view is also expressed in international instruments as can be seen in the *World Heritage Convention*.

69 Shi *Free Trade and Cultural Diversity in International Law* 48.

70 Ndoro, Mumma and Abungu *Cultural Heritage and the Law* 5.

71 Keitumetse *African Cultural Heritage Conservation and Management* 23.

72 The preamble of the *Cultural Charter for Africa*.

> To rehabilitate, restore, preserve and promote cultural heritage while developing, within itself, all the dynamic values and rejecting anything that hinders progress.[73]

It appears as if the Charter really sought to change the view of cultural heritage resources from mere cultural property. This is achieved by encouraging member states to preserve and promote cultural heritage. It not only requests of states to make provision for the (legislative) protection of cultural heritage,[74] but also suggests that states create an awareness of cultural heritage.[75]

This Charter can be viewed as a framework for the development of cultural heritage protection in African countries.[76] This is especially illustrated in that the Charter requires African states to "integrate a cultural development plan in the overall programme for economic and social development."[77] This suggests that culture should be regarded as an important pillar in the (sustainable) development of African nations. It also emphasises that the training of competent staff, at all levels (including the local), should be used in meeting these objectives, which are strengthened by the provisions of articles 12-16.[78] Chapter vii of this Charter is of particular relevance as it addresses the protection of African cultural heritage.[79] To this extent article 26 provides that African cultural heritage must be protected legally and practically in the manner laid down in the international instruments and in "conformity with the best standards applicable in this field."[80]

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73 Article 1 (b) and (h) of the *Cultural Charter for Africa*.

74 In terms of article 6(a) of the *Cultural Charter for Africa* states are required to develop a national cultural policy which ought to be designed as a codification of social practices with the aim of satisfying cultural needs within the available resources.

75 Own emphasis.

76 Du Plessis and Rautenbach 2010 *PELJ* 51.

77 Article 6(b) of the *Cultural Charter for Africa*.

78 Article 6(2)(d) of the *Cultural Charter for Africa*. Article 13, for example, provides that in order for African states to achieve the aims laid down in the articles, they should adopt a training policy for specialists at all levels and in all fields. Yet again this includes local authorities.

79 See articles 26- 29.

80 Article 26 of the *Cultural Charter for Africa*.

2.2.2.2 African Charter on Human and People's Rights, 1981

The *African Charter on Human and People's Rights*, 1981 (Banjul Charter)[81] deals with a wide range of issues including cultural oppression, cultural diversity, national identity, education, cultural development, international cultural co-operation and language.[82] The Banjul Charter does not give a clear and precise definition of cultural heritage, but it promotes the idea that culture and heritage form an integral component of the national identity of a people.

Article 17(2) provides that "every individual may freely take part in the cultural life of his community". It therefore explicitly addresses a person's right to culture and to express such a cultural life. Furthermore, article 17(3) provides that it is the duty of the State to promote and protect the morals and traditional values identified by a community.[83] Furthermore, article 24 of the *Banjul Charter* provides that "all people shall have the right to a generally satisfactory environment favourable to their development".[84] This provision might be interpreted as including a person's cultural heritage in this environment. This is based on the claim that culture is an important component in the development of the African community.

A case of relevance in this instance is that of *African Commission on Human and People's Rights v Republic of Kenya*[85] in which a case was brought by the indigenous Ogiek community against the Kenyan government, alleging the violation of rights to life, property, culture, natural resources, development and religion amongst others.[86] The application was filed on behalf of the indigenous minority group, known as the Ogiek community, as a result of evictions from the Mau Forest complex.[87] The African Commission sought and order to declare that the evictions be halted in light of the community's rights to the land. The Respondents (Kenyan Government) alleged that

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81 *African Charter on Human and People's* Rights, 1981 (the *Banjul Charter*).
82 Du Plessis and Rautenbach 2010 *PELJ* 52.
83 Article 17(3) of the *Banjul Charter*.
84 Article 24 of the *Banjul Charter*.
85 *African Commission on Human and People's Rights v Republic of Kenya* Application 006/2012 (hereafter Ogiek case).
86 These rights are contained in Articles 2, 4, 8, 14, 17(2)-(3), 21 and 22 of the *Banjul Charter*.
87 Ogiek case paras 5-8.

the eviction of the Ogiek community from their ancestral lands was necessary in order to protect and conserve the Mau Forest.[88] However, the court disagreed with the Kenyan government and held that their decision to evict the Ogiek community from the Mau Forest resulted in an infringement of the rights to culture, religion, property and natural resources.[89] In this instance the court referred to the right to manifest and practice religion as also including the rights to worship, engage in rituals, observe days of rest, to wear religious attire and to allow an assembly or worship in connection with a religion or belief and also to establish and maintain spaces for these purposes.[90]

The court held, in particular, that the eviction of the community from their ancestral land made it impossibly difficult for the Ogiek community to conduct religious practices and that this amounted in an unjustifiable interference with their right to freedom of religion.[91] To this end the court provided that the freedom to worship and engage in religious ceremonies is directly dependent on access to land and the natural environment.[92] In assessing whether article 17 was violated, the court stated that the protection of culture extends beyond the duty of the state to not destroy or deliberately weaken these minority groups.[93] The court held that this duty also requires the respect for, and protection of the cultural heritage that is essential to the group's identity. The outcome of this case illustrates the importance of the relationship between the environment and rights to culture and religion. It becomes clear that cultural and religious rights cannot be excluded in the environmental discourse. It further emphasizes that the needs and religious and cultural rights of [indigenous] communities must always be taken into account in the course of any decision undertaken by governments. This case also highlights the important role states can take on in the protection and preservation of the intangible cultural heritage of their communities.

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88 Ogiek case para 145.
89 The right to culture is contained in article 17(2) and (3), religion in article 8, property in article 14 and natural resources in article 21 of the *Banjul Charter*.
90 Ogiek case para 163.
91 Ogiek case paras 164- 169.
92 Ogiek case para 164.
93 Ogiek case paras 177- 179.

2.2.2.3 Charter for African Cultural Renaissance, 2006

The *Charter for African Cultural Renaissance*, 2006 (the *African Charter*) acknowledges the importance of preserving and promoting tangible and intangible cultural heritage by way of a national inventory,[94] especially with regard to the arts, history, handicrafts, traditions and (indigenous) knowledge.[95] This Charter replaced the *Cultural Charter for Africa* and addresses principles and objectives including identity and renaissance, African cultural diversity, the use of African languages, cultural development, the use of mass media, the protection of African cultural heritage, intra- and inter-African cultural co-operation, and the role of states in cultural development.[96]

The objectives and focus of the *African Charter* are not only to reconstruct and transmit the history of Africa but also to develop and manage cultural policies on a regional scale. What is apparent from this Charter is the emphasis on protecting and promoting intangible cultural heritage and the importance of state action in ensuring that access to culture and the participation of all stakeholders in culture is enhanced.[97] Similarly, it recognises local government, as well as the youth and elderly, as a cultural stakeholder and contends that it is instrumental in cultural development.[98] It is, therefore, the duty of states to build the capacity of the cultural sector and these stakeholders through training and by other means.[99] As a result, a move towards prescribing a role for local authorities in the protection and management of cultural heritage resources is gradually taking place in African governments.[100]

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94 Article 3(d) of the *African Charter* addresses the objective of the Charter as preserving and promoting the African cultural heritage through preservation, restoration and development.
95 The preamble of the *African Charter*.
96 Articles 5-33 of the *African Charter*.
97 Article 15 of the *African Charter*.
98 Article 11(1) of the *African Charter*.
99 Article 12(1) of the *African Charter*.
100 Barillet, Joffroy and Longuet *Cultural Heritage and Local Government* 28.

2.2.3 *Literature on the region*

African cultural heritage has long been threatened by a wide range of factors including colonialism, environmental pressures, urban development, warfare, poverty and a lack of awareness of the value of heritage, to name a few.[101] The future of cultural heritage in Africa, therefore, undoubtedly remains an issue of concern.[102] Henriques[103] attends to this by stating that due to the historical past of Africa having been suppressed, the inventory of its cultural heritage and the preservation thereof has been blocked. She refers to cultural heritage as being tied to cultural areas and that African cultures spread outwards from their place of origin and are linked to cultural practices more than geographical areas.[104] This view moves away from thinking of cultural heritage as only that which is attached to a certain area, site or place to something which exists in itself, outside of a geographical location. However, Yoshida[105] contends that the notion of intangible heritage still needs much exploration. He adds that when this notion is viewed in the context of the definition as provided for by the ICH Convention, intangible cultural heritage becomes fundamental to human existence. Furthermore, it represents the knowledge and memory of human beings, which is continuously constructed and reconstructed.[106]

Barillet, Joffroy and Longuet contend that human creativity not only extends to the construction of buildings or the manufacturing of precious objects, but that it also entails creating original cultural forms, which are not necessarily material.[107] In their view initiation rites, for example, point to the original knowledge practices (e.g. concerning nature or social interaction) and accomplishments of a specified period in time.[108] The authors state that the preservation of intangible heritage is possible only

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101 Eboreime "Challenges of Heritage Management in Africa" 1; Barillet, Joffroy and Longuet *Cultural Heritage and Local Government* 7-8.
102 Yoshida "Introduction" 1.
103 Henriques "Cultural Itineraries and Exchange Routes" 98.
104 Henriques "Cultural Itineraries and Exchange Routes" 98.
105 Yoshida "Introduction" 5.
106 Yoshida "Introduction" 5.
107 Barillet, Joffroy and Longuet *Cultural Heritage and Local Government* 8-9.
108 Barillet, Joffroy and Longuet *Cultural Heritage and Local Government* 9.

through co-operation by all levels of government which are responsible for legislation, and local communities which are able to identify their own heritage.

Keitumetse[109] views cultural resources as remnants of people's interactions with the environment, including archaeological materials and historical landscapes. She states that heritage is regarded as that which has been inherited from the past by the present and those heritage resources may manifest in natural or cultural dimensions.[110] Cultural heritage, in her view, refers to cultural resources that have been chosen by society as being relevant to their existence, and might serve several purposes including political, economic and psychological purposes.[111] This extends the view of cultural heritage beyond just being significant but to also being of a socio-economic value to the community to which these cultural resources belong.

Le Berre and Messan[112] point out that "natural heritage in Africa is the basis of a community's identity" and that this also aids in their development. They include the intangible dimension of this view by stating that it is the traditional influences that have come to create our cultural identities.[113] According to their views the biological and cultural elements are inseparable and they are also crucial for development. They argue that although several African buildings can be found on the World Heritage List, these physical structures still do not constitute the main part of Africa's heritage.[114] In their view it is the human arrangement of places i.e. cultural landscapes, holy places, springs, rivers, trade routes and waterways that matters. They contend that it is these things which give structure to a place and show the mark of human beings. This view touches on all components that are encountered locally, which should be protected if deemed to be of significance to a community. It also signifies that cultural heritage cannot be removed from the environment, social and economic fulfilment and development.

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109 Keitumetse *African Cultural Heritage Conservation and Management* 5.
110 Keitumetse *African Cultural Heritage Conservation and Management* 5.
111 Keitumetse *African Cultural Heritage Conservation and Management* 5.
112 Le Berre and Messan "From Managing Natural Areas to African Cultural Heritage" 84.
113 Le Berre and Messan "From Managing Natural Areas to African Cultural Heritage" 84.
114 Le Berre and Messan "From Managing Natural Areas to African Cultural Heritage" 84.

2.2.4 *Concluding remarks*

What can be seen from the above discussion is that the focus has largely been on immovable tangible heritage in African instruments and literature, which corresponds with the development of the body of international law applicable to heritage protection. This position has changed with the recognition and protection of the various forms of immaterial cultural heritage and the preservation of Africa's rich cultural diversity. In the light of the definitions provided by scholarly writers, a move away from the traditional view of cultural heritage resources, such as archaeological heritage for example, is noticeable. This new, more modern approach to cultural heritage as the living heritage of all people seeks an improved understanding of both culture and heritage. A move towards recognising cultural heritage as an integral component of the environment and development is also noticeable in many of the authors' views on cultural heritage resources.

2.3 The concept of cultural heritage resources defined in the South African context

2.3.1 *Background*

In the past, the heritage sector in South Africa was primarily focused on preserving architecture and structures in the natural and physical built environment with a colonial and Eurocentric influence or significance.[115] With the adoption of the *Constitution* and a new system of governance, a radical shift was noticeable in the approach to management and governance in the heritage sector. This has become evident in the identification of and increased focus on both tangible and intangible heritage resources by several structures in government. This shift in the public heritage resources sector is further highlighted by the fact that South Africa has a number of legislative and policy documents specifically designated for the management and protection of its cultural heritage resources.

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[115] Rautenbach, Hart and Naudé "Heritage Resource Management" 822.

2.3.2 *South African legislation, policies and documents*

2.3.2.1 National Heritage Resources Act 99 of 1995

The international instruments have been used as a point of reference in framing heritage laws and policy in South Africa, and in particular of the NHRA. The NHRA does not provide a precise definition for cultural heritage resources but does include a descriptive list of the national estate, including both natural and cultural heritage.[116] This list includes everything, from immovable heritage such as buildings, historical settlements, landscapes, geological and archaeological sites (including graves and cemeteries) to movable objects such as ethnographic art, objects recovered from the soil or waters, books, records, documents and objects to which oral traditions are attached or which are associated with living heritage.[117]

The NHRA adds to the concept of cultural heritage resources by defining heritage resources as any place or object that is of cultural significance.[118] Section 2(vi) describes cultural significance as having reference to the aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance that these resources should possess.[119] This consequently covers a broad view of cultural heritage resources which includes tangible and intangible forms of cultural heritage and their various manifestations. In South African law intangible cultural heritage is often referred to as living heritage. In terms of the NHRA living heritage is understood to include:

> Cultural tradition, oral history, performance, rituals, modern memory, indigenous knowledge systems, skills and techniques, and the holistic approach to the environment, society and relationships.[120]

This definition of living heritage captures all the intangible aspects of cultural heritage. It reaffirms the significance of heritage from the perspective of a

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116 The list of what is included in the national estate can be found in section 3(1) and (2) of the NHRA. In section 3(3) we find a list of places and objects that may form part of the national estate; Rautenbach, Hart and Naudé "Heritage Resource Management" 826-827.

117 Section 1 of the NHRA.

118 Section 2(v)(i) of the NHRA; Rautenbach, Hart and Naudé "Heritage Resource Management" 825.

119 Section 2(vi) of the NHRA.

120 Section 2(xxi)(a)-(h) of the NHRA.

community (society). This also means that heritage authorities will be required to manage and protect cultural heritage resources in consideration of the community to which such heritage belongs.

