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Cultural Heritage AND THE Law

PROTECTING IMMOVABLE HERITAGE
IN ENGLISH-SPEAKING COUNTRIES
OF SUB-SAHARAN AFRICA





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OF SUB-SAHARAN AFRICA

EDITED BY

Webber Ndoro, Albert Mumma and George Abungu



Africa 2009 Conservation of Immovable Cultural Heritage in sub-Saharan Africa

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Cultural Heritage and the Law: Protecting Immovable Heritage in sub-Saharan Africa

Edited by Webber Ndoro, Albert Mumma and George Abungu

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Contents

	Preface	v
	MOUNIR BOUCHENAKI	
	Introduction	vi
	GEORGE ABUNGU AND WEBBER NDORO	
1	Challenges of heritage management in Africa	1
	JOSEPH EBOREIME	
2	Introduction to heritage law in Africa	7
	VINCENT NÉGRI	
3	Introduction to international conventions and charters on immovable cultural heritage	13
	DAWSON MUNJERI	
4	Legal definitions of heritage	25
	WEBBER NDORO	
5	The ranking of heritage resources and sites in legislation	37
	WEBBER NDORO AND DONATIUS KAMAMBA	
6	Administrative arrangements for heritage resources management in sub-Saharan Africa	43
	GODFREY MAHACHI AND EPHRAIM KAMUHANGIRE	
7	Management mechanisms in heritage legislation	53
	WEBBER NDORO AND HERMAN KIRIAMA	
8	Powers and obligations in heritage legislation	65
	ANDREW HALL	
9	Implementation and enforcement of heritage laws	79
	PAUL MUPIRA	
10	Legal provisions on financial and human resources for heritage conservation	89
	MUNDUMUKO SINVULA	

11	Framework for legislation on immovable cultural heritage in Africa	97
	ALBERT MUMMA	
12	Heritage policy and law-making processes	109
	ALBERT MUMMA	
	APPENDIX 1	114
	Heritage laws in sub-Saharan Africa	
	APPENDIX 2	116
	Glossary and definitions	
	APPENDIX 3	120
	Charters and conventions	

Preface

THE AFRICAN CONTINENT HAS an extremely rich and varied cultural heritage, and though its movable heritage (masks, statuettes, textiles, oral traditions, myths, etc) has long been better known, its immovable heritage – monuments, ensembles, sites and landscapes – merits similar recognition, given the extraordinary potential for development that it represents.

As the cradle of humanity, Africa is where the first traces of early hominids were found, as well as the most ancient tools produced by humankind. The continent has numerous traces that each illustrate a period or notable event in its long history. But beyond that, one of the salient characteristics of African peoples is their relationship with nature. Often they have been able to shape nature, working with it and using the traditions, knowledge and know-how that they wisely adopted. This relationship has engendered many spectacular cultural landscapes and a variety of sacred places: rivers, mountains, forests, etc. Some of the ritual or commemorative practices that have grown up around these special sites are still alive and have few counterparts in the rest of the world. Among these are the practices or rules that are, in fact, genuine lessons in sustainable development, well before the concept became a trend in modern-day society.

Thus, African immovable cultural heritage is particularly worthy of interest. It contributes to the understanding of the cultures of the world proposed by UNESCO's World Heritage List and should become more fully represented there in the years to come.

Yet, faced with globalization and the mechanisms accompanying it – especially the development of urban areas and infrastructures – entire sections of this heritage are at risk. Still, they often play a decisive role in the quality of life of the communities who use them or live near them.

Given these conditions, one cannot but rejoice at the progress recently made by African institutions in charge of cultural heritage under the impetus of the AFRICA 2009 programme and its partners – both operational and financial. The publication of this work is, therefore, also an occasion for me to express my deep appreciation to all those, near and far, who contributed to the successful outcome of this programme, which will draw to a close on 31 December 2009!

Among the objectives set by AFRICA 2009 are the essential ones of reinforcing and above all implementing the legal and administrative measures that determine national capacity to protect and enhance the national and local heritage.

Nevertheless, although considerable progress has been made in recent years, there is still much to do. This is why the present volume – for which I am privileged to write the preface – is so important. The information, recommendations and comments on recent experiences contained here make it a unique tool. The language used is clear, making these legal notions accessible to heritage professionals. By de-mystifying “legalese,” it resolutely positions itself as a provocative tool at the service of change, taking into account not only the specific nature of different sorts of heritage but also the capacities and needs of the various parties involved.

With all of its qualities, I most strongly recommend this volume to those in charge of African heritage – to be read attentively and also shared with their partners and heritage stake-holders in various places. Also make sure it is read by the highest cultural authorities in your countries who, I hope, will encourage and support you in your task. I am convinced that working together in this framework of cooperation, coherent and above all applicable measures can be adopted and effectively applied. Ladies and Gentlemen in charge, spare no effort! All of Africa will be grateful to you!

MOUNIR BOUCHENAKI
DIRECTOR GENERAL
ICCROM

Introduction

THIS BOOK ON LEGAL FRAMEWORKS on immovable cultural heritage in English-speaking sub-Saharan Africa is an attempt to document and analyse the existing legal frameworks in the English-speaking African countries, addressing the history, development and contexts in which they were founded and used. The book provides an analysis of the current legal frameworks in the various countries and their origins. It addresses the fact that in the English-speaking countries of the continent there has been a replacement of the traditional customary regulatory practices with English Common law; however, for French, Portuguese and Spanish-speaking Africa, the Roman law has been applicable since the beginning of colonization. In the southern part of Africa Roman-Dutch laws were also implemented, given the historical events which initially brought the Dutch and later the English to this part of Africa.

Africa is recognized not only as the cradle of humankind, but also as a continent of great antiquity and civilization with many varied layers of history. It is a continent where heritage is embedded in movable and immovable, tangible and intangible heritage. African heritage is, therefore, not only admired and appreciated but is also lived and used. This fact is captured by nearly all the contributors to the book; it makes this heritage unique, requiring special attention. It is the continent where the tangible and the intangible are in many cases intertwined and, as such, there is often no straight dividing line between tangible or intangible, cultural or natural heritage. However, Africa is not a monolithic entity but a continent with regional and local diversity.

All the contributors to the book highlight that Africa's legal heritage has been much structured by colonial powers and their actions and that the previously existing institutions of heritage protection underwent drastic changes with the introduction of new legal systems. These resulted in the transfer of power and responsibilities from communities to central colonial governments and often led to the centralization of heritage management. The colonial periods also saw the redefinition of heritage from an African perspective to a western perspective, e.g. monumental, aesthetic and at times modern traditional values; thus many of the values that had provided the rationale for the protection of Africa's heritage in the past, particularly its intangible elements, often became objects of ridicule and were discarded. What was traditional became superstition and was often associated with witchcraft under the new colonial system.

The belief systems that were part of the heritage became elements of disapproval; the destruction of the same being spearheaded both by governments of the day, as well as the Christian missionaries in the name of cleansing and salvation. Thus, even immovable heritage that had always part of the living society, of the ritual and spiritual life of the communities, became recognized more for its beauty, uniqueness and physical attributes. This was also followed by restriction and denial of access to the local communities who were the owners of this heritage. Albert Mumma covers this aspect comprehensively in Chapter 11.

There were, of course, marked differences between the areas under the various European powers. Thus unlike the English, who allowed for some indirect rule by the communities and so to some extent for traditional leaders to have a say in heritage management, the French adopted direct rule over their territories and practiced an assimilation policy that resulted in centralized heritage management systems. This complex interplay of the introduction of western legal systems, the replacement and undermining of traditional systems, and, at times, the overhaul and creation of new values for African heritage provides the context for this book. While there is a common thread running through the chapters, particularly on issues such as community, ownership, management, participation, and diversity, several examples of particular legal frameworks in different countries are also presented.

In Chapter 1, on the challenges of heritage management in Africa, Joseph Eboime dwells at length on the intangible dimension of African heritage, including knowledge systems in woodcarving, baskets, ceramics, metal work, textile, costumes, and musical instruments. He also points out the indivisibility of tangible and intangible heritage in the African sense. It is clear that most of the present legislation is not only outdated but has failed to appreciate, recognize and use customary and value systems that should form the basis of African legal systems. Where such heritage legislation exists, it appears to be in conflict with laws on environment, land, and planning.

It is further observed by many contributors that most heritage legislation in the continent is concerned with monumental heritage rather than other types such as vernacular architecture, and intangible and spiritual heritage, although there is a feeling that the 2003 Convention on Intangible Heritage is the answer to this anomaly.

The need for community involvement and awareness creation is another major theme. Many contributors are of the opinion that the private sector has a role to play in heritage conservation and that this is not solely the responsibility of the government. A common point of convergence is that heritage must bring some benefit to the local community for it to be sustainable.

Vincent Négri in Chapter 2 (*Introduction to Heritage Law in Africa*) provides a critical assessment of African legal systems inherited from the colonial powers. He asserts that due to the public and administrative structures left by the colonial powers and developed in African territories, it was understandable that the principle of continuity in the legal domain was found necessary by independent African states. This continuity was dictated by economic and political realities as the former colonial powers became economic and political partners of the new states; as such renunciation of colonial laws was not practicable.

African countries in Négri's view, however, understood the importance of cultural values, especially in the reconstruction of national identity and the promotion of a dominant national culture. In this case culture becomes a means to develop a common national identity, a harmonious society, and a national consciousness. He notes that when culture is closely linked to politics, cultural heritage becomes a vehicle for transformation of the society. Thus, the cultural dimension is often used to legitimize political orientation, although its importance is more theoretical than practical, judging by the budget that is dedicated to heritage protection in Africa.

The laws are, however, designed on a European concept of protection of cultural property which is clear on ownership, usage, protection, rights and other regulations but does not address the fundamental issues of benefit to communities.

In Chapter 3, on international conventions and charters, Dawson Munjeri discusses how these have been applied in Africa, particularly those relating to immovable heritage. Here, the failure of international laws to take into consideration some of Africa's perspective in defining heritage is exposed. Consequently, most international laws and regulatory mechanisms, particularly those of UNESCO and ICOMOS, have not been successfully implemented in Africa. Almost all African countries signed the 1972 World Heritage Convention on Nature and Cultural Heritage, but the African continent itself has the smallest number of sites inscribed on the World Heritage List. The chapter points out that the failure to take into consideration African definitions and realities is one of the major stumbling blocks in the application of international conventions and charters.

Webber Ndoro in Chapter 4 addresses legal definitions of heritage and shows that these vary from one country or community to another. However, it is clear that heritage embodies some characteristics that may include communal appreciation, expressions, values, tangible and intangible, often inherited but at the same time dynamic, and that heritage undergoes change which may even lead to the production of new heritage. The importance of a definition, however, is the opportunity it provides to go beyond the physical to consider the spiritual, beliefs, language, sacredness, sounds, the whole array of intangible heritage that gives meaning to the tangible. A legal definition has a precision without ambiguity and influences the way heritage is administered or protected.

Like Négri, Ndoro observes the colonial influence on definitions of heritage, which sees material aspects of heritage as paramount. The notion of heritage as old or ancient continues to dominate the categorization of heritage up to the present day: African legislation is the embodiment of the same, with the possible exception of South Africa. This has a negative impact on heritage management in Africa. Ndoro also notes that a proliferation of laws based on the unnecessary division of heritage into movable and immovable leads to separate bodies being created to take care of it. Some legislation on cultural heritage recognizes the vegetation and surrounding land as part of the whole and is clear on the need for the demarcation of buffer zones, but other legislation is either silent on these subject or does not consider them necessary. The chapter illustrates the contrasts between the legislation of African countries, including the definitions of heritage.

South Africa seems to fare better than most in this book as a country that adheres to best practice on legal affairs, particularly in providing a voice and opportunity for all stakeholders in the enactment of relevant legislation and in heritage management. The reason for this may lie in the fact that South Africa is democratically a young nation that has been able to learn from the past mistakes of others. However, given the relative newness of the South African legislation, more time is needed to assess its effectiveness.

In Chapter 5, The Ranking of Heritage Resources and Sites in Legislation, the authors raise issues such as the ranking of heritage, and its ownership and value. While in some countries, declaration as a monument does not take the heritage away from the owner, in others such as Nigeria it does. Such declarations often lead to disempowerment of the local communities and take away their right of control and access.

Ranking of heritage occurs at local and national level. At international level, the 1972 World Heritage Convention is the major instrument. This provides for heritage that meets Outstanding Universal Value to be inscribed on the World Heritage List. It is then the responsibility of countries to incorporate the convention into their domestic legislation to ensure sustainable management of the heritage. While many countries in Africa subscribe to this convention, only South Africa has adjusted its domestic legislation accordingly.

Godfrey Mahachi and Ephraim Kamuhangire, discuss the administrative arrangements for heritage resources management (Chapter 6). They emphasize that administrative structures for heritage management existed in the pre-colonial period but were dismantled and replaced with colonial laws and systems. Some sites had custodians, for example, the Elders who looked after the Kaya Sacred Forest in Kenya, the spiritual leader/ spiritual medium at Great Zimbabwe, and the King's sister who cared for the Kasubi Tomb.

