

LEGAL PERSPECTIVES ON THE ROLE OF CULTURE IN SUSTAINABLE DEVELOPMENT*

AA Du Plessis and C Rautenbach*****

Culture keeps getting guernseys in the pep talks, but when the game starts it always seems to end up on the bench. Perhaps the reason why this keeps happening aren't [sic] all that important, provided that, this time, culture gets a run.¹

1 Introduction

Over the years, scholars from various disciplines have explored the meaning and possible parameters of the notion of sustainable development for different reasons.² With few exceptions, most scholars agree with the definition of sustainable development contained in the 1987 *Report of the World Commission on Environment and Development: Our Common Future* (the

* This article is premised on a paper delivered at the Konrad Adenauer Stiftung/North-West University, Faculty of Law Colloquium on Good Governance and Sustainable Development, Johannesburg, August 2009.

** Anél du Plessis. Associate Professor, Faculty of Law, North-West University (Potchefstroom Campus).

*** Christa Rautenbach. Professor, Faculty of Law, North-West University (Potchefstroom Campus).

1 Hawkes *The Fourth Pillar* 25.

2 See amongst other sources *The Pelican Web* - a website dedicated to research of all of the dimensions of sustainable development and host to the Journal of Sustainable Development, accessible at www.pelicanweb.org (date of use 4 November 2009). The notion of sustainable development is further addressed below.

Brundtland Report).³ Sustainable development has accordingly always been widely celebrated as an environmental concept.⁴ In South Africa, too, sustainable development has to date been interpreted primarily in the context of environmental law and is understood to embrace economic, social and environmental considerations as implicated by the environment.⁵ But, while acknowledging the development of sustainable development as an environmental concept, it is still possible to note some current developments concerning the role of culture in the original sustainable development equation. If indeed culture has a more prominent role to play in this equation than has been acknowledged to date, there will be implications for public decision-making aimed at sustainable development, as in other fields.

A simultaneous reading of the Brundtland Commission's Report and the Report of the World Commission on Culture and Development, "Our Creative Diversity" of 1995 (Creative Diversity Report),⁶ serves as an internationally applicable example where culture seems to infiltrate the sustainable development equation. Article 13 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the Cultural Diversity Convention)⁷ of 2005 explicitly requires Member States to "integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development". The inseparable tie between sustainable development and

3 Brundtland 1987 www.un-documents.net. The Brundtland Commission's Report is annexed to UN A/42/427 and accessible at Brundtland 1987 www.un-documents.net. The Commission defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

4 For a brief historical overview of the concept "sustainable development", see Throsby 2008 unesdoc.unesco.org

5 S 1 of the *National Environmental Management Act* 107 of 1998 (NEMA) defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations". Notably, the definition of the environment in the Act does indeed make reference to culture. South Africa's national policy document on sustainable development further sees sustainable development as "enhancing human well-being and quality of life for all time, in particular those most affected by poverty and inequality". See DEAT Framework 2008 www.deat.gov.za 12.

6 UNESCO 1995 unesdoc.unesco.org

7 The text of the Convention can be found under UNESCO 1995 unesdoc.unesco.org

issues of culture is also clear from much of the work of the Cultural Sector of UNESCO.⁸ Complementary to these international developments one finds that issues of culture increasingly are emerging in international⁹ and national¹⁰ case law dealing with legal claims to sustainable development and that more and more scholars from various disciplines are devoting their research to the overlap between issues of culture and the traditional sustainable development equation.

Still, in its definition the Brundtland Commission appears not to have originally intended for issues of culture to be explicitly recognised as an autonomous factor in the above equation. This leaves the onus on us to consider progressive developments in recent legal thinking in order to, *inter alia*, capacitate the decision-makers responsible for sustainable development.

Assuming, for the time being, that legally relevant links exist between issues of culture and sustainable development, the question arises as to whether or not the existing way in which authorities look at sustainable development suffices to recognise these links in practice.¹¹ The question is if South African authorities' existing understanding thereof is sufficient to ensure that issues of culture are duly considered in decisions relevant to sustainable development. However, this question seems to presume a clear and universal conception of "culture". It is exactly here that the making of a (practical) case for the inclusion of issues of culture in the sustainable development equation becomes complex. Is it

8 Increased awareness and recognition of cultural diversity can in part be attributed to the "Our Creative Diversity" report compiled by the World Commission for Culture and Development. This commission, founded by UNESCO and the United Nations (UN), commenced its work in 1993. Since the 1950s UNESCO has adopted various trend-setting documents dealing with culture in one way or another. Until 2005 the standard setting document for cultural diversity was the Universal Declaration. Since 2005 it has been complemented by the Cultural Diversity Convention.

9 See CCPR, *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Decision of 10 May 1990, Comm No 167/1984 UN Doc CCPR/C/38/D/167/1984, for example.

10 See *Oudekraal Estates (Pty) Ltd v The City of Cape Town* (25/08) [2009] ZASCA 85 (3 September 2009), for example.

11 Some of the links between issues of culture and sustainable development are explored in greater detail below.

possible to define and determine culture in a way that will be adequate for purposes of the fair application of the sustainable development equation in every instance? How should culture be conceptually defined in this specific context? Since the challenges posed by the exceptionally fluid meaning of the notion of culture are manifold and obvious, it may be necessary to find a way in which to set limits on those issues of culture which may properly be thought relevant to the sustainable development domain. This article explores the possibility of drawing such a distinction between "culture" and "cultural governance" in deliberating decisions relevant to sustainable development.

The subsequent discussion shows that "cultural governance" as a notion may be more distinct, exact and functional than "culture" itself. However, as a benchmark in the sustainable development equation "good cultural governance" implies cultural governance of a certain standard, which makes it an even more clearly defined yardstick for authorities to use. This standard is briefly considered by looking at the meaning of good cultural governance as a notion that encompasses both cultural governance and good governance generally.

The article is set in the South African context but also looks at some law and policy developments internationally, regionally and sub-regionally to depict how issues of culture have been infiltrating the sustainable development discourse and to distil some of the probable substantive benchmarks for good cultural governance.

2 Culture and sustainable development

2.1 *Pinning down "culture"*

The notion of culture remains a much contested concept as a consequence of its many possible multi-layered and context-dependent meanings. The

meaning and parameters of culture have been the subject of deliberations primarily by cultural anthropologists for many years.¹² Lawyers are increasingly joining in the quest to find a (legally) suitable definition of culture.¹³ Whilst this quest continues we are left with a plethora of fragmented and diverging views on the relevance, nature and meaning of culture.

Culture is often understood as an abstract driver of human behaviour; as something which has momentum and that faces constant change as peoples' contexts, demands, needs, and time itself change. It is understood as an abstract, albeit inherent part of human life, and according to some authors, it has to do with a subliminal *pattern of thinking* which describes the-

... organisation of values, norms, and symbols which guide the choices made by actors and which limit the types of interaction which may occur between individuals.¹⁴

A more elaborate internationally recognised definition that receives significant attention in law-based literature is that of the UNESCO Universal Declaration on Cultural Diversity (Universal Declaration), which defines culture as:

... a set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.¹⁵

In accordance with these two definitions, the Creative Diversity Report views culture very broadly as "ways of living together".¹⁶

12 Anthropologists' interest in culture is a natural result of the interrelationship between societies and cultures. Widely cited research conducted in the 1950s, when different authors listed 164 definitions for culture (divided into six main categories, *viz.* descriptive, historical, normative, psychological, structural and genetic), demonstrates the divergent views on what exactly culture means. See Kroeber and Kluckhohn *Culture*. Another valuable contribution which depicts the search for a suitable definition of culture is that of Moore *Major Definitions*.

13 See Rautenbach, Jansen van Rensburg and Pienaar 2003 *PER* www.puk.ac.za

14 Parsons and Shils "Values and Social Systems" 39-40.

15 See the preamble to the Universal Declaration.

16 Creative Diversity Report 1.

In the southern African context, the *SADC Protocol on Culture, Information and Sport* of 2000¹⁷ defines culture to mean the totality of peoples' ways of living, the whole complex of distinctive spiritual, material, intellectual and emotional features that characterises a society or social group, including not only arts and letters but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.

The South African legislature has attempted to describe and define culture on more than one occasion. In the late nineties the then Department of Arts, Culture, Science and Technology (DACST)¹⁸ defined culture in its *White Paper on Arts, Culture and Heritage* (White Paper)¹⁹ as:

... 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 developed over time and subject to change.