Similar to the position in international and regional law, the NHRA also provides explicit recognition and protection for the built (physical) environment. It states that built heritage can be defined as heritage resources which are considered to be of cultural significance or which might have other special values (normally aesthetic, religious and/or artistic value) for the present community or for future generations. The Act further clarifies what this built environment signifies by stating that it generally refers to a place, which may include a site, area or region.[121] Furthermore, the concept of a place is defined in section 3 of the Act, stating that it includes buildings or structures, places to which oral traditions have been attached, places that are associated with living heritage, historical settlements, townscapes, landscapes, natural features, and geological sites of scientific importance that embody cultural significance.[122]

The relevance of the definitions provided is illustrated by the protection of these resources by the NHRA and its application in real life situations. This, in fact, is further highlighted by recent debates sparked by the removal of various statues and monuments erected during pre-democratic South Africa.[123] While many argued for the removal of the statues of what they deemed as colonial and apartheid enforcers,[124] the argument was also raised for the protection of these statues as they constituted objects of cultural significance worthy of protection. The question here is what an understanding of the term cultural significance entails. Does this concept exclude heritage resources associated with an oppressive history or which are

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121 Section 3(3) of the NHRA. In defining significance, section 3(3) of the NHRA identifies a range of criteria used in the assessment of the value or significance given to places (as defined in the previous paragraph). The significance of a place is often defined by the value it adds to the pattern of South Africa's history.

122 Section 2 of the NHRA.

123 Vollenhoven 2015 *SAJCH* 8-9.

124 The removal and relocation of some of these statues were preceded by the defacing, damage and destruction of a number of monuments and statues across South Africa (including the likes of Cecil John Rhodes, Paul Kruger, and Mahatma Gandhi etc.). See South African History Online 2015 http://www.sahistory.org.za/article/timeline-defacing-statues for a discussion of the events.

perceived as being contrary to the values of our constitutional state? Accordingly, it will have to be determined whether these heritage resources are excluded from the scope of protection by the NHRA. If so, this will certainly have an impact on the scope and extent of the functions of the relevant heritage authority, including municipalities, responsible for the management and protection of this form of cultural heritage.

2.3.2.2 National Heritage Council Act 11 of 1999

The *National Heritage Council Act* 11 of 1999 (NHCA) describes living heritage as referring to intangible aspects of culture, denoting cultural traditions, oral history, performances, indigenous knowledge systems, rituals and a holistic approach to nature, society and social relationships.[125] The definition of living heritage in terms of the NHCA is expressly aligned with that of the NHRA. The inclusion of cultural expressions, rituals and practices as well as indigenous knowledge systems in the NHCA is especially relevant for this study. These include customs such as initiation rites and the slaughtering of animals for religious and cultural purposes. This is important since these customs and religious practices are generally observed at the local level. Municipalities would therefore be better able to provide protection to these manifestations of cultural heritage.

2.3.2.3 World Heritage Convention Act 49 of 1999

The main objective of the *World Heritage Convention Act* (WHCA)[126] is to provide for the nomination, identification and management of World Heritage Sites. It also functions alongside the NHRA as an instrument to protect cultural and natural heritage resources.[127] This Act initiated the idea of designating particular sites on national territories which were regarded to be of cultural significance, with the aim of nationalising their protection under specific legislation.[128] South Africa has seven

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125 Section 2(iii)(a)-(h) of the NHCA.

126 *World Heritage Convention Act* 49 of 1999 (the WHCA). The *World Heritage Convention* was ratified in 1997 and as such incorporated into South African law, upon which the WHCA was developed in alignment with heritage and environmental legislation.

127 Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 9.

128 See the title of the Act.

declared World Heritage Sites, comprising of both natural and cultural heritage sites.[129] The main objective of the WHCA is to give effect to constitutional values and to ensure the sustainable development and protection (cultural and environmental) of these World Heritage Sites.[130] -

2.3.2.4 White Paper on Arts, Culture and Heritage, 1996

In terms of the *White Paper on Arts, Culture and Heritage*[131] reference is made to the terms culture and heritage. The concept of culture is defined to mean the following:

> The dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group. It includes the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions, heritage and beliefs over time and subject to change.[132]

This provision is important because it includes the fundamental rights of a human being in the definition of culture. This signifies, for example, that the rights in the *Constitution* also form part of a person's culture. The White Paper,[133] states that the national heritage system in South Africa is made up of both tangible and intangible heritage resources as well as living culture in the form of cultural traditions, customs, oral history, performance, ritual, popular memory, and knowledge of nature and diverse natural resources.[134] It describes the term heritage as encompassing the following:

> the sum total of wildlife and scenic parks, sites of scientific and historical importance, national monuments, historic buildings, works of art, literature, music, oral traditions and museum collections and their documentation which provides the basis for a shared culture and creativity in the arts.[135]

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129 These sites include the following: Robben Island Museum, the Cradle of Humankind, Mapungubwe, the Vredefort Dome, the Greater St Lucia Wetland Park, the Cape Floral Kingdom, and the UKhahlamba-Drakensberg Park.

130 Sections 3(a(i), 3(b) and 3(f) of the WHCA; Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 9.

131 *White Paper on Arts, Culture and Heritage*, 1996(as revised); also see Du Plessis and Rautenbach 2010 *PELJ* 32. Specific mention of cultural heritage resources is not made, but for the purposes of this study it will be accepted that the two terms collectively refer to the concept of cultural heritage resources as defined and adopted by the various legislative and policy documents and conventions.

132 Article 12(2) in Chapter 1 of the *White Paper*.

133 Article 12(3) in Chapter 1 of the *White Paper*.

134 Article 3.4 of the *White Paper*.

135 *Revised White Paper on Arts, Culture and Heritage*, 2013.

This definition of culture considers natural and cultural heritage as well as the tangible and intangible manifestations of cultural heritage.

2.3.2.5 National Policy on Living Heritage, 2009

The *National Policy on Living Heritage*, 2009 provides a definition for the concept of living heritage as meaning the following:

> 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.[136]

This definition adds to the provision of the ICH Convention and is also aligned with the definitions as provided by the NHRA and the NHCA. This view of living heritage in the policy strengthens the view that this form of heritage is centred on the value and significance (the meaning) that is attached by a people. The body of knowledge referred to in the definition alludes to indigenous knowledge systems (IKS) as provided in the NHRA and NHCA. The definition also highlights the value of the sustainability of these cultural practices by describing living heritage as an intellectual capital for both current and future generations.

2.3.3 *South African literature*

In the context of South Africa, cultural heritage is often approached as two distinct concepts, namely culture and heritage. There is no doubt that culture and heritage are inextricably connected and that one cannot view the two terms in isolation. In Nawa's[137] view culture is considered to be "anything and everything about life pertaining to human experience". His perception highlights the multi-dimensionality and multi-faceted identity of cultural heritage. This covers a broad scope of values, significance, experience and attachments.

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136 *National Policy on South African Living Heritage*, 2009.
137 Nawa *Municipal Cultural Policy* 1.

From Roodt's[138] perspective culture, being an ambiguous concept, can be viewed as (i) having a clear role in the search of an authentic identity and differentiating between different communities and (ii) being susceptible to be used to institutionalise fragmentation and the actual distribution of power.[139] In her view, culture can be used as a vehicle for finding out who and what you are (as an individual or as a community) i.e. the traditions and influences that have shaped you, and the customs and practices which set a particular community apart. Secondly, in her view culture can also be used as a tool to separate people and different sectors and institutions (authorities and functions across the various mandates).This proves true in the context of South Africa as the heritage sector is regarded to be fragmented and the mandates of the different actors and role players often overlap.

Du Plessis and Rautenbach refer to cultural heritage resources in broad terms by stating that one must first understand the meaning of culture and heritage in order to grasp the full extent of cultural heritage.[140] They refer to the definition of culture as phrased in the case of *MEC for Education, Kwazulu-Natal v Pillay*.[141] This case, which had to do with the relationship between culture and religion, dealt with a school having forbidden a Hindu girl from wearing a small nose stud, a Hindu custom symbolising "love, beauty and adornment".[142] The court in this instance referred to the common identity of a people and held that "belonging involves more than simple association" and that it included "participation and expression of a community's practices and traditions".[143] Furthermore, the court expressed the idea that culture has an individual element which allows an individual who belongs to a certain community to choose which traditions they will follow, and that these practices and beliefs will differ from person to person within a culture.[144]

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138 Roodt 2006 *Fundamina* 204.
139 Roodt 2006 *Fundamina* 207.
140 Du Plessis and Rautenbach 2010 *PELJ* 29-30; own emphasis added.
141 Du Plessis and Rautenbach 2010 *PELJ* 34; *MEC for Education, KwaZulu- Natal v Pillay* 2008 1 SA 474 (CC) (the *Pillay* case).
142 *Pillay* case para 59; Du Plessis and Rautenbach 2010 *PELJ* 34.
143 Du Plessis and Rautenbach 2010 *PELJ* 34; *Pillay* case para 59.
144 Du Plessis and Rautenbach 2010 *PELJ* 34; *Pillay* case para 54.

Du Plessis[145] points out how difficult it is to find a definition of culture with reference to this case. The outcome of this case also signifies the importance of understanding the definition of cultural heritage in order to assess its significance and to protect and manage it accordingly. Rautenbach, Hart and Naudé contend that the meaning of culture in this context is complex, especially when considering the culturally diverse society of South Africa.[146] They add that an object, area or site may be evaluated or used differently by any two people or cultural groups.[147] This therefore suggests that culture is a contested concept due to its having these multi-faceted and context-dependent meanings.

Deacon, Mngqolo and Prosalendis state that heritage has often been viewed as that which we have inherited, that which we find value in, and something that is passed on from one generation to the next.[148] These writers state that cultural heritage consists of all cultural forms such as arts, crafts, language and buildings that are deemed to be of value to a society. There are also the intangible (symbolic) and living heritage (which may comprise of music, dance or narrative etc.) components of cultural heritage resources.[149] Cultural heritage, in their view, is a broad and wide concept that also includes natural environments which have cultural significance as part of a person's heritage.[150]

The concept of cultural heritage resources should accordingly not be treated as being limited to a specific form or manifestation of heritage or culture. In the South African context language can be regarded as an inherent form and manifestation of cultural heritage.[151] The NHC agrees with this view by stating that indigenous languages can be seen as the richest carriers and transmitters of our culture and heritage.[152] Language not only makes it possible to think about heritage and culture, but it also

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145 Du Plessis and Rautenbach 2010 *PELJ* 34.
146 Rautenbach, Hart and Naudé "Heritage Resource Management" 827.
147 Rautenbach, Hart and Naudé "Heritage Resource Management" 827.
148 Deacon, Mngqolo and Prosalendis *Protecting our Cultural Capital* 1.
149 Deacon, Mngqolo and Prosalendis *Protecting our Cultural Capital* 1.
150 Deacon, Mngqolo and Prosalendis *Protecting our Cultural Capital* 1.
151 Para 3.5 of the *White Paper on Arts, Culture and Heritage*, 2016.
152 National Heritage Council 2015 http://www.nhc.org.za/court-ruling-dual-language-policy-schools/.

makes it possible to discuss heritage in its original conceptual framework. Indigenous knowledge systems (IKS) also form an invaluable part of South African cultural heritage.[153] Indigenous knowledge most often refers to traditional knowledge and can manifest in a wide range of areas including cultural and religious ceremonies.[154] IKS are also a crucial component in the sustainability of livelihoods of many South Africans.[155] This suggests that IKS are imperative in the development of the social, economic and heritage sectors of South Africa and are especially relevant for local authorities in whose jurisdictions these systems function.

2.3.4 *Concluding remarks*

Given that South Africa has a number of heritage-related laws and policies, it is apparent that the development of the heritage sector has made remarkable progress in the country. Not only do these laws make provision for a well-formed description and definition of cultural heritage resources, including its various components such as oral traditions, but they also clearly set out the management of these resources on all levels of government. This is particularly relevant for this study as it defines the scope and content of the cultural heritage resources situated in the jurisdictional area of local authorities.

2.4 Concluding remarks

In the light of the above we can conclude that cultural heritage is concerned with more than just the mere environment. The international instruments mentioned indicate that cultural heritage is a complex concept and that the approach to finding a suitable definition involves interaction with the community. This has been done by cautiously assessing what the people regard as their culture and heritage, and thus the lengthy discussions on the matter. It is clear that the way in which culture and heritage are perceived and given value will determine how such heritage resources are protected and conserved.[156] This chapter has sufficiently made provision for a

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153 National Heritage Council *Critical Reflections on Heritage* 21(own emphasis added).
154 National Heritage Council *Critical Reflections on Heritage* 21.
155 National Heritage Council *Critical Reflections on Heritage* 22.
156 Forrest *International law and the Protection of Cultural Heritage* 4.

discussion of the meaning of cultural heritage across the various spectra. The authorities and functions with regard to these specific resources will be discussed in the chapters which follow.

3 The legal and policy framework for cultural heritage resource protection

The main focus of this study is the role of local government in the management and protection of cultural heritage resources. To this extent, the roles and responsibilities of authorities in CHRM[157] will be discussed. It looks at constitutional provisions and at the national statutory and policy framework with reference to the specific cultural heritage resources protected under these frameworks.[158] The scope and extent (and the relevance) of environmental legislation in identifying and addressing culture-related matters will be discussed in this chapter.[159] This will be accompanied by a discussion of applicable case law, which will be integrated into this discussion, and the role of development and planning in the cultural heritage sector.

3.1 The administration of cultural heritage resources

The heritage sector in South Africa has many role players and can be seen to be a multi-faceted and multi-layered sector.[160] The NHRA has made sufficient provision for the mandate to protect and conserve heritage resources by assigning this responsibility to the three spheres of government on a three-tiered/grade scale i.e. on national, provincial, and local levels.[161] To provide for the better management of heritage resources, the South African Heritage Resources Agency (SAHRA) was established as the custodian for sites that have been classified as Grade I heritage

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157 CHRM is described as a process that organises the use of cultural resources amongst multiple stakeholders such as people, institutions, governments, regions and the world. Keitumetse *African Cultural Heritage Conservation and Management* 1.

158 The framework for cultural-heritage issues consists of an impressive number of statutes and policies including, but not limited to *The Heraldry Act* 18 of 1962, the *Cultural Affairs Act* 65 of 1989, the *South African Geographical Names Council Act* 118 of 1998; the *Cultural Institutions Act* 119 of 1998; the *National Archives and Record Service of South Africa Act* 43 of 1996; the *National Arts Council Act* 56 of 1997; the *National Library of South Africa Act* 92 of 1998; the NHCA and the NHRA; the *White Paper on Arts, the Culture and Heritage*, 1996; and the *National Policy on South African Living Heritage*, 2009 amongst many others.

159 See for example the provisions of the NEMA and subsequent sector-specific legislation.

160 The heritage sector is also interlinked with the environmental, planning and land development sectors amongst others. The mandates of these authorities discussed here may often overlap, but this discussion will be limited to the role and scope of municipalities in CHRM.

161 Section 8 of the NHRA; Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 121.

resources,[162] with Grade II heritage resources being the responsibility of Provincial Heritage Resources Authorities (PHRA), [163] while local municipalities have the responsibility for sites of local significance (Grade III) and those that have not been graded yet.[164] The role that this three-tier system plays is to effectively promote the management of cultural resources on the level of local government and to further enhance the participation of communities who find that they too are concerned about cultural heritage resource management.[165]

The SAHRA has been assigned the duty and function of dealing with all heritage matters that affect the national estate. [166] This agency has the full mandate of regulating and managing cultural heritage resources in South Africa.[167] The SAHRA Council, to this extent, is responsible for identifying and coordinating the management of sites and objects that constitute the national estate and as such acts on a national level. [168] The National Heritage Council (NHC), in conjunction with SAHRA and its Council, has been entrusted with the objective of preserving, protecting and promoting the tangible and intangible heritage of South Africa, for the purpose of sustainable development.[169] The NHC has launched a number of projects in the furtherance of its mandate to protect, preserve and promote heritage.[170]

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162 The SAHRA Council was established in section 14 of the NHRA. The SAHRA is an agency of the Department of Arts and Culture that has been tasked with an overall legislative mandate to identify, assess, manage, protect, and promote heritage resources in South Africa. The duties and functions of the Council are found in sections 14-16 of the Act, and the powers and functions of the SAHRA can be found in section 13 of the NHRA.