Sites that were the abode of the spirits were significant for more than for their aesthetic qualities, a fact that was overlooked by the colonial powers. This resulted in the removal of responsibility for the sites from their owners to a central authority, eliminating the role of intangible heritage and leaving the physical bare of spirit, memories and meanings.

As centres of religious activities and shrines for rituals, sites were places of power. Places of power are also places of resistance in times of conflict. Some became places of resistance to colonial domination and were thus taken away from their traditional custodians. Even today, where custodians of heritage still possess power (for example, that of rain making at sites such as Manyika in Mozambique), there is always a conflict and struggle for power between the custodians and the chiefs who are central government employees.

Today, the administration of heritage in most English-speaking countries is of two sorts: it is controlled by government departments and by semi-autonomous institutions with parastatal status such as museums. Both have their strengths and weaknesses although the parastatal approach seems more effective and appropriate in most cases.

It has been shown that there are more problems than advantages with centralized systems of heritage administration where departments of ministries are given responsibilities but have little support in terms of resources or authority. The case of Uganda is a good example: the heritage department does not even have a bank account and the small amount of revenue it generates is returned to the exchequer.

The weakness of a European legal system supplanted to Africa is also discussed by Ndoro and Kiriyama in Chapter 7. Such a system recognized only the tangible and excluded the intangible; it also alienated local people from the administration of their natural and cultural heritage. Today, a few countries have managed to combine the European formal management system with a traditional one. South Africa, in particular, is exceptional in respect of community-based management and participation in heritage. The authors identify several key issues on management mechanisms in the legislation: English-speaking African countries with the exception of South Africa are still reliant on colonial legislation; in nearly all legislation there is no recognition of tradition and community management mechanisms; most countries do not explicitly recognize intangible heritage; the need for proper inventories is, on the other hand, usually specified; and no country apart from South Africa offers tax and other incentives for people to maintain heritage resources.

It is clear from this chapter that for cultural heritage management to be effective laws must not only recognize community definitions of cultural heritage but also ensure the promotion of the value, symbolism and social practices of communities. Cultural heritage embraces all elements of life and not just the built or material aspects.

Andrew Hall looks at the powers and obligations in heritage legislation (Chapter 8). He observes that although state heritage authorities are given powers of intervention in heritage management, through protective measures or punitive ones, recent laws have tended to lay more stress on providing incentives. The South African Heritage Resources Act is one such example.

Property rights are also looked at, particularly where they are enshrined in the Constitution. Where this is the case, mutual consent is the right approach to the management of cultural heritage. Should expropriation of land be necessary, this should only take place after negotiation and compensation.

The issue of reasonable access is important, especially at places of ritual and religious significance. Most legislation addresses this and, in some countries, right of access is considered a cultural or even human right. Equally, elsewhere right of access is either restricted or is the prerogative of the authority concerned.

Thus, sites with ceremonial significance are often protected for their significance of place rather than as a means of ensuring the right to conduct a ceremony, collect medicinal plants, and so on. The act of protecting does not always necessarily guarantee access for the perpetuation of such rights. There is a need for agreement between community and states on how to use and manage sites of intangible heritage value. Rather than treating such sites as monuments, recognition of intangible heritage is required and of systems of protection contained in traditional land management practices and unwritten law.

Chapter 9 by Paul Mupira on Implementation and Enforcement of Heritage Laws examines institutional arrangements, power, incentives and penalties in the enforcement of laws. It is noted that most common legal sanctions against violation of heritage are often fines and imprisonment or both. These punitive measures should be replaced by positive management, which includes the establishment of proper administrative structures, financing, enforcement, and systematic monitoring. Traditional enforcement mechanisms should also be encouraged. There is need for synergy between traditional law enforcement agents and heritage institutions, which can be achieved through close cooperation on implementation mechanisms.

Greater legal recognition of traditional knowledge and community stewardship is required, particularly where communities are directly associated with protected areas. They are the natural custodians of the heritage as well as the rightful owners and users, and can therefore enforce both formal and informal laws, rules and regulations.

With respect to resource allocation, it is noted that only a few Acts provide for the proper accounting of allocated resources; and very few for supplementary funding. However, all Acts must include a requirement for proper accounting records as part of institutional responsibilities.

Mundumuko Sinvula in Chapter 10 deals with the auditing of cultural institutions. This is usually always late as government auditors are overwhelmed. He observes, however, that private auditors are sometimes allowed to audit parastatal organizations, but that this does not include a technical audit. The practice of not allowing cultural institutions to utilize the revenue generated by them is commented upon as compromising their ability to fulfil their mandates.

In Chapter 11, Albert Mumma tackles the management of cultural landscapes – both as places of cultural and natural value. Like other writers he calls for the integration of legally pluralistic frameworks into management of the landscapes. There is need for acceptance of traditional methods of management – many long discarded and forgotten, and both communities and stakeholders should understand their roles.

In the following chapter, the same author outlines some of the issues related to undertaking legal reforms in the heritage sector. Sustainability requires that both state and local community play a role in management. A system should be put in place that recognizes the need to conserve heritage while at the same time allows for community needs such as development, ownership and/or right of use. The writer calls for the restoration of historic ownership in heritage to bring back community confidence and enable them to manage their local resources. The restoration of historic rights would include giving back rights to communities to determine their leaders and authority structures. ‘This involves a fundamental shift in the balance of power between the central state and local communities. At the same time, the communities must evolve in the direction of democratic governance, equity and articulation in their systems of heritage conservation ethics.

On the power and obligation relating to management of immovable cultural heritage, for an effective management and regulation to prevail, there is need for the provision of key management tools to managers and for the introduction of management plans to ensure the preservation of heritage values.

A categorization of heritage into universal, national and local value is proposed. This is very similar to the South African model. It is important to note that a site can move upward from the local to national category, and from national to universal. Prioritization, however, should not take away resources from the rest. The author feels strongly that a landscape regulatory body is necessary for effective management of cultural heritage.

In summary, this book tries to deal with the main areas of legal instruments and to see how they have been applied in English-speaking sub-Saharan Africa. Most chapters point out the inadequacies of the present laws and the need to initiate meaningful reviews. The laws are largely based on the colonial historical background, to be effective they need to incorporate African perspectives and definitions of heritage. Otherwise, the majority of African heritage, encompassing tangible and intangible, nature and culture, may remain inadequately protected and commemorated.

GEORGE ABUNGU AND WEBBER NDORO



Strengths in Africa's Heritage. Africa's immovable heritage is very varied and includes monuments, sites, landscapes and remains of archaeological, historical, religious, cultural, scientific and aesthetic significance. Conserving and understanding Africa's heritage is part of the quest for a sense of African identity, giving to each of its people a cultural soul and individuality. Africa's past can serve as a barometer of progress that measures and provide a sense of continuity necessary to the life of contemporary players for whom it could represent a powerful physical, moral and regenerative influence on the road to progress and development. Indeed, heritage, in the form of archaeological remains, constitutes for many African countries the only objective source material for the study of the pre-colonial past.

[JOSEPH EBOREIME]

Challenges of heritage management in Africa

It must be pointed out that development and heritage conservation are not necessarily antagonistic. Indeed, economic development and the valorization of heritage can be mutually reinforcing. Many archaeological sites in Africa were discovered in the course of railway and road building, mining, water supply, and other infrastructure projects. However, monitoring and Environmental Impact Assessments (EIA) need now to be part of development activities within the contexts of integrated conservation and sustainable development.

The cultural and symbolic significance of the historic built environment is a key part in the understanding of Africa's heritage. Mali and Cameroon are particularly rich in varieties of indigenous architecture.

On the whole, Africa's rich material culture constitutes a dynamic area of her cultural heritage.

Her rich traditions of woodcarving, basketry, ceramics, metal work, textiles, costumes, and musical instruments constitute art forms in motion. These will be the traditional art of successive generations, as they constitute chronicles of Africa's contemporary identity.

The prevailing situation in heritage conservation

The heritage of Africa is threatened by many factors: environmental pressures, uncontrolled urban development, warfare and communal conflicts, poverty, lack of political will, lack of awareness of the value of heritage, low levels of funding, inadequate expertise and equipment, lack of inventories, insecurity due to rioting, illicit trafficking, clandestine excavation and outright looting.

Lack of legislation and planning laws

In most African countries, outdated laws have failed to meet contemporary realities of integrated development, customary and community rights and value systems. There is either legislation without a policy basis or policies without legislative backing. As such, the legislation or policies available fail to address issues of poverty, employment, interests of youths, gender, land use and rights. Where legislation exists, it tends to conflict with other legislation on environment, land planning, urban and rural development, traditional and cultural rights and community values.

Most African legislation tends to favour the concept of monumentalism to the neglect of other types of heritage such as cultural landscapes and routes, itineraries, vernacular architecture or underwater heritage, and takes very little or no cognizance of associated intangible and spiritual values. It is geared towards single or collective monuments without taking into account the extant built environment, thus making conservation management difficult or even impossible. Since designation of conservation areas is not yet standard practice in sub-Saharan Africa, heritage legislation and planning laws tend to be in conflict, working against each other.

Conflicts and wars

Africa's heritage is threatened by civil conflicts and wars in Liberia, Sierra Leone, Angola, Sudan, Rwanda and the Democratic Republic of the Congo. Intra- and inter-communal conflicts continue to create havoc on Africa's heritage. Religious fundamentalism and zealotry have taken their toll, with the deliberate burning and destruction of monuments, shrines and sacred places considered offensive and heretical to the new belief systems of the resurgent religions.

Non-involvement of local communities and other stakeholders in planning and management

Scheduling and management processes in many sites across the continent do not often involve local and resident populations nor do they take the interests of people into consideration. Most legislative and management frameworks are top-down in approach, thus disempowering the primary owners of their heritage. Even when local stakeholders are cosmetically consulted, they lack the capacity and power to manage the sites and monuments in their localities. The result of this lacuna is the neglect,

looting and vandalism of monuments and sites in most parts of Africa, and a lack of awareness of existing laws on heritage and of international conventions and charters.

Lack of inventories

Heritage management requires accurate and up-to-date inventories. However, for many countries in Africa a comprehensive picture of heritage is still incomplete as there are few inventories of heritage sites and monuments, thus rendering effective management impossible.

Institutional framework

The responsibility for heritage management often rests with different institutions and ministries that combine culture with education, information, tourism, youths and sports, etc. Even worse, most national institutions do not have adequate financial and human resources to protect the heritage. Coordination with other heritage agencies is often poor if it exists at all. Furthermore, the Ministries of Culture are often not involved in issues of development and environmental planning.

The place of universities

Universities as training institutions of higher learning need to play a direct role in capacity building and knowledge production in heritage matters. However even though universities have played significant roles in a number of African countries in training and executing research in cultural heritage, many African countries still lack local experts in archaeology, museum training, architectural conservation, and management planning, among others.

Documentation, storage and retrieval systems

Accessible record systems for heritage management are either grossly inadequate or non-existent in most countries of Africa. Records on cultural heritage are difficult to locate and scarcely used by other related institutions in planning and implementation processes.

Non-involvement of the private sector

It is now clear that heritage conservation is the business of all, including the private sector. The private sector benefits from heritage through tourism and other heritage industries, but is not considered a major stakeholder in heritage conservation. The result is that the private sector has done little or nothing to support heritage conservation in most of Africa.

African-based Non-Governmental Organizations that support heritage preservation are still inadequate in relation to what needs to be done. It must, however, be acknowledged that international foundations, such as SIDA, Aga Khan Trust for Culture, the Ford and Rockefeller Foundations, and the Nordic World Heritage Foundation, are contributing to heritage conservation in many parts of Africa.

Non-integration of heritage into development efforts

Most countries in Africa have no countrywide policy on Environmental Action Plans (EAPS). Where they exist, they do not incorporate cultural heritage concerns into the overall agenda for development. The responsibility for EAP preparation and implementation should lie with national governments. These should integrate natural and cultural concerns into the country's development programmes. An EAP must be an ongoing process of environmental analysis and an integral part of development policy.

Community empowerment

Heritage development in Africa offers a unique opportunity for community empowerment through integrated rural development, with the potential to mobilize resources for cultural tourism, craft development and improved farming methods. Community participation in the management and conservation of cultural property should therefore be taken into account in overall development planning. Indigenous technological knowledge systems should be harnessed for developing Poverty Reduction Strategy Processes (PRSP).

Environmental linkages

Cultural administrators and heritage managers routinely establish contacts with environmental groups and departments of the World Bank to articulate coherent policies which link environmental and cultural concerns with social development in order to access non-lending facilities and funds for poverty reduction and Institutional Development Facility (IDF) for their countries (Achebe 2001). Project Environmental assessment provides a tool for incorporating cultural heritage concern into economic development. These assessments, however, will have significant effects only where they are joined to national policies that bring

cultural heritage into planning for the environment. According to Taboroff (1992), this policy should be based on the importance of preserving, studying and interpreting archaeological sites, architecture, and the arts and crafts. Such a policy should also reinforce the institutions devoted to these tasks.