The *Culture Promotion Act*²⁰ describes culture rather widely to include the visual arts, music and the literary arts; the acquisition of knowledge of the applied, natural and human sciences; the utilisation of leisure, including physical recreational activities which are of such a nature as not to be courses of training with a view to participating in competitions. South Africa's *National Heritage Resources Act*²¹ is even more liberal and provides that when something is described as being of "cultural significance" the tag refers to such

17 The Southern African Development Community (SADC) has been in existence since 1980, when it was formed as an informal alliance of nine majority-ruled states in southern Africa known as the Southern African Development Coordination Conference (SADCC)". Its main aim was initially to coordinate development projects in order to lessen economic dependence on the then apartheid South Africa. Nowadays, South Africa is an active member of the SADC. The Member States appear to be in agreement that culture plays a vital and central role in the process of integration and co-operation among them, and as a result they have agreed to a Protocol on Culture, Information and Sport. For more information, see SADC Protocol (date unknown) www.sadc.int

18 As of 1 August 2002 the DASCT has become operational as two different departments namely Department of Arts and Culture and Department of Science and Technology.

19 Of 4 June 1996. The White Paper is accessible at www.dac.gov.za

20 35 of 1983, s 3(5).

21 25 of 1999, s 1.

an object or activity's aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance. Admittedly, however, the latter does not offer a definition of "culture" *per se*.

In addition to national legislation, section 30 of the *Constitution of the Republic of South Africa, 1996* (the Constitution) affords the right to everyone to "participate in the cultural life of their choice" and section 31 provides that a member of a cultural community may not be denied the right to enjoy his culture together with other members of that community. Notably, no mention is made in these provisions to African customary law, yet in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*²² Langa DCJ used the cultural rights referred to in sections 30 and 31, together with sections 39²³ and 211,²⁴ to demonstrate that African customary law occupies a special place in the legal system. This suggests a relationship between the constitutional protection of culture and African customary law.

In the case of *Oudekraal Estates (Pty) Ltd v The City of Cape Town*,²⁵ as a further example, the Court agreed to the limitation of property rights (the setting aside of an approval for a township development on land situated below the Twelve Apostles peaks and alongside the Cape Atlantic Coast in Cape Town) because of a combination of the cultural, religious and environmental claims that the Muslim community, the inhabitants of Cape Town and the South

22 2005 1 SA 580 (CC) par 86.

23 Sub-ss 39(2) and (3) provide that: "(2) When interpreting any legislation, and when developing the common law or [African] customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, [African] customary law or legislation, to the extent that they are consistent with the Bill."

24 S 211 reads: "(1) The institution, status and role of traditional leadership, according to [African] customary law, are recognised, subject to the Constitution. (2) A traditional authority that observes a system of [African] customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply [African] customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with [African] customary law."

25 (25/08) [2009] ZASCA 85 (3 September 2009).

African community, generally, hold in the land. In another example, the case of *MEC for Education, KwaZulu-Natal v Pillay*,²⁶ Langa DCJ had the opportunity to interpret the notion culture in contrast to the concept religion, this time in the context of a Hindu custom that entailed the wearing of a small nose stud which symbolises "love, beauty and adornment".²⁷ Without providing a cast-iron definition of culture,²⁸ he made two important points; firstly, that culture in the African context has a communal element expressed in the phrase *umuntu ngumuntu ngabantu*.²⁹ The court held that "belonging involves more than simple association; it includes participation and expression of the community's practices and traditions."³⁰ Secondly, culture has an individual element allowing an individual belonging to a certain community to decide which traditions he or she wants to follow. The court stated that "the practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture".³¹ Exactly how difficult it can become to define culture in legal terms is to some extent proven by this second viewpoint in particular. The constitutional protection of culture, as contemplated and described by different courts, assists in showing how the judiciary perceives the notion of culture and the extent to which it regards certain property and practices worthy of protection due to the constitutional protection afforded to issues of culture.

In parallel with the work of legislatures and the judiciary as sculptors of the law, different authors from different contexts have historically defined and still

26 2008 1 SA 474 (CC).

27 Par 59.

28 The court regards culture as something that "generally relates to traditions and beliefs developed by a community". See par 47.

29 Meaning "a person is a person through other people". See par 53.

30 Par 59.

31 Par 54. The reasoning of O'Regan J, who delivered a minority decision in this judgment, should also be noted. According to her, culture (in ss 30 and 31 of the Constitution) should not be understood in an individualist sense; it "involves associative practices and not individual beliefs". Her finding is based on the wording of a 27 of the United Nations International Covenant on Civil and Political Rights that reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". UN International Covenant (date unknown) www.hrweb.org

continue with their attempts to define culture. It falls beyond the scope of this article to discuss the manifold definitions that currently exist or to explore in greater detail the reasons for the difficulty in defining culture generally and in legal terms. However, it may be worthwhile to pause and consider one or two salient views to be found in existing literature. The view has been expressed that culture is a collective term for aesthetical expression by means of literature, theatre, music and sculpture; or ways of living.³² But it can at the same time be a modality that identifies and binds a specific group of people, or a determining source of identity that draws distinctions between people on the grounds of characteristics such as language, religion, beliefs and traditions.³³

Bennett's³⁴ view entails that culture bears (at least) two meanings in a legal context. In the first place it means "intellectual or artistic endeavours", and in the second place it refers to peoples' "store of knowledge, beliefs, arts, morals, laws and customs". This view denotes culture as "everything that humans acquire by virtue of being members of a society". In the context of the first meaning of culture as proposed by Bennett, the right to culture implies, for example, the freedom to perform and practice culture in the form of arts and sciences.³⁵ Such freedom could further be complemented by other rights such as the right to freedom of expression.³⁶ The second meaning of culture that Bennett proposes seems relevant for African customary law, for instance.³⁷

32 Hawkes 3; Creative Diversity Report 14.

33 For example, ss 30 and 31 of the Constitution do not refer to culture in general but to "cultural life" and "their culture".

34 Bennett *Customary Law* 78-79. See also Bennett *Human Rights* 23-24.

35 An explanatory example of this would be the National Arts Festival held annually in Grahamstown, South Africa. Note, for interest's sake, the politics around cultural activities, and this festival in particular, as discussed by Grundy 1994 *African Affairs* 387-409.

36 In South Africa, for example, section 16(1)(c) of the Constitution reads: "Everyone has the right to freedom of expression, which includes – freedom of artistic creativity."

37 Bennett *Customary Law* 78-79. African customary law, as applied in the South African context, is broadly defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those communities". See s 1 of the *Recognition of Customary Marriages Act* 120 of 1998. For practical purposes this definition is void of legal meaning, unless one knows (a) what the relevant customs and usages are; (b) who the indigenous peoples are; and (c) what their culture is.

The work of Throsby is particularly useful. The author suggests two possible meanings for the term culture.³⁸ According to the author the term is used in the broad sense in anthropological, sociological or legal frameworks to describe a set of attitudes, beliefs, mores, customs, values and practices which are common to or shared by a group.³⁹ Such a group may be defined in terms of politics, geography, religion, ethnicity or some other characteristics, making it possible to refer, for example, to African culture, Asian culture, Christian culture, feminist culture, corporate culture and youth culture. The characteristics which define a group may be substantiated in the form of signs, symbols, texts, language, artefacts, oral and written tradition, or by other means. One of the critical functions of these manifestations of a group's culture is to establish, or at least to contribute to establishing, the group's distinctive identity, and thereby to provide a means by which the members of the group can differentiate themselves from members of other groups.

Throsby,⁴⁰ however, also defines culture more functionally as denoting certain activities that are undertaken by people, and the products of those activities, which have to do with the intellectual, moral and artistic aspects of human life.⁴¹ Culture, in this sense, relates to activities drawing upon the enlightenment and education of the mind rather than the acquisition of purely technical or vocational skills. When defined in this way the word is more likely to occur as an adjective than as a noun, as in "cultural goods", "cultural institutions" and "cultural governance". Throsby's second definition of culture makes it possible to arrive at some more or less objectively definable characteristics of the cultural activities and goods. These are firstly that the activities concerned involve some form of creativity with the purpose of the production of certain goods; secondly, that they are concerned with the generation and

38 Throsby 3-4. His definitions are not necessarily mutually exclusive and seem to overlap.

39 In Hawkes' language, this particular definition would denote culture as a particular "message". Hawkes 3.

40 Throsby 4.

41 In Hawkes' language, this definition would denote culture as a "medium". Hawkes 3.

communication of symbolic meaning; and thirdly, that their input embodies, at least partially, some form of intellectual property.

The variety in Throsby's views could help us to describe culture differently in different contexts, including the sustainable development context. Still, the mere fact that Throsby needs to rely on two different approaches in an attempt to define culture demonstrates the difficulty in pinning down a single general meaning for the term. It is evident that the assortment of definitions and views of culture (of which only a few were described above) creates a collage from which it appears virtually impossible to distil a single legally relevant umbrella definition. This fact poses significant challenges to any attempt to establish clearly what the role of culture is or ought to be in the sustainable development context. We return to this point later.