163 Section 8(1) and (3) and section 23 of the NHRA describe the procedure for the establishment of PHRAs.

164 Section 8(1) and (4) of the NHRA.

165 Ndlovu 2011 *CMAS* 36.

166 The full and comprehensive list of the national estate can be found in section 3(2) of the NHRA.

167 SAHRA date unknown http://www.sahra.org.za/about-sahra/. It must be kept in mind that the SAHRA acts in conjunction with other authorities such as the Department of Arts and Culture (DAC) and the National Heritage Council (NHC).

168 The functions, powers and duties of the SAHRA are set out in section 13 of the NHRA; the SAHRA Council is established in terms of section 14 and the functions of this Council are set out in section 16 of the NHRA.

169 The National Heritage Council is established in section 3 and mandated in terms of section 4 of the NHCA.

170 National Heritage Council 2017 http://www.nhc.org.za/project/liberation-heritage-route/; Department of Arts and Culture *Arts and Culture Guide 2010* 44. The National Liberation Heritage Route (NLHR) is a NHC project specifically aimed at recording significant historical accounts of a variety of events, places, people and communities. The main aim behind the positioning of a

In the light of the available heritage legislation in South Africa, provision is made for a considerable number of other heritage authorities.[171] These authorities include the National Archives Advisory Council, whose mandate extends to promoting, protecting and managing of the nation's documentary heritage.[172] This council is also mandated to advise and consult with the SAHRA regarding matters that concern the protection of records forming part of the national estate.[173] The South African Geographical Names Council (SAGNC) is responsible for registering, processing and advising the Minister on any proposed name changes (in particular street names).[174]

3.2 The constitutional framework for cultural heritage resources

The *Constitution* provides the foundation for the protection of cultural heritage resources by including fundamentally justiciable rights to culture, language and religion in its Bill of Rights.[175] It is apparent, therefore, that culture and religion both form an inherent part of a person's cultural heritage.[176] In this light, cultural rights are seen to be an integral part of human rights, which are universal, indivisible and interdependent.[177] The provisions of sections 15, 30 and 31 of the *Constitution*, in this instance, are key elements in cultural heritage resource protection. Section 15 of the *Constitution* specifically addresses the rights to freedom of religion, conscience and belief.[178] In essence it is section 15(2) that indirectly protects cultural heritage by stating that religious observances may be conducted at state or state-aided institutions. There is no definition provided for these religious observances but they

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NLHR was to reconstruct the story of the liberation struggle and transmit this to succeeding generations. This highlights the importance of not only protecting areas and places of historical significance but also events and the experiences of individuals and communities.

171 It must be noted that section 9 of the NHRA provides for the rights, duties and exemptions of state and supported bodies and all branches of the state and supported bodies and requires them to give heritage resources authorities such assistance in the performance of their functions as is reasonably practicable.

172 Section 6(1) of the *National Archives and Records Service Act* 43 of 1996 (henceforth the NARSA) provides for the establishment of a National Archives Advisory Council (NAAC).

173 Section 6(4)(c) of the NARSA.

174 Section 4 of the *South African Geographical Names Council Act* 118 of 1998 provides for the establishment and objects of the Council and prescribes its executive functions in section 6 of the Act.

175 Sections 30 and 31 of the *Constitution*.

176 See Chapter 2 for a discussion of cultural heritage resources and its components.

177 Article 5.1 of the *Universal Declaration on Cultural Diversity*.

178 Section 15(1) of the *Constitution*.

can be interpreted to refer to cultural practices such as initiations and the ritual slaughtering of animals, for example. From the provisions of this section we can infer that it falls in line with the definition of living heritage as previously discussed.[179] These religious observances must be given sufficient attention and must also be conducted in accordance with the internal limitations as provided for in this section.[180] In this vein section 15(2) allows for state and state-aided institutions to make provision for religious observances, meaning that they would have to designate specific areas to these religious observances.

In section 30 the rights to language and culture are directly addressed. It 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.[181]

The wording of this section suggests that the *Constitution* simultaneously encourages ("participate" and "choice") and mandates the conservation of people's cultural heritage (language). It emphasises this by stating that "everyone can participate in the cultural life of their choice". In the event where this right infringes or imposes a negative effect on any other constitutional right, the conduct from which such an infringement results will be invalid and unlawful.[182]

Adding to this, section 31 provides for the protection of cultural, religious and linguistic communities and provides that:

> 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

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179 See the discussion of what constitutes cultural heritage in South African legislation, policy and documents in paragraph 2.4.2.

180 Section 15(2)(a) of the *Constitution*.

181 Section 30 of the *Constitution*.

182 In conjunction with internal limitations, the rights as provided under the *Constitution* are also limitable in terms of section 36 of the *Constitution*.

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.[183]

This section addresses the rights stated in sections 15 and 30 by increasing the scope of the protection to include communities. Furthermore, it provides for the protection of the cultural, religious and linguistic rights of persons belonging to a community, stating that they may not be denied the right to enjoy their culture, practise their religion or use their language. Highlighting that they have a clear right to the aforementioned, this inadvertently alludes to the conservation of a person's cultural heritage. Therefore, when sections 15, 30 and 31 of the *Constitution* are read with section 7(2), which provides that the state must "respect, protect, promote and fulfil all the rights in the Bill of Rights",[184] it can be argued that local authorities are given a constitutional mandate to make provision for the conservation and management of cultural heritage resources by way of honouring the cultural, linguistic and religious rights of the people over whom they have authority.

The constitutional environmental right in section 24 of the *Constitution* exists in addition to the cultural, religious and language rights. Section 24 of the *Constitution* accordingly provides the following:

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.[185]

This section offers an enforceable right to an environment that is safe and not harmful to one's health or wellbeing.[186] In the light of this provision, the courts

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183 Sections 31(1)(a)-(b) of the *Constitution*.
184 Section 7(2) of the *Constitution*.
185 Section 24(a) and (b)(i)-(iii) of the *Constitution*.
186 Section 24(a) of the *Constitution*.

looked at the meaning of well-being in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*.[187] The court held that the concept of well-being is open-ended and incapable of precise definition, and consequently refers to a sense of environmental integrity.[188] In *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* [189] the court regarded exposure to a stench as being adverse to one's health and well-being. However, well-being in this instance was not confined or restricted to direct impacts on a person.[190] Well-being includes notions of concern for the aesthetic and spiritual dimensions of the natural environment, including a sense of place (concepts commonly used in cultural heritage resources assessment).[191] By implication, a threat to a person's well-being can be regarded as or may become a threat to such a person's culture or heritage. The judgments in these cases therefore confirm that the attachment, value and significance to/of cultural heritage does in fact affect a person's well-being.

This environmental right in section 24 further requires of the state to take reasonable legislative measures in realisation of this right.[192] The capacity of local government to legislate on and execute powers in respect of the "environment", and particularly in light of section 24, has been addressed in a number of cases before the courts.[193] In this vein, municipalities are obliged to contribute to the realisation (albeit progressive) of the fundamental rights in the *Constitution*, including the environmental right in section 24. [194] This gives the municipalities capacity to administer on matters concerning the environment.

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187 2007 SCA 37 RSA (hereafter the *HTF Developers* case).

188 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 344-348.

189 2004 2 SA 393 (E) (hereafter *Hichange* case).

190 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 349.

191 As held previously, cultural heritage has often been referred to as objects or practices with religious (spiritual) and aesthetic significance, reiterating the fact that a person's cultural heritage forms part of his right to an environment that is not harmful to his well-being. Du Plessis 2015 *PELJ* 1855-1856.

192 Section 24(b) of the *Constitution*.

193 See the discussions in Du Plessis 2010 *Stell LR* 265-297; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 340-359; Fuo 2015 *CJLG* 1-19; Du Plessis 2015 *PELJ* 1855-1856.

194 Fuo 2015 *CJLG* 18; sections 4(2)(j) and 23(1)(c) of the *Systems Act*.

As previously mentioned, culture can be seen as an important and interlinked component of the environment.[195] Therefore section 24 has a direct bearing on cultural heritage resources and the conservation and management thereof.[196] A proper understanding and awareness of the detrimental effects of unsustainable development patterns on the environment and all of its constituent parts, is required for sound environmental management.[197] To this end, Feris[198] is of the view that local government, regarded as an organ of state, cannot be excluded from the application of section 24 and therefore has a constitutional duty to adhere to the provisions of section 7(2).

The cultural rights as well as the environmental right, when read with section 7(2) of the *Constitution*,[199] indicate that these rights are enforceable against the state (including local government) and that the state incurs an additional duty to ensure the fulfilment and protection of these rights. It can, therefore, be accepted that by granting a person a right to participate in his or her cultural life and to enjoy and practice his or her culture and religion, in essence you are protecting that person's cultural heritage and well-being.[200] This means that an organ of state (a municipality)[201] will not only be liable to respect, and fulfil these rights but also to promote and actively protect them. A municipality must therefore not only respect the cultural and environmental rights but also make provision for the active protection of these rights. This active protection of cultural and religious rights may entail creating awareness of cultural rights, promoting the observance of diverse cultural and religious practices, and providing safe spaces/areas for these observances and finally to ensure that no one else interferes with these practices.

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195 See the discussion on cultural heritage in Chapter 2.

196 See Rautenbach, Hart and Naudé "Heritage Resource Management" 821-853 for a discussion on the environmental law- cultural heritage resources interface.

197 Ekurhuleni Municipality *State of the Environment Report* 14.

198 Feris "Environmental Rights Protected in the Constitution of the Republic of South Africa" 219.

199 This section provides that "the state must respect, protect, promote and fulfil all the rights contained in the Bill of Rights"; Du Plessis 2015 *PELJ* 1855-1856.

200 See section 24 of the *Constitution*; Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 10.

201 An organ of state is defined in section 239 of the *Constitution* and in terms thereof an organ of state refers to any department of state or administration in the national, provincial and local sphere of government.

3.3 Cultural heritage legislation and policy

3.3.1 *Introductory comments*

In light of the extensive legislative and policy framework governing the heritage sector, this discussion will look at the provisions of each of these Acts; the manner in which they protect specific cultural heritage resources and the relevant policy documents.

3.3.2 *National Heritage Resources Act 25 of 1999*

3.3.2.1 Introduction

A critical differentiation between previous heritage legislation and the current statutory framework for heritage resource management is that the NHRA promulgated a three-tier system for CHRM in South Africa i.e. on national, provincial, and local levels.[202] The importance thereof is that the NHRA requires of all spheres of government and the community to become involved in the management and conservation of their cultural heritage.

Most importantly, the NHRA provides for the manner in which to deal with all heritage resources in South Africa. It secures the formal protection of cultural resources, which refers to those heritage sites, objects or features which have been formally declared as heritage by a heritage authority.[203] These include the following formal protections: protected areas; provisional protection; heritage registers; heritage areas; and heritage objects.[204] The formally protected areas refer to the protection placed on a site by a heritage resources authority or by a municipality for example.[205] This would mean that a heritage resource would have to be identified, graded and then given formal protection.

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202 Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 135; Ndlovu 2011 *CMAS* 36.

203 Section 27(1) of the NHRA; Rautenbach, Hart and Naudé "Heritage Resources Management" 835-836.

204 Chapter 2 Part 1 of the NHRA makes provision for formal protections; Sections 27-32 of the NHRA; Rautenbach, Hart and Naudé "Heritage Resources Management" 836-838.

205 Rautenbach, Hart and Naudé "Heritage Resources Management" 835.

Furthermore, it also makes provision for general protection i.e. the automatic protection provided for by legislation,[206] including but not limited to the import of objects in terms of the laws of foreign states; structures; archaeology, burial grounds and graves; public monuments and memorials; and other heritage resources. In the light of this, the NHRA provides three categories of heritage resources to be divided amongst the three spheres.[207]

3.3.2.2 Heritage management principles

In achieving the objective of effective and efficient heritage resources management and protection, the NHRA provides a set of principles for the management of heritage resources.[208] These principles must influence and guide heritage authorities on national, provincial and local levels in the execution of their duties and mandate to manage and protect cultural heritage resources.[209] This means that municipalities must adhere to and consult the principles set out in terms of the NHRA when executing their functions. Section 5(b) creates the view that it is the responsibility of every person to protect and manage national heritage (resources). [210] This responsibility extends to both local authorities (as legal persona) and the communities in their jurisdiction.[211] A municipality, as an organ of state, is therefore *obligated* by law to protect and manage the cultural heritage resources under its jurisdiction. Furthermore, these principles add to and are aligned with the provisions of the *Constitution* and environmental legislation (the NEMA principles) and seek to fulfil the objectives and aims of the NHRA and NHCA. In the protection and management of specific cultural heritage resources (which will be discussed below) these principles must be applied and considered accordingly.

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206 Sections 33-38 of the NHRA.

207 Section 8(1) and (4) of the NHRA. See the specific delineation of Grade I, II and III heritage resources assigned to national, provincial and local authorities, respectively, in paragraph 3.1.

208 Section 5(1)(a)-(d) makes provision for the general principles of heritage management.

209 Sections 5 and 6 of the NHRA; Rautenbach, Hart and Naudé "Heritage Resource Management" 832.

210 Section 5(1)(b) of the NHRA provides that every generation has a moral responsibility to act as the trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans.

211 Section 8(4) of the NHRA.

Section 5(2) pertinently provides the following in ensuring the effective management of heritage resources:

> (a) the skills and capacities of persons and communities involved in heritage resources management must be developed; and
>
> (b) provision must be made for the on-going education and training of existing and new heritage resources management workers.[212]

This not only means that qualified and competent persons must be appointed to deal with heritage resources, but also that the skills of anyone involved in heritage management must be developed further. This section also applies to the training of existing and new heritage resources management workers. This would mean that the employees in these departments, possibly in municipalities, must be given sufficient training if they are considered to be incompetent to deal with heritage-related matters. However, this might prove to be a lot more difficult in under-resourced municipalities as they usually do not have the capacity or funding available to provide for the extensive training and appointment of competent heritage practitioners. Furthermore, in giving effect to these principles and guidelines this section further states that:

> Laws, procedures and administrative practices must—
>
> (a) be clear and generally available to those affected thereby;
>
> (b) in addition to serving as regulatory measures, also provide guidance and information to those affected thereby; and
>
> (c) give further content to the fundamental rights set out in the Constitution.[213]

Of relevance here is the provision stating that the laws, procedures and administrative practices must elaborate on the fundamental rights that are set out in the *Constitution*.[214] This section essentially states that any law in South Africa or any practice or procedure, in alignment with the NHRA, must give effect and consideration to all rights in the *Constitution*.