Translating cultural heritage objectives into development activities

Taboroff (ibid.) also states that many opportunities to improve site security and sustainability through institutions like the World Bank have been missed in sub-Saharan Africa, often due to the lack of information and institutional coordination.

Linking the management of heritage to the social and economic needs of people living in communities adjacent to archaeological sites or in historic settlements is one sure way of achieving sustainability. Looting and vandalism of sites can be greatly diminished if protection is shifted away from emphasis on patrols and penalties for illegal use to job creation, through site improvement activities or compatible tourism.

It must be stressed that without deliberate and concerted efforts by national governments and implementing agencies, lenders and donors, the outlook for the survival of heritage in Africa is bleak.

The intangible dimension of the immovable heritage

Following the classical European conception of drawing a clear distinction between spirit and matter, the tangible heritage as represented by museum artefacts and church buildings was distinguished from the spiritual heritage as connoted in hymns and poetry. The two dimensions were perceived as parallel lines that would never meet. While the former belonged to the realm of science, the latter fell within the ambit of superstition or at best religion.

Thus the spiritual and immaterial aspects of the immovable heritage were either ignored or given oblique and residual attention as can be seen in Criteria VI of the *Operational Guidelines for the Implementation of the World Heritage Convention* (Whc.02:2:2003).

This European perception largely influenced the World Heritage Committee in the enlistment of properties into the World Heritage List. Monumental European buildings, churches and cathedrals were favoured to the neglect of the non-monumental and

intangible cultural properties characteristic of Africa. This prejudice against the intangible and spiritual heritage of Africa became very glaring, as was shown by the imbalance of the World Heritage List. In 1994, the World Heritage Committee adopted a global strategy intended to make the list more balanced by identifying categories of properties and regions that had been neglected to date. In 1995, experts from thirteen African countries were brought together in Harare, Zimbabwe by the World Heritage Centre to examine the imbalance of the World Heritage List. The experts stressed how completely interwoven culture and nature were in African societies and noted the importance of the links between the spiritual (intangible) and material heritage (tangible).

The Sukur cultural landscape in Nigeria, the first from Africa in this category to be inscribed on the World Heritage List (1999) vividly illustrates the interface between spirit and matter, nature and culture, as well as the intangible dimension of immovable heritage.

Africa is rich in non-monumental forms of heritage whose intangible and spiritual values are intertwined with what can be described as their cultural spaces and nodal points. Slave routes, pilgrimage routes, trade routes, and places of technical production, bear unique testimony to the intangible heritage of Africa. This includes practices, knowledge and skills which are now endangered by modern technological advancement.

In recognition of these threats, the Intangible Convention was adopted at the 32nd General Conference of UNESCO in 2003. With this, heritage conservation has come a full cycle. According to the convention, the following categories are associated with intangible heritage: oral traditions and expressions; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship.

It is ground breaking that the ICOMOS 13th General Assembly held in Victoria Falls (Zimbabwe) adopted as its theme 'Preserving the Intangible Values in Monuments and Sites'. It thus echoes the 25th session of the World Heritage Bureau (Paris June 2003) which noted that intangible and tangible elements were in many instances inseparable.

The UNESCO-World Heritage Committee's Operational Guidelines for the implementation of the World Heritage Convention captures this concept vividly in its definition of associative cultural landscape, which, as it says, is tied 'to powerful religious, artistic or cultural association of the natural elements rather than material cultural evidence which may be insignificant or even absent'.

Heritage planners and policy makers are advised to take this holistic approach into account in setting up legislative and administrative frameworks for heritage management.

Authenticity and integrity

As the concept of cultural heritage widened to include such categories as vernacular architecture, cultural landscapes and the spiritual heritage, so the concerns of conservationists moved from how best to maintain the integrity of the fabric to how best to maintain the integrity of the process which gave form and substance to the fabric (Stovel 1995). Furthermore, when Japan signed the World Heritage Convention (1972), conservators from that country expressed reservations about accepting a global approach to issues of authenticity.

In response to these concerns, ICOMOS organized a series of meetings in connection with the Nara Document on Authenticity (1994) which recognized the relativity, diversity and dynamism of heritage in the definition of authenticity and integrity.

Until the Nara Conference, the notion of authenticity was derived from the Venice Charter. This advocates the faithful conservation of the original building material and asserts that replacements of missing parts must be distinguishable from the original. With Nara it became evident that the perishable vegetal materials, of which Japanese and African historic buildings are constructed, necessitate regular restoration and periodic replacement of certain of their members without losing their conceptual essence.

The application of the concept of authenticity and integrity to African cultural heritage must accommodate the conception and form, use and function, tradition and techniques, spirit and feeling emanating from the monument/landscape.

With respect to the 1972 convention, an 'authentic' African cultural site should thus be of vast size, and include all the natural, cultural, economic, social and symbolic components of which it is composed and which bestows on it its meaning and *raison d'être*.

Sustainable practices and poverty reduction

It is prescribed in the 1972 World Heritage Convention that local communities should be involved in the management of their heritage and derive associated benefits. This view was also propounded

at a workshop on African Heritage and Sustainable Development organized in Pretoria (2002) by the UNESCO World Heritage Centre.

The challenge to heritage managers is how to accommodate economic activities such as grazing, farming, medicinal gardening, forestry, and animal husbandry in cultural landscapes, without compromising the authenticity and integrity of the landscape.

It is recommended that African Governments adopt laws and management practices that do not alienate local communities (Ngoro 2003). For example, in the Sukur cultural landscape an agricultural officer with a university degree has been employed by the National Museum. He is working with the local farmers to improve their crop yields on the terraces using traditional practices such as preparing manure from cattle dung and tree-planting to check erosion.

Customary laws and practices in heritage management: the issue of relevance

In most areas of Africa, traditional regulatory mechanisms and practices have existed down through the ages for the protection of heritage places such as sacred groves, streams, rivers, shrines, temples, tombs, palaces, and mausoleums. These comprise prescriptive taboos, avoidances, and practices put in place by local communities and constitute customary laws and traditions which can be regarded as unwritten constitutions and laws passed on from one generation to the next.

However, the emergence of modern nation states in Africa, together with colonially derived legislative systems, has created conflict between traditional and western modes of heritage management. Most western-derived legislation still in use in post-colonial Africa takes no cognizance of community interests, aspirations and belief systems (for example, in Nigeria, Zimbabwe and Tanzania), although there are countries where some recognition is given (for example, in South Africa and Uganda).

Sacred groves all over Africa present a modern day management challenge to heritage practitioners in policy and practice. Sacred groves may be likened to the modern concept of biosphere reserve, with core, buffer and transition zones. As indigenous knowledge and cultural resources have become increasingly relevant for research and development in bio-prospecting, customary laws and practices should

be encouraged and accommodated within municipal laws so as to protect traditional and community resources from unauthorized use and exploitation. African lawmakers should address these issues in the heritage legislation along with the development of new land policies. Ways can be found to integrate customary and statutory tenure systems.

The CISPEG project in Ghana, the Osun-Osoybo grove in Nigeria, and the Kaya forests in Kenya, are typical examples of the way bio-cultural diversity can be managed in a sustainable manner, taking into account customary practice belief systems and taboos. It is crucial that community values and practice be incorporated into the drafting of national or regional heritage laws.

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African legal systems, inherited from the colonial powers, can be classified into two major groups. In the case of sub-Saharan Africa, the Roman law group comprises, in particular, those States originating from the former French Colonial Empire and the former Spanish and Portuguese territories. For reasons related to their history, some states, like Mauritius and the Seychelles, are linked with this group despite their ties with the Commonwealth. The common law group comprises those states originating from the former British Empire. This group also includes those states that belonged to the Roman law group before they were annexed by England. In the case of North Africa, the different countries in the region have implemented, in the cultural domain, legal concepts and laws based on the French or Italian system. This is the result of either colonization or the political and cultural influence of France.

[VINCENT NÉGRI]

Introduction to heritage law in Africa

Nevertheless, it would be misleading to introduce an oversimplified view of African legal systems, which would give the impression that the laws of the former colonial states have been merely grafted onto the domestic legislation of African states. It would be more accurate to point out that the total renunciation of colonial law was not conceivable, especially considering the public structures and administrative bodies that the colonial powers had developed in African territories. The Governments of the newly independent states were thus led to proclaim the principle of continuity in the legal domain.

This conception led to the abandonment of traditional rules, that is, the customary law that existed before the introduction of European law. Whether they are labelled as transplanting, borrowing or mimicry, the phenomenon of imitating foreign models can be justified as a recourse to legislation that would be accepted by the former colonial powers, which had

become the major economic partners of the new states and whose collaboration was necessary to establish the economic development objectives which were, moreover, partly dictated by the European states (Rivero 1972; Metraux and Rieben 1992).

Nonetheless, this importation of Western legal models met with resistance. The substitution, by the colonial states, of the African traditional system for a legal system founded on the law of the colonial power did not affect all the branches of the law or the organization of African society (Alliot 1965). Furthermore, the terms of this policy of substitution were expressed differently according to the colonial powers involved. The European states with a Roman legal tradition implemented the system of direct administration while the British, being more pragmatic, used the local traditional institutions and merely reinforced them or weakened them according to their political needs (M' baye 1970). That is why it came to be written that: *l'Angleterre est la*

terre classique du principe de l'autonomie coloniale (Girault 1943).

Thus, while the English had, on the whole, a policy of indirect administration, designed as indirect rule, according to which the local populations could govern themselves under the control of British authorities, the French, the Spanish and the Portuguese pursued a policy of assimilation whose terms were that the home country took direct charge of the country's administration.

Whereas British law applied the decentralizing conception, Roman law preferred a centralizing solution. These two concepts have left their mark on the institutional forms and the administrative organization of African states today. These two major legal classes correspond, therefore, to different systems of administration shown in the diversity of the legal statutes applied to cultural heritage.

Cultural heritage and national identity

Some African states affirm the pre-eminence of the cultural dimension to establish national identity. The acknowledgement of cultural values can thus be effected at the highest level of the legal standards which underpin the creation of the state. This phenomenon is especially noticeable among developing countries and new states. The incorporation of cultural priorities in the Constitution may correspond to different objectives. It may be from the need to use these foundations to build a national identity common to the different ethnic groups or the need to promote a dominant national culture that will compel recognition among the various communities of the state.

When culture is closely linked to politics, cultural heritage becomes a vehicle for transformation of society. Preservation of cultural heritage contributes to the reinforcement of this viewpoint. In the case of African states, some constitutions take this cultural dimension into account. Naturally, the political objectives for which the cultural heritage is used differ from one nation to another. The cultural dimension may thus be used to legitimize political orientations. It is in this sense that the 1st February 1987 Constitution of the Democratic People's Republic of Ethiopia declared in Article 55.1 that 'Ethiopians shall have a duty to safeguard and take care of the socialist wealth. Ethiopians shall have a duty to participate in the State and the society's efforts to safeguard, collect and use those objects that have a historical interest as well as safeguarding the national heritage and to take care of these objects' (Brown-Weiss 1993). In a more neutral and relatively traditional version as regards

the objective of protecting and preserving cultural heritage, the 1st October 1979 Constitution of the Federal Republic of Nigeria states in Article 20 that 'the State shall protect and bring Nigerian culture to the fore' (Myles 1989). This recognition of cultural values by the law on which the state is founded is the reason for the special attention that the public authorities pay to the administration and departments that are charged with implementing and spreading these cultural priorities to society and its communities.

The cultural provisions of the Constitutions of the Republics of Cape Verde and Guinea Bissau, marked by the seal of the law of development, are an example of the will of new states to establish their legitimacy on a national identity that is fortified by a common cultural identity to be put at the service of the society's development. The fundamental laws of these two republics are relatively similar. Article 16.1 of the Cape Verde law¹, enacted in 1981, states:

'The State shall have the fundamental obligation to create and promote favourable conditions for safeguarding its cultural identity, both as a base for national consciousness and dignity and as an incentive to a harmonious development of the society. The State shall preserve, defend and develop the cultural heritage of the Cape Verdian people' (Brown-Weiss 1993).

In the same vein, the Guinea Bissau Constitution states in Article 17.1:

'It is the imperative duty of the State to create and promote favourable conditions for the safeguarding of cultural identity in its role as the fulcrum of national conscience and dignity as well as a stimulating factor for the harmonious development of society. The State shall protect and safeguard human dignity'².

