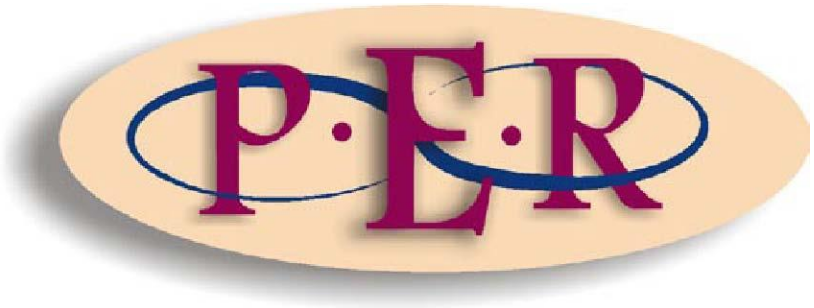
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# THE PURSUIT OF SUSTAINABLE DEVELOPMENT THROUGH CULTURAL LAW AND GOVERNANCE FRAMEWORKS: A SOUTH AFRICAN PERSPECTIVE

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# THE PURSUIT OF SUSTAINABLE DEVELOPMENT THROUGH CULTURAL LAW AND GOVERNANCE FRAMEWORKS: A SOUTH AFRICAN PERSPECTIVE

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## 1 Introduction

One of the most quoted definitions of sustainable development is drawn from the report of the Brundtland Commission[1] - *Our Common Future*[2] - which defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[3] In this sense, sustainable development was primarily engaged as an environmental concept and subsequently interpreted as such.[4] Developments globally led to the extension of the recognition of the concept in terms of environmental protection, economic growth and social inclusion or equality.[5]

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1 The Brundtland Commission (also known as the World Commission on Environment and Development (WCED)) was headed by Norwegian Prime Minister Gro Harlem Brundtland and the Report - WCED *Our Common Future* - is credited with successfully thrusting the concept of "sustainable development" into the mainstream of world debate. The WCED was convened in 1987 to argue, amongst other things, the resultant effect of exploitative resource use in industrialised countries.

2 The report of the WCED: *Our Common Future: Report of the World Commission on Environment and Development* UN Doc GA/42/427 (1987) (hereafter WCED *Our Common Future*).

3 WCED *Our Common Future* 43.

4 The concept was given recognition in 1972 at the UN Conference on the Human Environment held in Stockholm. The conference adopted a basic declaration which contains a set of common principles to inspire and *guide the peoples of the world in the preservation and enhancement of the human environment. Report of the UN Conference on the Human Environment* UN Doc A/Conf48/14 (1987); *Stockholm Declaration of the United Nations Conference on the Human Environment* (1972) (hereafter *Stockholm Declaration*).

5 The *Rio Declaration on Environment and Development* UN Doc A/CONF.151/26 (Vol. I) (1992) (hereafter the *Rio Declaration),* which is one of the resulting documents from the UN Conference on Environment and Development 1992 (also known as the Earth Summit) held in Rio, Brazil from 3-4 June 1992, is credited with recognising sustainable development in terms of the economic, environmental and social dimensions of development.

The content and meaning of sustainable development has witnessed a paradigm shift with significant focus on the different social dimensions of human development. The focus on human development is promoted on an international scale by the United Nations (UN) Development Programme, which began publishing its Human Development Reports in 1991. These reports typically analyse a range of issues which have an impact on human development like human security,[6] mobility,[7] global warming[8] and cultural liberty.[9] In this context, "culture" began to feature as a very prominent dimension of human development.

Similarly, Sen proposes the characterisation of development as "human capacity expansion," explaining that human capacity expansion is the enhancement of a person's capacity to lead the kind of life they desire, including their access to *cultural resources and cultural participation*.[10] This line of thinking prompting the prioritisation of human development over other more econometric development models resulted over time in proposals for the inclusion of culture as a key element for the full development of people and communities.[11]

In turn, the measurement of development which was traditionally theorised from an economic growth perspective has been expanded to include other indicators such as institutional indicators like the rule of law, political regimes, the property rights versus contract rights development nexus, international trade, foreign direct investment and development.[12] Gleaned from the broad definition of sustainable development quoted above and the paradigm shift in the contemporary development indicator focusing on human development, it is possible to conceive of sustainable development as a development model which aims at ensuring optimal living conditions for the present generation without denying similar opportunities to future generations.[13]

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6 UNDP 1994 http://hdr.undp.org/en/content/human-development-report-1994.
7 UNDP 2009 http://hdr.undp.org/en/content/human-development-report-2009.
8 UNDP 2007 http://hdr.undp.org/en/content/human-development-report-2007.
9 UNDP 2004 http://hdr.undp.org/en/content/human-development-report-2004.
10 Sen "Development as Capacity Expansion" 41-58. Cultural resources and cultural participation will be further developed in para 2.2.1 and para 3 below.
11 Marana *Culture and Development* 4.
12 See generally, Trebilcock and Prado *What Makes Poor Countries Poor?*; Sagar and Najam 1998 *Ecological Economics* 249-264.
13 Ako "Challenges to Sustainable Development" 9.

Therefore a pragmatic understanding of sustainable development will focus not only on the three traditional dimensions of sustainable development (which will be further discussed in paragraph 2), but will include other factors necessary for the realisation of "optimal living conditions" within a community. One of such factors would include considerations of culture, bearing in mind that different communities develop at different rates, a fact which must be taken into consideration in the implementation of sustainable development.[14] It is also agreed that culture gives meaning and content to development, as aptly stated in *Our Creative Diversity Report* 1995: "Development divorced from its human or cultural context is development without a soul".[15]

This article examines the infiltration of culture into the contemporary understanding of sustainable development, the relevance of international cultural law developments to domestic (South African) law, and possible governance measures for the recognition of culture in the pursuit of sustainable development and culture. It commences with a brief overview of the concept of sustainable development and an examination of the relationship between sustainable development and culture within existing literature and relevant international law instruments. Subsequently, an analysis of the role of cultural law as embedded in major international standard-setting treaties, guidelines and policies in the pursuit of sustainable development will be carried out. Furthermore, an insight into the South African position in relation to the interpretation of sustainable development that recognises issues of culture will be explored. The aim is to determine if issues of culture have received sufficient recognition in this context, and to determine if governance measures may be employed *via* existing governance structures to advance culture in the pursuit of sustainable development in South Africa.

## 2 An overview of the concept of sustainable development

The definition of sustainable development proffered by the Brundtland Commission in paragraph 1 above has earned wide acceptance and is argued to be instrumental in developing a global view of the concept.[16] It is argued by Kotzé that this definition of

14 Principle 1 of the *Rio Declaration* also states that "human beings are at the centre of concerns for sustainable development".

15 WCCD *Our Creative Diversity* 48.

16 Mebratu 1998 *Environ Impact Assess Rev* 494; Ako R "Challenges to Sustainable Development" 10.

sustainable development is vague and incoherent.[17] It is also contended by other authors that the blandness of the phrase makes the concept almost meaningless,[18] and that it lacks any clear rigour of analysis or theoretical framework for implementation and evaluation.[19] However, the ultimate aim of the ideal of sustainable development as suggested by the Brundtland Commission is "changing the quality of growth, meeting essential needs, merging environment and economics in decision making"[20] with an emphasis on human development, participation in decisions and equity in benefits.

The aim of sustainable development as articulated by the Brundtland Commission perhaps propels the adaptation of the concept over time by various disciplines, in spite of the varying debates about its meaning and intent. For instance, the economists' approach to sustainable development focuses on the "limits to growth theory".[21] The environmentalists' approach to sustainable development tends to agree with the conservationists' view of promoting bio-diversity,[22] promoting renewable sources of energy consumption, and recognising the real effect of climate change on the environment and patterns of consumption.[23] The socialists' approach to sustainable development is homocentric in nature as it focuses on issues like adequate housing, the eradication of poverty, human development, political freedom, cultural diversity,

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17 Kotzé *Legal Framework for Integrated Environmental Governance* 18-20; Lele 1991 *World Development* 608.