Leaving the attempt to establish meaning of the term culture behind for the moment, the subsequent section explores the ways in which at least some variants of peoples' perception of culture have to date been linked with the notion of sustainable development generally, as well as with each of the original components of sustainable development, namely: the social, economic and environmental.

2.2 *The role of culture in sustainable development*

As was indicated above, the international arena seems to increasingly admit to a role for issues of culture in sustainable development. Some clear examples can be drawn from international treaty law, for instance. It is worth noting the content of articles 12(6) and 13 of the Cultural Diversity Convention, for example. Article 12(6) provides that:

Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations.

Article 13 of the same Convention provides that:

Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

The treaty drafters may be lauded for explicitly tying culture to sustainable development "for the benefit of present and future generations". However, whilst laying down ambitious objectives, the treaty seems to assume the existence of a universal understanding of "cultural diversity" and "cultural expressions", an assumption which is not without obvious shortcomings.⁴²

The limitations implicit in an interpretation of sustainable development confined to a consideration only of social, economic and environmental factors have been raised in the South African context by Du Plessis and Feris⁴³ and Du Plessis and Britz.⁴⁴ Whilst not having necessarily attempted an argument related to the role of culture in sustainable development, the Constitutional Court (especially Sachs J in his dissent judgment) furthermore commented critically on the feasibility of looking at social, economic and environmental factors along separate tracks in government's dealing with environmentally relevant decisions.⁴⁵

But none of the above developments or responses (given the lack of a single satisfying definition of culture) truly assists in clarifying the role of culture in sustainable development and in agreeing on the subsequent implications of such a role for decision-making authorities or the South African government, for example. In what follows we turn our attention to the interrelationship between

42 An in-depth discussion of the possible shortcomings falls outside the scope of this contribution. See, for example, the contributions in Obuljen and Smiers (eds) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making it Work* (2006 Institute for International Relations Zagreb).

43 Du Plessis and Feris 2008 SAJELP 157-168.

44 Du Plessis and Britz 2007 *Journal of South African Law* 275-276.

45 Refer to the legal questions and decision in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

some of the variants of culture and economics, social development, environmental sustainability and some of the relevant provisions in South African constitutional law. The aim is to show how some variants of the notion of culture seem to tie in with the factors necessary for the achievement of sustainable development as originally identified by Brundtland *et al.* (The contextual framework and the ensuing view of culture in the material cited can be deduced from the discussion thereof.) The aim is further to move towards a point where it would be possible to assess whether or not one should go to the trouble of trying to establish a role for culture *per se* in sustainable development, and whether or not, following some of Throsby's thinking as described earlier, it would not be appropriate to work with a more confined culturally relevant descriptor.

2.2.1 Culture as a causal factor of economic, social and environmental factors

2.2.1.1 Culture and economics

The Creative Diversity Report is one forum that forges clear links between issues of culture (arguing that culture has instrumental value), on the one hand, and economics on the other. It is stated that:⁴⁶

Culture, therefore, however important it maybe as an instrument of development (or an obstacle to development), cannot ultimately be reduced to a subsidiary position as a mere promoter of (or an impediment to) economic growth. Culture's role is not exhausted as a servant of ends – though in a narrower sense of the concept this is one of its roles – but is the social basis of the ends themselves. Development and the economy are part of a people's culture.

Cultural economics is furthermore an acknowledged subject field and is widely recognised as having its roots in Galbraith's 1960 publication "The Liberal Hour" and the seminal work "Performing Arts: The Economic Dilemma" by Baumol and Bowen, published in 1966. The idea of cultural economics confirms

46 "Executive Summary" 15.

that culture plays a role in (sustainable) economic development – it deals with questions such as: to what extent economic value can encompass cultural value and cultural goods and services; what are the parallels between sustainability and cultural and natural capital; what is the relationship between cost-benefit analysis, cultural value and heritage management; what is the economic value of the work of creative artists; and what is the role of cultural industries and cultural tourism in economic development.⁴⁷ Throsby⁴⁸ states that there has been an ongoing interest in several schools of economic thought in examining the role of culture as a significant influence on the course of economic history. Perhaps the most celebrated contribution to the field, as is indicated by Throsby,⁴⁹ has been Weber's analysis of the influence of the Protestant work ethic on the rise of capitalism. It may accordingly be contended that at least some sort of a cultural context in which economic activity occurs and develops is explicitly linked to economic outcomes.

In economic terms, the so-called cultural industries sector is furthermore one of the fastest growing sectors in the world economy. Best estimates value the cultural industries sector at seven percent of the world's gross domestic product and in 2004 forecast a growth of ten percent per annum.⁵⁰

2.2.1.2 Culture and social development

A prominent link between issues of culture and social development is to be found in the disciplines of psychology and anthropology, manifest in the notion of socio-cultural theory. The literature on socio-cultural theory draws heavily on Vygotsky's 1986 work on "Thought and Language". Socio-cultural theory poses a particular view of human development: higher order (cognitive) functions develop from social interaction and are directly influenced by culture. However,

47 Refer to sources such as Guo *Cultural Influences* and Towse (ed) *A Handbook of Cultural Economics*.

48 Throsby 9.

49 Throsby 9.

50 Nurse 2006 www.fao.org

the link between culture and social development also transcends the area of cognitive development.⁵¹ Social development generally has everything to do with people and their growth – the acquisition of different skills, the improvement of living conditions and the enhancement and advancement of human life and well-being, for example. Socio-cultural theory seemingly implies that the extent and degree of social development are determined by peoples' cultural background and cultural identity (in the individual and collective sense) to the extent that it manifests in the intellectual and the moral – the way in which people perceive and experience life.

Hawkes⁵² shows that there is a further dimension to the relationship between culture, social life and sustainable development. He argues that culture is taken to denote the social production and transmission of values and meaning and that the expression of social purpose and aspiration is at the heart of the public planning process. Although any public planning process is in the hands of the authorities, Hawkes' view shows how culture and planning can or should be integrated and directs the mind towards a potential role for the incorporation of issues of culture in public planning usually aimed at social development.

2.2.1.3 Culture and environmental sustainability

The link between culture and environmental sustainability lies *inter alia* in the fact that in the South African context at least, cultural heritage resources are contained in the legal definition of the environment.⁵³ Here, cultural heritage resources are defined as any place or object of cultural significance, with the latter being defined as having aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance.⁵⁴ The protection of cultural heritage resources is further perceived to be one of the

51 See, amongst others, Garbarino *Sociocultural*; Berendt (ed) *Metaphors for Learning and Featherstone Cultural Theory*.

52 Hawkes 1.

53 See the definition of the environment in s 1 of the NEMA.

54 As per s 1 of the *National Heritage Resources Act* 25 of 1999.

factors that influences a person's perception or experience of his or her state of well-being.⁵⁵ The notion of well-being is often at the core of substantive environmental rights protection. This is also the case in South Africa, where the section 24 environmental right in the Constitution explicitly encompasses peoples' "well-being".⁵⁶ Similarly, natural resources such as rivers, streams, forests, mountains and rock formations may have cultural meaning for a particular community or may be at the centre of certain cultural practices. This implies that the conservation of such natural resources is necessitated, for example, by the important role they play in the survival of particular cultural practices. Also, the way of life and hence the culture of religious groups (for example, Islam, Hindu, Christian, Jewish and African belief systems) may be influenced, for example, by such religions' views of the natural environment and the protection of natural resources.⁵⁷

To deny that environmental, social or economic factors play a foundational role in how sustainable development as a notion developed over the years would be fatal. It is agreed that all three factors have an equally valid function in any sustainable development equation and subsequent decision-making. It was shown above that some forms of the notion of culture are intimately involved in general social, economic and environmental issues. Although it has not necessarily arrived at a notion of what the role of culture should be, the introductory discussion above at least demonstrates that issues of culture do not pose obvious threats to the existing factors in the equation and that, in fact, culture seems to complement environmental, social and economic interests in different ways.

55 See Du Plessis *Constitutional Environmental Right* 245.

56 See for example Du Plessis 245.

57 See Du Plessis 28-33.

2.2.2 *Culture as a fourth and more autonomous factor for sustainable development*

The discussion above is premised on a somewhat fragmentary view of the interrelationship between culture and the three primary factors necessary for the achievement of sustainable development – the social, the environmental, and the economic. As a result, issues of culture were depicted as being subsumed by the other three factors. This may reflect the fact that it was widely accepted until recently that culture need not be an independent factor in estimations aimed at sustainable development. Historically, culture has at most been cast in a supporting role to the other three players.