The presence of trust in the administration of cultural heritage

Since it was the colonial power itself which laid down the legal systems that were transmitted at the time of independence, theories such as the Theory of Trust have long been disseminated and still remain

¹ The almost similar wording of certain constitutional provisions of the Republic of Cape Verde and the Republic of Guinea-Bissau is notably a result of historical factors. The two former Portuguese colonies, which have been independent since 1975 and 1974 respectively, gained their independence under the pressure of the African Party for the Independence of Guinea and the Cape Verde Islands (P.A.I.G.C.). The 1980 military coup in Guinea-Bissau broke the ties with Cape Verde. The present constitutions which were drawn up before this event still retain traces of their institutional links. [Unofficial translation].

valid, whatever the reactions of African Governments to this legal heritage. It even appears that they hardly showed any resentment towards English law (Allot 1980). On this basis, the Trust was also developed in countries which were subjected to the influence of Roman-Dutch law in the nineteenth century. The apparent simplicity of the principle brought into play by the concept of Trust and the very essence of this principle has met with considerable success in the administration of cultural (and natural) heritage in African countries, the legal system of which has been influenced by common law.

It is true that, in essence, the Trust is a system intended to enable the transmission of property from one generation to another³. It is consequently the expression of a protective system. These criteria are characteristic of the tasks assigned to administrations of heritage. In fact, the institution of the Trust effectuates the legal expression of the principles that characterize the cultural (and natural) heritage institution.

It has been underscored, where these heritage applications are concerned, that the notion of a common heritage of humanity develops a certain legal mechanism which could be similar to the mechanism of the Trust (Kiss 1982). All these elements show that the institution of the Trust provides a legal framework for the cultural heritage institution in states with legal systems influenced by the common law.

The main characteristics of African laws

The formulation and elaboration of cultural heritage laws are often based on European concepts of the protection of cultural property. In a traditional meaning, laws on the protection of cultural heritage include provisions relative to the definition of cultural property. They define ownership and usage systems; the scope of protection required for these systems; regulate archaeological excavations and chance discoveries; and indicate the authorities and bodies charged with the protection and consequently application of these legal provisions. The scope of protection for cultural property covers modalities for cataloguing, recording, listing, and declaring heritage items; the rights and obligations of the

owner, holder and public agencies towards the protected items; and the control of the trading of these items and the regulation of their export. But it does not state the modalities according to which the knowledge of this heritage can be returned to the populations or in which form it will participate in the social life and development of society. This European influence in the transcription into law of the heritage concerns can be found in many African laws. The legal texts which deal with the protection and development of cultural heritage only partially deal with the educational role of heritage.

The cultural field has often been monopolized by the public authorities of African countries to reinforce their national identity and, only rarely, to pursue an objective of educating the people. The legal system concerning cultural heritage advances inside a perimeter marked by the state system: from the centralized concept, which places all initiatives and all new orientation under the close supervision of Governmental authorities, to decentralization, which grants in its principle, a certain degree of intervention in and management by local authorities. In any case, the preservation of cultural heritage is certainly one of the sectors which contributes to national reconstruction in the post-Independence period.

Political or revolutionary objectives may be also developed in African laws. This form of the centralizing process is typically illustrated in Angola. Article 1 of the Decree N° 80-76 of 3rd September 1976, pertaining to the definition of modalities of conservation and protection of the historical and cultural heritage of the Angolan people, declares that any object which can be considered as belonging to the historical and cultural heritage of the people of Angola belongs wholly to the people of Angola and is subject to the relevant authority proclaimed in the decree⁴.

Found in varying degrees from one country to another, this institutional trend is the reflection of the symbol of unity embodied by the African State. The State becomes a tool for cohesion and for reducing the threats of ethnic and cultural heterogeneity of national communities that might outweigh the unity of the nation. Against this backdrop, policies concerning cultural heritage may be a factor of the cultural identity and become the object of particular attention from governmental authorities.

African legislation concerning cultural heritage is linked to the history of the continent. The colonial period has left its mark on the legal systems, but even more on the concepts of protection and identification of cultural heritage.

² [Unofficial translation].

³ The origins of the Trust go as far back as the feudal era. Then it was a question of underscoring the legal means of ensuring the protection of the property of deceased persons and the transmission of such property to their descendants.

Independence has not always been the opportunity to dispense with the cultural heritage protection system installed by the former colonial power. Two situations can be identified:

- 1 The vote on laws protecting cultural heritage happens immediately or not long after independence. It corresponds to a will to institutionalize the protection of cultural heritage, either because the former colonial system was deficient, or to reject this legacy and build the protection of cultural heritage on a new cultural identity. But there can be a gap between the proclaimed concepts and their juridical translation: a persistence of colonial criteria and protection methods can be seen (Lesotho, Malawi, and Seychelles). This situation prevails in many French and Portuguese-speaking and in some English-speaking African States, because of the conflicts caused by independence.
- 2 The colonial power had adopted a specific law to protect cultural heritage, and this text has been repealed or replaced by a new law many years after independence (Kenya, Zambia, Togo, Niger) or is still in force (Zimbabwe, Congo, Guinea). But the enforcement of colonial laws (for a period of 20 years in Kenya and 25 years in Zambia) after independence has never been seen in any French-speaking African country. For example, the colonial French law was not really applied in Niger. Equally, the persistence of the

4 Art. 1 - Tudo o que possa ser considerado como fazendo parte do Património Histórico-Cultural do Povo Angolano pertence inelutavelmente ao Povo Angolano e fica sob a jurisdição enunciada neste diploma por parte dos organismos do Estado competentes para o efeito. (...). The preamble preceding the recitals of the decree: 'Five centuries of oppression and exploitation of the people of Angola through a frenzied colonialization and a particularly reactionary capitalism, which were in fact, five centuries of struggle, have profoundly marked the national territory and its peoples. But they did not succeed in quelling the creative force of our people, our intellectuals and our artists. During these five centuries, the people never ceased to personalize and perfect their talent which constantly evolved to take on new shapes during the struggle against colonial domination; this is how our people intended to affirm their right to self-rule in order to claim their rightful place in the concert of free nations and among humanity as a whole. Throughout these centuries, the people of Angola, as well as its most representative intellectuals, contributed to the construction of a revolutionary national culture for the people because founded on the objective reality of their history and the collective subjectivity of the people. But during five centuries, the colonial administration stimulated by the cultural needs of the capitalist world, through the greed and selfishness of the colonial masters and their corrupt functionaries, attempted to scatter the cultural wealth created by the people and the documents which illustrate the historical truth of the Angolan nation, a truth sometimes spectacular and often severely critical of the exploitation the nation had suffered' [Unofficial translation].

colonial law – albeit updated – in Zimbabwe, is characteristic of the continuation of some legal rules in English-speaking Africa, despite, in this case, a long and painful war of liberation. But the Zimbabwe case seems to be an exception.

In opposition to observations which can be made in French-speaking Africa, independence in English-speaking countries led less frequently to an open questioning of the legal system passed on by the colonial power. This situation resulted probably from the colonial doctrines applied in English-speaking Africa, more decentralizing and less interventionist – i.e. indirect rule – as opposed to the ones applied in French-speaking countries.

The history of colonization thus appears in certain cases as a determining and essential factor influencing directly the criteria of identification and above all of institutional recognition of cultural heritage.

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International law, or more precisely public international law, is a body of legal rules governing the conduct of States in their mutual relations. As traditionally understood, public international law was born in 1648, with the emergence of the 'nation-state' notion and concept that found its expression at the 1648 Conference of the Peace of Westphalia. The key feature of this law is that most of its rules are aimed at regulating the behaviour of the States, and not that of individuals, which distinguishes it from private international laws.

International law is also taken to embrace, as its subjects, States and accredited public and intergovernmental organizations, but States remain the primary subjects.

[DAWSON MUNJERI]

Introduction to international conventions and charters on immovable cultural heritage

Treaties/conventions in the context of international law

According to the Statute of International Court of Justice (Article 38.1), there are 'four sources of law', i.e. ways by which law is created. One such source of law is through conventions: 'International Conventions, whether general or particular, establish rules expressly recognized by contesting States'. Treaties are known as and are variously called Conventions, International Agreements, Covenants, Acts, Charters, Pacts, Statutes, etc. All of these terms denote the creation of written agreements whereby two or more international subjects for the purpose of regulating their interests by international rules, bind themselves legally to act in a particular way and or to set up particular relations between themselves.

Article 2(1) of the Vienna Convention on the Law of Treaties defines a treaty as 'an international agreement concluded between States in a written form and governed by international law, whether embodied in a single instrument or two or more related instruments'. The importance of treaties is reflected in the fact that, since 1945, more than 33 000 treaties, several thousands of which are multilateral, have been registered with the United Nations.

In our context, the focus is on those multilateral 'law-making' treaties, i.e. treaties that create legal obligations arising from the general norms for the future conduct of the parties in terms of legal propositions. Focus is more specifically on cultural and natural heritage treaties in the context of sub-Saharan Africa.

A distinctive feature of law-making treaties is that they are intended to have universal as opposed to local applicability, which is the case with 'treaty contracts' between one or few States. In law-making treaties, States, who are referred to as 'States Parties' to the agreement, elaborate their perception of international law upon any given topic and then establish new rules which will guide them in their international conduct. In this way, they are often referred to as 'Normative instruments' or normative treaties, because they prescribe rules of conduct to be followed. One of the primary roles of the UN system is to play the leading normative role to guide all the Member States of the UN system. The supreme example of a normative instrument is the Charter of the United Nations and Statute of International Court of Justice.

The formation of a treaty is a process that involves a number of stages: there is first the negotiations stage.

At the negotiating stage, the goal is to reach consensus on a Convention that caters for a variety of other interests from the different sets of actors who come into play to determine the issues. So the issues themselves are constantly modified. In the initial drafts of the Convention for the Safeguarding of the Intangible Heritage, little or no provision was made for the setting up of funding mechanisms. This would have meant that, for developing countries, the Convention would be merely a normative instrument but difficult to implement. The African states stressed the inter-linkage between the normative role of the Convention and operational activities, citing the case of the Convention for the Protection of the World's Cultural and Natural Heritage, a normative instrument which has been successful because it has been backed by the resources of the World Heritage Fund.

The second stage is the adoption of the text of the treaty whereby parties to the negotiations agree upon its provisions. However, adoption does not mean that the negotiating States have expressed consent to be bound by the treaty. Thus for example, the 2001 Convention on the Protection of the Underwater Cultural Heritage was adopted by eighty-seven States voting in favour and four against, but the Treaty is not yet operational because only fourteen States have agreed to be bound by it. Following adoption there is the signature stage. Many international Conventions incorporate a signature procedure for States. Signature merely indicates that the State concerned regards the text as a correct recording of what has been agreed and intends to become a party in the future and in the meantime undertakes not to do anything that openly conflicts with the convention (O'Keefe 2002). Thus with regard to the

said Convention on Underwater Cultural Heritage, States may still accept to be bound by the treaty.

UNESCO rules, under which almost all the Cultural heritage treaties fall, do not however follow this signature process. After adoption by Member States at the General Conference, the President of the General Conference signs on behalf of all Member States and the Director-General signs on behalf of the Secretary-General of the United Nations.

Following this step, there is ratification/ acceptance/approval. According to Article 2(1) (b) (use of terms) of the Vienna Convention on the Law of Treaties, ratification is an international act, 'whereby a State establishes on an international plane its consent to be bound by a treaty.' Acceptance or approval performs substantially the same functions as ratification.

In multilateral treaties, it is accomplished by depositing the 'instrument of ratification' with one of the parties; in the case of UNESCO, these instruments are deposited with the Director-General.

In many other treaties, for example, the Convention on Biological Diversity (1992), deposition is made to the UN Secretary-General. Even in the case of UNESCO instruments, all multilateral treaties are registered with the United Nations in accordance with Article 102 of the UN Charter.

The higher the number of States Parties to the Convention, the more effective the instrument is, because it reflects the number of States bound by the provisions of such legal instruments.

To date, the Convention for the Protection of the World's Natural and Cultural Heritage (1972) (also known as the World Heritage Convention) has been ratified by 183 States out of 192 Member States of the United Nations, forty-three of which are from sub-Saharan Africa (SSA). Only three SSA States, Djibouti, Somalia and Equatorial Guinea, are yet to ratify. Compared to the situation in 1994 when only twenty-eight SSA States had ratified, the Convention is in both global and African terms a resounding success.

The same can be said of the Convention for the Safeguarding of the Intangible Cultural Heritage (Intangible Cultural Heritage) which was adopted in 2003. It has now been ratified by seventy-five States, sixteen of which are from SSA- i.e. 22% of the global total.

What is critically important to underscore is the fact that by ratification States have committed themselves to be bound by the provisions of a treaty. In the case of cultural heritage, this entails *inter alia* adopting policies, and establishing institutional and legal frameworks that preserve and promote that heritage. 'Each State Party to this Convention recognizes that the duty of ensuring the

identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred in Articles 1 & 2 and situated on its territory, belongs primarily to that State'. (Article 4 of the World Heritage Convention).

Similarly, Article 11 of the Intangible Cultural Heritage convention enjoins each State Party to 'take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory. Among the safeguarding measures referred to in Article 2 – identify, define the various elements of intangible cultural heritage present in its territory with the participation of communities'.