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212 Section 5(2)(a) and (b) of the NHRA.
213 Section 5(3)(a)-(c) of the NHRA.
214 Section 5(3)(c) of the NHRA.

3.3.2.3 National and provincial heritage resources

The cultural heritage resources that qualify for "formal protection" consist of those sites that are deemed to be of national significance. These sites must be graded by the SAHRA as Grade I heritage resources. They are then considered to be national heritage sites.[215] However, in terms of section 27 it is also the duty of the SAHRA to identify areas with exceptional qualities which may give them special national significance.[216] This identification must be in accordance with the provisions of sections 3(2), 6(1) and (2) of the NHRA. It is further provided that a PHRA may identify areas with special qualities[217] in light of the heritage assessment criteria[218] and the principles for the management of heritage resources.[219] These sites will be graded as Grade II heritage resources and are managed and protected on a provincial level. Whilst the NHRA makes provision for the protection of cultural heritage on a national and provincial level only the provisions relevant to the role of local authorities will be addressed in this discussion.

Section 27 of the NHRA enables any heritage stakeholder, other than national and provincial, to submit a nomination to the SAHRA, which may declare the place a national heritage site, or to a PHRA, which may declare the place to be a provincial heritage site.[220] An aspect of importance arising from this section is the alignment with section 38 of the Act. In section 27(18) it is held that any person is prohibited from destroying, damaging, defacing, excavating, altering, removing from its original position, subdividing or changing the planning status of any heritage site without having had a permit issued by the heritage resources authority responsible for the protection of such a site.[221] While the provision of this section indicates that a wide scope is provided for the protection and management of heritage resources, Ndlovu

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215 Section 27 of the NHRA; Rautenbach, Hart and Naudé "Heritage Resources Management" 835. The full and comprehensive list of the national estate can be found in section 3(1) and (2) of the NHRA.
216 Section 27(1) of the NHRA
217 Section 27(2) of the NHRA.
218 Section 3(2) of the NHRA.
219 Section 6(1) and (2).
220 Section 27(3) of the NHRA.
221 Section 27(18) of the NHRA. Also see section 38 of the Act.

is of the opinion that heritage legislation in South Africa has not proven to be an effective instrument in heritage management.[222] The author contends that it is more common for the destruction of cultural heritage resources to occur without the consequence of legal proceedings being instituted than there have been cases that were brought before the court and were won.[223] Heritage legislation could be proactive, but only if local government's role in the protection of cultural heritage resources were to be widened. This would have the effect of local authorities actively participating in ensuring that cultural heritage resources are conserved and managed effectively.

3.3.2.4 Buildings as a form of heritage

The NHRA also gives recognition and protection to buildings older than 60 years.[224] In this instance all structures[225] presumed to be older than 60 years are afforded protection, whether they have been proclaimed or listed in heritage registers or not. These buildings have been identified as forming part of the national estate and as such may not be altered or demolished without a permit issued by the SAHRA or a provincial authority.[226] This would mean that no building may be altered or demolished if it is considered to be of historical significance, without such activity having been authorised. These buildings must be identified and included in a list of the national estate inventory as compiled by the SAHRA.[227] While these resources are considered to be a part of the national estate, this does not preclude municipalities from partaking in their protection, especially since "building regulations" is a Schedule 4B power of municipalities.[228] Municipalities will therefore be required to identify buildings and structures older than 60 years within their areas of jurisdiction, afford the necessary protection status to these resources and to effectively provide

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222 Ndlovu 2011 *CMAS* 53.
223 Ndlovu 2011 *CMAS* 53.
224 Section 39(1) of the NHRA.
225 In section 34 of the NHRA the protection of structures are ensured.
226 Section 34(1) of the NHRA; Rautenbach, Hart and Naudé "Heritage Resource Management" 928-930.
227 Section 39 of the NHRA; Rautenbach, Hart and Naudé "Heritage Resource Management" 930.
228 Schedule 4B of the *Constitution*.

for their conservation by way of the instruments made available for the execution of their powers and functions.[229]

In the appeal case of *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape*[230] the court had to look at the provisions of section 34(1) of the NHRA. This section provides direct protection to cultural heritage resources by prohibiting any person or entity from altering or demolishing a structure or part thereof that is older than 60 years without having obtained a permit from the heritage resources authority.[231] In this case the appellant applied for a permit for the complete demolition of a villa and an adjacent cottage which were older than 60 years for the construction of an apartment block development. The PHRA in this instance approved the demolition of the adjacent cottage but under the condition that the development plans ought to be submitted in order to obtain final approval. Consequently, the appellant challenged the power of the respondent to impose such a condition. The court held, however, that the respondent acted in accordance with its mandate to conserve and its action was aligned with the principles of heritage resources management as provided by the Act.[232] This case illustrates the important role that heritage authorities can take on in the prevention of harm to the country's cultural heritage resources.

3.3.2.5 Archaeological resources

The NHRA describes archaeological sites as the material remains that result from human activity and are older than 100 years, found in or on land.[233] These sites include rock art, which are forms of engravings or paintings made by human agency on a fixed rock surface or loose rock or stone and which are older than 100 years.[234] Archaeological resources find their protection in section 35 of the NHRA. This

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229 See the discussion of the instruments available to local government in paragraph 4.5 of this study.
230 2008 1 All SA 550 (SCA) (the *Qualidental* case).
231 Section 34(1) of the NHRA.
232 *Qualidental* case para 19.
233 Section 2(ii)(a). These include artefacts, human and hominid remains, and artificial features and structures.
234 Section 2(ii)(b) of the NHRA.

provision describes the role of local authorities as being responsible for reporting the discovery of an archaeological object or material to a PHRA.

The importance of this provision can be illustrated in the case of the Canteen Kopje.[235] In this instance a mine had obtained a permit from the Department of Mineral Resources (DMR) but without having obtained a permit from the SAHRA, as required by section 38 of the NHRA. Despite the protected status of this site, most of the area surrounding the delineated protected area has been destroyed by illegal mining.[236] The events which occurred at this heritage site affirm the need for tighter inter-governmental relations so that state organs communicate and share information on their respective mandates.[237] In order to prevent the occurrence of similar events as in the Canteen Kopje, it is recommended that municipalities play a greater role in the mapping of archaeological resources during the identification and designation stages.[238]

3.3.2.6 Burial grounds and graves

In terms of the NHRA, graves and burial grounds that are located outside a formal cemetery and which are deemed to be clan ancestral sites are given legislative protection.[239] The NHRA provides declared protection to graves that are older than 60 years but younger than 100 years.[240] Graves older than 100 years are considered to be archaeological and can be protected in terms of the archaeological site clause.[241]

The importance of this provision for municipalities is illustrated by the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Another*[242] in which the importance of the protection and consideration of cultural heritage resources was

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235 The Canteen Kopje, situated in Barkly West, Northern Cape, was declared and gazetted as a protected national monument in 1948. Canteen Kopje is the country's oldest dated archaeological site. Together with the heritage of communities still living in the area, it boasts a Stone Age history stretching back some 2.3 million years.

236 Heritage portal 2016 http://www.theheritageportal.co.za/thread/canteen-kopje-barkly-west.

237 Heritage portal 2016 http://www.theheritageportal.co.za/thread/canteen-kopje-barkly-west.

238 City of Cape Town *Cultural Heritage Strategy* 13.

239 Graves and burial grounds form part of the inventory of the "national estate" in section 3(2)(g) of the NHRA.

240 Section 36 of the NHRA.

241 Section 35 of the NHRA.

242 2010 1 SA 333 (SCA).

judicially confirmed. The case dealt with the development of a township in Cape Town which a Muslim community opposed due to the presence of burial sites on land which they regarded as sacred.[243] The court held that, having regard to the religious, cultural and environmental rights of the community, the City of Cape Town cannot allow the development to continue, as these rights should be regarded as integral to land development.[244] The decision of the court was based on the approved township development plan, in 1957. The landowner now requested approval of its engineering services plan for the township, which the municipality refused. The court therefore set aside the approval of the township development plan. The decision in this case confirms that a) public participation is a key factor for consideration in development and planning, and b) local government has an important role to play not only in the realisation of cultural and religious rights but also in the protection of cultural heritage resources. It yet again affirms that municipalities are capable protecting cultural heritage resources as they are better able to appreciate and understand cultural rights on the level on which they are encountered. The outcome of this case also signifies the importance of considering all factors affecting development including cultural matters.

3.3.2.7 Indigenous knowledge systems

The African cultural heritage sector has long been reliant on IKS, which have formed the centre of their communities' livelihoods.[245] The challenge in this instance will be to the practical management and regulation of these knowledge systems. The NHRA, NHCA and *National Living Heritage Policy* all provide for the protection and sustainable management of IKS. This form of cultural heritage resource is also addressed in the *Protection, Promotion, Development and Management of*

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243 In Ratiba 2015 *PELJ* 3198-3200 the concept sacred is discussed and what qualifies as being sacred to a community. The author states that these (burial) sites are called sacred mainly because they carry with them a whole range of rules and regulations regarding people's behaviour in relation to a set of beliefs that often refer to spirits of the ancestors or other gods or spirits.

244 *Oudekraal* case paras 74-78.

245 Masoga and Kaya 2008 *IAJIKS* 142.

Indigenous Knowledge Systems Bill, 2016 (IKS Bill).[246] The IKS Bill refers to indigenous cultural expressions as having regard to such expressions that have cultural content developed within indigenous communities and assimilated into their cultural disposition or essential character, which might include verbal or phonetic expressions; music or sound; expressions by action; and tangible expressions.[247] It further defines indigenous knowledge as any knowledge of a scientific or technical nature, knowledge of natural resources and indigenous cultural expressions.[248]

Municipalities have an exceptionally important role to play in the management of IKS especially since these systems are encountered locally. They have an obligation to ensure sustainability according to section 24 of the *Constitution*, the management and advancement of community-centred IKS which has a cultural focus, will aid the municipality in contributing towards the sustainable improvement of its community.

3.3.2.8 Religious and cultural practices

The NHRA has not designated a specific provision for the protection and conservation of cultural and religious practices. For the purposes of this study these practices include initiation rites, the slaughtering of animals for traditional purposes, and other forms of traditional expressions. Initiation is described as a customary or cultural practice in respect of male and female children that takes place as a rite of passage to adulthood in traditional communities.[249] An initiation school is described as any place where these initiation practices are conducted. There are many role players when it comes to initiations, and as a result the duplication of mandates adds to the complexity of the regulation of this cultural practice. Mancotywa[250] argues that the government has not adequately designated places for the free practice of religious and cultural rituals. As such, the intangible dimension of cultural heritage still needs a lot of consideration in terms of protection and awareness.

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246 *Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill*, 2016 (IKS Bill).
247 Section 1(a)-(d) of the IKS Bill.
248 Section 1(a)-(c) of the IKS Bill.
249 Gen Not 471 in GG 38814 of 22 May 2015.
250 Mancotywa *Critical Conversations about Heritage* 51.

While the NHRA has not made express provision for religious and cultural practices, the *Constitution* does however, provide for religious observances to be conducted at state or state-aided institutions as per section 15 of the *Constitution*. This could mean that municipalities need to designate specific areas for these specific practices to be conducted and to ensure that there is not interference with these specific observances.

3.3.2.9 Heritage areas

In South Africa, planning law and land-use management play an integral role in the conservation and governance of the environment,[251] which is why sections 152 and 153 of the *Constitution* require municipalities to be development oriented with specific emphasis on social, economic, environmental and cultural interests.[252] The NHRA directly addresses the role of municipalities and planning authorities in section 31. This provision touches on the planning law aspect and states that a planning authority must investigate the need for the designation of heritage areas to protect places of environmental and cultural interest.[253] This section adds that a local authority may designate any area or land to be a heritage area on the grounds of its environmental or cultural interest or the presence of heritage resources.[254] However, this is subject to prior consultation with the PHRA, the owners of property in the area, and any affected community.[255] In this instance municipalities have the authority and power to not only designate specific heritage areas, but also to manage such areas.

A municipality is responsible for protecting a heritage area by way of the provisions of its town planning scheme and By-laws.[256] This, however, must be done through consultation with and after approval by a PHRA and a provincial planning authority. If

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251 Kotzé 2006 *PELJ* 87.
252 Sections 152 and 153 of the *Constitution*.
253 Section 31(1) of the NHRA. The rest of the provisions discuss the interaction between the PHRA and the planning authorities in terms of investigating the designation of heritage areas (see sections 31(2),(3) and (4) of the NHRA).
254 Section 31(5) of the NHRA.
255 Sections 31(5)(a) and (b) of the NHRA.
256 Sections 30(11) and 31(7) of the NHRA

any alteration or development should be undertaken without the consent of the municipality,[257] the municipality may order the owner to stop work and restore the site to its previous condition.[258] The NHRA also provides that no person may subdivide or develop any part of a protected area unless the heritage resources authority that designated the area has been consulted in accordance with the prescribed procedure. This must take place at least 60 days before the changes are initiated.[259] The role of the municipality in this instance is to make By-laws regulating the admission to, controlling the conditions of use of, and protecting and managing protected areas.[260] A local authority is also required to notify the SAHRA and the PHRA when a place listed in the heritage register within its area of jurisdiction is destroyed.[261]

Municipalities are also responsible for coordinating and promoting the presentation and use of places of cultural significance and heritage resources which form part of the national estate and for which they are responsible.[262] Section 8 of the NHRA makes provision for the responsibilities and competence of heritage resources authorities and local authorities in the identification and management of the national estate. An important provision arising from the NHRA is the delegation of the functions or powers of heritage resources authorities.[263] This provision enables the written delegation of functions or powers, under this Act, by a heritage resources authority to another as described under the provision. The SAHRA, for example, can delegate any of its powers and functions to a PHRA, provincial government or local authority.[264] A PHRA may also delegate any of its powers and functions to a local

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257 Section 30(11)(a) requires the consent of a municipality for any alteration or development to a place listed in the heritage register.
258 Section 31(7)(c) of the NHRA.
259 Section 27(21).
260 Section 54 of the NHRA.
261 Section 30(10) of the NHRA.
262 Section 44(1) of the NHRA.
263 Section 26 of the NRA. See section 26(3) for a list of what functions and powers the heritage resources authority may not delegate.
264 Section 26(1)(f) of the NHRA. This delegation requires the approval/consent of the authority to which these functions are being allocated.

authority.[265] The heritage resources authority, however, will be deemed to have exercised the powers as executed by the delegate.[266] This provision indicates that a local authority *may* receive the functions or powers to act even where specific resources may be under the competence of a national or provincial authority. The municipality would under such circumstances be responsible for carrying out the delegated function(s).