18 Hopwood, Mellor, O'Brien 2005 *Sustainable Development* 6.

19 Centre for Urban Policy Research 2000 http://bit.ly/1zrCJej; Kotzé *Legal Framework for Integrated Environmental Governance* 17.

20 WCED *Our Common Future* 49.

21 The limits to growth theory has its roots in the economic Malthusian population doctrine propounded by Thomas Robert Malthus (1766-1834). It was further advocated by the Club of Rome. The Club of Rome comprised of a group of eminent scientists, environmentalists and concerned citizens who came together to deliberate over the global environmental crisis around 1972. The group went on to produce a comprehensive report on the state of the natural environment. This report emphasised the imminent danger of industrial society's exceeding most of its ecological limits within decades if it continued to promote the kind of economic growth witnessed in the 1960s and the 1970s. For more on the concept of limits to growth, see: Mebratu 1998 *Environ Impact Assess Rev* 498-499; Mitcham 1995 *Technology in Society* 314-322. There are, however, salient differences between Malthusianism and the kinds of assumptions and methodologies employed in the report submitted to the Club of Rome. For more about Malthusianism and its relation to sustainable development, see Rogers, Jalal and Boyd *Introduction to Sustainable Development* 12-22.

22 Boer 1995 *Willamette L Rev* 308; Mebratu 1998 *Environ Impact Assess Rev* 501-502.

23 *Agenda 21* UN Doc A/CONF.151/26 (Vol. I) (1992) (hereafter *Agenda 21*); WCED *Our Common Future* ch 7 para I; G8 Renewable Energy Task Force 2001 http://bit.ly/1J1N9BX 18. The Report is an outcome of the 26th G8 Summit held in Nago Okinawa, Japan, 21-23 July 2000.

education, and other human rights-related issues.[24] The legal approach to sustainable development focuses on finding a synergy between international economic law, international environmental law and international social law (or social justice systems) and effectively harnessing and integrating them in furtherance of the sustainable development ideal.[25] The trans-disciplinary nature of the concept makes it acceptable to corporate organisations, governments, social reformers, environmental reformers[26] and cultural policy practitioners.[27]

It is suggested that the wide acceptance of the ideal of sustainable development is related to the recognition of the principles of sustainable development which remain largely the same across all disciplines. These principles include five interconnected equity principles deducible from the *Stockholm Declaration*[28] and the Rio Instruments[29] and categorised by Haughton[30] as follows:

a) inter-generational equity (futurity);[31]

b) intra-generational equity (social justice);[32]

c) geographical equity (trans-frontier responsibility);[33]

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24 Giddings, Hopwood and O'Brien 2002 *Sustainable Development* 39; Pezzoli 2010 *J Environ Plann Manag* 568-570.

25 Cordonier Segger 2004 *UNSDJ* 62; Barnard 2012 *PELJ* 209.

26 Giddings, Hopwood and O'Brien 2002 *Sustainable Development* 187.

27 Hawkes *Fourth Pillar of Sustainability* 25.

28 UN Conference on Human Development held in Stockholm in 1972. The Stockholm Conference represented a major step forward in the advancement of the concept of sustainable development. Although the link between environmental and developmental issues did not emerge strongly, the conference adopted a basic Declaration (known as the *Stockholm Declaration*) which contains a set of common principles to inspire and guide the world on the preservation and enhancement of the environment.

29 UN Conference on Environment and Development 1992 (also known as the Earth Summit) held in Rio, Brazil from 3-4 June 1992. The resulting documents that were adopted from the Earth Summit were: *Agenda 21*, the *Rio Declaration*, the *Statement of Forest Principles*, the *UN Framework Convention on Climate Change* (1992) (UNFCC) and the *UN Convention on Biological Diversity* (1992) (CBD).

30 Haughton 1999 *JPER* 235-238.

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

32 Principles 5, 8 of the *Rio Declaration*; para 7 of the preamble to the *Stockholm Declaration*; Principle 8 of the *Stockholm Declaration.*

33 Principle 2 of the *Rio Declaration*.

d) procedural equity (fair treatment of people and creating access to basic needs);[34] and

e) inter-species equity (the importance of biodiversity).[35]

These five equity principles, though appearing distinct, collectively form the basis of the notion of sustainable development, and it is suggested that the integration of the principles would be beneficial to achieving the aim of sustainable development. The intent of integration in this context is not to trade off one issue against another, but to recognise the interdependent nature of the different dimensions.[36] Policy makers and governments are expected to reflect these equities in the formulation of policies regulating the different dimensions of sustainable development domestically.

The degree of reflection or application of these equity principles in contemporary times will differ from one country to another, one society to another. The concept of needs and the idea of limitations placed on development process in order to improve or balance ecological interests against economic and social interests as propounded by the Brundtland Commission will also influence the interpretation of these principles in different contexts. For example what may define as a need in developing countries may not be defined as such in developed and industrialised countries. The resultant effect will be the trade-off of one dimension of sustainable development for another and the taking of different sectoral approaches[37] depending on the stage of development of society in that sector. For example, the needs requirements of developed or industrialised countries may accommodate sacrificing economic development for social and environmental considerations, whilst the reverse is most likely to occur in developing countries, including Small Island developing states.

This article approaches the concept of sustainable development from a developing country's perspective in order to properly appreciate the need to interpret sustainable

34 Principle 22 of the *Rio Declaration*.
35 Principles 2, 4 of the *Stockholm Declaration*.
36 Drexhage and Murphy "Sustainable Development" 6.
37 The sectoral approach to defining sustainable development emphasises one of the dimensions of sustainable development over the others. See generally Tladi *Sustainable Development*; Ako "Challenges to Sustainable Development".

development beyond the traditional dimensions of environmental, economic and social considerations. Indeed, owing to the multiplicity of the meanings attributed to the concept, it is expedient to adopt a nuanced definition of sustainable development that includes culture and suits developing countries like South Africa. In the words of Ako "a pragmatic approach must be adopted in defining sustainable development to ensure its relevance to the society in question".[38]

In the light of the above, sustainable development for the purpose of this contribution is described as the process of development that prioritises the capacity of development processes - economic, environment, social, and cultural - to continue into the future whilst improving the quality of life of the present generation and ensuring that the future generation will be equipped to do the same.

This article further proposes that the primary objective of sustainable development is to maximise the success of development processes which are aimed at maintaining or improving environmental, economic, social, cultural and human resources whilst recognising the potential for trade-offs in such arrangements and proffering a system of mitigation.

### *2.1 Defining culture*

As already explained, this contribution deals primarily with the role of culture in achieving sustainable development. However, the concept of culture is broad and polysemic, with far-reaching applicability resulting from its multi-layered and context-dependent meanings.[39] Although a detailed analysis of the theories of culture is outside the scope of this article, some insight will be given into the relevant aspects of culture within development discourse.