This entails in the case of the World Heritage Convention:

- Adopting policies which aim to give cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- Taking appropriate legal, scientific, technical and financial measures (Article 5).

In the case of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with the Regulation for the Execution of the Convention, States Parties are duty bound to ensure that in peace time, they safeguard property against foreseeable effects of armed conflict. Such measures 'include the preparation of inventories, the planning of emergency measures for the protection against fire or structural collapse; preparation for removal of movable cultural property' (Article 5 of Protocol II (1999) of the Hague Convention).

These cases illustrate how international instruments not only declare intent to protect and conserve cultural heritage, but go so far as to provide guidance on implementation of the legislation.

The last stage in the treaty process is that of 'Entry into force' of a Treaty. Treaties stipulate expressly either that ratification is necessary for the entry into force or that they enter into effect upon signature or upon a specified date or event. To date, all cultural heritage Conventions have entered into force after a stipulated number of States have ratified the Convention. The agreement on the date of entry into force of a treaty is essential for ascertaining the rights and obligations of the parties with regards to the treaty.

Adopted in November 1972, the World Heritage Convention entered into force in December 1975, when the stipulated twenty States had ratified. In accordance with article 24 of the Intangible Cultural Heritage Convention adopted in 2003, it went into force on 20 April 2006 while the Convention on Protection of the Diversity of Cultural Expressions (Convention on Cultural

Diversity) adopted in October 2005 entered into force in March 2007 when the requisite thirty States had ratified it. Because entry into force or effect of a treaty constitutes the commencement of the time period of the binding force of the entry it is important that countries that have seen the benefits of the treaty ratify it quickly so that it can become operational.

The fact that the Convention on Underwater Cultural Heritage has not yet entered into force, six years after its adoption means that countries with interests, in this case littoral States, are disadvantaged.

The 2001 Convention was the international community's response to the looting and destruction of underwater cultural heritage. The Convention provides that this heritage should not be commercially exploited for trade or speculation but allows for professional archaeology. It also underscores preference of the preservation in situ of underwater cultural heritage thus stressing the importance of the historical context of the cultural objects and their scientific significance. Africa's coastal lagoons and seabeds abound with cultural treasures from shipwrecks and these are being lost to private collectors.. With only Nigeria having ratified the treaty, Africa is a long way from reaping the fruits of the Convention.

The disadvantages of late ratification are illustrated later on in the relation to the World Heritage Convention and here again sub-Saharan Africa lost out.

1972 Convention for The Protection of The World's Natural and Cultural Heritage

To illustrate the stages in the treaty process, it is pertinent to look at the 1972 Convention for the Protection of the World's Natural & Cultural Heritage.

The World Heritage Convention has been aptly summed up as 'a unique legal instrument based on the idea that some cultural and natural heritage sites are of universal and exceptional importance and therefore need to be protected as part of the common heritage of humanity.'

Later emulated by the Intangible Cultural Heritage Convention, the World Heritage Convention is based on the intergenerational principle that States have an obligation to protect sites of outstanding universal value and to transmit that heritage to future generations.

Captured in its preamble are the following elements:-

- Cultural heritage and natural heritage are increasingly threatened with destruction.
- Deterioration or disappearance of any item of the cultural and natural heritage constitutes a harmful impoverishment of the heritage of all nations of the world.
- Protection of this heritage at national level often remains incomplete because of the scale of resources which it requires and of the insufficient economic, scientific and technological resources of the country where the property to be protected is situated.
- Parts of the cultural and natural heritage are of outstanding interest and therefore need to be protected as part of the world heritage of mankind as a whole.
- Considering that in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of understanding universal value, by the granting of collective assistance.

The focus on global interests, the need for global, collective ‘international community as a whole’, (i.e. global actors addressing global issues, that threaten cultural heritage) all become one major issue that of preserving heritage ‘as part of the world heritage of mankind as a whole’. This in turn becomes an issue of wider interests, where ‘cultural and natural heritage [is] of outstanding universal interest’. That being so, the strategy to resolve the issues centres on global collective action. ‘It is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage’, the preamble underlines.

What triggered this Convention is itself indicative of the global dimension.

The decision by Egypt to build the Aswan High Dam would result in the flooding and destruction of many important archaeological sites and treasures in Nubia. Faced with this imminent threat, in 1959 the Governments of Egypt and Sudan requested UNESCO’s assistance and UNESCO agreed to the proposals contained in the communication of the two Governments to ‘launch an appeal in UNESCO’s name for international co-operation to safeguard the sites and monuments of ancient Nubia’ (Decision Ex55/4, 1959), providing in the first instance, from its own Net Reserve Fund \$125,000. For the first time reference was made to the fact that the submersion of the monuments and archaeological sites of Nubia would be an ‘irreparable loss to the cultural heritage of mankind’ and that an ‘international committee of eminent persons to assist in organizing world-wide’ efforts to raise resources

and expertise to save the heritage of mankind, was necessary: purely global Actors.

In his Information Meeting to the Board in May 1964, the Director-General of UNESCO aptly summed up the spirit of a Convention which was still far from being drafted but whose seeds had been sown:

This is the first time that international fellowship has found expression on so large a scale in matters of culture and that Governments committed their States to such an undertaking. It is also the first time that this same fellowship has been translated into action on the basis of an idea that certain religious, historical and artistic monuments, in which mankind at certain times and places holding a special place in its history has expressed deepest convictions and highest aspirations, belong to the whole human race and form part of its common heritage, regardless of the period when they came into existence or the place they happen to be (Report UNESCO/CUE/127).

The campaign was a resounding success, raising more than \$80 million and saving the heritage of humankind. It was the driving force that was to lead to the formulation and incorporation of the cultural dimension into the 1972 World Heritage Convention.

Quite independently another movement led by the International Union for the Conservation of Nature and Natural Resources (IUCN) advocated the idea that certain national parks were of international significance. This led to the launching of a World Heritage Trust in 1965 in order to stimulate international cooperation to protect ‘the World’s superb natural and scenic areas and historic sites for the present and future benefit of the entire world citizenry.’ The idea was followed through and a draft Convention to address the natural component of the World Heritage Convention was ready by 1971. At the UN Conference on the Human Environment held in Stockholm in 1972, a resolution was adopted that UNESCO should have a World Heritage Convention. At the 17th General Conference in November 1972 UNESCO adopted the Convention.

What is evident from the above is that these were highly global processes, subsuming the purely national interests. There may have been individual actors, such as the Presidents of Sudan and Egypt who took the first initiatives in presenting their requests, and President Richard Nixon of the USA who wanted the World Heritage Convention to be ready by 1972 to coincide with the centennial celebrations of Yellowstone National Park. But they were not the drivers of the process. The real drivers were UNESCO (the General Conference, the Executive Board and the Director General) which produced the strategies, expertise, work plans and fund-raising campaigns. And it was the IUCN,

through its instrumental framework, which pushed the natural heritage agenda. These were global players working with a variety of stakeholders (nation states, NGOs, individuals, private sector, and civil society) to advance global interests and address issues of a global character.

Success of treaties thus depends on the interplay of different actors at all tiers. However the Nation State role remains central because international treaties need to be internalized into municipal or domestic law.

This is one of the main weaknesses of countries in sub-Saharan Africa, when it comes to legislation on culture and cultural heritage. A survey carried out on the implementation of the World Heritage Convention in sub-Saharan Africa revealed that only eleven States Parties had introduced new legislative texts and where this was done the domestic law was not guided by the World Heritage Convention. So far, only South Africa has produced a South African World Heritage Act (World Heritage Report No. 3).

In the case of Tanzania for example, 'It is a matter of [great] concern that the country's legislation has not been harmonized with the international Conventions. In some instances, it becomes therefore difficult to decide on a course of action, which is not a healthy situation' (Kamamba 2005).

For success stories, it may be worth borrowing examples from natural heritage and in particular with reference to the Convention on Biological Diversity (1992) which involved all Stakeholders (172 Governments of whom 108 were Heads of States; 2,400 representatives from NGOs and 10,000 individuals). Like the World Heritage Convention, the Biodiversity Convention reflected that biodiversity was a common concern for humankind: 'Intrinsic value of biological diversity of the ecological, genetic, social, economic scientific, educational, cultural recreational and aesthetic values of biological diversity and its components.'

For Africa and similar 'eco/ethno-based' societies, the Convention 'recognizes the close and traditional dependence of many indigenous local communities embodying traditional lifestyles on biological resources, and the disability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components'. In addition to the Convention itself there is Agenda 21, a comprehensive blueprint of actions to be taken at global, national and local levels by all stakeholders in the UN system (governments, civil society, NGOs, private sector, and individuals).

In support of the Convention there is the Global Environment Facility which manages financial support

for biodiversity and has been able to distribute in excess of \$2 billion. The bigger picture ensures a harmonization of the three pillars: the actors, the interests and the issues. It is this which has enabled the Convention to be universally acceptable. At its inception, at the Rio Conference in 1992, 168 States signed on to it and within a year (September 1993) it had come into force; to date 190 have ratified the Convention.

In practice it has succeeded because of the follow-ups that have been made at global and regional levels, e.g. at the World Summit on Sustainable Development held in South Africa in 2002. This made a lasting contribution to the global agenda in the form of the Johannesburg Plan of Action which affirmed the commitment to full implementation of Agenda 21 along with the achievement of the Millennium Development Goals. At the national level, it has given rise to 'Local Agenda 21'. A number of national Governments have legislated or advised that local authorities take steps to implement the plan locally as per the recommendation of Chapter 28 of Agenda 21. Many states, including several African countries, have changed their national laws to create or strengthen mechanisms to implement the Convention.

Notable advances have been made in areas relating to Article 6 in developing national strategies, programmes and plans for sustainable use of biological diversity. In many African countries, environmental impact assessments are now enshrined in the legislation. That is the key to success: internalizing the international instrument down to the grassroots (local community) level so that, in the language of the World Heritage Convention, it can have a function in the life of the community.

Link between international conventions and the local systems

A *sine qua non* for the success of any convention that addresses issues of culture and nature has to have as its departure point an acceptance of the fact that in many African societies there is no demarcation between nature and culture. The human being and nature are all derivatives of the earth which is the progenitor/creator. In the words of Ali Mazrui, one should 'identify first the more purely indigenous epoch of pantheism when no sharp distinction was made between God and nature and no sharp separation in habitat was mandatory between man and animals. Indeed the indigenous belief systems of Africa did not assert a monopoly of the soul for

the human species. A tree, a mountain, a river could have a soul ... there is also no monopoly of divine power in a single deity where Creator stands on one side and creatures on the other' (Mazrui 1986).

What needs to be emphasized here is that, in the context of many societies in Africa, these principles must form the basis of legislation relating to culture and nature. Sustainability of cultural and natural heritage is the main goal but this is only achievable if there is harmony between international law, domestic law and customary law.

An excellent example illustrating this point is Nigeria where in the north a Western-derived municipal system co-exists with Islamic law. In most parts of the south, African customary law and practices sanctioned by traditional rites and rituals operate together with canonical codes and a Western legal system (Eboime 2005). Testimony to this is the Sukur cultural landscape in central Nigeria, an impressive landscape anchored on the three pillars of international law: World Heritage Convention, Domestic Law (the National Commission for Monuments Act), and the Customary Law (centred on the Hidi). From the seventeenth century, the landscape has had its roots steeped in the Hidi, the spiritual leader who is envisaged as the 'wife' to the society's elders and trustees, the latter are the 'collective husband'. The elders and the Hidi are supported by a third tier made up of the young men who are organized into age grades or groups. It is these young men who maintain the vast terrain of terraced landscape and the Hidi palace. The palace itself is a symbolic statement of the relationship of the collective 'husband' to the 'wife' and serves to define power relationships: the Hidi (the spiritual) at the top of the plateau and the profane (human) at the foothills (nature). (Eboime 2001)

This ordering of space and its use is a telling reminder and reinforcement of the nature and character of society as well as the unwritten codes (Norms) which are prescribed in obligations, roles and responsibilities to retain and sustain the values of Sukur cultural landscape.

What this illustrates is the centrality of local customs and practices underwriting both the local and universal values. The capacity of the site to exist relies heavily on the nature of the society itself and so focus should be on motivating that societal chain whose links are the norms based on the values of the society. (Munjeri 2004a)

Albert Mumma (2003) along with many experts notes that the relationships between the formal legal systems and community-based traditional systems have been antagonistic because they essentially compete for legitimacy and influence. State-based

systems have predominated and have succeeded in completely marginalizing the community-based systems. The consequences are reflected in a growing amount of endangered heritage. This is because unless the local communities are integrated into management systems and activities, there will be no such checks and balances as provided for in the case of Sukur cultural landscape. The role of international law in the protection of nature and culture, of natural and cultural heritage is only possible when international law is internalized in state-based laws which in turn are harmonized with community-based laws.

Where there is no linkage, the two will float in different orbits and will remain parallel and never converge to address the issues and interests of the actors.