One of the core reasons for having undertaken this study is the fact that, as was shown earlier, issues of culture increasingly turn up as autonomous considerations in sustainable development discourse. Issues of culture, how ill-defined they may be, seem to gradually develop into autonomous factors to be taken into account in the sustainable development context "alongside", as opposed to "as part of", the social, environmental and economic factors. Hawkes⁵⁸ is a strong supporter of this view and argues that: "(c)ulture is the basic need – it is the bedrock of society." Hawkes contends that without a foundation that expressly includes culture, the environmental, social and economic factors in the sustainable development equation are bereft of the means of comprehending, let alone implementing, the changes they promote.⁵⁹

For this reason culture may have to be an autonomous and distinct reference point when planning for or when assessing progress towards sustainable development.⁶⁰ Other authors share Hawkes' view and it seems probable for it to lead (at least theoretically) to a different and fresh understanding of the

58 Hawkes 3.

59 Hawkes 25-26.

60 Hawkes 25.

deeper meaning and scope of the notion of sustainable development. This novel approach can be summarised as follows:⁶¹

- **Environmental** responsibility (represented by ecological balance);
- **Economic** viability (represented by material prosperity);
- **Social** equity (represented by justice, engagement, cohesion and welfare); and
- **Cultural** vitality (represented by well-being, creativity, diversity and innovation).

However, it is one thing to acknowledge that issues of culture justify autonomous attention in the sustainable development equation and another to realise this position in practice. In this context, it is probably fair to ask on behalf of government and other decision makers what should be done differently in order to ensure that culture (regardless of how exactly it is defined) gets its rightful place as an equally autonomous consideration in the context of sustainable development?

Throsby⁶² captures some of the challenges in this regard by stating that:

Although there is now widespread acceptance of the idea that human development should be a primary focus of development thinking, the incorporation of culture into development processes remains unclear, and there is no agreed model for describing how this should occur. Certainly the advances made over the last ten years or so in understanding the role of culture in development ... have consolidated an acceptance that such a role exists, but how this should be articulated, and how it translates into policy, are matters that remain to be fully resolved.

If in response to the question and Throsby's concerns we step for a moment into the shoes of Hawkes and others who support the elevation of the role of culture in the achievement of sustainable development, some preliminary conclusions may be drawn. It is predicted that, in the South African context at

61 This view is proposed by Hawkes 25, among others.

62 Throsby 3.

least, an elevated and autonomous role for issues of culture in decision-making towards sustainable development would require a certain level of transformation in a couple of areas.⁶³ The most important step remains first to establish what culture means when referred to in the sustainable development context. It would, subsequently, be necessary for decision-makers and government to establish a "cultural framework" in law and/or policy for an estimation of cultural impact in decisions that involve sustainable development⁶⁴ and to ensure that systems and structures are in place to identify and voice relevant cultural concerns on a case-to-case basis. Ultimately, however, it seems necessary for government to commit to so-called "good cultural governance". This point is taken further in 3 below.

The role of culture in sustainable development is destined to remain blurred and indistinct for as long as it is not possible to define culture, generally, or for the sustainable development context specifically. The challenges in this regard were referred to in 2.1 above. But the reader is reminded of Throsby's second, functional view of culture that was described earlier. This view gives rise to the effect that culture does not necessarily lose its meaning when used as an adjective, rather than a noun, as in such phrases as "cultural diversity" or "cultural governance". Therefore, without further evaluating the feasibility of including culture *per se* as an autonomous factor in the sustainable development equation and following Throsby's thinking, the remainder of this article explores how the role of culture in sustainable development can be

63 Some of these requirements have been identified by Hawkes 27 and Throsby 4.

64 The idea of environmental impact assessment in the traditional sustainable development framework is well established as is indicated by Hawkes 32. However, as is argued by the author, just as there are social, environmental and economic frameworks (or lenses or filters) through which plans are (or should be) evaluated, so there should be a framework for culture. And just as the basic questions being asked by these frameworks are fairly simple, so too would it be with the cultural framework. Typical questions that need to be asked include: What has been the quality of community input into the development of the actual and proposed activities under review? To what extent are these activities reflective of the values and ways of life of the communities upon which they (will) impact? Do these activities improve the capacity of communities to act and interact?

understood by looking beyond culture *per se* and looking instead at cultural governance as a derivative.

Inspired by the generically applicable features of existing definitions of environmental governance, "cultural governance" can be defined as:⁶⁵

The management process executed by government and communities to holistically regulate human activities and the effects of these activities on their own and the total cultural environment (including, for example, cultural heritage resources, cultural practices, cultural goods and services, arts and cultural artefacts); by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the present and future cultural interests of human beings. This management process necessitates a collection of legislative, executive and administrative functions, instruments and ancillary processes that could be used by government, the private sector and citizens to organise and regulate culturally relevant activities within the community as far as products, services, processes, tools and livelihoods are concerned, both in a substantive and procedural sense.

This definition encapsulates several issues of culture as a phenomenon which is flexible enough to include most, if not all, of the culturally relevant considerations that one would like to see addressed in authorities' decisions that are aimed at or relevant to sustainable development. In the absence of a clear understanding and definition of culture *per se*, it is hence suggested that in the sustainable development equation "cultural governance" be used as a rather wide, yet better defined, determining factor. For cultural governance to be a determinable factor or benchmark in this context, it is proposed further that "good" cultural governance be used as the point of reference. As will be discussed in 3 below, good cultural governance implies an even more distinct and measurable standard with pre-determined internal qualities that authorities

65 For the definitions of environmental governance that the definition of cultural governance is based on, see Nel and Du Plessis "Unpacking Integrated Environmental Management – a Step Closer to Effective Cooperative Governance?" *SA Public Law* 2004 181-190 and Kotzé "Environmental Compliance" 107-108. A narrower definition of cultural governance has been given by Moon 2001 *Administration and Society* 432-433 as "government's direct or indirect involvement in the promotion and administration of programs of cultural organisations (including museums) existing in specific geographic boundaries with unique financial and administrative arrangements (that is, earmarking a certain percentage of sales or property tax to support cultural institutions and activities.)"

would find particularly useful when weighing up the economic, environmental, social and cultural factors in decisions directed at sustainable development.

3. Good cultural governance

If one is to argue that good cultural governance must be used as an additional factor in the sustainable development equation, one has to ask what is meant by the phrase. We attend to this question in the subsequent section firstly by considering the now fairly common notion of good governance and secondly by expressing certain viewpoints regarding the link between good governance and culture and the meaning of 'good cultural governance' as such. This part of the discussion is concluded by considering a number of legally relevant global developments and trends in the domain of cultural affairs and the (potential) influence of the latter on good cultural governance in the South African context.

3.1 Good governance

Good governance in recent years has fast established itself as a prominent feature of development literature. Good governance was the focus of the Colloquium that this article developed from, and is further widely celebrated as a new approach to the way in which the world, individual countries and local communities are governed.

Generally, governance refers to the management of the relations between government and its populace within a given constitutional order.⁶⁶ Governance is a state's government in action, in the context of the relationship between public authorities and the communities that they are responsible for. Governance collectively embraces the duties of a government "to govern" and

66 Ginther *et al* (eds) *Sustainable Development* 157. See also the author's observations on the notions of good and bad governance. For a more comprehensive analysis of the notion of governance refer to Kotzé "Environmental Compliance" 104-106.

"to represent."⁶⁷ In this context, "to govern" means to exercise authority and to have various powers such as the power to enact and enforce legislation, to take decisions that may potentially affect the rights of other persons, and to exercise discretion in matters of public administration. "To represent" means that political representatives and officials in government should be concerned with issues important to the public and their decisions should be responsive to public needs. To represent further requires continued public involvement in authorities' decision-making processes.

Good governance has been defined in different ways by different people and institutions including the World Bank, the International Monetary Fund and the United Nations.⁶⁸ Most of the existing definitions have been designed along the lines of a list of characteristics or qualities. In a nutshell, some of these descriptive qualities include participatory decision-making, transparency, effectiveness and efficiency, equitability and inclusiveness, aiming for consensus, and commitment to the rule of law.⁶⁹ It is further agreed in most definitions thereof that good governance promotes the eradication and minimisation of corruption, the inclusion of minority views and ensuring that the voices of the most vulnerable in society are heard in decision-making.⁷⁰ Good governance is essentially also responsive to the needs of present and future generations of people and must, in and by itself, be sustainable. It seems therefore as if good governance has a significant relation to administrative and other processes but that it also has substantive objectives.