Attempts at linking culture to development are often limited to mainstreaming investments in cultural heritage and the living arts. This is probably why Hawkes

38 Ako "Challenges to Sustainable Development" 11.

39 In 1952, cultural anthropologists, Kroeber and Kluckhohn *Culture,* in a search for a suitable definition of culture, assembled 156 definitions of culture. These were classified under 6 headings, each presuming a different perspective on what a particular population is likely to share, namely: descriptive, historical, genetic, structural, psychological and normative definitions of culture.

argues that the value and the potential of culture are being undermined by the "tacit acceptance of the arts and heritage version of culture, thereby marginalising the concept of culture and denying theorists and practitioners an extremely effective tool".[40] The core of Hawkes argument is that there are several interpretations of the word "culture". For example, Bennett[41] thinks that culture bears at least two meanings in a legal context, one of which refers to intellectual or artistic endeavours, and the other of which refers to peoples' "store of knowledge, beliefs, arts, morals, laws and customs". Bennett's view denotes culture as "everything that humans acquire by virtue of being members of a society".[42] In the reference to intellectual or artistic endeavours, the right to culture would imply the right or freedom to perform and practice culture in the form of arts and sciences, and the second meaning of culture seems relevant to African customary law.[43]

Another attempt at a definition of culture in determining it's applicability to development is drawn from considering the definition of culture in the *UNESCO Mexico City Declaration on Cultural Policies* (hereafter the *Mexico City Declaration*) at the World Conference on Cultural Policies (hereafter the WCCP) held in Mexico City in 1982:[44]

> [C]ulture [is] the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs; that it is culture that gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. It is through culture that man expresses himself, becomes aware of himself, recognises his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.

The definition of culture in the *Mexico City Declaration* highlighted above, when read together with Principle 10 of the same Declaration, also gives insight into the potential link between culture and development. Principle 10 provides that:

40 Hawkes *Fourth Pillar of Sustainability* 1.
41 Bennett *Customary Law* 78-79.
42 Bennett *Customary Law* 78-79.
43 Du Plessis and Rautenbach 2010 *PELJ* 35.
44 Held 26 July - 6 August 1982.

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

Furthermore, the definition of culture in the *Mexico City Declaration* and the proceedings of the WCCD indicates the presupposition that there is a dual concept of culture. The *Mexico City Declaration* goes beyond the creative concept of culture in the form of arts and literature to the anthropological or sociological concept where it pertains to lifestyles, basic human rights, traditions and beliefs.[45] Perhaps it could be said that the creative concept of culture views the individual as the creator of culture, whilst the concept of culture as a way of life views the individual as a product of culture.

Williams,[46] on the other hand, observes that there are implicitly four contested definitions of culture, namely:

a) Culture – in reference to a developed state of mind as used in the phrase "a cultured person".

b) Culture - in reference to "cultural activities" or "cultural interests," signifying the processes of the development in (a).

c) Culture as "the arts" and "humane intellectual works," signifying the means of the processes in (b)

d) Culture as a whole way of life, a signifying system through which a social order is communicated, reproduced, experienced and explored.

Use of the word culture occurs mostly in the contexts of (c) and (d), which are often indistinguishable. However, in conceiving the relevance of culture in sustainable development from a developing country perspective it is imperative to consider all four definitions. As suggested by Nurse, when engaging with issues of sustainable

45 Kono and Van Uytsel "Convention on the Diversity of Cultural Expressions" 25-26.
46 Williams *Culture* 11-13; Nurse 2006 http://bit.ly/1iSnHs2 35.

development it is critical to extend cultural issues beyond the preservation of the arts, heritage and cultural identities to include the:

> ... broad civilizational notion embodied in culture as a "whole way of life" because it informs the underlying belief systems, worldviews, epistemologies and cosmologies that shape international relations as well as human interaction with the environment.[47]

From this perspective, the contested definition of culture as "cultural activity" is relevant, as culturally informed patterns of relating to the environment, as in cultivating the environment for the benefit of meeting the needs of the community in terms of crop produce, will ultimately have an impact on the development of such a community; for example the use of more eco-friendly agricultural practices as in the practice of integrated farming versus slash and burn agriculture. In addition, the developing countries that portray themselves as being more enlightened on matters of sustainable development may view the developing countries as being less "cultured", a shift in vision which would have implications for the environmentalist social movement and how it mobilises.[48] These instances go to illustrate the pervasiveness of the concept of culture and how it may impact on notions and practices of sustainable development.

References to culture in the reminder of this article will therefore be to cultural rights[49] within the context of the right to participate and produce intellectual and artistic works and the cultural heritage,[50] cultural diversity,[51] and the cultural creative industry (which includes the arts and creative industries)[52] as captured in several UN Educational, Scientific, and Cultural Organisation instruments (hereafter UNESCO).[53]

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47 Nurse 2006 http://bit.ly/1iSnHs2 36.

48 Nurse 2006 http://bit.ly/1iSnHs2 35.

49 Articles 4 and 5 *Universal Declaration on Cultural Diversity* (2001) (hereafter *UDCD*).

50 Articles 1 and 2 *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972) (*World Heritage Convention*); A 7 *UDCD*; A 2 *Convention for the Safeguarding of the Intangible Cultural Heritage* 2003 (*Intangible Cultural Heritage Convention*).

51 Article 3 *UDCD*; the preamble and A 1, 4, 12 and 13 *CDC*; WCCD *Our Creative Diversity* which increased awareness and recognition of cultural diversity.

52 Article 1 of *CDC*; A 7, 8, and 9 of *UDCD*.

53 UNESCO is the UN organisation responsible *inter alia* for the promotion of culture. Its work in advancing culture first focused on common cultural heritage in the form of buildings and monuments. However, this has since been extended to other aspects of culture, including but not limited to cultural diversity and creative cultural expression. See Kono and Van Uytsel "Convention on the Diversity of Cultural Expressions" 23; A 12 of *UDCD.*

These instruments make reference to the potential contribution of cultural advancement to sustainable development.[54]

### *2.2 Relationship between sustainable development and culture*

Scholars have referred to the limitations of interpreting sustainable development only in the context of social, economic, and environmental factors.[55] However, since the publication of *Our Creative Diversity Report*, which regard development without considering the cultural context as development "without a soul",[56] the idea that the cultural dimension should be explicitly included in development policies gradually became the focus of international scholarly and policy debates. Nurse argues that culture should not be conceived of as simply as an additional factor of sustainable development *along with* the environmental, economic and social factors, because "peoples' identities, signifying systems, cosmologies and epistemic frameworks shape how the environment is viewed and lived in".[57] Therefore, culture shapes the ideology of development and conditions how people interact with the environment.[58]

International treaty law also advocates the inclusion of culture in sustainable development. One example is the wording of guiding principle 6 in article 2 of the UNESCO *International Convention on the Protection and Promotion of the Diversity of Cultural Expressions* 2005[59] (hereafter *CDC*), which provides that the protection, promotion and maintenance of cultural diversity are essential requirements for sustainable development for the benefit of present and future generations. Article 13 of *CDC* encourages member states to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development. This provision of the *CDC* draws attention to the need to take a holistic view of sustainable development by recognising the cultural dimensions of development together with the traditional economic, social and environmental dimensions.

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54 These will be further discussed in para 2.3.

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

56 See para 1.

57 Nurse 2006 http://bit.ly/1iSnHs2 37.

58 For more on how culture contributes to peoples' interaction with the environment, see generally Magallanes 2015 *Widener L Rev* 273-327.

59 *International Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005), also known as the *Convention on the Diversity of Cultural Expressions*.