3.3.2.10 Heritage resources assessment and management

In order to avoid and remedy the potential risks and adverse effects that a development or project might have on cultural heritage the NHRA prohibits any potential development or project from taking place without having obtained the proper authorisation for the execution of such an activity.[267] Taking this into account, section 38 provides the following:

> Any person who intends to undertake a development categorised as:
>
> (a) Linear developments (e.g. roads, walls, power lines, pipelines, canals) longer than 300m;
>
> (b) Construction of a bridge or similar structure exceeding 50m in length;
>
> (c) Proposed developments which will change the character of a site— (i) exceeding 5000 m2 in extent; or (ii) involving three or more existing erven or subdivisions thereof; or (iii) involving three or more erven or divisions thereof which have been consolidated within the past five years; or (iv) the costs of which will exceed a sum set in terms of regulations by SAHRA or a provincial heritage resources authority;
>
> (d) The re-zoning of a site exceeding 10000 m2 in extent; or
>
> (e) Any other category of development provided for in regulations by SAHRA or a provincial heritage resources authority,[268]

In this light any person, who intends to undertake a development, including any of the listed activities, is obliged to notify the responsible heritage resources authority thereof. The responsible developer must therefore notify the SAHRA or another

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265 Section 26(1)(g) of the NHRA. In this instance the competence and consent of the authority being delegated to is important.

266 Section 26(2) of the NHRA. It also requires that the delegate be held accountable by the heritage resources authority for the powers that it has exercised.

267 Section 38 of the NHRA.

268 Section 38(1)(a)-(e) of the NHRA.

relevant heritage authority at the earliest stage of development and not a moment later.[269] The developer is required to submit an impact assessment report, if required,[270] and also provide the authority with details such as the location, nature and extent of the proposed development.[271] After having received this information, the relevant heritage authority will reply to the applicant, within 14 days, explaining whether or not an Heritage Impact Assessment (HIA) is needed and which components it requires e.g. archaeology, palaeontology, living heritage etc.[272] The heritage authority will accordingly inform the applicant that there are no objections to the development, from a heritage perspective, if the proposed development does not trigger any of the listed activities under section 38(1).[273]

The application for development can be initiated independently or it may run concurrently with the EIA process.[274] The HIA will then be conducted as a specialist study within the EIA process and its accompanying reports. The HIA must include a mapping and identification of all heritage resources in the area, an assessment of the significance of such resources, the impact of the development on such resources, and an evaluation of the impact of the development on heritage resources relative to the sustainable socio-economic benefits to be derived from the development and plans for the mitigation of any adverse effects during and after the completion of the proposed project.[275] In most cases local authorities are closest to the areas which will be impacted by the proposed development projects. It could therefore be argued that a municipality should be the first actor to address this development and its impacts on heritage resources.

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269 Section 38(1)(a)-(e) of the NHRA.
270 Section 38(2)(a) of the NHRA.
271 Section 38(1)(a)-(e) of the NHRA.
272 Section 38(2)(a) of the NHRA.
273 If a proposed development does, however, trigger the listed activities in section 38(1) then the heritage authority must follow the process set out in sections 38(1)-(4) of the NHRA.
274 If the proposed development is triggered as part of other legislation such as the NEMA, NEMBA or NEMPAA the process to be followed is set out in section 38(8) of the NHRA which also makes provision for the alignment of the HIA and EIA processes which will be discussed in paragraph 3.4.2.
275 Section 38(3) of the NHRA.

The NHRA does not address the process of impact assessment.[276] However, the *Australia ICOMOS Charter for Places of Cultural Significance* (the *Burra Charter*)[277] makes provision for the protection of all places which are deemed to have some form of cultural significance. The *Burra Charter* is therefore used by South African heritage resources authorities in order to assess the significance of an identified place and implement and execute the plans according to the procedure set out in the Charter.[278] The importance of this Charter lies in the fact that it also assigns a definition to the term cultural significance.[279] This definition is the yardstick against which heritage resources complying with the definitions of places and fabrics are measured for conservation,[280] maintenance,[281] preservation[282] and restoration[283] purposes. Article 6 of the *Burra Charter* provides a summary of the steps to be taken in planning for and managing a place of cultural significance.[284]

3.3.3 *World Heritage Convention Act 49 of 1999*

The Act provides for the identification and management of sites of national significance i.e. World Heritage Sites.[285] It provides that heritage management must be sensitive to people and their needs.[286] The Act further elaborates on the sustainable management of World Heritage Sites, and expressly states that

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276 Kotzé and Jansen van Rensburg 2003 Q*UTLJJ* 18-19.

277 *Australia ICOMOS Charter for Places of Cultural Significance*, 1999. It must be noted that there is a 2013 revised version of this Charter available, which also includes explanatory notes.

278 Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 18-19.

279 Article 1.2 of the *Burra Charter* describes as referring to the aesthetic, historic, scientific or social value for past, present or future generations which is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects.

280 Article 1.4 of the *Burra Charter* provides that conservation refers to all the processes of looking after a place so as to retain its cultural significance.

281 Article 1.5 of the *Burra Charter* provides a definition for this term.

282 Article 1.6 of the *Burra Charter* provides a definition of this term.

283 See Article 1.7 of the *Burra Charter* for the definition of restoration.

284 The steps as set out in this Charter include that a) the place must be understood and its history, use, fabrics and associations investigated (articles 5-7, 12 and 26), b) all values must be assessed using relevant criteria in order to develop a statement of significance (article 26), c) identifying obligations arising from significance including the identification of future needs, resources, opportunities and constraints (articles 6 and 12), d) policy must be developed, e) a management plan must be prepared together with implementation actions (articles 14-28), and lastly that this plan must be f) implemented (articles 26-34) and g) the results monitored and the plan reviewed (article 26).

285 The WHCA is the enactment of the *World Heritage Convention* into South African law.

286 Section 4 of the WHCA.

development must be socially, culturally, environmentally and economically sustainable.[287] This makes culture an important component to be considered for a development project to be considered as sustainable. An important guiding principle stemming from the Act is the requirement of intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to cultural and natural heritage.[288] The importance here is that it requires of states to not only identify these sites, but that they must also provide for measures to protect this national heritage on all levels of government.

Kotzé and De la Harpe[289] are of the opinion that provincial and local government legislation pertaining to the conservation, protection and development within a World Heritage Site has the biggest potential to influence on the governance of such a site. They state that local municipal by-laws may significantly impact on such sites especially when they relate to the IDPs, SDF'S and land use management schemes of local authorities.[290] This indicates that although World Heritage Sites are governed on a national level, the role and function of municipalities cannot be overlooked. The legislative and executive powers of a municipality are therefore important components in the governance of these sites.

3.3.4 *South African Geographical Names Council Act 118 of 1998*

The naming of places and the removal of place names can be directly linked to cultural heritage. This is because geographical names are considered by most people to provide a sense of belonging to the township, city or place in which they live. This value attached to the names of places is often contested and highly controversial.[291] The *South African Geographical Names Council Act* 118 of 1998[292] was enacted in order to give effect to the cultural values attached to place names, and also to address the inequalities of the past by representing all cultures and religions in the

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287 Section 4(b) of the WHCA.
288 Section 4(k) of the WHCA.
289 Kotzé and De la Harpe 2008 *PELJ* 225.
290 Kotzé and De la Harpe 2008 *PELJ* 225.
291 See for example the discussion of the *Afri-forum* case.
292 The *South African Geographical Names Council Act* 118 of 1998 (SAGNCA).

naming of places. It is the duty of the Council to address geographical names of national concern. The objective is therefore not only to provide guidance on existing geographical names and their conservation, but also to give effect to the wide range of diverse cultures and values in South Africa through the changing and removal of existing names.[293] The renaming of existing geographical names, however, must not be done without proper consultation and approval.[294]

A practical illustration of the application of this Act can be seen in *Tshwane City v Afri-forum*,[295] in which the court had to consider the decision of the City of Tshwane Metropolitan Municipality to change 25 of the street names in Pretoria to names of special significance to the previously disadvantaged in South Africa. The applicant, Afri-forum, opposed this change and applied for an interim interdict to the High Court in order to prevent the municipality from changing the street names. In the granting of such an interdict the court held that the street names were a historical treasure and heritage "so intimate to the very being of the Afrikaner people" that the removal thereof would cause irreparable harm. The municipality then submitted an application for leave to appeal to said High Court which was dismissed by the court and subsequently granted on petition to the Supreme Court of Appeal (SCA). This appeal was dismissed by the full court (SCA), which led to the case being brought before the Constitutional Court, which stated that the interim interdict should never have been granted and that Afri-forum had not satisfied the requirements of irreparable harm, adding that its sense of place and belonging was deemed to be highly insensitive to the sense of place and belonging of other cultural and racial groups.

The judgement in this case emphasises that while a person's cultural heritage is highly regarded in South Africa, we must not forget the history that fostered the

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293 Section 9 of the SAGNCA deals with the powers and duties of the Council, which include but are not limited to advising the Minister on the standardisation of proposed new geographical names; (ii) existing geographical names not yet standardised; (iii) the changing, removing or replacing of geographical names and others.

294 See section 9(1)(e)- (i) on the requirements for consultation and liaison. Section 10 addresses the approval and revision of geographical names.

295 2016 6 SA 279 (CC).

exclusion of other cultures, especially in terms of place naming. A municipality plays a key role in the management of place names, which is also considered to form a part of cultural heritage resources. However, a difficult question arises when it needs to be asked who's cultural heritage is worthy of being protected. Municipalities will have to thoroughly consider this Act in alignment with the provisions of the NHRA as well as alongside stakeholder input when making changes in this regard.

3.4 Environmental legislation

3.4.1 *Introduction*

In terms of South African law an integrated approach is followed with regard to heritage and environmental management. [296] Although the heritage and environmental sectors are regarded to be multifaceted, specialised and distinct disciplines, their successful regulation and management is dependent on a combination of the two extensive legal frameworks.[297] The environmental legislative framework also provides for further relevant legislation such as the *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBA)[298] and the *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPAA). [299] The analysis of these instruments will be limited to those provisions which have specific and direct relevance to cultural heritage resources.

3.4.2 *National Environmental Management Act 107 of 1998*

The first important aspect to note in the NEMA is the definition of the "environment", which highlights the fact that both cultural and natural heritage are included in what is considered to be the environment.[300] The NEMA points out that the aesthetic and cultural properties are deemed to be constituents of the environment, both of which

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296 Section 2(4)(b) of the NEMA; National Heritage Council *Critical Reflections on Heritage* 35.
297 Rautenbach, Hart and Naudé "Heritage Resource Management" 823.
298 *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBA).
299 *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPAA).
300 Section 1(1)(xi)(iv) of the NEMA.

are characteristics identified in the definition of cultural heritage.[301] The definition of environment must be understood clearly in order to fully understand how the rest of the provisions in the NEMA relate to cultural heritage resources. The NEMA defines the environment as pertaining to:

> The surroundings within which humans exist and that are made up of –
>
> (i) 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
>
> (iv) between them; and the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.[302]

The definition provided by the NEMA makes express mention of cultural properties, thus denoting the inextricable link between the environment and culture.[303] The mention of aesthetic and cultural properties relates to the characteristics associated in determining the significance of cultural heritage resources.[304] Furthermore, reference is also made to "well-being", a term which strengthens the argument that a threat to a person's culture or heritage also influences the person's well-being.[305] Owosuyi avers[306] that since it is accepted that environmental issues can interfere with a person's health and well-being, culture-related matters can accordingly also influence a person's "human health and well-being".

Another important aspect of this Act is the environmental management principles which are universally accepted and acknowledged.[307] These principles are applicable to all state organs and to all activities which affect the environment.[308] This means that they must also be taken into account by municipalities whenever they make a

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301 Rautenbach, Hart and Naudé "Heritage Resource Management" 824. Also see the discussion on the definitions of cultural heritage resources in paragraph 2.3.2.

302 Section 1(1)(xi) of the NEMA.

303 Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 7-8.

304 See the discussion in Chapter 2; Rautenbach, Hart and Naudé "Heritage Resource Management" 824.

305 See the discussion in paragraph 3.2; Owosuyi 2015 *PELJ* 2035.

306 Owosuyi 2015 *PELJ* 2035.

307 In section 2 of the NEMA provision is made for a substantial number of these environmental principles.

308 Section 2(1) of the NEMA.

decision that may adversely affect the environment and its counterparts. In section 2(2) it is required of environmental management to place people and their needs at the forefront of its concern, and to serve their physical, psychological, developmental, cultural and social interests equitably.[309] This section relates strongly to aspects of the concept of sustainability and more importantly makes direct reference to cultural interests. The Act also makes provision for intergovernmental coordination and the harmonisation of legislation, policies and actions related to the environment.[310]This would suggest that the NHRA (which addresses environmental heritage) should also be aligned with environmental legislation. Accordingly this would also mean that the duties and functions should be aligned between the different organs of state and heritage and environmental authorities. This is highlighted by the fact that the NHRA provides for the designation of heritage areas with an environmental, and cultural, interest by a local authority and the integration of such heritage areas into spatial plans for example.[311]

The principle mentioning landscapes and sites that constitute the nation's cultural heritage promotes the protection and enhancement of heritage and provides that the disturbance of these landscapes and sites must be avoided.[312] This also relates to reducing the environmental impact and enhancing sustainable development. This means that developments in the built environment must be designed to ensure that they do not disturb landscapes or cultural heritage, i.e. the green building effect. Provision is also made for the protection of traditional knowledge systems by way of section 2(4)(g), which provides that any decision that is made must take into account all the values and interests of the affected and interested parties, and must recognise all forms of knowledge, in particular traditional and ordinary

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309 Section 2(2) of the NEMA.

310 Section 2(3) of the NEMA; Sections 11-16 of the NEMA provide the procedures of co-operative governance which is aimed at co-ordinating and harmonising environmental policies, programmes and the decisions of all three spheres on government. These procedures assist in preventing the duplication of functions and procedures in terms of varying legislation such as the NHRA and the NEMA for example.

311 Section 31(5) and 31(1) of the NHRA.

312 Section 2(4)(a)(iii) of the NEMA; Van der Bank *The Role of Building Regulations in Sustainable Local Governance* 45.

knowledge. [313] Furthermore, the NEMA provides that integrated environmental management aims for the identification, prediction and evaluation of the actual and potential impact of development on cultural heritage, for example.[314] In this vein the NEMA recognises an HIA as a component of its environmental assessment process.[315]

The Act requires that an assessment and/or investigation must be done on all activities that require authorisation or permission by law, being those which may significantly affect the environment.[316] An assessment, investigation and evaluation of the impact of any proposed listed or specified activity on any national estate is obliged in this instance.[317] The reference to national estate in this provision must be read in conjunction with the list of the national estate in section 3(1) of the NHRA.[318] This must be done before the commencement of these activities, and the potential impact on the environment, socio-economic conditions and cultural heritage must accordingly be considered and assessed.[319] This refers to an environmental impact assessment (EIA),[320] which in terms of the NEMA must consider cultural properties in addition to environmental and socio-economic factors. The requirement was judicially confirmed in the *BP Southern Africa (Pty) Ltd v MEC for Agriculture*[321] and *Fuel Retailers*[322] cases. In most cases an environmental assessment will also trigger the provisions of other legislation such as the NHRA for example. In such an instance the

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313 Section 2(4)(g) of the NEMA; National Heritage Council *Critical Reflections on Heritage* 36.
314 Section 23(2)(b) of the NEMA.
315 Kotzé and Jansen van Rensburg 2003 *QUTLJJ* 18.
316 Section 24 of the NEMA.
317 Section 24(4(b)(iii) of the NEMA; Rautenbach, Hart and Naudé "Heritage Resource Management" 824.
318 In terms of section 3(1) of the NHRA the national estate includes heritage resources which are of cultural significance and of special value to a community.
319 Section 24(1) of the NEMA; National Heritage Council *Critical Reflections on Heritage* 36.
320 In GG R543 in GN of 18 June 2010 the term "Environmental Impact Assessment" is understood to refer to the identification, assessment and reporting of the environmental impact associated with an activity.
321 *BP Southern Africa* case.
322 *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC).