In the same way, state-based law ought to be internalized through and into community-based (customary/traditional) laws. State-based laws on the management of immovable heritage need to be changed to re-orient the relationship between state and community-based legal systems. The two systems must be brought into a complementary and symbiotic relationship rather than one of antagonism and competition.

In this way communities will not only be contributing to national strategies but will fill a huge gap in operationalizing international law at local and national levels. The standard-setting role of international treaties will thus be in synchronism with the operational role of international organs, the State and the local community. In excluding the local community tier from participation in the affairs of international society, the international legal system establishes a notion of community and participation which fails to reflect an important reality and which accounts for the lack of effectiveness of international treaties. One consequence of this flawed structure is the inability of the international law to give effect to a large number of people's expressed desires for environmental and cultural protection. (Sands, P. 1989).

The import of this approach in the context of Africa can best be illustrated by taking a closer look at one or two international conventions and how they have impacted on Africa's cultural and natural heritage. The already cited World Heritage Convention which was adopted in 1972 was meant to be a truly universal treaty designed to establish 'an effective system of collective protection of the cultural and natural heritage of outstanding universal value'. In terms of Articles 4 and 5, each State Party has a duty to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural

and natural heritage situated in its territory. To ensure that effective measures are taken in that regard, each State Party was expected *inter alia* to adopt policies that aimed to ‘give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes’; to take the appropriate legal; scientific measures that would foster the protection, conservation and preservation of such heritage. In their efforts, States Parties would also count on world community because ‘such heritage constitutes a world heritage for whose protection is the duty of the international community as a whole to co-operate’.

Under Article II, every State Party is expected to submit to the World Heritage Committee an inventory of property that could be considered for the ‘World Heritage List’, a list of cultural and natural heritage considered to be having an ‘outstanding universal value’ with set criteria. Also in Article II, the List of World Heritage in Danger was established, naming sites that were threatened by specific and serious dangers e.g. threat of disappearance, deterioration, and destruction. The basis of the criteria and of ‘outstanding universal value’ was Article I (for cultural heritage) and Article 2 (for natural heritage).

The global strategy

As at the end of June 2007 the position with respect to the World Heritage List was as follows:

Globally there were 830 world heritage properties (i.e. properties on the World Heritage List). 644 are cultural; 162 natural and 24 mixed. Of that number, only 66 properties are from sub-Saharan Africa (7.95% of the total) Of that number, thirty-one were natural and thirty-five cultural properties.

The World Heritage in Danger List had thirty-one properties and eleven of these (35%) were from Africa. So sub-Saharan Africa, with the lowest number of sites by region on the World Heritage List, dominates the ignominious World Heritage in Danger List. Given the geographical, historical, human and cultural significance of Africa and the area (approximately 300,000 square kilometres), the number of properties on the World Heritage List is incredibly low. What is disconcerting is that five years ago; with fifty-three sites, the percentage was the same (8%), with 35 % on the Heritage-in-Danger List.

Another anomalous fact, unique to sub-Saharan Africa, is that in other regions of the world cultural sites constitute a large proportion of the properties

on the World Heritage List, approximately 78%. With 31 out of 66 natural sites (i.e. 47%), Africa has the lowest in terms of representation of its cultural heritage: ‘This plays a part in giving Africa the image of a continent where the human contribution is minimized or devalued. This state of affairs is not a true portrayal of Africa’s significant cultural heritage with its diversity and distinctive characteristics’ (Wangari 2004).

This is not the place to point out the many reasons that contributed to this state of affairs. But in the context of Conventions, it is important to refer to the issues that have helped shape the destiny of sub-Saharan Africa. When the Convention was first muted, in the 1960s sub-Saharan Africa with a few exceptions was largely under the colonial yoke and, therefore, made no contribution to the conceptualization, negotiation, drafting and adoption of the Convention. By the end of 1980, there were only nine sub-Saharan countries that had ratified the Convention and none of them were on the World Heritage Committee, the organ that considers the World Heritage nominations. So there was no one to represent Africa’s interests and issues. The ratification process only accelerated in the 1980s when thanks to the conscious efforts of the Director-General of UNESCO, Amadou-Mahtar M’Bow from Senegal, nineteen more African countries added their names between 1981 and 1991, bringing the total number of African States Parties to the World Heritage Convention to twenty-eight by the end of 1991. But this was only a small fraction (19%) compared to 145 countries that had globally ratified the Convention at that point.

There are also some basic problems with the definitions of cultural and natural heritage in the Convention. The defining terms in the World Heritage Convention are Articles 1 and 2.

In Article 1, the following are considered as cultural heritage:

- Monuments, architectural works; works of monumental sculpture and painting, which are of outstanding universal value from the point of view of history, art and science;
- groups of buildings because of their architecture, homogeneity or place in the landscape;
- Sites: works of man or combined works of nature and man and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, etc.

It is evident that the perceptions were largely modelled on the ‘masterpiece’ concept and, as has already been clearly spelt out, the influences were largely Judaeo-Christian. Taking centre stage was ‘monumentality’ and ‘aesthetic’ heritage. The essentially

anthropological and other 'non-civilized' knowledge systems and practices took a backstage to the tangible heritage. Yet in many sub-Saharan societies, non-monumental heritage is what is important.

Furthermore, Article 2 which embraced 'natural heritage' defines these as essentially:

- natural features consisting of physical and biological formations ---
- geological and philosophical formations and precisely delineated areas which constitute the habitat of threatened species ---
- natural sites or precisely delineated natural areas

All the three components had to have 'outstanding universal value from the point of view of science, conservation and natural beauty'.

All this is what Ali Mazrui appropriately terms, 'the aesthetics of imperialism' whereby 'man is among things, Homo aestheticus – the only creature that appreciates beauty.' (Mazrui A. 1986)

This whole notion, first of separating nature and culture in societies where no sharp distinction was made between god and nature and no separation in habitat between man and animals, as again Mazrui underscores, demolishes yet another triangle: that of humanity, nature and the spiritual realm.

What is most heartening and augurs well for success in sub-Saharan Africa is the outcome of the World Summit on Sustainable Development (2002). This acknowledged 'the urgent need to reduce the conceptual gap between culture and nature'. The rise of many sectors in society for sustainable development 'is pushing us to go beyond the dichotomy between the biological and the social or between nature and culture. It is now generally admitted that nature is also what societies do and will make of it. The holistic vision of the world of traditional societies which is far from the dichotomy of opposing nature and culture specific to Judeo-Christian society is arousing renewed interest today' (Roué, M, 2006).

Article 2 is primarily concerned with designating a series of material zones so that there is 'integrity' where the greater number of geological, climatic and biological characteristics would be protected from all human endeavours perceived to be destructive to the ecological balance. It finds its finest expression in the notion of nature reserves and natural parks: in practice, in 'ecological apartheid'. In such situations ecological welfarism takes precedence over human welfare. This is anathema to those societies whose ethno-systems are underwritten by ecosystems: cultures of Africa have evolved out of nature and still draw their authority from it.

As aptly put by Léon Pressouyre, 'by definition, the 1972 Convention only deals with a small part of the heritage of mankind; therefore the cultural (and

natural) priorities of Africa were not those of the 1972 Convention' (Pressouyre 1995).

By 1993, it was evident that the implementation of the World Heritage Convention was totally off the mark of the original intentions. A whole continent was now 'in the dark'.

Only twenty-eight out of fifty-three African States had ratified the Convention and yet worldwide there were 146 States Parties, putting Africa's share at 19%. In terms of representation on the World Heritage List, Africa's share stood at 4.95%.

It was these chilling facts which led the World Heritage Committee to convene the 1994 Meeting of Experts to address the root causes of these distortions. The experts decried the predominance of the 'monumentalist' philosophy and called for a more global anthropological perspective which perceived heritage holistically.

The meeting recommended a non-typological approach and proposed a thematic methodology and identified areas and themes based on a broad anthropological context.

These observations and series of recommendations were adopted by the World Heritage Committee which came up with a 'Global Strategy' for a more representative and credible World Heritage list.

Three meetings to advance and promote the Strategy were held on the African continent in 1993 (Harare, Zimbabwe), 1994 (Addis Ababa, Ethiopia) and in 1998 (Porto Novo, Benin). In these meetings, African experts identified the following thematic areas for prioritization: archaeological heritage; living cultures (traditional know-how and techniques); spiritual heritage; cultural landscapes; routes and itineraries. A small step for world heritage but a giant step for Africa. Since the launch of the Global Strategy, which equally focused on the ratification of the World Heritage Convention by African States, there has been a phenomenal leap in the number of States that have ratified the Treaty. Between 1994 and 2006, the number increased from 28 to 43; in fact in sub-Saharan Africa, only three countries are still to ratify the Convention.

While the level of representation on the World Heritage List remains very low (7.95% of the global total), this is a step forward compared to the 4.95% in 1994. Moreover, whereas in 1994, there were only 17 cultural properties on that list, by May 2007, there were 35 (compared to 31 natural sites) completely reversing the trend whereby natural sites had previously dominated the African World Heritage List.

A closer look at cultural sites nominated since then shows that most sites fall in the categories proposed by the Global Strategy. e.g. Sukur cultural landscape, Matobo cultural landscape in Zimbabwe,

Tsodilo Hills (Botswana), Kasubi Tombs (Uganda), Ambohimanga Royal Hill (Madagascar), and Osun-Osogbo (Nigeria).

The point is thus proven that the future of Africa's heritage on the World Heritage List lies in the categories of property where Africa is strongest. The extent to which this can be achieved is by and large a factor of the legal framework and legislation that recognizes, and prioritizes this heritage, which is population-based: the truth has to do with the population rather than with the Convention. Regrettably the pace of change in this area has been slow. In a study carried out in 12 English-speaking countries, except for South Africa, the legislation on cultural heritage goes back to the 1960s and 70s – well before the Global Strategy. In fact only South Africa, Namibia, Botswana and Kenya have a post-Global Strategy legislation: 'The history of colonization appears as the main determining essential factor directly influencing the criteria for identifying cultural heritage.' (Négri 2005)

As long as that remains the case, the gains made as a result of the Global Strategy will be lost. Harmonization of domestic law, community-based traditional systems and international treaties is an *a priori* condition for the future of culture, nature and the environment in Africa South of the Sahara. As Albert Mumma (2003) says, 'grounding protective mechanisms on a legally pluralist premise appears to be the most promising way forward.'

The bottom line of it is that despite all efforts and the progress made, a number of issues still prevent the full implementation of the World Heritage Convention and conservation of heritage in Africa.

Sub-Saharan Africa suffers in terms of cultural heritage because few countries have ratified such treaties as the 1954 Convention for the Protection of Cultural Property in the Event of Armed conflict with the Regulations for the Execution of the Convention and its two Protocols (1954 and 1999). Of the 116 countries that have ratified this Convention, only twenty (17%) are from the African continent, yet Africa has experienced the most wars of both a civil and inter-territorial nature. Ironically three of these countries, namely the Democratic Republic of Congo (DRC), which was one of the first to ratify in April 1961, Sudan (1970) and Rwanda (2000) have experienced bitter wars. In the case of DRC, one can pose the question whether there is any level of awareness about a treaty signed many years ago, almost during the colonial era. In the case of Rwanda, the ratification was after the events of the 1999-2000 genocide.

In such situations, where States Parties to the World Heritage Convention are involved it indicates that the *pacta sunt servanda* (PSS) is not working. Perhaps the most fundamental maxim in international law, PSS

means that treaties shall be observed. This sanctity of treaties underlies the entire system of the law of treaties.

What can only be stressed is that commitment to international law entails above all a determination to implement law at all levels.

2003 Convention for Safeguarding of the Intangible Cultural Heritage

The adoption of the 2003 Convention for Safeguarding of the Intangible Cultural Heritage is another milestone achievement for a holistic vision of the world traditional societies, who form the bulk of the population in sub-Saharan Africa. Complementing the 1972 World Heritage Convention, the 2003 Convention allows for 'a holistic approach to cultural heritage and providing a general framework for highlighting the special roles of the bearers of intangible cultural heritage.' It 'filled a gap in the legal system of international cultural heritage protection which hereto had been focused exclusively on the safeguarding of tangible heritage' (Matsuura 2004). The Convention above all, gives meaning, form and significance to a potential collective duty for the identification, recognition and appreciation of the value of this heritage.

With the deliberate emphasis on 'safeguarding' the main objective of the Convention is 'to prevent humankind's intangible heritage from disappearing. In this quest for the most effective safeguard we were able to build dykes that save this heritage' says the former President of the International Court of Justice in The Hague, Mohammed Bedjaoui who presided over the drafting of the Convention (Bedjaoui 2004).

Such intangible cultural heritage includes oral traditions and expressions such as epics, tales and stories, performing arts, (music song, dance, puppetry), theatre, social practices, rituals, traditional craftsmanship. In essence, it is beliefs and perspectives, events, etc.