3.2 *Good cultural governance*

Flowing from the generic understanding of good governance as described above, the attempt to ascertain the meaning of the phrase good cultural

67 Craythorne *Municipal Administration* 11.

68 See also Kotzé 119-121.

69 These are also the characteristics identified by the UN Economic and Social Commission (date unknown) www.unescap.org

70 Mafunisa 2004 *International Review of Administrative Sciences* 489.

governance entails that one reads into the notion of cultural governance the qualities inherent in good governance. Good cultural governance may therefore be described as cultural governance of a certain measurable standard. Based on the separate definitions of good governance and cultural governance given above, good cultural governance must be a management process based on a combination of legislative, executive and administrative functions, instruments and ancillary processes that meet the generic requirements for good governance. In other words, good cultural governance relates to governance that meets the minimum requirements of good governance generally, albeit in the context of the total cultural environment – with the latter being understood in the South African context to include, *inter alia*, cultural heritage resources, cultural practices, cultural goods and services, arts and cultural artefacts.

As was shown earlier, good governance and subsequently, good cultural governance, follows the rule of law. It follows that good cultural governance would as far as possible aim at realising the objectives and at fulfilling the duties for public authorities and others as created by the legal framework applicable to cultural governance. Notably, also, good cultural governance necessitates that government structures are in place to facilitate the fair and equal realisation of the objectives of cultural law, and to duly fulfil the duties imposed by the latter.

One of the aims of this article is to make recommendations directed at public authorities towards the improvement of what would qualify as good cultural governance in the South African context. Apart from the generically applicable qualities of good governance, this requires that the content and scope of the applicable cultural law framework be clear. Several different laws and policies apply directly or indirectly to cultural governance in South Africa. The cultural law framework that is applicable hence comprises of a mix of international, regional, sub-regional and domestic laws and policies. For purposes of this article some of these are discussed below. The discussion is limited to an

overview of the objectives of the laws and policies against which different decisions of government could generally be measured.

3.3 *Global developments and trends and their (potential) influence on good cultural governance in the South African context*

It goes without saying that South Africa's domestic cultural policies and legislation are greatly influenced by its being a member of the global community. The country is party to various international,⁷¹ regional⁷² and sub-regional⁷³ bodies and organisations⁷⁴ that make every effort to regulate different issues of culture.⁷⁵ We depart from the viewpoint that the objectives of these institutions and instruments cumulatively provide a substantive benchmark for South Africa's achievement of good cultural governance.

The most recent international legal instrument of relevance is the Cultural Diversity Convention.⁷⁶ The important link between culture and development is reaffirmed by one of the objectives of the Convention.⁷⁷ The objectives of the Convention generally recognise the legitimate role of decision-makers or governments in supporting cultural diversity through cultural policy, and by strengthening international cooperation so as to favour the development of

71 South Africa is, for example, a member of UNESCO, a lead international organisation with the objective of contributing to peace and security by promoting international collaboration through education, science and culture.

72 South Africa is, for example, a member of the African Union (AU) of which the objective, amongst others, is to promote sustainable development in the cultural context. See a 3(j) of the *Constitutive Act* of the AU, which entered into force in 2001.

73 For example, South Africa is an active member of the Southern African Development Community (SADC), which regards culture as a social phenomenon that plays a vital role in the process of integration and co-operation of the Member States.

74 South Africa was a Member State from 4 November 1946 to 31 December 1956. Post-apartheid South Africa has been a Member State since 12 December 1994.

75 For a variety of legal instruments that refers to culture, see Bernier 2000 incp-ripc.org.
South Africa follows a dualistic approach to the incorporation of international law, which in essence requires the formal transformation of international law into domestic law. See Dugard *International Law* 47-48.

76 The Convention was adopted on 20 October 2005 and ratified by South Africa on 21 December 2006, three months before it entered into force on 18 March 2007.

77 See a 1(f) of the Cultural Diversity Convention.

cultural expressions of member states.⁷⁸ As a point of interest it is worth noting that the Convention addresses developing countries' fears of being bulldozed by stronger economies when it comes to cultural industries. But as a matter of substantive importance it should also be noted that the Convention promotes and hence expects of Member States to commit to the "protection, promotion and maintenance of cultural diversity".⁷⁹

The Cultural Diversity Convention has not yet been transplanted into South Africa's domestic statutory law and its current relevance as providing a substantive benchmark for good cultural governance may therefore be questioned. This instrument is not further discussed for purposes of the current review. However, it seems as if the Department of Arts and Culture is already committed to comply with the aims and responsibilities entrenched in the Convention, which could be indicative of the role that this instrument is (already) playing in South Africa – especially in the context of cultural diversity.⁸⁰

On a regional level the doings of the African Union (AU) also provide something of a framework for cultural law. The AU's objectives, generally, are to "promote sustainable development at the economic, social and cultural levels as well as the integration of African economies".⁸¹ The Economic, Social and Cultural Council is one of the organs of the AU that deals specifically with cultural issues. South Africa ratified its *Constitutive Act* on 3 March 2001 and is a Member State of the AU.⁸² There are a number of regional instruments dealing

78 See a 1 for the objectives of the Cultural Diversity Convention.

79 "Cultural diversity" is described in the Convention as the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies". See a 4(1). This definition is wide enough to link up with the functional definition of culture given by Throsby. See 2.1 above.

80 The Department of Arts and Culture's commitment to the objectives of the Convention is evidenced *inter alia* by its conducting of a review of the existing Arts and Culture Policy. A discussion document entitled "Arts and Culture Policy Review" sets out the objectives for this review and is accessible at www.dac.gov.za

81 See a 3(j) of the *Constitutive Act* of the AU which entered into force in 2001.

82 See www.africa-union.org

with culture and/or cultural diversity in some or other way. The relatively unknown *African Cultural Charter*⁸³ deals with issues such as cultural diversity, cultural oppression, national identity, cultural development, education, language, and international cultural co-operation. The Charter was adopted in 1976 and entered into force in 1990, but to date South Africa has not yet ratified it. Two of the objectives of the Charter that could still serve as benchmarks for good cultural governance are the promotion in each country of popular knowledge of science and technology as a necessary condition for the control of nature, and the development of all dynamic values⁸⁴ in the African cultural heritage as well as the rejection of any element which is an impediment to progress.⁸⁵

Another relevant regional instrument is the *African (Banjul) Charter on Human and Peoples' Rights*,⁸⁶ which entered into force on 21 October 1986 and was ratified by South Africa on 3 July 2002. The Charter recognises a link between culture and development by stating that it is-

... essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The Charter furthermore explicitly provides in article 22 that "(a)ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

The *African Charter on Democracy, Elections and Governance*⁸⁷ entered into force in the nineties. South Africa ratified it on 31 May 2001. Apart from the

83 For the text of the Charter, see www.africa-union.org

84 The meaning of dynamic values may need clarification to be of use.

85 See a 1 of the Charter.

86 For the text of the Charter, see www.africa-union.org

87 On 12 May 1994, accessible at www.africa-union.org

benchmarks to be deduced from some of its objectives and binding duties, the Charter draws direct links between good governance and issues of culture by stating in article 2(6) that one of its objectives is to:

Nurture, support and consolidate good governance by promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance.

Article 2(8) refers to sustainable development as a further objective. But perhaps article 8 is most relevant, as it makes it abundantly clear that state parties (including South Africa) shall respect ethnic, cultural and religious diversity, which are qualities that contribute to strengthening democracy and citizen participation.

At the sub-regional level, the *SADC Protocol on Culture, Information and Sport*⁸⁸ was signed by the member states, including South Africa, in 2000. This Protocol was concluded in terms of the SADC Treaty⁸⁹ to promote regional integration and co-operation, and is guided by four general principles.⁹⁰ Two of the principles in the Protocol that may be useful in the identification of substantive benchmark for good cultural governance are, namely: to strive towards the development of policies and programmes in certain areas, for example culture;⁹¹ and to commit to the enhancement of a regional identity in diversity in certain areas, for example culture.⁹² In relation to substantive benchmarks of good cultural governance in South Africa, it is further useful to note the objectives of the Protocol. These can be summarised as follows:⁹³

- cooperation in the formulation and harmonisation of cultural policies;

88 Hereinafter referred to as the SADC Protocol, accessible at www.sadc.int

89 See aa 20 and 21 of the Treaty of the Southern African Development Community, as amended, and accessible at www.sadc.int (hereinafter referred to as the SADC Treaty).

90 See a 2 of the SADC Protocol.

91 See a 2(a) of the SADC Protocol.

92 See a 2(c) of the SADC Protocol

93 See a 11 of the SADC Protocol.

- creation of a socio-cultural environment to realise the regional integration ideals of the SADC;
- promoting the value of culture in regional development programmes;
- identification, promotion and co-ordination of projects in the cultural field, including the exchange of expertise and information between cultures;
- ensuring that the significant role culture plays in economic development is recognised;
- developing and promoting cultural heritage institutions; and
- promoting indigenous languages.