Furthering the contention that culture should be recognised as the fourth dimension in the pursuit of the sustainable development, at the International Conference on Cultural Policies for Development held in Stockholm,[60] it was proposed that governments should recognise culture in such a way that cultural policies become "one of the key components of endogenous and sustainable development".[61]

In addition, the UN *Millennium Declaration*[62] and the commencement of the realisation of Millennium Development Goals (hereinafter MDGs)[63] led to the approval of standard setting documents and legal instruments to boost the link between culture and development in the international community. Some of such instruments include the *CDC* and the *UDCD,*[64] which advocate the recognition of culture as an autonomous dimension in sustainable development rather as part of the social dimension of development. These instruments along with others[65] further advocate for the inclusion of culture-related issues in sustainable development. At the UN Sustainable Development summit 2015 held in New York from 25-27 September 2015, a new set of Sustainable Development Goals (SDGs) and targets were considered for adoption.[66] The new SDGs replace the MDGs and aim to achieve by 2030 *inter alia* the "appreciation of cultural diversity and of culture's contribution to sustainable development".[67] The *2030 Agenda for Sustainable Development Resolution on Culture and Sustainable Development* marks the first time that culture is referred to explicitly in the framework of sustainable development goals in the international development agenda related to education, sustainable cities, food security, the environment,

60 Held from 30 March - 2 April 1998.
61 UNESCO *Power of Culture.*
62 *UN Millennium Declaration* UN Doc A/55/L2 (2000).
63 The Millennium Declaration Goals were the world's time-bound and quantified targets for addressing eight key issues identified by world leaders in September 2000. The time limit for the actualisation of these goals was set at 2015.
64 Other related instruments will be further discussed in para 2.3.
65 For instance the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR); *International Covenant on Civil and Political Rights* (1966) (ICCPR); and the *Intangible Cultural Heritage Convention.*
66 See *Resolution Adopted by the General Assembly on 25 September 2015 - Transforming our World: The 2030 Agenda for Sustainable Development* UN Doc GA/RES/70/1 (2015) (hereafter *2030 Agenda*).
67 See Goal 4.7 of the *2030 Agenda*.

economic growth, sustainable consumption and production patterns, and peaceful and inclusive societies.[68]

The work of UNESCO affirms the recognition of culture in development strategies and policies. Some of the outcomes of UNESCO's work, in the form of international conventions, standard setting guidelines in relation to culture and sustainable development will be examined below. It has been suggested that these international instruments provide legal and political guidelines for the regulation of culture-related issues which states are politically committed to consider within their jurisdiction by virtue of their membership in the international community.[69]

### *2.3 International law and sustainable development via culture*

In order to highlight the inter-relation between international culture-related instruments and sustainable development, UNESCO's most influential culture-related instruments furthering the link between culture and development and how this interacts with sustainable development are discussed below:[70]

#### *2.3.1 1972 World Heritage Convention*

The *World Heritage Convention* draws attention to the value of the preservation of cultural heritage sites and its contribution to the development of communities.

Consequently, states have a duty to consider cultural heritage sites when approving development projects.[71] The cultural impact of development projects must ultimately be taken into consideration along with the environmental impact of such development projects. The Convention combines the protection of cultural heritage[72] with natural heritage with a view to providing a balance in the development of such communities.

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68 UNESCO 2015 http://en.unesco.org/sdgs/clt.

69 Wessels 2003 *PELJ* 160.

70 See also the expose by Rautenbach "Cultural Diversity" for a list of some of the international documents dealing with culture.

71 For example, the South African *Natural Heritage Resources Act* 25 of 1999; *Oudekraal Estates (Pty) v City of Cape Town* 2010 1 SA 333 (SCA), where the importance of including intangible cultural heritage issues in planning and development was illustrated.

72 Reference to cultural heritage in this convention is to tangible cultural heritage only. The *Intangible Cultural Heritage Convention* deals specifically with intangible aspects of culture such as the way of life of a people.

Although intended to protect cultural heritage sites, the Convention demonstrates the integration of the cultural dimension in development strategies.

One of the ways in which this Convention's outlook on the protection of cultural and natural heritage lends support to the sustainable development ideal is through its suggestion of the establishment of cultural impact assessments of development projects, which would support the protection of the environment where these cultural sites are situated. A good example of the interaction between culture and sustainable development would be engaging in the protection and proper management of cultural sites whilst considering the environmental, economic and social factors of sustainable development. Integrating cultural considerations into the more usual considerations of sustainable development could potentially contribute to the sustainable development of the community.

### *2.3.2 Mexico City Declaration on Cultural Policies*[73]

At the WCCP, development was viewed as:

> A complex, global and multidimensional process which transcends simple economic growth and incorporates all of life's dimensions and all of the energies of the community, whose members are called to contribute towards and share in the benefit.

Reference to the multidimensionality of development appears open-ended and allows for the inclusion of the cultural dimension in development strategies and processes. The *Mexico City Declaration* establishes various themes and ideas linked to culture's inclusion in development and, by extension, sustainable development. A few of the cultural themes highlighted in the Declaration are discussed below:

a) Cultural Identity/Diversity:[74] The *Mexico City Declaration* suggests that cultural identity and cultural diversity are inseparable. Therefore, the equality and dignity of all cultures must be recognised, as must the right of each people and community to affirm and preserve its cultural identity and have it respected by others, as a result of which the need to have cultural policies protecting,

[73] *UNESCO Mexico City Declaration on Cultural Policies* (1982), also referred to as the *Mexico City Declaration*.

[74] Principles 1-9 of the *Mexico City Declaration*.

stimulating and enriching every person's identity and cultural heritage is essential in the development process.

b) Cultural Heritage:[75] The *Mexico City Declaration* extends cultural heritage to both the tangible and the intangible aspects of culture through which people find expression, such as languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries. All people have the right to defend and preserve their cultural heritage.

c) Cultural Dimension of Development:[76] The *Mexico City Declaration* suggests that culture constitutes a fundamental dimension of the development process and helps to strengthen the independence, sovereignty and identity of nations. Development must therefore not be measured only in quantitative terms but must include the qualitative dimension, namely the satisfaction of man's spiritual and cultural aspirations. Thus, for development to be balanced, the cultural dimension must be integrated *via* cultural policies and development strategies.[77]

d) Cultural Rights: This theme, although not a specific heading in the *Mexico Declaration*, is implied under principles 17-22,[78] and relates to the *Universal Declaration of Human Rights* 1948 (hereafter *UDHR*). Cultural rights are inherently embedded in Article 27 of the *UDHR*. The *UDHR* proclaims the right of every person to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. The *UDHR* urges states to take the steps necessary to attain this objective by creating a conducive environment *via* cultural policies and projecting a cultural right as a fundamental human right which requires protection by the state.[79]

It is therefore possible to suggest that the recognition and integration of the above aspects of culture in proactive and engaging cultural policies will foster the human

75 Principles 23-26 of the *Mexico city Declaration.*
76 Principles 17-22 of the *Mexico City Declaration.*
77 Principle 16 of the *Mexico City Declaration*.
78 These principles are couched under the heading "Culture and Democracy".
79 Article 5 of *UDCD*.

development context of development advanced in this article, thereby harnessing the full potential of individuals and communities *via* culture in the promotion of sustainable development.

### *2.3.3 The UDCD*

The *UDCD*[80] pioneered the promotion of cultural heritage as world heritage and identified cultural diversity as a development factor.[81] Interestingly, in connecting cultural diversity, cultural heritage and creativity, the *UDCD* states in article 7 that creation draws from the roots of cultures. Therefore the tangible and intangible heritage must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures. The *UDCD* also urges in article 8 that cultural goods and services should not be considered as mere commodities but should rather be recognised as bearers of identity, value and meaning. In order to implement the principles contained in the *UDCD*, it advocates the crucial role of cultural policies in enabling the free circulation of ideas and works by creating conditions conducive to the production of and dissemination of cultural goods and services through cultural industries that have the means to assert themselves at the local and global level.[82]

Furthermore, the *UDCD* recognises the role of civil society in collaborating closely with the state in the definition of public cultural policies to preserve and promote cultural diversity. In advocating the role of cultural diversity the *UDCD* further highlights the need for a participatory system of governance in the realisation of the sustainable development ideal. Cultural diversity potentially serves as a springboard to the overall realisation of the goal of sustainable development of not just the environment, the economy and providing social inclusion, but also provides an avenue whereby the aspirations of the people are catered for.