In many ways, the Convention can be seen as the culmination of a process that began when the World Heritage Convention was being challenged for its purely materialistic, monumentalistic and par excellence perception of cultural heritage. As already mentioned elsewhere, it was an answer to the call made by the 1994 Experts on Global Strategy that there be also an anthropological approach to culture and therefore a 'redefinition of heritage as an entity rather than the adhesion to a descriptive standard.'

The 1994 Experts meeting inadvertently defined the relationship that will from now on exist between the tangible and intangible heritage and, indeed, between the World Heritage Convention and the Intangible Cultural Heritage Convention, as well as other conventions such as the Cultural Diversity Convention. In their message, these Experts boldly pronounced that ‘the history of art and architecture, archaeology, anthropology and ethnology was no longer concentrated on single monuments in isolation but rather on considering cultural groupings that were complex and multidimensional, which demonstrated in spatial terms the social structures, ways of life, beliefs, systems of knowledge, representations of different past and present cultures in the entire world. Each individual piece of evidence should therefore be considered not in isolation but within its whole context with an understanding of the multiple reciprocal relationships that it had with its physical (i.e. tangible) and the non-physical (i.e. intangible environment)’. (World Heritage Centre 1994) ‘It may have taken a long time for the marriage to be consummated but it was inevitable that it would have to take place at some point in time. Intangible cultural heritage provided the larger framework within which tangible heritage could take its shape and significance’. (Munjeri 2004 b)

States, Government departments, institutions, local authorities, heritage personnel etc.; should capture this message in their national legislative frameworks, policies and practices. At the beginning of 2007, UNESCO had begun to restructure and reorganize the Culture Sector, to take on board these new realities.

Member States need to take their cue from there, if there is to be the harmonization of international and national legal instruments relating to culture and cultural heritage. This holistic approach is what sub-Saharan Africa requires in order to redress the imbalances between it and the rest of the world. No opportunity should be missed to take advantage of a scenario that is premised on Africa’s society, own cultures, norms and values.

Related instruments in the field of heritage conservation

Charters

A professional charter (as opposed to a charter in international law) is a code of ethics stipulating the standards of a profession or ‘the best practices’. They are moral codes and consist of do’s and don’ts; or guidelines which a member of the professional body

must follow in the execution of his or her practice. To deviate deliberately from the guidelines or professional prescriptions is to defy the code of ethics which may attract sanctions of the body. These can range from suspension and fines to expulsion in very serious cases of professional misconduct. Indeed, ICOMOS Australia has had cause to delete the names of some architects and conservators from its Registration List on grounds of misconduct.

The first systematic attempt to promote such professional ethic in the cultural conservation field was in Athens in 1931. Following the creation of the League of Nations, after World War I the Athens Congress, as it was to be called, had as its focus the restoration of historic buildings, unguarded excavations, as well as broad issues of legislation and conservation areas.

The Athens Congress also recommended the creation of an association of professionals involved in the conservation of historic structures. Following two meetings, one in Paris in 1957 and the second in Venice in 1964, the body (i.e. the International Congress of Architects and Specialists of Historic Buildings) took a number of far-reaching measures. The first was the enunciation of the Venice Charter (the International Charter for the Conservation and Restoration of Monuments and Sites). The second resolution provided for the creation of the International Council on Monuments and Sites (ICOMOS); now an advisory body to UNESCO on matters relating to monuments and sites.

The Venice Charter came to supersede the Athens Charter and remains the best-known guiding instrument of monuments conservation worldwide. Other related charters, such as the Burra Charter (Australia) and the recent Chinese Charter, have taken a cue from it and adapted it to suit local conditions.

The Venice Charter has the unique credit of introducing the notions of systematic maintenance, social use, as well as the value of proven techniques of repair (Stovel 1995).

Shortcomings however came to light in the application of the Venice Charter to a variety of properties such as non-monumental or vernacular structures, rural and urban settlements as well as monuments in European regions of the world. Instead of revising the Venice Charter, the 1978 ICOMOS General Assembly in Moscow proposed to accompany the 1964 Charter with a coordinated series of thematic and regional instruments to fill in gaps and adapt some of its articles as required.

Various ICOMOS Charters on Historic Gardens, Cultural Tourism, Historic Towns, Vernacular Architecture, amongst others, have continued to emerge to cope with the ever-growing body of knowledge in the conservation field.

Home-grown Charters such as the Burra and Chinese Charters have emerged to address peculiarities of some countries and regions. Under the aegis of the Australian National ICOMOS Charter for instance, the Burra charter has contributed significantly to conservation ethics and discipline. One major contribution of the Burra Charter is its advocacy of a detailed and comprehensive Conservation Plan in advance of any project and in its use by Government to supply criteria in awarding grants for work on historic buildings. Contrary to popular belief the Burra Charter is not an international one but specific to Australia.

Thus, since the Venice Charter, and the creation of ICOMOS, conservation practice has been enhanced, enriched and elaborated by various charters, documents, and declarations emanating from numerous international symposia and national committee meetings.

Recommendations (UNESCO definition)

These are principles and norms for the international regulation of any particular question which invite Member States (e.g. of UNESCO) to take whatever legislative or other steps that may be required in conformity with the constitutional practice of each State and the nature of the question under consideration, and to apply those principles and norms in their territories.

These are therefore not norms which are subject to ratification but which States are 'invited to apply.' The aim of recommendations is to influence the development of national laws and practices.

Examples of recommendations are:

1972, Protection at National Level of the Cultural and Natural Heritage; 1976, Safeguarding and Contemporary Role of Historic Areas; 1978, Protection of Movable Cultural Property.

Recommendations may take the form of Declarations which though non-mandatory tend to be more 'forceful' than Recommendations.

The 2001 Universal Declaration on Cultural Diversity (UDCC) is a case in point.

This case also illustrates that Recommendations may be an initial step to 'test the waters' before a Treaty is formulated. It was on the basis of UDCC that the 2005 Convention on the Protection and Promotion of Diversity of Artistic Expressions was drafted.

Conversely, a Recommendation may be premised on a Convention to enable the particular Convention to be translated into national legal framework and policies. A case in point is the elaborate 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage.

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Definitions of heritage and the criteria employed in defining heritage resources vary from one country to another and from one community to another. Various authors have tried to define heritage and these range from Layton and Ucko (1999) who see heritage resources as a physical entity broadly fashioned by human action to others such as Hodder (1993) who looks at it as an expression of meanings, values and claims based on material things as an inheritance. UNESCO defines cultural heritage more broadly as: The present manifestations of the human past. These are usually those elements of our past that have the capacity or potential to contribute to our understanding or appreciation of the human story or which are an important part of continuing cultural traditions in a spiritual and emotional sense.

[WEBBER NDORO]

Legal definitions of heritage

UNESCO further states that it is ‘that which is inherited; one’s inherited lot; anything transmitted from ancestors or past ages’. This goes beyond physical remains from the past to include aspects of culture such as language, spiritual beliefs, and intangible heritage such as the belief in sacred rivers, groves, forests or mountains.

Definitions of heritage in legal instruments have to be very precise so as to avoid ambiguity. Precision leaves no doubt with regard to what falls within the coverage of the law. The history of the country and the perceptions of heritage would normally govern definitions which are used in most legal instruments. These definitions in turn influence the development and administrative categorization of heritage in a given country.

Given that most heritage legislation in Africa was enacted during the colonial period it is not surprising that the definition of heritage and its categories were influenced by the colonial experience. The European colonial community imposed the typologies of heritage to be protected

and definitions adopted were borrowed from the mother countries. Most of the definitions generally equated heritage to the built heritage or to artefacts or objects from the past. Thus, material aspects were paramount in defining heritage. Rarely were intangible aspects incorporated into the definition of what heritage is.

The colonial definition as incorporated in the law also reflected the perception that for heritage to be of value it had to be old or ancient. Accordingly, heritage places and objects or items were equated with monuments, relics or antiques. This perception was reflected in the titles of most of the heritage legislation. ‘Historic Monuments, Relics and Antiquities Act’ was a typical title.

Surprisingly, even after independence in Africa, the definitions used by heritage laws has remained unchanged. In fact, most of the heritage legislation of African countries still dates back to the 1960s and 1970s. In a few cases where heritage legislation has been enacted after the 1990s, the perceptions, lifestyles and cultures of the indigenous populations have to some extent been recognized.

Furthermore, most legislation concerning the protection of immovable heritage also covers movable heritage, particularly objects or relics. In some cases, the heritage administration of the country has also been designed to mirror the perceived division between movable and immovable heritage. This distinction at times has extended to the enactment of two separate laws dealing with cultural heritage. In Zambia for example, one heritage administration has been created for movable (The National Museums of Zambia) and another for immovable (National Heritage Conservation Commission). Two pieces of legislation have been enacted, one covering immovable heritage and the other movable. This was also the case in Kenya until 2006, although here the National Museums of Kenya implemented the two legal instruments.

Present situation

In most English-speaking countries, the legislation on immovable heritage defines what it protects in some detail. Most define heritage as monuments, relics and antiques. For example section 21(a) of *the Historical Monuments Act, 1967 of Uganda*, defines ‘*historical monument*’ to mean any object, site, place, building or erection having connections to historical events. This also includes objects of archaeological, paleontological, ethnological or historical interest and includes any site, place, structure, erection of building, memorial, tumulus, cairn, pit dwelling, trench, fortification, irrigation work, cave, rock sculpture, inscription, monolith, fossil remains of man or animal or plant or any object which is of historical interest, or any part thereof. This definition echoes Objective No. 25 of Uganda’s Constitution of 1995, which states that, ‘the State and the citizens shall endeavour to preserve and protect and generally promote the culture of the preservation of public property and Uganda’s heritage’.

In Malawi, section 2 of the Monuments Act of 1965 defines ‘monument’ to mean any area of land which has distinctive or beautiful scenery or which contains rare or distinctive or beautiful vegetation or any area of land, structure, building, erection, ruin, stone circle, monolith, altar, pillar, statue, memorial, grave, tumulus, cairn, place of interment, dwelling, trench, fortification, excavation, working, kiln, rock, rock shelter, midden, mound, cave, grotto, rock sculpture, rock painting, wall painting or inscription or any other site or article of a similar kind or associated therewith which is of archaeological, geological, anthropological,

ethnological, prehistorical, historical, artistic or scientific value or interest or remains thereof and includes the site on which any monument or group of monuments was discovered or exists and such portion of land and adjoining such site as may be required for the maintenance of or otherwise for the preservation of such monument or group of monuments. Thus the definition of monuments also includes natural features such as vegetation. The definition of ‘relics’ is also very specific: it means any fossil of any kind and any implement, ornament or article (not being a monument), which is of archaeological, geological, anthropological, ethnological, prehistoric, historical, artistic or scientific value or interest. Thus, this legislation clearly categorizes heritage into two basic groups, monuments and relics, and then provides a list of the heritage to be protected.

In Lesotho the heritage legislation recognizes three types or categories of heritage and these are defined as monument, relic and antique. Section 8 of *The Historical Monuments, Relics, Fauna and Flora Act, 1967 of Lesotho* provides the following definitions of these categories of heritage:

- a) A monument means any area of land having a distinctive or beautiful scenery or geological formation, any area of land containing a rare or distinctive or beautiful flora, any area of land containing objects of archaeological, historical or scientific interest, any waterfall, cave, grotto, avenue of trees, old tree or old building and any other object whether constructed by man of aesthetic, historical, archaeological or scientific value or interest;
- b) Relic means any fossil of any kind, any drawing or painting on stone or petroglyph known or commonly believed to have been executed by Bushmen or other aborigines of Southern Africa or by any people who inhabited or visited Southern Africa in ancient days, and any anthropological or archaeological contents of the graves, caves, rock, shelters, middens, shell mounds or other sites used by them;
- c) Antique is defined as any movable object (not being a monument or relic) of aesthetic, historical, archaeological, or scientific value or interest, the whole or more valuable portion of whereof has for more than one hundred (100) years been in any part of Southern Africa, or which was made therein more than one hundred (100) years before the publication of such notice.

It is important to note that the Lesotho legislation does also incorporate natural heritage in the definition of heritage. It is rare for African heritage

legislation to recognize the unique relationship between nature and culture. What qualifies as an antique is based on a time scale of 100 years, which means that each year new objects qualify automatically as antiques as they reach this age.

The situation is similar in Swaziland where three types of heritage are also recognized: national monument, relics and antiques. In Swaziland, the National Trust Commission Act, 1972 recognizes three categories of heritage and defines them as follows:

National Monument: any area on land having a distinctive or beautiful scenery or geological formation, or any area of land containing a rare or distinctive or a beautiful flora and fauna, or any area of land containing objects of archaeological, historical, or scientific interest or value, or any waterfall, cave, grotto, avenue of trees, old building, or any other place or object (whether natural or constructed by man) of aesthetic, historical, archaeological, scientific, sacred, or religious value or interest.

Relic: any fossil of any kind, any drawing or painting on stone or petroglyph known or commonly believed to have been executed by Bushmen or other aboriginal inhabitants of Southern Africa, or by any people who inhabited or visited Southern Africa in ancient days, and any implement or ornament known or commonly believed to have used by them and any anthropological or archaeological contents of the graves, caves, rock shelters, middens, shell mounds, or other sites used by them.