South Africa furthermore has an impressive list of domestic law instruments of which the content forms part of the substantive benchmark for good cultural governance. The aim here is not to critically examine and review the content of all domestic laws and policies dealing with culture, but to give a synoptic overview of the scope and objectives of some of the most prominent laws and policies.

Two pre-constitutional cultural Acts should be fore-grounded. The first is the *Culture Promotion Act*.⁹⁴ The primary aims of the Act are-

[t]o provide for the *preservation, development, fostering and extension of culture* in the Republic by planning, organising, co-ordinating and providing facilities for the utilisation of leisure and for non-formal education; for the development and promotion of cultural relations with other countries; and for the establishment of regional councils for cultural affairs; to confer certain powers upon Ministers in order to achieve those objects; and to provide for matters connected therewith.⁹⁵

94 35 of 1983. This Act was assigned to the provinces in terms of Proc R38 in GG 16363 of 13 April 1995. The application thereof has been affected by the provisions of s 20 of the *Cultural Affairs Act (House of Assembly)* 65 of 1989, which came into operation on 1 March 1991.

95 Italics added.

The second Act is the *Cultural Affairs Act*,⁹⁶ the objectives of which correspond with those of the above Act, namely-

[t]o provide for the *preservation, fostering and extension of culture* by the provision of certain services and facilities; for the establishment of regional councils for cultural affairs; and for determining the objects, powers and functions of such councils; to confer certain powers upon the Minister in order to achieve those objects; and to provide for matters connected therewith.⁹⁷

The *Cultural Affairs Act* deals mainly with the establishment, powers and functions of regional councils, which are expected to "preserve, foster and extend culture in the region for which they are established in accordance with a policy determined by the relevant authority".⁹⁸

Whilst the Department of Arts and Culture is currently reviewing all national legislation pertaining to culture (a process which commenced during the apartheid era), the existing legislation remains important for the protection and promotion of culture in South Africa. Its objectives as they relate to the protection and development of different facets of cultural activity arguably still create substantive benchmarks for good cultural governance.

However, the core of the substantive benchmarks for good cultural governance may be encapsulated by the Constitution, which provides that:

- Unfair discrimination on the ground of culture is prohibited;⁹⁹
- People have the right to participate in the cultural life of their choice;¹⁰⁰
- People have the right to enjoy their culture with other members of the community;¹⁰¹

96 65 of 1989.

97 Italics added.

98 S 10.

99 S 9.

100 S 30.

101 S 31.

- A Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is to be established;¹⁰² and
- Communities sharing a common cultural heritage have a right to self-determination.¹⁰³

The existing legal framework for cultural governance in South Africa comprises of a wide array of other, different statutes, many of which are currently under review. The acts include, amongst others, the *National Archives and Record Service of South Africa Act*,¹⁰⁴ the *Cultural Institutions Act*,¹⁰⁵ the *South African Geographical Names Council Act*,¹⁰⁶ the *Heraldry Act*,¹⁰⁷ the *Legal Deposit Act*,¹⁰⁸ the *National Arts Council Act*,¹⁰⁹ the *National Film and Video Foundation Act*,¹¹⁰ the *National Heritage Council Act*,¹¹¹ the *National Heritage Resources Act*,¹¹² the *PAN South African Language Board Act*,¹¹³ the *National Library of South Africa Act*,¹¹⁴ and the *Library for the Blind Act*.¹¹⁵

The *National Heritage Resources Act* is often cited and discussed as forming part of the framework of environmental laws in South Africa. Since sustainable development is celebrated as an environmental notion, the inclusion of good cultural governance as a factor in the sustainable development equation may largely be influenced by the aims and objectives of this specific Act. As has already been indicated, the Act defines "heritage resources" as any place or object of cultural significance. It can therefore be deduced that culturally relevant places and objects fall within the purview of its protection. But the Act

102 S 181. Ss 184-186 describe the functions and composition of the Commission.

103 S 235.

104 43 of 1996.

105 119 of 1998.

106 118 of 1998.

107 18 of 1962.

108 54 of 1997.

109 56 of 1997.

110 73 of 1997.

111 11 of 1999.

112 25 of 1999 (hereafter *National Heritage Resources Act*).

113 59 of 1995.

114 92 of 1998.

115 91 of 1998.

also defines "living heritage," a phrase which refers to the intangible aspects of inherited culture, which may include cultural tradition, oral history, performance, ritual, popular memory, skills and techniques, indigenous knowledge systems, and the holistic approach to nature, society and social relationships. Section 5 of the Act outlines the principles for the management of heritage resources in South Africa and provides as follows:

- 1) All authorities, bodies and persons performing functions and exercising powers in terms of this Act for the management of heritage resources must recognise the following principles:
 - (a) Heritage resources have lasting value in their own right and provide evidence of the origins of South African society and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival;
 - (b) every generation has a moral responsibility to act as 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;
 - (c) heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity; and
 - (d) heritage resources management must guard against the use of heritage for sectarian purposes or political gain.
- (2) To ensure that heritage resources are effectively managed—
 - (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 ongoing education and training of existing and new heritage resources management workers.
- (3) 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.
- (4) Heritage resources form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management.
- (5) Heritage resources contribute significantly to research, education and tourism and they must be developed and presented for these purposes in a way that ensures dignity and respect for cultural values.
- (6) Policy, administrative practice and legislation must promote the integration of heritage resources conservation in urban and rural planning and social and economic development.
- (7) The identification, assessment and management of the heritage resources of South Africa must—

- (a) take account of all relevant cultural values and indigenous knowledge systems;
- (b) take account of material or cultural heritage value and involve the least possible alteration or loss of it;
- (c) promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs;
- (d) contribute to social and economic development;
- (e) safeguard the options of present and future generations; and
- (f) be fully researched, documented and recorded.

It is argued that an array of practical guidelines and fundamental norms re cultural heritage may be derived from these principles. The latter are particularly useful in the process of distilling substantive benchmarks for good cultural governance in South Africa. Also, the fact that the *Cultural Heritage Resources Act* has traditionally been categorised alongside environmental laws may to some extent be reminiscent of the fact that up until now a conventional approach to sustainable development has been followed, in which room was explicitly made only for social, cultural and economic considerations. Clearly, however, the aim with the protection of cultural heritage resources and the principles for the management of such resources is ultimately to achieve sustainable development. Whereas significant further research may be required to unpack this idea in full, it is proposed *pro tem* that the requirements for good governance and the principles for the management of cultural heritage and living heritage be used to establish the bedrock for good cultural governance as an autonomous factor in the sustainable development equation.

However, it is not only enforceable domestic cultural law that serves to create a substantive benchmark for good cultural governance. The *White Paper on Arts, Culture and Heritage* of 1996 (the White Paper)¹¹⁶ for example declares its mission to be to "realise the full potential of arts, culture, science and technology in social and economic development, nurture creativity and innovation, and promote the diverse heritage of our nation".¹¹⁷ Its relevance for

116 Accessible at www.dac.gov.za

117 White Paper par 1.3.

good cultural governance is clear: the White Paper realises that governance is one of the main themes of culture which needs to be addressed directly¹¹⁸ and sets forth various aspirations for the advancement of culture-

By addressing seven crucial areas - the provision of infrastructure, human resource development, greater access to public funds to support the creation and dissemination of art, the development of markets and audiences, integration with the RDP, increased funding for the arts, culture and heritage, and securing the rights and status of artists, it will indeed be possible for everyone to freely participate in the cultural life of the community, and to enjoy the arts.

Subsequent to the White Paper, the Department of Arts and Culture published a Discussion Document on the Arts and Culture Policy Review.¹¹⁹ The Policy Review is the result of a joint effort between the Policy Review Task Team and the Policy Review Committee and is regarded as only the beginning of a much wider cultural policy review process. One of the objects of the Policy Review was to check and evaluate the progress made by government to reach the objectives set out in the White Paper.¹²⁰ The review culminated in an acknowledgement of a number of challenges currently experienced in the domain of cultural governance. Viewed from a different angle, substantive benchmarks for good cultural governance could be deduced from challenges such as the following:

- The dangers of fragmentation which necessitate cooperative governance;¹²¹
- The misinterpretation of and conflict concerning the competency and role of the state in cultural affairs;¹²²
- The conflict and hesitation concerning jurisdiction in cultural affairs among the three spheres of government;¹²³ and

118 White Paper par 11.

119 DAC Policy (date unknown) www.dac.gov.za The document was debated during a workshop in 2007, see Hagg "Policy Review Workshop".

120 Policy Review 11-15.

121 Policy Review 11-15.

122 This has to do with the misinterpretation of Schedules 4 and 5 of the Constitution that set out the legislative competencies of the various spheres of government. See Policy Review 11-15.