NEMA makes provision for an integrated and interactive system for the management of the national estate (heritage resources).[323]

Municipalities are required to carefully consider and apply the provisions of the NEMA and the NHRA when considering any application for development, or when considering to undergo a development project themselves. In this case they must conduct an assessment of the impact of the proposed development on heritage and environmental resources, as per the EIA and HIA processes. Once such an assessment is complete they are required to ensure that all impacts are controlled, avoided or mitigated. This would mean that the municipalities must provide for the protection of these resources, according to section 31(7) and section 54 of the NHRA, through its zoning scheme/by-laws in order to regulate access, use, protection, and management and to provide for fines or incentives for the heritage resources protected under the NHRA.[324]

3.4.3 *National Environment Management Biodiversity Act 10 of 2004*

The definitions provided for cultural heritage in chapter 2 of this study confirm the interface between the environment and cultural heritage, more specifically the biodiversity component of the environment. In this light the natural environment is also protected in terms of heritage legislation and policy. It is therefore perceived that the sector-specific Act for biodiversity, the NEMBA, may also be used to enforce an issue concerned with cultural heritage. To this end, the NEMBA has as its objectives the management and conservation of biological diversity and the use of indigenous biological resources in a sustainable manner;[325] to give effect to ratified international agreements that relate to biodiversity,[326] and to provide for co-operative governance in biodiversity management.[327] In this instance all the principles of heritage management mentioned under the NHRA and the environmental

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323 Sections 23-24 of the NEMA are focused on integrated environmental management (IEM).
324 This assumption is reached through a reading of section 31(7) and section 54 of the NHRA which provide for the protection of heritage resources.
325 Section 2(a) (i) and (ii) of the NEMBA.
326 Section 2(b) of the NEMBA.
327 Section 2(c) of the NEMBA.

management principles under the NEMA will find application. Therefore in consideration of these provisions, municipalities are required to consider the provisions of the NEMBA in order to provide for effective CHRM. This will entail giving effect to the provisions of all binding legislation and (international) instruments and to effectively promote and ensure the sustainable management of biological resources and its cultural heritage components. In this vein the NEMBA recognises the State's trusteeship of biological diversity by stating that the state, by way of its organs, is responsible for managing, conserving and sustaining South Africa's biodiversity and its components, and is also responsible for ensuring the progressive realisation of these rights (section 24 of the *Constitution*).[328]

3.4.4 *National Environmental Management: Protected Areas Act 57 of 2003*

The *National Environmental Management: Protected Areas Act* 15 of 2009 (NEMPAA), assigns special- and national parks and heritage sites to South African National Parks. The Act defines "environmental goods and services" as including cultural non-material benefits that are of a spiritual, aesthetic, and community, educational and symbolic nature.[329] This refers directly to cultural heritage resources as components of the environment. The NEMPAA expressly mentions World Heritage Sites as protected areas in South Africa.[330] The Act aims to provide for co-operative governance in the declaration and management of these protected areas.[331] This would therefore require inter-governmental co-operation and public participation with all areas considered to be protected areas.[332] Municipalities will therefore play a key role in identifying and designating protected areas in terms of both the NEMPAA and the NHRA, and will be required to ensure that these protected areas are managed and protected as per the provisions of these Acts.

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328 Section 3(a) and (b) of the NEMBA; also see the discussion on the link between biodiversity and cultural heritage in paragraph 2.3.
329 Section 1 of the NEMPAA.
330 Sections 9(b) and 13 of the NEMPAA.
331 Section 2(b) of the NEMPAA.
332 See the long title of the Act.

3.5 Concluding remarks

The body of law in South Africa aimed at protecting cultural heritage resources has developed to such an extent that it covers a multitude of cultural heritage manifestations. This discussion looked at the various legislative and policy provisions on the management and protection of cultural heritage resources. It becomes clear that while the *Constitution* supplies a good foundation when it comes to cultural, environmental, religious and linguistic rights and the enforcement thereof, it should not be regarded as the beginning and end of cultural management. Cultural heritage resources are most effectively governed by both heritage and environmental legislation. This means that a variety of heritage, environmental and planning authorities and laws find application to cultural heritage management. In this instance the greater objective is the reconciliation between environmental, planning and heritage legislation in order to integrate heritage management into broad environmental management systems and regulatory frameworks. What clearly emanates is that there is an overlap of mandates with regards to CHRM. However, while this duplication may be problematic it also provides a wider scope of protection and regulation of cultural heritage resources especially with regards to the functions of local authorities.

4 The authority and functions of local government in cultural heritage management and protection

4.1 Introduction

This chapter provides a critical discussion of the applicable constitutional provisions and the overarching local government legislation and policies for the fulfilment of local government's responsibility in the protection of cultural heritage resources. Furthermore, it attempts to determine the extent to which municipalities can manage and regulate specific cultural heritage resources. Lastly, reference will be made to the current regulation of cultural heritage resources in a specific local authority in South Africa, as well as the instruments employed in the governance of these resources.

4.2 Co-operative governance and inter-governmental relations

In order to understand the extent and scope of local government's authority and functions, it is important first to understand the functioning of the three spheres of government and the various role players in the regulation and management of cultural heritage resources.[333] The South African legal framework makes cooperative governance a constitutional requirement under section 41 of the *Constitution*, which requires that organs of state must act in a way which is in compliance with and not inconsistent with the acts and decisions of other organs of state, and must respect their functions and authority.[334] This system of cooperative government is reinforced by the *Systems Act*.[335] Observance of the principle of subsidiarity is central to intra-governmental cooperation[336] in the municipality as well as to inter-governmental cooperation between local government and the national and provincial spheres.[337]

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333 See the discussion on the administration of cultural heritage resources in paragraph 3.1 of this study.
334 Nortjé *Local Government's Executive Authority* 43.
335 Section 3 of the *Systems Act*.
336 Du Plessis 2015 *CILSA* 294.
337 Du Plessis 2015 *CILSA* 296.

Although the statutory framework makes provision for the division of functions between the different spheres, the principle is best described in the writings of scholars. Du Plessis, as one such author, describes it as an organising principle of decentralisation, clearly requiring that matters are dealt with by the lowest, smallest or least centralised authorities, who will be those most capable of addressing the matters effectively.[338]

4.3 The constitutional mandate of local government

4.3.1 *Introduction*

In order to ascertain what role local government has in cultural heritage management reference must be made to the constitutionally allocated functional areas of local government, while taking into account the provisions relating to culture and religion,[339] and briefly the environmental right in section 24, as previously discussed.[340] Since the *Constitution* makes express provision for the functional areas of all three spheres of government,[341] a discussion of the relevant sections of the *Constitution* will follow.

4.3.2 *The scope of local government's original powers*

Aside from the rights to culture, language and religion as contained in the *Constitution*,[342] there are also specific sections in the constitutional framework that have been designated for the purposes of understanding the competency and the role of the state with regards to cultural matters.[343] Chapter 7 of the *Constitution* specifically affords a municipality the right to govern the local affairs of its

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338 Du Plessis 2015 *CILSA* 296; Roodt 2006 *Fundamina* 210-211.

339 Sections 15, 30 and 31 of the *Constitution*.

340 Section 24 of the *Constitution*. See the discussion of the applicable constitutional provisions in paragraph 3.2 of this study.

341 Schedules 4 and 5 of the *Constitution* provide lists of the functional areas of national, provincial and local government.

342 See the discussion in paragraph 3.2 of the argument surrounding cultural, religious and environmental rights.

343 Roodt 2006 *Fundamina* 209.

community in a democratic and accountable manner.[344] Its role as the regulator of its community's affairs is made subject to its compliance with national and provincial legislation.[345] These sections highlight the fact that local government has been tasked not only with addressing matters affecting its community (as a regulator), but also with ensuring that the measures that it takes are in line with the provisions of national and provincial legislation (as a regulated entity).[346]

Whilst many academics and scholars have argued that local government has a duty or responsibility to protect the environment without that function having been assigned to it in terms of the *Constitution*,[347] it is also plausible that this argument and rationale may be extended to cultural matters.[348] In support of this argument, Rautenbach, Hart and Naudé aver that while it appears that CHRM is an exclusive function of the national and provincial levels of government, the picture looks somewhat different when the legislation is reviewed.[349] Furthermore, the objects of local government are described as ensuring the sustainable provision of services to communities, promoting social and economic development, the promotion of a safe and healthy environment and to encourage the involvement of communities in the affairs of local government.[350] This section has been interpreted as giving a clear environmental mandate to local government in alignment with section 24.[351] In discussing whether local government has authority in respect of "environmental matters", the court held, in *Le Sueur v eThekwini Municipality*, [352] that the functions of municipalities are not confined to the lists in the Schedules of the *Constitution*.

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344 Section 151(3) of the *Constitution*. It is the right and duty of the municipal council to govern the local government affairs of its local community as prescribed by section 4(1)(a) of the *Systems Act*.

345 Section 151(3) of the *Constitution*; Bosman, Kotzé and Du Plessis 2004 *SAPL* 416.

346 Section 151 of the *Constitution*; Bosman, Kotzé and Du Plessis 2004 *SAPL* 416.

347 See Du Plessis 2015 *PELJ*; Du Plessis and Van der Berg 2014 *Stell LR*; Fuo 2015 *CJLG* etc.

348 Rautenbach, Hart and Naudé "Heritage Resources Management" 828.

349 Rautenbach, Hart and Naudé "Heritage Resources Management" 828. See also the discussion on the provisions of the NHRA in paragraph 3.3.2 of this study.

350 Section 152(1)(b)- (e) of the *Constitution*.

351 See for example the discussion of the outcome of the *Le Sueur* case in Du Plessis and Van der Berg 2014 *Stell LR* 589-594.

352 *RA le Sueur v eThekwini Municipality* 2013 JDR 0178 (KZP) paras 19-29 (hereafter the *Le Sueur* case).

It must be noted that a safe and healthy environment also refers to an environment in which its cultural properties are protected and conserved.[353] Section 152 of the *Constitution* mandates local government to integrate environmental concerns into its planning process and to conduct its business in a way that is consistent with sustainable development principles.[354] Based on the arguments in this study it is accepted that the protection of cultural heritage resources can be an environmental concern, it is also a pillar of sustainable development and must therefore be taken into account by local authorities. Under section 152(2) a municipality must strive, within its financial and administrative capacity, to achieve these objects.[355]

This study has shown that culture, and in particular cultural heritage, forms an integral part of the environment and therefore deserves equal consideration.[356] It should be assumed, therefore, that when local government is mandated to integrate environmental concerns into its planning process, those concerns include cultural matters. Furthermore, section 31 of the NHRA strengthens this notion by stating that local authorities are required to integrate the protection of cultural areas into their planning and through the framing of appropriate by-laws.[357]

As indicated earlier, local government's legislative and executive authority is derived from Schedules 4B and 5B of the *Constitution*, which includes a comprehensive list of its functional areas. It must be understood that legislative competence refers to the power to enact legal rules, while executive competence is regarded as the power to give effect to these legal rules.[358] In terms of Schedule 4B of the *Constitution*, municipalities are authorised to legislate on or make by-laws in the functional area of municipal planning. In terms of Schedule 4B "municipal planning" is a functional area of local government. This largely covers aspects of planning law and land-use management, under which cultural heritage is an integral component to be considered.

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353 See the discussion in paragraphs 2.3.2 and 3.4.
354 Section 152 of the *Constitution*.
355 Section 152(2) of the *Constitution*.
356 See the discussion in paragraph 3.4.1 of this study.
357 Section 31(7) of the NHRA. See the full discussion in paragraph 3.3.2.11 of this study.
358 Van Wyk 2012 *PELJ* 289.

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[359] the court held that municipal planning often entails land use and is inextricably connected to every functional area that concerns the use of land (i.e. tangible cultural heritage). Land use to a large extent also deals with the conservation of the environment, of which cultural heritage resources is also a component of. It is also a principle of land use and planning law that sustainable development must be integrated into land-use and fostered in planning tools and legislative instruments. The *Wary Holdings* case is relevant for this discussion in so far as it affirms that local government has the function of executing its municipal planning duty and the authority to do so.[360] This can be interpreted as including a responsibility in relation to cultural heritage resources. In addition, the NHRA requests that planning authorities must investigate the need for the designation of heritage areas to protect a place which has an environmental or cultural interest.[361] This means that municipalities are required to take into account the sustainable land-use i.e. considering environmental and cultural interest in the land when executing their municipal planning function.

Another illustration of the planning law-cultural heritage interface may be found in the *Habitat Council and Another v Provincial Minister of Local Government*[362] decision. The court looked at the proposed redevelopment of a part of a block of buildings which have existed since the 18th century, since this property was situated in an "urban conservation" area which required special consent from the municipal council. In this instance the regulations of the local zoning scheme provided that consent must not be granted if the demolition, erection or any alteration will be detrimental to the protection and maintenance of properties of historical, architectural and aesthetic significance in such an area.[363] The court held that the building had clear historical importance for the City of Cape Town.[364] The outcome of this indicates that

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359 2009 1 SA 337 (CC) para 128 (*Wary Holdings*).
360 *Wary Holdings (CC)* para 127; Van Wyk 2012 *PELJ* 289.
361 Section 31 of the NHRA.
362 *Habitat Council v Provincial Minister of Local Government* 2013 6 SA 113 (WCC) (the *Habitat Council* case).
363 *Habitat Council* case para 117A-C.
364 *Habitat Council* case para 116E-G. When reviewing the case, a few things come to mind. Firstly, since the buildings have existed for more than 100 years should they not have been classified as

cultural interests must be taken into account and provided for in planning tools (local zoning schemes for example). The consideration of cultural heritage resources must therefore inform decisions taken on development.

The *Constitution* places an obligation on municipalities to create by-laws with regard to the regulation of their affairs and the provision of the services within their jurisdiction. These by-laws are passed by the Council of a municipality in terms of powers which are set out in Schedules 4B and 5B of the *Constitution*. Whilst the *Constitution* does not specifically assign cultural matters to local government, it makes provision for other functional areas which might relate to cultural heritage, such as the management of municipal abattoirs[365] (a religious practice may be inferred), cemeteries, funeral parlours and crematoria etc. The provisions of the NHRA expressly require of local authorities to frame by-laws with regard to their responsibility for heritage resources. The legislative powers of the municipal councils are further set out in more general terms in section 156 of the *Constitution*.[366] To this end a municipality will be able to draft legislation (by-laws) under its municipal planning function and/ or on the basis of all other functions that may have a bearing on its cultural heritage governance mandate in terms of the NHRA.

4.3.3 *Incidental and assigned powers of local government*

As mentioned previously, the Schedules are the source of local government's original powers when read in combination with chapter 7 of the Constitution. Municipalities obtain their legislative and executive powers in terms of the *Constitution* by which they are to govern within their demarcated jurisdictions.[367] Another form of power in terms of local government is assigned power created under section 156(1)(b) read with 156(2)of the *Constitution*, that provide that municipal councils have the

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cultural heritage and thus fall under the scope of protection of the NHRA. Secondly, the decision affirms the role of municipalities in assessing development decisions and their importance in urban conservation. *Habitat Council* case para 116E-G.