80 This is not a legally binding instrument.
81 Article 3 of *UDCD*.
82 Article 9 of *UDCD*.

### *2.3.4 Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 (hereafter CDC)*

The *CDC* is recognised as the first legally binding international document protecting and promoting the diversity of cultural expressions.[83] The Convention acknowledges the need to protect cultural diversity and reaffirms the link between culture and development.[84] The Convention in article 2(1) states *inter alia* that cultural diversity can be protected and promoted only if human rights and fundamental freedoms are guaranteed, thereby establishing the link between cultural diversity and human rights. The Convention recognises the sovereign rights of states to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions in their territory.[85] The central objective of the Convention is to create an enabling environment in which artists, cultural professionals, practitioners and citizens internationally can engage in creating, producing, distributing, disseminating and enjoying a broad range of cultural goods, services and activities. The responsibility for implementation lies with state members in their respective localities.[86]

It is submitted that the cultural activities, goods and services as envisaged in the *CDC* will potentially contribute in a cultural nature to sustainable development, as they convey identities, values and meanings. Their potential contribution to sustainable development in the community can be harnessed through the promotion of cultural diversity, cultural rights and the common heritage of the people, with a view to actively engaging the people in the pursuit of sustainable development.

### *2.3.5 2013 Resolution on Culture and Sustainable Development*

The General Assembly of the UN on 20 December 2013 adopted the *Resolution on Culture and Sustainable Development* (hereinafter the *2013 Resolution*).[87] The *2013 Resolution*, amongst other things, acknowledges the contribution of culture to

83 Rautenbach and Du Plessis 2009 *SAYIL* 133; A 1(a) of *CDC*.
84 Article 1(f) of *CDC*.
85 Article 1(h) of *CDC*.
86 Article 13 of *CDC*.
87 *Resolution on Culture and Sustainable Development* GA Res 68/223, UN Doc A68/223 (2013).

inclusive economic development. It highlights cultural heritage, cultural and creative industries, sustainable cultural tourism and cultural infrastructure as sources of income generation and job creation, especially at the community level.[88] The resolution is thus aimed at improving living conditions and fostering community-based economic growth and individual empowerment.

The resolution builds on several other resolutions from 1986 to 2012.[89] The earlier resolutions[90] urged the mainstreaming of culture into developmental policies and strategies and highlighted the intrinsic contribution of culture to sustainable development.

From the provisions of the international instruments examined above, the value of initiatives being carried out in the international domain in promoting the inclusion of the cultural dimension in the sustainable development equation is evident. The cultural themes discussed in this paragraph also indicate how the culture-related issues envisaged can be integrated into the main stream of sustainable development. It is also explicit in these instruments that cultural policies and governance of the same are essential tools in actualising the full potential of the cultural dimension in the sustainable development equation. It further imposes certain obligations on decision makers in relation to development policies.

The instruments provide useful principles to be taken into consideration when matters of sustainable development and culture must be considered, namely:

a) The cultural impacts of development projects must be considered along with the environmental, social and economic impacts.

88 See A 7(a) of the *Resolution on Culture and Sustainable Development* GA Res 68/223, UN Doc A68/223 (2013) 4.

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

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

b) The protection of cultural heritage must be combined with the protection of natural heritage in order to provide a balance in the development of communities.

c) The cultural heritage should include the intangible aspects of culture through which people find expression, such as languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries.

d) Cultural diversity, heritage and creativity are primary to being human. The tangible and intangible heritage must therefore be preserved, enhanced and handed down to future generations as a record of human experience and aspirations worthy to foster creativity in all its diversity and to inspire genuine dialogue among peoples.

e) Culture must be placed at the heart of public policy to address global development challenges including environmental sustainability, poverty and social inclusion.

f) Cultural policies must protect, stimulate and enrich every person's identity.

g) The right of all individuals to defend and reserve their heritage must be recognised.

h) The cultural dimension of development consists *inter alia* of the satisfaction of man's spiritual aspirations.

i) Culture must be mainstreamed into developmental policies and strategies and its intrinsic contribution to sustainable development must be recognised.

j) States have a duty to progressively realise the right of every person to freely participate in the cultural life of the community, to enjoy the arts and share in scientific advancement and its benefits. To this end, states must create a conducive environment through cultural policies, and must recognise a cultural right as a fundamental human right which requires state protection.

k) Cultural goods and services must be recognised as bearers of identity, value and meaning.

l) Cultural industries must be equipped to be able to assert themselves at the local and global level through proactive cultural policies.

m) Collaboration between the state and different sectors of civil society in the definition of public cultural policies must be encouraged with the object of preserving and promoting cultural diversity.

n) A participatory system of governance of sustainable development must be promoted.

o) It must be recognised that states have the sovereign right and responsibility to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of cultural expressions in their territory.

## 3 Culture and sustainable development in the South African context

Following the above, the reflection of the principles in paragraph 2.3 in South Africa's recognition of culture in the pursuit of sustainable development will be investigated. Before this is done, a brief overview of sustainable development in the South African context, the recognition and integration of culture, and the influence of international law and governance measures in the pursuit of sustainable development will be investigated.

### *3.1 A brief overview of sustainable development in the South African context*

The closest the *Constitution of the Republic of South Africa,* 1996 (hereafter the 1996 *Constitution*) has come to defining sustainable development is in section 24. In guaranteeing the right "to an environment that is not harmful to their health and wellbeing",[91] the section adopts the principle of intergenerational and

[91] Section 24(a) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

intragenerational equity.[92] These two equity principles are derived from the general principle of equity, which has a firm place in international law within different contexts.[93] For the purposes of achieving sustainable development, intergenerational equity and intragenerational equity require that decisions concerning development planning, consumption patterns and the natural resource base as well as social justice consider the needs of the present generation without compromising the ability of future generations to meet their own needs as well.[94] Section 24 further provides that these principles of sustainable development can be achieved through "reasonable legislative and other measures"[95] that among other things "secure ecologically sustainable development,"[96] and further advocates the promotion of "justifiable economic and social development".

Similarly, the primary legislation for environmental management in South Africa, the *National Environmental Management Act*[97] (hereafter *NEMA*), in section 1 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

In addition, section 2 prescribes a variety of national environmental management principles which apply to the actions of all organs of state that may significantly affect the environment. These principles are centred on the tenet specified in section 2(3), that development "must be socially, environmentally and economically sustainable". Similar references to the notion of sustainable development are gleaned from many sectoral laws including the *National Water Act,*[98] *National Environmental Management:*

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92 As already stated in para 1 above; s 24(b) of the *Constitution* "for the benefit of present and future generations".

93 For example in aa 74 and 83 of the *Law of the Sea Convention* (1982) the phrase "equitable solution" is employed in reference to the marine delimitation; also in further elaboration of equitable principles in the jurisprudence of the International Court of Justice in the landmark case of *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* Judgement of 20 February 1969 (1969) ICJ 1 3.

94 Also see the definition of sustainable development in the Brundtland Commission Report (WCED *Our Common Future*).

95 Section 24(b) of the 1996 *Constitution.*

96 Section 24(b)(iii) of the 1996 *Constitution.*

97 *National Environmental Management Act* 107 of 1998.

98 *National Water Act* 36 of 1998.

*Biodiversity Act,*[99] *Marine Living Resources Act,*[100] *National Environmental Management: Protected Areas Act,*[101] *Minerals and Petroleum Resources Development Act,*[102] *Development Facilitation Act*[103] *and the Local Government: Municipal Systems Act.*[104]

The *National Strategy for Sustainable Development and Action Plan 2011-2014* (*NSSD1*), the *National Framework for Sustainable Development* (*NFSD*) and the *National Development Plan: Vision for 2030 2011* (*NDP*) were formulated by the government in furtherance of South Africa's international commitments particularly to the MDGs, the *Agenda 21 and the Johannesburg Plan of Implementation* 2002. These instruments of development planning highlight the importance of institutions and systems of governance in the promotion of sustainable development.