- The scarcity of constitutional jurisprudential development.

From the above outline it is evident why *inter alia* the development of a "cultural framework" may be necessary for good cultural governance in South Africa. Currently, the substantive benchmarks (which have not been discussed in any detail) are spread across different international, regional, sub-regional and domestic laws and policies. It is proposed that such a framework could even go beyond the *content* of the instruments that were discussed to include also practical *approaches* that seem to work for the authorities in charge of cultural governance.

In this regard, South Africa currently follows a so-called "arm's length approach" in the regulation of different cultural affairs, as was initially proposed in the White Paper.¹²⁴ This "arm's length approach" means, in essence, that state agencies (boards and councils) and not government *per se* have operational autonomy in cultural matters.¹²⁵ The formulation and exercise of public cultural policy are therefore left to a number of delegated agencies and institutions.¹²⁶ Although the approach lays itself open to criticism,¹²⁷ the idea has been to create a general system of checks and balances that seems to be necessary in a pluralistic society such as that of South Africa.¹²⁸ In addition, the approach was an attempt to avoid the undue concentration of power and the conflict of interest concerning cultural matters.¹²⁹

There seem to be clear links between this approach to the regulation of cultural affairs and the characteristics of good governance generally. The advantages

123 This has to do with the roles of different spheres of government, especially local government and traditional authorities. This links with the challenge of fragmentation. See Policy Review 11-15.

124 White Paper par 1.13.

125 Policy Review 28-30.

126 Policy Review 28.

127 See Policy Review 28 for some of the questions raised.

128 Policy Review 29.

129 Policy Review 29.

of the "arm's length approach", when well-implemented and monitored, outweigh the disadvantages and are three-fold:¹³⁰

- The governance of culture is more likely to be autonomous and transparent;
- The use of culture as a political strategy is prevented to a large extent; and
- The use of culture as a mechanism of exclusion or a barrier between people is less likely.

It is proposed that an approach such as the "arm's length approach", once tried and tested, should also be included as a substantive benchmark for good cultural governance. In fact, the "arm's length approach" seems to be a clever mechanism to overcome a mere mechanical perception of good cultural governance. It could be used as a tool to ensure that the substantive objectives of cultural law and policy in practice meet the procedural requirements inherent in the notion of good governance.

4. Conclusion

This article set out to introduce some legal perspectives on the role of cultural issues in decisions directed at sustainable development in the South African context. It was shown that sustainable development was originally conceived as an environmental concept but that room has since, at least in theory, been made for more prominent inclusion of the notion of "culture" in the sustainable development equation. We referred to some of the areas where issues of culture traverse economic, social and environmental considerations in order to show that culture may indeed be closely tied with sustainable development. Following the progressive thinking of Hawkes and others, we agreed that it may be possible to elevate the role of culture in sustainable development to a level where it receives autonomous attention in the sustainable development equation. In other words, decisions relating to sustainable development must

130 Policy Review 29.

consider not only the relevant environmental, economic and social factors, but must also attend to culture as an equally important factor.

With reference to some of the existing descriptions of culture in laws, case law and literature, it was contended that the meaning of the term "culture" is particularly fluid and indistinct, and that this poses significant challenges to the possible role of culture in sustainable development. It was shown that it is necessary to draw a distinction between the role of "culture" *per se* and the role of "cultural governance" in sustainable development discourse. It was also argued that "cultural governance" as a notion may be more distinct and exact than "culture" itself and that it therefore makes sense to use the flexible yet better defined notion of cultural governance for the purposes of the equation under discussion. In order to create a truly measurable standard it was further put forward that the notion of "good cultural governance" be used in the equation. This would mean that in making decisions to promote sustainable development the relevant authorities would have to question not only economic, social and environmental risks and impacts but also the potential risks and impact of a decision on good cultural governance. Since good cultural governance, presupposes compliance with international, regional, sub-regional and domestic cultural law, a brief description was provided of the key instruments and policies that comprise the cultural law framework in South Africa. The objectives of these were briefly indicated to distil the type of targets or substantive benchmarks that the cultural governance endeavors by South African authorities and others should be aimed at.

South Africa has a constitutionally entrenched environmental right that entrenches a legal claim to sustainable development for everyone in the country. Development in the private and public sectors will be bound by the parameters set by sustainable development for a very long time, if not forever. This is necessary to ensure an environment for the people of South Africa that will not be detrimental to health or well-being. In a culturally diverse and vibrant country, where cultural rights are also constitutionally entrenched, it appears

inevitable that scholars but especially public authorities reconsider the prominence of the role of issues of culture in sustainable development.

It has been established in this contribution that good cultural governance should be the decision-makers or government's point of reference to ensure that issues of culture are attended to in the sustainable development domain. This means that the authorities in charge of cultural governance will have to ensure that their houses are in order. They will, for example, have to acquaint themselves with the substantive benchmarks for good cultural governance as contained in cultural law, policy and practice. A cultural impact assessment may have to be designed and implemented that focuses on the issues relevant to sustainable development and that could as far as possible be aligned with environmental and social impact assessments. The latter may require the identification of cultural priority areas, for example. The sphere of government best positioned to take effective legislative and executive control over issues of cultural governance in the sustainable development context may have to be identified albeit without losing sight of the need for cooperative government.

The discussion in this article may have merely introduced the view that a more compelling case be made for the consideration of culture in the sustainable development discourse in South Africa. This suggests that challenges and practical difficulties relevant to the implementation of this approach remain to be further explored by scholars, policy makers and those tasked with cultural governance. We also acknowledge that significant research remains to be done in relation *inter alia* to the fragmented nature of cultural governance, the division of culturally relevant powers and functions among different organs of state, and the true potential of the so-called "arm's length approach", the implementation and enforcement of cultural law, and the representation of minority groups, whose culture and heritage may be particularly exposed to the risks posed by development within the borders of South Africa.

Bibliography

Bennett TW *Human Rights*

Bennett TW *Human Rights and African Customary Law* (Juta Cape Town 1999)

Bennett TW *Customary Law*

Bennett TW *Customary Law in South Africa* (Juta Lansdowne 2004)

Berendt EA (ed) *Metaphors for Learning*

Berendt EA (ed) *Metaphors for Learning: Cross-Cultural Perspectives* (John Benjamins Amsterdam 2008)

Craythorne *Municipal Administration*

Craythorne DL *Municipal Administration: A Handbook* (Juta Cape Town 1997)

Du Plessis *Constitutional Environmental Right*

Du Plessis A *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (Wolf Legal Publishers Nijmegen 2009)

Du Plessis "South Africa"

Du Plessis W "South Africa" in Blanpain R (ed) *International Encyclopaedia of Laws* (Kluwer Law International The Hague 2006)

Dugard *International Law*

Dugard J *International Law: A South African Perspective* (Juta Cape Town 2005)

Du Plessis and Britz 2007 *Journal of South African Law*

Du Plessis W and Britz L "The filling station saga: environmental or economic concerns?" 2007 *Journal of South African Law* 275-276

Du Plessis and Feris 2008 *SAJELP*

Du Plessis W and Feris L "The dissident Sachs J: a rebellious step in the right direction" 2008 *South African Journal of Environmental Law and Policy* 157-168

Featherstone *Cultural Theory*

Featherstone M *Cultural Theory and Cultural Change* (Sage London 1992)

Ginther *et al* (eds) *Sustainable Development*

Ginther K *et al* (eds) *Sustainable Development* (Kluwer Academic Boston 1995)

Grundy 1994 *African Affairs*

Grundy KW "The Politics of South Africa's National Arts Festival: Small Engagements in the Bigger Campaign" 1994 *African Affairs* 387-409

Hagg "Policy Review Workshop"

Hagg G "Report on the Policy Review Workshop of the Department of Arts and Culture" 6-8 May 2007 Sandton International Convention Centre (May 2007 Commissioned by the Department of Arts and Culture)

Guo *Cultural Influences*

Guo R *Cultural Influences on Economic Analysis Theory and Empirical Evidence* (Palgrave Macmillan 2006)

Hawkes *The Fourth Pillar*

Hawkes J *The Fourth Pillar of Sustainability: Culture's Essential Role in Public Planning* (Common Ground Publishing Australia 2001)

Garbarino *Sociocultural Theory*

Garbarino MS *Sociocultural Theory in Anthropology: A Short History* (Holt, Rinehart & Winston 1977)

Kotzé "Environmental Compliance"

Kotzé LJ "Towards a More Effective Environmental Compliance and Enforcement Regime for South Africa" in Paterson AR and Kotzé LJ (eds) *Environmental Compliance and Enforcement Legal Perspectives* (Juta Cape Town 2009)

Kroeber and Kluckhohn *Culture*

Kroeber AL and Kluckhohn C *Culture: A Critical Review of Concepts and Definitions* (Vintage Books New York 1952)

Levy and Tapscott (eds) *Intergovernmental Relations*

Levy N and Tapscott C (eds) *Intergovernmental Relations* (IDASA Cape Town 2001)

Mafunisa *International Review of Administrative Sciences*

Mafunisa MJ "The Role of Civil Society in Promoting Good Governance in the Republic of South Africa" 2004 *International Review of Administrative Sciences* 489.