365 Schedule 4B of the *Constitution*.

366 In this regard, section 156(1) empowers local government with the right to administer all the matters as listed in Schedules 4B and 5B and any other matter that has been assigned to it by national or provincial legislation.

367 Sections 151 and 156 of the *Constitution*.

authority to pass laws with respect to the matters assigned to them by national or provincial legislation.[368] The *Constitution* further empowers a provincial legislature to assign any of its legislative powers to a municipal council in such province.[369] The assignation of these powers are limited by section 44(1)(a)(iii) of the *Constitution* which states that the national government may assign its power to legislate on any matter, except to amend the *Constitution*, to any legislative authority in another sphere of government. This is perfectly aligned with the NHRA which provides for the possibility of delegations of power to local authorities. This assignment indicates that municipalities would be able to legislate and execute cultural matters and all functions associated thereto (CHRM) when such powers have been assigned or delegated to the municipal council.

This can be seen in section 156(4) of the *Constitution*, which provides that if a function would be better carried out under municipal authority that function must be assigned to the municipality by the other spheres.[370] The municipality in this instance obtains executive authority in terms of how the function should be executed. Section 156(4) of the *Constitution* acknowledges that even where (cultural) matters are listed in Schedules 4A and 5A there may be circumstances in which they may be most effectively dealt with by municipalities.

The *Constitution* also makes provision for incidental power of local government. This form of power is provided in section 156(5), which holds that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. A municipality should be aware of the needs of its community and be able to deal with these matters effectively. Roodt suggests that the debate on whether or not local government has the authority or function of dealing with cultural matters has been led astray due to the misconception that Schedules 4 and 5 prevent local authorities from making by-laws and regulations that deal with cultural matters affecting their jurisdictional

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368 Sections 156(1) (b) read with and s 156 (2) of the *Constitution;* Freedman 2014 *PELJ* 578.
369 Section 104(1)(c) of the *Constitution*.
370 Section 156(4) of the *Constitution*.

areas.[371] In the landmark decision of *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*,[372] the courts provided an understanding on what constitutes "municipal planning". This case highlights the notion that local authorities are one of the most important spheres of decision-making on planning.[373] In this case the Constitutional Court clarified the fact that neither national nor provincial spheres of government can, by legislation, exercise executive municipal powers or the right to administer municipal affairs. The courts have also highlighted that they are in favour of municipalities taking on functions not specifically allocated to them by the Schedules, these powers are known as incidental powers as confirmed in *Nel v Hessequa Local Municipality*.[374]

It should therefore not be deemed that the Constitution prohibits local government from dealing with cultural matters purely based on the scheduled functions. In the *Le Sueur* case the court took the question of assigned and incidental powers of local government into account. The court held that the power of municipalities to deal with "environmental matters" as part of their municipal planning function should be seen as a function assigned from national and provincial legislation.[375] In this vein, "cultural matters" will also form part of the municipality's "municipal planning" function and will afford the municipality with the capacity to administer on matters concerning the protection and management of cultural heritage resources.

4.4 Framework legislation and policy on local government

Local government derives its legislative and executive functions in the first place from the constitutional provisions and Schedules as discussed above; then secondly, from the framework Acts for local authorities. This section looks at the provisions of the *Local Government: Municipal Systems Act*[376] and the *Local Government: Municipal*

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371 Roodt 2006 *Fundamina* 211.
372 2010 (6) SA 182 (CC) (hereafter the *Gauteng Development Tribunal* case).
373 *Gauteng Development Tribunal* paras 24-45.
374 *Nel v Hessequa Local Municipality* case no. 12576/13.
375 *Le Sueur* case para 22.
376 32 of 2000 (hereafter the *Systems Act*).

Structures Act[377] (both of which are framework local government laws) with regard to local government's executive and legislative mandate in managing cultural heritage resources.

4.4.1 *Local Government: Municipal Systems Act 32 of 2000*

The *Systems Act* compels municipalities to exercise their executive and legislative authority within the constitutional system of co-operative government envisaged in section 41 of the *Constitution*.[378] This requires of all three levels of government to work in co-operation when it comes to cultural matters for example. The NHRA appears to acknowledge that cultural heritage is best managed and protected by the level of government closest to the people. However, with the multitude of mandates and shared responsibilities of the SAHRA, the PHRAs and other heritage resources authorities, the powers and responsibilities of local government in this matter become tenuous indeed. Therefore, in the light of the discussion so far, it is recommended that the SAHRA, together with the PHRA's, should be empowered to delegate the management of any site to a local authority if that authority is deemed competent and well resourced.[379]

The law has been changing in the direction of integrating environmental and spatial planning and land use approvals. Consequently, environmental (and heritage/social) impacts at the local level are now also considered through the process of land use management that forms part of municipal planning.[380] The *Systems Act* obliges every municipality to include a spatial development framework (SDF) in its integrated development plan (IDP).[381] This IDP forms part of the execution of a municipality's duty in terms of its municipal planning function as per the *Constitution*. The duty to include an SDF in the IDP is emphasised by the *Spatial Planning and Land Use*

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377 117 of 1998(hereafter the *Structures Act*).
378 Section 3(1)(a) of the *Systems Act*.
379 City of Cape Town *Cultural Heritage Strategy* 5.
380 In terms of Schedule 4B of the *Constitution* this is a function of local government.
381 Section 26(e) of the *Systems Act*. The SDF aims to provide guidance on the spatial distribution of current and the desired use of land within a municipality. The five-year IDP is regarded as one of the most important instruments to be used in municipal planning.

Management Act 16 of 2013 (SPLUMA), in section 20(2).[382] In addition to the national decision-making criteria and the provincial decision-making criteria, the SPLUMA enables municipalities to pass by-laws to enforce their respective land-use schemes.[383]

Du Plessis and Fuo are of the view that the foregrounding of integrated development planning in South Africa was an implicit response to the country's commitment to UN Agenda 21, which placed sustainability at the forefront of development.[384] The Agenda of which they speak also refers to cultural heritage as one of the pillars of sustainable development. In terms of these plans, local government has to be committed to working with its communities in order to find sustainable ways of meeting their social, economic and material needs and improving the quality of their lives. The *Systems Act* provides that local government is obliged to provide government at a local level and to execute the functions associated with this responsibility.[385] In terms thereof a municipality can exercise its legislative or executive authority through the passing of by-laws and through implementing such by-laws. This power to make and execute by-laws is provided under section 55 of the *Systems Act*.[386] This empowerment affords municipalities with the ability to create by-laws concerning the identification, nomination, protection and management of cultural heritage resources.

Adding to the provisions of the *Constitution*, the *Systems Act* and the SPLUMA on municipal planning and related matters, section 28(6) of the NHRA should also be taken into account. This provision states that a local authority may, with the agreement of the heritage resources authority, make provision in its town planning

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382 Sections 20(1) and (2) of the SPLUMA provides that each municipality must prepare and adopt, by notice in the Provincial Gazette, a municipal SDF, which must form part of the municipality's IDP in accordance with the provisions of the *Systems Act*.

383 Section 32 of the SPLUMA.

384 Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right* 463; Fuo 2013 *PELJ* 232.

385 Section 11 of the *Systems Act*.

386 Section 55 of the *Systems Act* states that the municipal manager is responsible for the administration and implementation of by-laws and other legislation.

scheme or in By-laws for the management of a declared protected area.[387] This is particularly relevant to executing its responsibility to protect cultural heritage resources as provided by the NHRA and also relevant with regard to the provisions of the NEMPAA on protected areas. Section 23 of the *Systems Act* further provides that planning should be development oriented.[388] In this respect the High Court held in the *Le Sueur* case that section 23(1)(c) of the *Systems Act*, which deals with integrated development planning at a municipal level, recognises that there is an obligation on municipalities together with other organs of state to contribute to the progressive realisation of the fundamental rights contained in (section 24) the *Constitution*, and that this was clearly a mandate from the national legislature with regard to environmental matters.[389]

4.4.2 *Local Government: Municipal Structures Act 117 of 1998*

This Act assigns responsibility for the scheduled functions between the different tiers of local government. The specific functions vested in district municipalities are discussed in section 84 of the Act. The Act provides that it is the duty of a local authority to implement and administer legislation in the execution of its authority and functions, and that it is mandated to develop policy and pass by-laws to effectively govern within those functional areas. If local government should fail to fulfil its executive obligations, the provincial executive may intervene.[390] The *Structures Act* compels the municipal council to review the needs of its community[391] and its organisational and delivery mechanisms for meeting the needs of such community.[392] It further requires of the council to develop mechanisms to consult the community

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387 Section 28(6) of the NHRA. Also see the discussion on heritage areas in paragraph 3.3.2.11.

388 This also refers to sustainable development, thus aiming to improve the quality of life and serving both the present and the future generations. Section 23 of the *Systems Act*; Retief and Cilliers "Municipal Integrated Development Planning" 170.

389 *RA le Sueur v eThekwini Municipality* 2013 JDR 0178 (KZP) para 24; Freedman 2014 *PELJ* 586. The link between the environment and cultural heritage has been established in the discussion in paragraph 3.4. It is therefore assumed that in dealing with environmental matters, the integration of cultural heritage resources, and in particular their management and protection, should always be considered and given sufficient attention.

390 Section 139 of the *Constitution*.

391 Section 19(2)(a) of the *Structures Act*.

392 Section 19(2)(d) of the *Structures Act*.

and in performing its functions and exercising its powers.[393] It is therefore implied that when reviewing the needs of its community a municipal council must take into account the cultural affairs of its community. It must accordingly put mechanisms into place to where these matters require protection for example.

4.5 An analysis of existing cultural heritage governance instruments in the City of Cape Town Metropolitan Municipality

4.5.1 *Introduction*

The legislative authority of local government translates into the power of municipalities to make by-laws and to adopt other regulatory instruments such as planning instruments with legal force.[394] In order to efficiently execute their legislative and executive authority, municipalities make use of various instruments and tools. These instruments may be categorised into various types.[395] The *Systems Act* lists a number of these instruments in section 11. These instruments include, but are not limited to, governance-based,[396] command and control (governing based),[397] and procedural (information-based) instruments.[398]

Despite the absence of a very clear and explicit constitutional mandate of local government to deal with cultural matters (including cultural heritage resources), there are certain municipalities which have taken initiative by implementing various cultural heritage strategies and policies, i.e. using the instrumentation and tools available to them, as required by the national laws discussed above. The aim of this

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393 Section 19(3) of the *Structures Act*.

394 Du Plessis "Municipal by-law making in South Africa" 8.

395 The discussion on the instruments and tools in this paragraph are adapted from the following sources: Section 11(3) of the *Systems Act*; Du Plessis 2010 *Stell LR* 274-275; Fuo *Local Government's Role in the Pursuit of Transformative Constitutional Mandate* 302-334; Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 97-110.

396 These instruments define the role of municipalities as a regulator i.e. controlling its own processes and activities. They define the processes to be adopted and uses to generate information e.g. IDPs or spatial plans.

397 Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 123-125. This refers to tools that a municipality can adopt and use in exercising its powers for example the drafting of by-laws and local standards and the right.

398 This instrument aims to make information readily available to the public through the duty of promoting rights in terms of the *Constitution* i.e. creating awareness and educating the public.

section is to provide insight into the current functioning of the heritage sector in one of the most efficient municipalities in South Africa. The City of Cape Town Metropolitan Municipality (CCTMM) is known for its beautiful natural environment and exceptional natural resources. The City has thus committed itself to ensuring that the diverse cultural heritage of Cape Town is protected and promoted.[399] The paragraphs below provide a brief review of the instruments available to local government and discuss which of these are currently being used in the management and protection of cultural heritage in the CCTMM. The aim of this discussion is to arrive at a broad proposal for heritage resource management following pointers from the CCTMM. The instruments used by the City in cultural heritage management are discussed below.

4.5.2 *Governance instruments*

The IDP is seen as the leading governance instrument for local government.[400] The CCTMM has drafted and published its IDP for the period 2017-2022 in accordance with section 25 of the *Systems Act*. This IDP aims for the building of integrated communities through spatial transformation. It further seeks to promote and support cultural activities and to honour and respect events that enable communities to display their heritage by making optimal use of its existing facilities.[401] This strategic aim is a direct enforcement of the right to participate in a cultural life as provided by the *Constitution*.

The City's first strategic focus area is to position Cape Town as a globally competitive forward-looking city. [402] In achieving this object the City has established the "intergovernmental legislation project" which aims to explore the introduction of a regulatory impact assessment. This impact assessment must therefore be aligned with the provisions of the NHRA and the NEMA. To this end the City also established a "green infrastructure project" which will offer a planning and management tool for

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399 City of Cape Town 2017 http://www.capetown.gov.za/Local%20and%20communities/Heritage-and-the-community/Heritage-resources/Heritage-information-and-resources.

400 Fuo *Local Government's Role in the Pursuit of Transformative Constitutional Mandate* 339.

401 City of Cape Town *Integrated Development Plan* 43.

402 City of Cape Town *Integrated Development Plan* 62.

public open spaces, parks and rivers.[403] The focus here will also be on the cultural benefits derived from these natural assets. The first spatial priority is to build an inclusive, integrated and vibrant city. In achieving this objective the City aims to identify, conserve and manage the heritage resources, cultural landscapes, scenic routes and special places that are fundamental to the City's sense of place as provided by the NHRA and the NEMA, for example.[404]

The City has established a "citizen value programme" under which it has launched the naming, heritage and anti-racism projects.[405] The naming project is aimed at inclusivity through the naming and renaming of spaces, places and memorials which represent all its residents' heritage.[406] This is in line with a municipality's duties in terms of the SAGNCA.[407] The heritage project seeks to protect the City's natural and cultural heritage by developing a Heritage Inventory (HI). This HI will be compiled in consultation with the PHRA (Heritage Western Cape) and will be a streamlined development application process.[408] This means that heritage matters are to be aligned with development and planning processes. The IDP of the CCTMM has therefore taken into account the functions and powers of the City in terms of national laws and policy and has given effect to its responsibility in the management and protection of cultural heritage by expressly addressing these priorities. The way in which the City's IDP provide for matters of cultural heritage can be used as a guiding tool by other municipalities yet to consider how to best incorporate CHRM in its governance practices. It must also be emphasised that the IDP's priorities should always be reflected in the municipal budget to ensure effective implementation and coherence between the different governance instruments of a municipality.

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403 City of Cape Town *Integrated Development Plan* 79.
404 City of Cape Town *Integrated Development Plan* 53.
405 City of Cape Town *Integrated Development Plan* 121.
406 City of Cape Town *Integrated Development Plan* 121.
407 See the discussion in paragraph 3.3.4.
408 City of Cape Town *Integrated Development Plan* 121.