Furthermore, in 2007 the Constitutional Court in the case of *Fuel Retailers Association of Southern Africa v Director – General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*[105] noted that:

> The Constitution recognises the interrelationship between the environment and development; in deed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development… Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.

This decision of the court, whilst recognising the relationship between the environment and development, gives the concept of sustainable development legal recognition within constitutional court jurisprudence. It also suggests an integrated approach to the dimensions of sustainable development which can be extended to the cultural dimension envisaged in this article. The court further stated that the protection of the

99 *National Environmental Management: Biodiversity Act* 10 of 2004.
100 *Marine Living Resources Act* 18 of 1998.
101 *National Environmental Management: Protected Areas Act* 57 of 2003.
102 *Minerals and Petroleum Resources Development Act* 28 of 2002.
103 *Development Facilitation* Act 67 of 1995.
104 32 of 2000.
105 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 45.

environment "is vital to the enjoyment of the other rights contained in the Bill of Rights",[106] which in sections 30 and 31 of the *Constitution* include the right to the enjoyment of one's culture.

### *3.2 Recognising culture in the promotion of sustainable development in South Africa*

Following the above discussions, it is contemplated that a cultural right be entrenched in the Bill of Rights. It is possible to argue that if the right to a healthy environment (section 24) can be achieved through sustainable development and if sustainable development includes a cultural dimension, then it follows that cultural issues can be inscribed within the right to a healthy environment vital for the wellbeing of individuals. Therefore, as the right to a clean and healthy environment vital for the wellbeing of individuals is entrenched in the Bill of Rights, so is the right to the enjoyment of one's culture.[107] These rights thereby enjoy the status of "constitutionally protected rights" subject to the limitation of rights provision in section 36 of the 1996 *Constitution*.

Apart from the 1996 *Constitution*, *NEMA* defines the "environment"[108] to mean the surroundings within which people exist, which are made up *inter alia* of "aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being". This definition of the environment links environmental factors with cultural heritage, which international cultural law principles discussed earlier requires states to consider in reaching decisions regarding sustainable development. For example in *Oudekraal Estates (Pty) v City of Cape Town* (hereafter the *Oudekraal Estates Case*)[109] the importance of including intangible cultural heritage issues in planning and development was illustrated.

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106 Such rights include property rights, housing rights, the right to education, health care rights, social security rights, food security, environmental rights, the right to water, the right to access to information, and all other related rights protected by the *Constitution*. See ss 25(5), 26, 27, 29(1)(b) of the 1996 *Constitution*.

107 Section 31 of the 1996 *Constitution.*

108 Section 1 of *NEMA*.

109 *Oudekraal Estates (Pty) v City of Cape Town* 2010 1 SA 333 (SCA) (hereafter the *Oudekraal Estates Case*).

In that case the court came to the conclusion that a plan approved earlier (in 1957) to develop a township given by the provincial government had not considered the cultural practices of persons other than the dominant political group at the time. Since the 1996 *Constitution* recognises the progressive realisation of the right to exercise one's culture and religion[110] and other related rights, including the recognition of the value of diversity, it behoves the government to include culture in all development processes. In the light of the combination of the cultural, religious and environmental claims that the Muslim community, the inhabitants of Cape Town and the South African Community generally hold in the land, which was not considered in granting the permission to develop the land initially, the court set aside the approval for development on the land.[111]

Section 1 of NEMA, when read together with paragraph 45 of the judgement of the court in the *Fuel Retailers Association of Southern Africa* and the decision of the court in the *Oudekraal Estates Case* above, confirms a definite link between the environment and culture. Furthermore, the reading of section 1 of *NEMA* along with the definition of sustainable development in *Our Common Future* and section 24 of the *Constitution* suggests that cultural factors have a significant role to play in development policies in order to advance the realisation of constitutionally enshrined cultural rights, which also include cultural diversity in the sense of a person being entitled to have his cultural identity respected. In addition, it is submitted that culture-related matters are capable of influencing "human health and well-being" just as much as issues of the environment can interfere with "human health and well-being". In as much as the right to a clean environment in order to protect the health and well-being of individuals is recognised in national law, a further recognition of culture-related issues would be beneficial for the consolidation of the protection of the health and well-being of individuals in line with the proposals and suggestions in the international documents discussed in paragraph 2.3, thereby reiterating the need to integrate issues of the environment with cultural, social and economic considerations in the pursuit of sustainable development.

110 Sections 30 and 31 of the 1996 *Constitution*.
111 Rautenbach, Hart and Naude "Cultural Heritage Resources Management" 855.

Flowing from the above discussions it is possible to submit that the culture-related matters raised in this article are applicable in the South African context. The legislative recognition of culture-related issues in South Africa is a good platform to launch the recognition of culture within the sustainable development equation from a human development perspective.

### *3.3 Integrating culture issues for sustainable development in South Africa*

Issues of cultural heritage (as opposed to cultural diversity, cultural rights and creative cultural expression (arts and culture)) received legislative attention with the enactment of the *National Heritage Resources Act*[112] (*NHRA*), 1999, which governs the management of heritage resources. Perhaps this is because South Africa is home to eight of the world's official heritage sites.[113] However, it must be noted that the management and regulation of other aspects of culture are products of a combination of the extensive legal frameworks that exist both nationally and internationally.[114] For example, section 2(b) of *NEMA* provides that environmental management must be integrated, acknowledging that all elements of the "environment"[115] (with links to cultural heritage) are "linked" and "interrelated," and it must take into account the effects of decisions on all aspects of the "environment" and all people in the "environment" by pursuing the selection of the best practicable environmental option.

Therefore, it is implied that measures and governance in furtherance of environmental protection can be extended within applicable limits to issues of cultural policy, in the sense that due consideration must be given to issues of culture when applying measures and governance in furtherance of environmental protection. In relation to cultural policies, Roodt has argued that cultural policies are not intended for the regulation of heritage conservation sites alone rather that they underlie every viable

112 *National Heritage Resources Act* 25 of 1999.

113 SA Places Date Unknown http://www.places.co.za/html/south_africa_world_heritage_sites.html. South Africa is home to eight of the world's official heritage sites.

114 For example aa 5 and 6 of *CDC* safeguards and fosters state capacity for cultural policy-making. It also provides a non-exhaustive list of the measures that parties may adopt in order to protect and promote the diversity of cultural expressions within their territory, including regulatory, institutional and financial measures. Also see Psychogiopoulou "Convention on the Diversity of Cultural Expressions" 366.

115 "Environment" as defined in s 1 of *NEMA*.

project or development strategy in every sector of the community. This includes tourism, transportation, education, economic development and social services.[116] Therefore they transcend creating a climate conducive to cultural expression and the protection and development of heritage to allow cultural considerations to feature in planning and development.[117]

Furthermore, the 1996 *Constitution* in section 7(1) provides that the Bill of Rights is a cornerstone of democracy in South Africa and thus enshrines the rights of all people in South Africa by affirming the democratic values of human dignity, equality and freedom. With the establishment of these rights, there is an implied social contract between the government and the people. The social contract is such that the organs of state (national, provincial and local)[118] are legally obliged to provide a conducive environment *via* the instrumentality of legislation and appropriate policy to protect the exercise of such rights.[119]

Furthermore, the *2013 Resolution*[120] especially highlights the social and economic value of culture for South Africa on many levels, especially in view of the country's culturally diverse population. It also highlights the intrinsic contribution of culture to environmental sustainability.[121] Thus, the recognition of its provision and its subsequent application would be potentially beneficial to achieving sustainable development through cultural advancement.

Within the context of the foregoing, achieving sustainable development would necessitate the recognition of culture-related issues and the creation of the conditions necessary to promote their intrinsic value alongside the other dimensions of sustainable development.