Moon *Administration and Society*

Moon MJ "Cultural Governance: A Comparative Study of Three Cultural District" 2001 *Administration and Society* 432-454

Moore *Major Definitions*

Moore CA *Major Definitions of the Concept of Culture: A Review of the Literature* (University of Akron January 1980)

Noorderhaven and Tidjani CCM

Noorderhaven NG and Tidjani B "Culture, Governance, and Economic Performance: An Explorative Study with a Special Focus on Africa" 2001 *International Journal of Cross Cultural Management* 31-51

Parsons and Shils "Values and Social Systems"

Parsons T and Shils E "Values and Social Systems" in Alexander JC and Seidman S (eds) *Culture and Society: Contemporary Debates* (Cambridge University Press New York1990) 39-46

Thompson *International Sociology*

Thompson K "Cultural Studies, Critical Theory and Cultural Governance" 2001 *International Sociology* 593-605

Towse A *Handbook of Cultural Economics*

Towse R (ed) *A Handbook of Cultural Economics* (Edward Elgar Publishing Northampton 2005)

Register of Internet Sources

Bernier 2000 incp-ripc.org

Bernier I *List of International Instruments which make Reference to Culture* (June 2000 Liaison Bureau), accessible at incp-ripc.org/w-group/wg-cdg/list_e.pdf [accessed on 5 November 2009]

Brundtland 1987 www.un-documents.net

Brundtland GH *Our Common Future: The Brundtland Report* (1987 World Commission on Environment and Development United Nations) accessible at www.un-documents.net/wced-ocf.htm [accessed on 4 August 2009]

Nurse 2006 www.fao.org

Nurse K *Culture as the Fourth Pillar of Sustainable Development* (June 2006 Prepared for the Commonwealth Secretariat London) accessible at www.fao.org/SARD/common/ecg/2785/en/Cultureas4thPillarSD.pdf [accessed on 4 November 2009]

Rautenbach, Jansen van Rensburg and Pienaar 2003 *PER* www.puk.ac.za

Rautenbach C, Jansen van Rensburg F and Pienaar GJ "Culture (and Religion) in Constitutional Adjudication" 2003 (1) *Potchefstroom Electronic Law Journal* 1-19 accessible at www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/03craut.pdf [accessed on 3 August 2009]

Schomberg 2002 [ftp://ftp.cordis.europa.eu](http://ftp.cordis.europa.eu)

Schomberg R "The Objective of Sustainable Development" (Foresight Working Paper Series no1 of the European Commission: Directorate General for Research) accessible at [ftp://ftp.cordis.europa.eu/pub/foresight/docs/fores_wp_0210.pdf](http://ftp.cordis.europa.eu/pub/foresight/docs/fores_wp_0210.pdf) [accessed on 4 November 2009]

Srinivas 2006 *Economic and Political Weekly* www.epw.org

Srinivas KR "Unesco: Cultural Diversity Convention" *Economic and Political Weekly* 2006 (10) accessible at www.epw.org.in [accessed on 15 August 2009]

Throsby 2008 unesdoc.unesco.org

Throsby D "Culture in Sustainable Development: Insights for the Future Implementation of Art 13" (14 January 2008 UNESCO Sydney) accessible at unesdoc.unesco.org/images/0015/001572/157287E.pdf [accessed on 4 November 2009]

UNESCO 1995 unesdoc.unesco.org

"World Commission on Culture and Development Our Creative Diversity" (1995 UNESCO France) accessible at unesdoc.unesco.org/images/0010/001055/105586e.pdf [accessed on 4 November 2009]

Register of Judgments

Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa 2005 1 SA 580 (CC)

Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC)

MEC for Education, KwaZulu-Natal v Pillay 2008 1 SA 474 (CC)

Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence 2001 11 BCLR 1137 (CC)

Oudekraal Estates (Pty) Ltd v The City of Cape Town (25/08) [2009] ZASCA 85 (3 September 2009)

S v Basson 2005 1 SA 171 (CC)

S v Makwanyane 1995 6 BCLR 665 (CC)

Register of Legislation

Broadcasting Act 4 of 1999

Constitution of the Republic of South Africa 1996

Cultural Affairs Act (House of Assembly) 65 of 1989

Cultural Institutions Act 119 of 1998

Culture Promotion Act 35 of 1983

Group Areas Act 41 of 1950

Heraldry Act 18 of 1962

Intergovernmental Relations Framework Act 13 of 2005

Legal Deposit Act 54 of 1997

Library for the Blind Act 91 of 1998

National Archives and Record Service of South Africa Act 43 of 1996

National Arts Council Act 56 of 1997

National Environmental Management Act 107 of 1998

National Film and Video Foundation Act 73 of 1997

National Heritage Council Act 11 of 1999

National Heritage Resources Act 25 of 1999

National Library of South Africa Act 92 of 1998

PAN South African Language Board Act 59 of 1995

Population Registration Act 30 of 1950

Recognition of Customary Marriages Act 120 of 1998

South African Geographical Names Council Act 118 of 1998

Register of other documents

DAC Policy (date unknown) www.dac.gov.za

Department of Arts and Culture Arts and Culture Policy Review, accessible at www.dac.gov.za [accessed on 6 November 2009]

DEAT Framework 2008 www.deat.gov.za

Department of Environment and Tourism People-Planet-Prosperity: A National Framework for Sustainable Development in South Africa (July 2008), accessible at www.deat.gov.za [accessed on 29 September 2009]

GATS (date unknown) www.wto.org

General Agreement on Trade in Services (GATS) accessible at
www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm [accessed on 4 November 2009]

SADC Protocol (date unknown) www.sadc.int

Protocol on Culture, Information and Sport, accessible at
www.sadc.int/english/documents/legal/protocols/culture_information_and_sport.php#preamble [accessed on 29 September 2009]

SADC Treaty (date unknown) www.sadc.int

Treaty of the Southern African Development Community (SADC Treaty) (date unknown) as amended, and accessible at www.sadc.int [accessed on 26 September 2009]

UN International Covenant (date unknown) www.hrweb.org

United Nations International Covenant on Civil and Political Rights, accessible at www.hrweb.org/legal/cpr.html [accessed on 7 December 2009]

UN Economic and Social Commission (date unknown) www.unescap.org

United Nations Economic and Social Commission for Asia and the Pacific "What is Good Governance?" accessible at
www.unescap.org/pdd/prs/projectactivities/ongoing/gg/governance.asp [accessed on 26 September 2009]

White Paper on Arts, Culture and Heritage of 1996, accessible at

www.dac.gov.za/white_paper.htm [accessed on 17 August 2009)]

LEGAL PERSPECTIVES ON THE ROLE OF CULTURE IN SUSTAINABLE DEVELOPMENT*

AA Du Plessis and C Rautenbach*****

SUMMARY

This article introduces some legal perspectives on the role of culture in sustainable development. The authors agree that sustainable development has been designed as an environmental concept but that room exists for the more prominent inclusion of some form(s) of the notion "culture" in the sustainable development equation. It is shown that the fluid nature and meaning of "culture" may require a distinction between the role of "culture" per se and the role of "cultural governance" in the sustainable development context. It is suggested that "cultural governance" as a notion may be more distinct and exact than "culture" itself. The more functional notion of "good cultural governance" is preferred as a benchmark in the sustainable development equation, with the implication that cultural governance occurs in accordance with a certain standard. This standard is briefly considered by looking at the meaning of good cultural governance as a notion that encompasses both cultural governance and good governance generally. The article is set in the South African context but also invokes some law and policy developments

* This article is premised on a paper delivered at the Konrad Adenauer Stiftung/North-West University, Faculty of Law Colloquium on Good Governance and Sustainable Development, Johannesburg, August 2009.

** Anél du Plessis. Associate Professor, Faculty of Law, North-West University (Potchefstroom Campus).

*** Christa Rautenbach. Professor, Faculty of Law, North-West University (Potchefstroom Campus).

internationally, regionally and sub-regionally to depict how issues of culture have been infiltrating the sustainable development discourse and to distil some of the substantive benchmarks for good cultural governance.

Keywords: sustainable development; role of culture in sustainable development; culture; definition of culture; environmental law; cultural governance; good cultural governance