4.5.3 *Governing instruments*

In execution of its constitutional and legislative governance mandate the CCTMM has drafted a Municipal Planning By-law.[409] This By-law makes provision for a heritage protection overlay zoning (HPO).[410] This tool is used by the CCTMM in order to protect heritage places entered on the heritage register[411] and for the protection of heritage areas as provided by the NHRA.[412] The By-law further provides a set of development rules[413] together with a few general provisions.[414] The general provisions provide a list of activities which require the approval of the City if it affects a place or an area that is protected as an HPO zone.[415] These listed activities are similar in nature to the listed activities in section 38(1) of the NHRA and those provided in the NEMA EIA Guidelines. The approval of the City would be required where, for example:

> (b) any development, including any physical intervention, excavation, or action other than those caused by natural forces, which may in any way result in a change to the appearance or physical nature of a heritage place, or influence its stability and future well-being…[416]

From these provisions it can be seen that almost every development activity will require the approval of the City. The By-law has therefore made provision for a strict regulatory framework for obtaining permits and authorisations. Furthermore, the City requires certain information from an applicant in the consideration of applications for any of the activities listed in the By-law.[417] The City may require that the applicant,

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409 City of Cape Town Municipal Planning By-law, 2015 available at City of Cape Town 2017 http://www.capetown.gov.za/Local%20and%20communities/Heritage-and-the-community/Our-history-and-heritage/Protecting-our-heritage.

410 Items 159-164 of chapter 20 of the Municipal Planning By-law.

411 Item 159(a) of the By-law makes provision for the application of HPO zonings on any heritage place that has been entered into the register of heritage resources maintained by the PHRA in accordance with the NHRA.

412 Item 159(b) of the By-law makes provision for the application of HPO zonings on any heritage area that has been designated in accordance with the NHRA.

413 Item 161(1)(a)-(b) and (2) of the By-law.

414 Item 162 of the By-law.

415 Item 162(1)(a)-(f) of the By-law.

416 Item 162(1)(b) of the By-law.

417 The activities are listed in items 162 and 163(specific provisions which might apply to activities). The consideration of these applications is done in terms of item 164(1)-(4) of the By-law.

for example, furnish details of the activities for which the application is made,[418] submit a statement of significance or a heritage statement,[419] or require that a statement of conservation policy be submitted in respect of the work proposed to be carried out.[420]

The By-law provides that in deciding on the application the City must consider the effect of the proposed activity on the significance of the heritage area or place in question.[421] This consideration of the effects on heritage resources refers to the inclusion of an HIA in terms of development and planning processes. The By-law further states that the City may, when approving the application, also impose any conditions appropriate for the protection of the heritage area or place.[422] These may include conditions regarding the heritage management plan, for example.[423] The By-law also provides that the approval of the activity does not exempt the applicant from obtaining approvals required from other laws such as the NEMA or NHRA.[424] The CCTMM's By-law contains a concrete example of how a municipality can execute its law-making powers, by virtue of the provisions of the *Constitution*, national laws and framework legislation, in order to effectively manage and protect cultural heritage resources. This By-law also represents the close relationship between development, planning and heritage management. Of significance is the fact that it is through the municipality's constitutionally determined function of municipal planning that it has embarked on framing this By-law.

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418 Item 164(1)(a) of the By-law.
419 Item 164(1)(b) of the By-law.
420 Item 164(1)(c) of the By-law.
421 Item 164 (2) of the By-law.
422 Item 164 (3) of the By-law.
423 Item 164 (3)(c) of the By-law.
424 Item 164 (4) of the By-law. It is therefore suggested that this By-law must function alongside national laws and policies in order to strengthen its effectiveness.

4.5.4 *Procedural instruments*

Procedural instruments may also be described as right- or information based tools and instruments.[425] This may include access to the information on the functioning of local government and the methods and means that it achieves its aims.[426] These could include official websites or the distribution of pamphlets for example. In light of its procedural function in terms of the NHRA the City has compiled a heritage register which can be accessed on the City's official website. The City's heritage database contains a register of all the cultural heritage resources in its jurisdiction.[427]

A practical illustration of these instruments in the Municipality can also be seen in the production of a series of heritage advice pamphlets.[428] These heritage pamphlets provide information on specific heritage resources in the City such as symbolic places, buildings and landscapes.[429] It also addresses the definitions, grading of specific resources, the authorities responsible for their management and protection and provides a list of requirements for property developers.[430] The main purpose of the pamphlets is to inform the public of their valuable heritage and to provide an understanding of the conservation and good management of their cultural and natural environment.

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425 Du Plessis "Municipal By-law Making in South Africa" 8.

426 The writer's own emphasis based on Section 11(3) of the *Systems Act*; Du Plessis 2010 *Stell LR* 274-275; Fuo *Local Government's Role in the Pursuit of Transformative Constitutional Mandate* 302-334; Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 119-128.

427 City of Cape Town 2017 http://www.capetown.gov.za/Local%20and%20communities/Heritage-and-the-community/Heritage-resources/Heritage-information-and-resources.

428 City of Cape Town 2017 http://www.capetown.gov.za/Local%20and%20communities/Heritage-and-the-community/Heritage-resources/Heritage-information-and-resources.

429 City of Cape Town 2017 http://www.capetown.gov.za/Local%20and%20communities/Heritage-and-the-community/Heritage-resources/Heritage-information-and-resources.

430 This is taken from the first Heritage Advice Pamphlet, there is a total of 16 which are accessed on City of Cape Town 2017 http://www.capetown.gov.za/Local%20and%20communities/Heritage-and-the-community/Heritage-resources/Heritage-information-and-resources.

4.6 Summary

The aim of this chapter was to give a critical discussion on the authority of municipalities in the protection of cultural heritage resources and their functions in cultural heritage management. In view of the discussion it is clear that municipalities derive their legislative and executive powers from the provisions of the *Constitution* and from national law such as the *Systems Act*. The scheduled functions should, however, not be regarded as exhaustive. It was shown that although the *Constitution* does not assign cultural matters to local government it does make provision for the allocation of powers to municipalities in addressing matters that are necessary or incidental to carrying out their functions in terms of the *Constitution*. In this instance it was argued that in order to carry out its function of municipal planning it is necessary that municipalities take into account the cultural heritage resources within its jurisdiction. This chapter has further established that municipalities have a wide range of instruments available in order to execute their functions as per the *Constitution*, heritage, environmental and planning legislation. It was also illustrated that these instruments have already been implemented by one of the most successful (and best resourced) municipalities in South Africa. This discussion has shown that while the role of local government in cultural heritage management has often been regarded as miniscule and passive, municipalities can and should take on an active role in the management and protection of cultural heritage resources. This should, however, be in alignment with national laws and policies.

5 Conclusion

5.1 Background

The proactive protection of cultural heritage may be more important than ever. The threats to and the loss of cultural heritage resources requires a holistic approach to their management. The interests in cultural heritage cannot be removed from that in the environment, planning or development sectors in general. In order to address the protection and management of cultural heritage resources a system of good inter-governmental and institutional co-operation is needed. This would mean addressing culture related matters on the level at which they are encountered, on a much larger scale. Considering that cultural heritage resources are given meaning and value in local communities, it would be of greater value to effective CHRM if these are regulated on a local level by the municipalities which have jurisdiction over these communities.

Against the background of the above the aim of this study was to discuss the authority and functions of municipalities in the management and protection of cultural heritage resources. Chapter 2 demonstrated that the development of the international instruments, from the protection of cultural objects into a scope of law protecting the (living) cultural heritage and the diversity of individuals and their cultural practices, contributed a great deal to the current governance and management framework for cultural heritage resources in (South) Africa. African policies and treaties have furthermore guided member states in drafting national legislation in furtherance of the mandate to conserve their cultural heritage.

Chapter 3 gave an overview of the governance and management framework of cultural heritage resources in South Africa. This part of the study indicated that the heritage, environmental and planning law sectors are interconnected and often overlap through the interpretation of cultural, linguistic and religious rights in conjunction with the constitutional environmental right. Therefore, in the light of a municipality's planning mandate, heritage laws must be read in conjunction with *inter alia* planning and environmental laws. This integrated approach creates an extended mandate for local government to administer some aspects of the cultural matters of

its community. A municipality therefore has a role with regards to heritage resources management in the NHRA and otherwise. However, with regard to the overlapping mandates there is often confusion as to where this role may, or even should be extended.

Chapter 4 addressed the sources and scope of the functions and powers of local authorities in cultural heritage resources protection and management. This discussion pointed out that the three matters upon which local government can exercise legislative and executive competence include the functional areas as set out in Schedules 4B and 5B, the matters assigned to it by national and provincial government and those matters that are reasonably necessary for or incidental to the effective exercise of the municipality's ordinary functions. These functions and the authority of local government are informed by the provisions of the *Systems*- and *Structures Act* and accordingly also the provisions of heritage, environmental and planning law legislation. What is also clear is that certain municipalities already make provision for the regulation of their cultural heritage resources, as has been shown in the discussion of the cultural instruments used in the CCTMM. The latter discussion has revealed that municipalities can execute and enforce their authority and functions with regard to CHRM through the use of the local governance instruments available to them. Through the use of planning and strategic tools local authorities can clearly set out plans of promoting, protecting and managing heritage resources. The discussion illustrates that municipalities can address and enforce the priorities and objectives set out in their planning instruments (IDPs) most effectively through drafting by-laws which provide strict regulatory provisions for CHRM.

5.2 Main findings

Notwithstanding the fact that cultural matters are not a constitutionally assigned function of local government, the provisions of the heritage and environmental legislation indicate that municipalities have the authority to manage and protect cultural heritage resources. This authority is firstly derived from the interpretation of the cultural, environmental, religious and linguistic rights provided in sections 15, 24, 30 and 31 read with section 7(2) of the *Constitution*. This places a duty on all organs

of state to ensure the fulfilment of the aforementioned rights including municipalities. Secondly, the NHRA provides that local government has authority to manage and protect Grade III heritage resources and also provides the possibility for the delegation of powers by national and provincial authorities to the local sphere. In line with the Act the functions of municipalities in CHRM includes the identification of cultural heritage resources and the designation of land for their conservation, the recording thereof in a heritage register, the promotion and presentation and use of heritage resources, reporting to PHRA's and finally to make By-laws regulating the admission to, controlling the conditions of use of, and protecting and managing protected areas.[431]

The Act also addresses the planning law dimension and provides that a planning authority must investigate the need for the designation of heritage areas to protect places of environmental and cultural interest.[432] This section adds that a local authority may designate any area or land to be a heritage area on the grounds of its environmental or cultural interest or the presence of heritage resources.[433] This directly and expressly suggests the need for close co-operation between municipalities as heritage authorities and as planning officials (as per their municipal planning mandate). It is further important to identify and explore the nexus between planning law, environmental law and local regulation and management in the heritage sector. In similar vein, the NHRA requires of a municipality to protect a heritage area by way of the provisions of its town planning scheme and By-laws.[434] This is in alignment with the provisions of the SPLUMA and its requirement for the integration of a SDF into the IDP of a municipality. To this extent, a municipality has heritage, environmental and planning regulatory tools and instruments to its avail in order to provide for effective CHRM.

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431 Section 54 of the NHRA.

432 Section 31(1) of the NHRA. The rest of the provisions discuss the interaction between the PHRA and the planning authorities in terms of investigating the designation of heritage areas (see sections 31(2),(3) and (4) of the NHRA).

433 Section 31(5) of the NHRA.

434 Sections 30(11) and 31(7) of the NHRA

5.3 Recommendations

In the light of the findings above, it is proposed that the management and protection of cultural heritage resources by municipalities should in general be approached along two stages. The first stage entails the identification of the cultural heritage resources within the territory of that particular municipality and putting prescribed and innovative measures safeguarding such resources into place. It is imperative for municipalities to be trained in identifying heritage resources and all relevant stakeholders in order to make the decision-making process easier (regarding permits and authorisations, for example). This stage also requires of municipalities to describe and record the status of a cultural heritage resource in a heritage register in order to enhance its protection. This is directly in line with the provisions of national and international law on cultural heritage management. The second stage involves the identification and optimal use of the available governance instruments for regulation and management. These tools and instruments include, for example, IDPs, by-laws and access to and distribution of information on CHRM as discussed in chapter 4 in this study.

In closing and bearing the above two-staged approach in mind, the following action steps and methodologies are proposed for the effective management and regulation of cultural heritage resources in the local government sphere:[435]

- The integration of heritage in all of the development strategies and plans of local authorities;

- The alignment of planning, environmental, and heritage laws and policies;

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435 The recommendations made for purposes of this study have been taken from the proposals in Barillet, Joffroy and Longuet *Cultural Heritage and Local Government* 28-35. These proposals have been adapted for this study in order to suit the system of government in South Africa and for purposes of alignment with the statutory and policy framework. For the recommendations on the legislative and policy changes see Department of Arts and Culture *Review of Heritage Legislation*.

- Meaningful consultation with and participation of local communities and developers. This will assist municipalities *inter alia* in compiling a heritage inventory of places, sites, objects, buildings and intangible manifestations of cultural heritage which are considered to be of relevance to their communities. Municipalities must also investigate these cultural heritage resources and assess their significance in light of the Burra Charter provisions and any applicable national law. Heritage inventories of this kind should be used in the drafting of a municipal heritage policy or By-law, for example;

- Development and actual use of suitable regulatory local governance tools (e.g. IDPs and spatial plans) for the management of heritage through collaboration between municipalities and a) the community; b) national and provincial government; and c) the South African Local Government Association (SALGA); and

- The drafting of municipal by-laws for the effective regulation of local cultural heritage resources. By-laws dealing with matters of culture must address specifically the definitions and manifestations of heritage resources, provide for the recording, research and assessment of heritage resources, describe the role and functions of the stakeholders responsible thereof and must provide for safeguard and clear regulatory measures.

While it has been established that local government has both executive and legislative authority with regard to cultural heritage management and protection, this study has also unpacked the extent of these authorities and functions of municipalities in CHRM. In order to ensure that cultural heritage resources are managed effectively and efficiently the recommendations above will have to be championed by local government officials and councillors.

5.4 Conclusion

Cultural heritage plays an invaluable part in the existence of a people and has the capacity of giving value and significance to the identities and existence of individuals and the communities in which they find themselves. This cultural heritage is an important component of a society and it is of value to the development of the nation as it not only contributes to the social and economic advancement of a nation, but is also of importance to the overall well-being and national identity of a people. In this sense, cultural and religious rights must be given sufficient consideration and protection. Therefore, it is important to give normative content to the understanding of cultural heritage and to put measures into place to actively protect and promote all the manifestations thereof. In this instance the law has a very important role to play by providing for the promotion, protection and management of heritage resources and integrating these measures in its development processes.

While it has been confirmed that municipalities have an important role to play in CHRM, it has also been shown that as a result of the fragmentation of legislation and duplication of functions many of the South African municipalities have not taken any active measures in cultural heritage management. This proves to be very problematic for the continuity and sustainability of heritage practice in South Africa. The task of setting out the extent of local government's authority and functions in cultural matters must be undertaken by national actors and stakeholders. A further issue to be considered is providing a national guideline or policy for the management of cultural heritage resources. This investigation should be a national imperative followed by a thorough consultative process with all stakeholders in cultural heritage resources. The question of what this guideline or policy should contain is open for debate. If the South African courts were able to define a role for local government in dealing with environmental matters despite this being a function of national and provincial competence, there is also no reason why it could not be done with regard to cultural matters. The investigation on this mandate should be led by an interpretation of heritage laws, and in particular the NHRA, environmental legislation, national policies and laws.

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