116 Roodt 2006 *PELJ* 205.
117 DAC *White Paper.*
118 Section 40 of the 1996 *Constitution*.
119 Section 8 of the 1996 *Constitution*.
120 *Resolution on Culture and Sustainable Development* GA Res 68/223, UN Doc A68/223 (2013).
121 *Resolution on Culture and Sustainable Development* GA Res 68/223, UN Doc A68/223 (2013) paras 5-7.

### *3.4 The influence of international law on South Africa's cultural law and policy*

Generally, South Africa adopts a dualist approach to the incorporation of international law within the national legal system. This approach requires the formal metamorphosis of international law into domestic law.[122] It has been suggested that international legal instruments (treaties and soft law alike) provide legal and political guidelines for the governance of culture-related issues by virtue of South Africa's membership of international and regional organisations.[123] Therefore, international agreements or treaties and international instruments dealing with cultural issues should form part of the sources of cultural law in South Africa.

South Africa has ratified two international law conventions relevant for the regulating of cultural issues for sustainable development, and they are the *World Heritage Convention*[124] and the *CDC*.[125] The *World Heritage Convention* was enacted into domestic law *via* the *World Heritage Convention Act*[126]. Although South Africa played a significant role in the events leading to the creation of the *CDC*,[127] it has not yet been incorporated into the South African domestic legal regime by means of national legislation. However, this does not absolve South Africa from liability towards other member states in the event of non-compliance with the provisions of the *CDC,* having ratified it at international level.[128]

South Africa's rights and duties flowing from the *CDC* include the right to:

a) formulate and implement cultural policies;

b) adopt measures to protect and promote the diversity of cultural expressions; and

122 Dugard *International Law* 47-48; ss 231, 233 and 39(1)(b) of the 1996 *Constitution*.
123 Wessels 2003 *PELJ* 160.
124 South Africa ratified it on 10 July 1972.
125 South Africa ratified it on 21 December 2006, three months before the Convention went into force on 18 March 2007.
126 *World Heritage Convention Act* 49 of 1999.
127 Rautenbach "Implementation of the Convention" 398.
128 Dugard *International Law* 62.

c) strengthen international co-operation to achieve the promotion and protection of the diversity of cultural expression.[129]

South Africa's duties, on the other hand, include:

a) to promote and protect cultural expressions;[130]

b) to provide reports on a four-yearly basis with information on the measures taken to protect and promote cultural expressions;[131]

c) to encourage better understanding of the *CDC* through educational and public awareness programmes;[132]

d) to strengthen partnerships with and among the components of civil society;[133]

e) to promote international co-operation;[134]

f) to integrate culture in sustainable development policies;[135]

g) to support co-operation for sustainable development and poverty reduction;[136] and

h) to encourage the sharing of information, expertise, statistics and best practices pertaining to the diversity of cultural expressions between member states.[137]

The right to formulate and implement cultural policies is linked with the duty to integrate culture in sustainable development policies in the pursuit of sustainable development in South Africa. The formulation and implementation of cultural policies is the responsibility of the state and it is suggested that an effective governance structure would contribute to advancing the recognition of culture in the pursuit of

129 Articles 5 and 6 of *CDC*.
130 Articles 7 and 8 of *CDC*.
131 Article 9 of *CDC*.
132 Article 10 of *CDC*.
133 Articles 11 and 15 of *CDC*.
134 Article 12 of *CDC*.
135 Article 13 of *CDC*.
136 Article 14 of *CDC*.
137 Article 19 of *CDC*.

sustainable development. The existing cooperative governance structure in South Africa and how this structure could effectively be utilised to carry out this function is therefore explored as a means to further the linkage between issues of culture and sustainable development.[138]

### *3.5 Governance measures for cultural issues in South Africa in the promotion of sustainable development*

Governance as conceived in this article relates to the existing governance structure in government in the pursuit of sustainable development in South Africa. The governance structure provided by the 1996 *Constitution* for culture-related matters is such that adjudication of "cultural matters" is within the concurrent legislative competence of the national and provincial arm of government in South Africa[139] to the exclusion of the local government.[140] The exclusion of the local government form the governance of cultural heritage matters may be overcome, however, by the application of section 156(1)(b), which provides that:

> ... a municipality has executive authority in respect of, and has the right to administer … (b) any other matter assigned to it by national or provincial legislation.

For example the *NHRA* assigns the management of Grade III heritage resources to the local authority to the extent that section 8(4) of the *NHRA* provides that:

> A local authority is responsible for the identification and management of Grade III heritage resources and heritage resources which are deemed to fall within their competence in terms of this Act. The local government in this instance is enabled by the stated provision of the 1996 *Constitution* to manage cultural resources. This possibility is important to the extent that the effective governance of culture at the grass root level is essential to the over-all advancement of the cultural dimension in the advancement of sustainable development.

Furthermore, the notion of cooperative governance provided in chapter 3 of the 1996 *Constitution*[141] specifically in section 41(1) requires all spheres of government and all organs of state within each sphere to co-operate with one another in mutual trust and

138 Article 13 of *CDC*; Rautenbach "Implementation of the Convention" 411.
139 Sch 4 and 5 of the 1996 *Constitution*.
140 Ch 7 and sch 4(B) and 5(B) of the 1996 *Constitution*.
141 Which is also supported by the *Intergovernmental Framework Relations Act* 13 of 2005.

good faith, which includes *inter alia* co-ordinating their actions and legislation with one another.

In recognition of the place of governance in the sustainable development equation, in formulating the *NSSD1, NFSD and the NDP*[142] the South African government has highlighted the importance of institutions and systems of governance in implementing the ideals of sustainable development.[143] In addition, the *National Development Plan 2030: Our Future - make it work*[144] (hereafter *NDP 2030)* was published by the National Planning Commission in 2012 as an amplification of the *NDP* policy document. The *NDP 2030* also reiterates the theme of governance for the actualisation of sustainable development.

The Department of Arts and Culture (DAC) possesses a constitutional and legislative mandate emanating from sections 16, 30 and 31 of the *Constitution* which spreads over a range of institutions[145] and legislation.[146] The governance of culture-related issues in South Africa consists of an impressive legislative and policy framework[147] and a legal framework which includes the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[148] The establishment of various statutory bodies provides for additional frameworks for the protection of the cultural sector, for instance the National Arts Council, the National Film Video

142 National Planning Commission 2011 http://bit.ly/1J02Eim.

143 See DEAT *National Framework for Sustainable Development* 15.

144 National Planning Commission 2012 http://bit.ly/1FBUGq5 24.

145 Declared Cultural Institutions are so declared according to the *Cultural Institutions Act* 119 of 1998. These are corporate bodies receiving annual subsidy from the Department.

146 Some of the legislation includes the *Culture Promotion* Act 35 of 1983; the *Cultural Institutions Act* 119 of 1998; and the *NHRA*. To see a complete list of the legislation, see DAC Date Unknown http://bit.ly/1Kn9ee4.

147 For instance, the statutes promulgated in furtherance of the DAC's legislative mandate include *Cultural Affairs Act* 65 of 1989, *Cultural Institutions Act* 119 of 1998, *Heraldry Act* 18 of 1962, *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, DEAT *National Framework for Sustainable Development*, *National Heritage Council Act* 11 of 1999, *National Library of South Africa Act* 92 of 1998, *Natural Heritage Resources Act* 25 of 1999, *PAN South African Language Board Act* 59 of 1995, and the *South African Geographical Names Council Act* 118 of 1998. In addition to these statutes, the policy document of the DAC - the *White Paper on Arts, Culture and Heritage* 1996 - and sections 4 and 5 of the 1996 *Constitution* form part of the legislative framework for the governance of culture in South Africa.

148 Established by virtue of the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* Act 19 of 2002; and ss 181, 185-186 of the 1996 *Constitution*.

Foundation, the Pan South African Language Board, the Provincial Language Committees, the National Language Service (at the DAC) and the National Cultural Institutes, including the Robben Island Museum, the Nelson Mandela Museum and the Albert Luthuli Museum.

One outcome of the existence of this broad legislative and governance framework governing cultural matters in South Africa is the proliferation of governance institutions in this context and the potential overlap of their functions, leading to both vertical and horizontal fragmentation of authority. Borrowing from a study[149] on the relationship between government fragmentation and economic development, the polycentric model, the centrist model and the regionalist model provide explanations from different perspectives of the merits and demerits of fragmentation in government institutions.

On the polycentric model, it is argued that a fragmented government structure offers greater choice to the public among government-provided services and institutions.[150] On the other hand, the centrist theory supports the view that government consolidation with multi-purpose functions is efficient in administration, and claims that with a larger pool of resources such a consolidated authority can effectively offer varied services to the community. The regionalist model, whilst negating the import of the actual fragmentation of government, believes in the economic and social advantages offered by the existence of region-wide mechanisms for collaborative decision-making.

Although these three models are meant to apply primarily in the context of economic development, they could positively contribute to the debate on the advancement of the governance of culture-related matters in the promotion of sustainable development. The polycentric and regionalist theory accurately describe the current state of the governance of culture in South Africa, when viewed in terms of the CDC's[151] call for multiple policies and measures related to culture, irrespective of

149 Rollins and Owens 2006 http://bit.ly/1vq1xCG.
150 Rautenbach and Du Plessis 2009 *SAYIL* 156.
151 Article 4(6) of *CDC*.

whether or not they are formulated at international, national, regional or local levels, for the discharge of the obligations and duties laid on states (South Africa).

On the other hand, the centrists' theory, when viewed together with the "developmental local government" mandate for local government to work towards achieving development for everyone, captures the preferred framework for the advancement of culture in the sustainable development of South Africa.[152] It is not suggested that the structures and instruments that govern culture issues as they currently exist should be drastically redesigned or transformed, as this would be a staggering task to undertake. It is rather suggested that the current structures and instruments be extended to accommodate the constitutional objects and developmental duties of local government as outlined in sections 152 and 153 of the 1996 *Constitution*.

It is further suggested that consideration should be given to adapting an additional framework that would promote the fusing of matters of cultural diversity, cultural heritage, cultural rights and the promotion of the creative cultural industry at grassroots level in furtherance of the principles laid out in the international standard-setting documents discussed in this article.

## 4 Conclusion

The infiltration of culture into the contemporary understanding of sustainable development has been explored and its potential contribution to the advancement of sustainable development has been highlighted in this article. The need to recognise the cultural dimension of sustainable development is promoted on the platform of human development. Human development has been described as human capacity expansion, which includes improved access to resources, including cultural resources. It has also been established in this article that human beings are at the centre of concerns for sustainable development, and that developmental processes must actively recognise the role of culture in delivering human development to communities.

152 Fuo *Local Government's Role* 98-101.

The explicit and implicit provision for cultural matters in relation to sustainable development in the 1996 *Constitution* and related statutes and policies make the governance of cultural issues for sustainable development essential to give force to the recognition of issues of culture in the pursuit of sustainable development.

In furtherance of the governance of culture-related issues in the pursuit of sustainable development, the requirement for cooperative governance provides the platform for the three spheres of government to be actively involved in the advancement of cultural diversity, cultural heritage, cultural rights and the culture industry in the pursuit of sustainable development. The need for an integrated approach is supported by the view that the notion of sustainable development is promoted by the interdependency and interrelation of the traditional economic, environmental, social and cultural dimensions.

In addition, the effective governance of the cultural dimension manifested as described in this article would ultimately contribute to providing optimal conditions for achieving economic, environmental and social developmental goals in South Africa. In order to achieve the pursuit of sustainable development, the cultural law and governance framework in South Africa should be integrated into developmental planning at the national, provincial and local government levels. In view of this, two recommendations are advanced:

a) In recognition of South Africa's rights and duties flowing from the *CDC*,[153] and the recognition of the potential place of local government involvement analysed in this article, it is recommended that the local government sphere of government be more involved in the cultural polices envisaged in the promotion of sustainable development. It is the view of the author that through the instrumentality of local government bye-laws and the explicit increased inclusion of local government in national and provincial cultural law and governance, the ideal of sustainable development can be greatly advanced *via* the cultural dimension. The rationale behind this recommendation is the fact

153 Articles 5 and 6 of *CDC*.

that issues of culture are most greatly reflected at the grassroots level, which is the area of governance for the local government.

b) The role of civil society as envisaged in the *CDC*[154] should also be engaged in the form of a rights-based approach towards the governance of culture-related matters. Its role would be beneficial as it could potentially be the "conscience of the state governance structure" and aid the monitoring of the governance of cultural issues in furtherance of sustainable development. This might be achieved by allowing more civil society engagement in the formulation of cultural policies, thereby increasing public participation in the formulation of strategies for sustainable development *via* the cultural dimension.

It is believed that these recommendations are not exhaustive, but could serve as a departure point for further research into the pursuit of sustainable development *via* the cultural dimension in South Africa.

154 Articles 11 and 15 of *CDC*.

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| CBD | UN Convention on Biological Diversity |
| CDC | Cultural Diversity Convention |
| DAC | Department of Arts and Culture |
| DEA | Department of Environmental Affairs |
| DEAT | Department of Environmental Affairs and Tourism |
| Environ Impact Assess Rev | Environmental Impact Assessment Review |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| J Environ Plann Manag | Journal of Environmental Planning and Management |
| JPER | Journal of Planning Education and Research |
| MDGs | Millennium Development Goals |
| NDP | National Development Plan |
| NEMA | National Environmental Management Act |
| NHRA | National Heritage Resources Act |
| NFSD | National Framework for Sustainable Development |

| | |
|---|---|
| NSSD1 | National Strategy for Sustainable Development and Action Plan 2011-2014 |
| PELJ | Potchefstroom Electronic Law Journal |
| SAJELP | South African Journal of Environmental Law and Policy |
| SAYIL | South African Yearbook of International Law |
| SDGs | Sustainable Development Goals |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg |
| UDCD | Universal Declaration on Cultural Diversity |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNDP | United Nations Development Program |
| UNESCO | United Nations Economic, Social and Cultural Organisation |
| UNFCC | United Nations Framework Convention on Climate Change |
| UNSDJ | United Nations Sustainable Development Journal |
| WCCD | World Commission on Culture and Development |
| WCCP | World Conference on Cultural Policies |

| | |
|---|---|
| WCED | World Commission on Environment and Development |
| Widener L Rev | Widener Law Review |
| Willamette L Rev | Willamette Law Review |

# THE PURSUIT OF SUSTAINABLE DEVELOPMENT THROUGH CULTURAL LAW AND GOVERNANCE FRAMEWORKS: A SOUTH AFRICAN PERSPECTIVE

**IL Owosuyi***

## SUMMARY

The idea of including a cultural dimension in development policies has become the focus of international scholarly and policy debates. Analysing and conceptualising the role of culture in the sustainable development context was brought into focus by the World Commission on Culture and Development (WCCD), with the publication of the report *Our Creative Diversity: Report of the World Commission on Culture and Development* in 1995. The Report highlighted the cultural dimensions of a human-centered development paradigm and proposed placing culture at the center stage of development thinking. This argument was taken further at the International Conference on Cultural Policies for Development held in Stockholm in 1998, where it was proposed that cultural policies become key components of development strategies. This article will examine the infiltration of culture into the contemporary understanding of sustainable development and the relevance of international law developments to domestic (South African) law and policy with regards to sustainable development and culture.

**KEYWORDS:** Governance; sustainable development; cultural law; cultural policies.

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