Antique: any movable object (not being a monument or relic) of aesthetic, historical, archaeological or scientific interest or value, the whole or more valuable portion whereof has for more than 30 years been in any part of Southern Africa, or which was made therein more than 50 years before the publication of such notice.

In Swaziland the definition of antiques also adopts a sliding time scale. Within the category of National Monuments, Swaziland recognizes some aspects of intangible heritage related to sacred or religious values. This is very rare in most legislation of this period. However, given the fact that Swaziland is a kingdom with a traditional monarchy this might explain the recognition of the indigenous and intangible aspects of the heritage.

In Ghana the National Museums Regulation of 1973, uses the year 1900 as one of the defining criteria for heritage. This is four years after the establishment of the English protectorate. Nonetheless, 1900 is above all the date of the rebellion provoked by the British announcement of the discovery of the gold stool, a symbol of Asantehene's power, hidden by

the king's loyal servants since 1896. This is similar to the Seychelles where the same year, 1st January 1900, is used to qualify heritage objects as ancient objects and monuments.

The Sudanese law (Antiquities Act 1952) which is one of the earliest on the continent and has survived with minimum amendments, uses the year 1821 for movable and immovable objects to qualify to be referred to as antiques, and the year 1340 for faunal remains, be they human or animal remains.

In Tanzania, the law has fixed the cut-off date of 1863 for items to qualify to be defined as relics and monuments. Thus section 2 of the Antiquities Act 1964 contains the following definitions:

A relic is defined as any movable object made, shaped, carved, inscribed or otherwise produced or modified by human agency before the year 1863, whether or not it shall have been modified, added to or restored at a later date; and any human or other vertebrate faunal or botanical remains or impressions.

A monument is defined as any building, fortification, internment, midden, dam or structure erected, formed or built by human agency before the year 1863, or the ruins or remains thereof; or any rock painting or carving or any natural object painted, incised, modified or erected in Tanzania by human agency before the year 1863, or any earthwork, trench, adit, well, road or other modification of the soil or rock, dug, excavated or otherwise engineered by human agency before the year 1863.

A protected object is defined as any wooden door or doorframe carved before 1940 in any African or oriental style; or any object declared a protected object by the Minister under the provisions of the Act.

Thus Tanzania has three categories of heritage, namely relic, monument and protected object. The cut-off date in the definition of relic and monument is 1863 while the cut-off date in the definition of a protected *object* is 1940.

In Botswana, the recently enacted Monuments and Relics Act, of 2001 fixes the cut-off date for the definition of ancient monuments, ancient working, historic buildings, relics and protected heritage to 1st June 1902; that date coincides with the colonization of Botswana.

Section 2 of the Botswana Act defines an ancient monument as any building, ruin, remaining portion of a building or ruin, ancient working, stone circle, grave, cave, rock shelter, midden, shell mound, archaeological site, or other site or thing of a similar kind, which is known or believed to have been erected, constructed or used in Botswana before

1st June 1902. The provision for the definition of monuments is based on aesthetic, archaeological, historical or scientific value or interest. Such monuments include cave, rock shelter, groves, tree, old structure or other object or article, whether natural or constructed by human agency other than a relic.

A relic is defined as a fossil, meteorite, drawing, painting or carving on stone or petroglyph executed in Botswana before 1 June 1902 and includes an artefact, implement or ornament of aesthetic, archaeological, anthropological, historical or scientific value made or used in Botswana before 1 June 1902; any stone tool, bone pottery or any other anthropological or archaeological contents of any ancient monument or ancient working; or any treasure trove discovered in Botswana. For a legislation revised in 2001, the Botswana legislation is anachronistic in its definitions. It refers neither to cultural landscapes nor to intangible aspects.

The Gambia Monuments and Relics Act 1974 uses specific values and a cut-off date to determine what qualifies as heritage to be protected. Apart from the usual categories of monuments and relics the Gambian law also defines ethnographic articles, which must have been made before the year 1937. The Act clearly states that its purpose is to provide for the preservation of ancient, historical, and natural monuments, relics and other objects of architectural, archaeological, ethnographic, and historical or other scientific interest. The Act also makes a clear distinction in the definition of monuments for ‘ancient workings’ which are excluded from the definition of ancient monuments. This might be due to the link between ancient workings and minerals. In the case of Zimbabwe the Mines and Minerals Act (1961) has been made to override the heritage legislation in order to cater for this possible conflict.

The Nigerian National Commission for Museums and Monuments, Decree No. 77 of 1979 provides for the definition and identification criteria of antiquity pre-1918 and is based on historical, artistic or scientific values. Section 32 of the Decree No 77 defines antiquity in the following ways:

- a) any object of archaeological interest or land in which any such object was discovered or is believed to exist; or
- b) any relic of early human settlement or colonization; or
- c) any work of art or craft work, including any statue, model, clay figure, figure cast or rust metal, carving, house post, door, ancestral figure, religious mask,

d) staff, drum, bolt ornament, utensil, weapon, armour, regalia, manuscript or document if such work of art is of indigenous origin and-

- i) was made or fashioned before the year 1918; or
- ii) is of historical, artistic or scientific interest and is or has been used at any time in the performance and for the purposes of any traditional ceremony.

Decree No 77 also recognizes items which are related to intangible aspects, for example, ancestral figures and religious masks. It also specifically recognizes items of art of indigenous origin.

In Zambia, National Heritage Conservation Commission Act No 23 of 1989 is one of the few pieces of legislation in Africa that clearly states as its mandate the conservation of ancient, cultural and natural heritage, relics and other objects of aesthetic, historical, prehistoric, archaeological or scientific interest. Unlike the laws of other African countries, it includes within its scope the conservation of ‘cultural’ heritage. The Act is also intended to provide for the regulation of archaeological excavation and the export of relics. These relics must have been manufactured before 1st January 1924. This was the year the British Government took over the administration of the territory from the British South Africa Company (BSAC) which had administered this territory since the Berlin Conference of 1885.

Zambia also recognizes relics, ancient heritage and historic buildings. Except with respect to historic buildings the date 1 January 1924 is significant. Under each of the categories the Act then lists a number of items, which come under that definition and category. As stated above, Zambia’s law is one of the few which also recognizes intangible aspects as well as heritage associated with indigenous communities. These are recognized as relics associated with traditional beliefs such as witchcraft, sorcery, exorcism, rituals and other rites.

TABLE 1 **Definitions of Zambia's National Heritage Conservation**

Relic
<ul style="list-style-type: none"> a) a fossil of any kind; b) any drawing, painting, petroglyph or carving on stone commonly believed to have been executed in Zambia before 1st January, 1924; c) any object of ethnological interest; d) any object of historical, scientific, anthropological, archaeological, aesthetic, or cultural value made or used in Zambia before 1st January 1924; e) any ethnographic material associated with traditional beliefs such as witchcraft, sorcery, exorcism, rituals or other rites; f) any object associated with a person or an event prominent in Zambian history; g) any product of archaeological excavation (whether regular or clandestine) or of archaeological discoveries; h) any anthropological, historical or archaeological contents of any ancient heritage; or i) any other object of historical, anthropological, archaeological, aesthetic or cultural value declared a relic by the Minister under Section 32.
Ancient Heritage
<ul style="list-style-type: none"> a) any building, ruin, or remaining portion of a building or ruin; b) any pillar or statue; c) any settlement, cave, or natural rock shelter with traces showing that people once lived there, any house site or church site of any kind, or remains or parts of these, any mound representing the midden of an ancient settlement, and any site with concentrations of buildings, such as trading centres, towns and the like, or remains of these; d) any site and remains of workings and any other place of work of any such kind, such as a quarry or other mining site, iron extraction site, charcoal kiln and any other trace of a craft or industry; e) any trace of any kind of cultivation of land, such as a pile of stone heaped up when land was cleared, a ditch and any trace of ploughing; f) any fence or dry stone wall, and any enclosure or arrangement for hunting, fishing or snaring; g) any road or other track paved with stones, wood or other materials, or entirely unpaved; h) any dam, weir, bridge, ford, harbour-works, landing place or ancient slip-way or the remains of such; i) any bar made of sunken vessels; j) any land mark for use on land or on water; k) any kind of defence such as a fort, entrenchment, fortress and remains of these; l) any site for holding council, any cult site or any place where objects were thrown for purposes of magic, any well, spring or other place with which archaeological finds, tradition, belief, legends or customs were associated; m) any stone or solid rock with inscriptions or pictures such as rock carvings, rock paintings, cup marks, ground grooves or any other rock art; n) any monolith, cross or other such heritage; o) any stone setting, stone paving or the like; p) any burial place of any kind, individually or in collected sites, such as a burial mound, burial cairn, burial chamber, cremation patch, urn burial and coffin burial; or q) any place or thing which is designated by the Commission as an ancient heritage Which is known or believed to have been erected, constructed or used as the case may be, before 1st January 1924, whether above ground, underground or underwater.
Historic building
<p>Is any building, which in the opinion of the Board is of historic, architectural or aesthetic interest.</p>

The criteria used for defining heritage resources in Zimbabwe through the 1972 Act, correspond to the archaeological, historical, paleontological, artistic or scientific value of the resource. The criteria are complemented by using a cut-off date of 1st January 1890, which marks the date of the occupation of Zimbabwe by the British South African Company. This day also marks the beginning of the confrontation with the Ndebele. Section 2 of the National Museums and Monuments Act of Zimbabwe, 1972 provides for the following definitions:

Monument means any

- a) ancient monument; or
- b) area of land which is of historical, archaeological, palaeontological or other scientific value or interest; or has a distinctive geological formation; or
- c) waterfall, cave, grotto, avenue of trees, old tree or old building or remaining portion of an old building; or
- d) other objects, whether natural or constructed by man, of historical, archaeological or other scientific value or interest.

Relic means any

- a) fossil of any kind;
- b) drawing or painting on stone or petroglyph known or commonly believed to have been executed in Zimbabwe prior to 1900; or
- c) weapon, implement, utensil or ornament of historical, archaeological or other scientific value or interest known or commonly believed to have been used in Zimbabwe prior to 1900.
- d) other objects, whether natural or made or executed by man, of historical, archaeological or other scientific value or interest which is prescribed as being a relic for the purposes of this Act.

This legislation recognizes two types of heritage: monuments and relics. For relics, the date of 1890 is the definitive date.

In Kenya, under the 2006 Act objects made or imported before 1895 qualify as antiquities. This date corresponds to the establishment of the British Protectorate in Kenya. However the Act defines cultural heritage in four categories (a) monuments, (b) architectural works, (c) groups of buildings and (d) works of humanity. For heritage to be protected by The National Museums and Heritage Act of 2006, it must fall into the above categories. The Act also provided for the Minister responsible for culture, by an express decision, to include in the category of heritage, any place regardless of its age. However it has to be a structure with a specific location and construction. The National Museums and Heritage Act of 2006 recognized heritage in the form of antiquity, monuments and objects of archaeological

or palaeontological interest. The Kenyan legislation also defines protected areas as places with buildings, object, monuments, antiquities and shipwrecks. Part 1 of the Act provides for the following definitions of heritage resources:

Antiquity:

- any movable object other than a book or document made in or imported into Kenya before the year 1895, or any human, faunal or floral remains of similar minimum age which may exist in Kenya.

Monument:

- A place or immovable structure of any age which, being of historical, cultural, scientific, architectural, technological or other human interest and remains declared by the Minister;
- Any rock painting, carving or inscription made on an immovable object;
- Any ancient earthwork or other immovable object attributable to human activity;
- A structure which is of public interest by reason of the historic, architectural, traditional, artistic or archaeological interest attached to it and has been ... declared by the Minister;
- A shipwreck more than fifty years old.

The National Heritage Resources Act, 1999 (NHRA) of South Africa uses very wide identification criteria, reinforced by a minimum age of one hundred years for an object or a site to legally qualify as a heritage. For sites associated with military history, the limit is reduced to seventy-five years. A minimum age limit is considered more relevant than the use of a fixed date. It allows heritage to be protected automatically without necessarily declaring it. The extent of heritage protected also grows with each passing year as opposed to when a fixed date, based on the advent of colonialism, is imposed.

In South Africa, values, including intangible aspects are also used in qualifying movable and immovable objects as heritage. Graves of victims of the liberation struggle are considered in heritage and the Act also provides a general protection for all graves over 60 years of age. The South African legislation also clearly provides protection for intangible living heritage, which is defined as:

- Living heritage means the intangible aspects of inherited culture and may include cultural tradition, oral history, performance, ritual, popular memory, skills and techniques.

What distinguishes South African heritage law from the other countries in Africa is that it is wide in scope and includes the intangible, non-material places of memory, the traditional/customary, and the modern historical developments in the types of heritage under its protection.

The South African Heritage Resources Agency (SAHRA), the agency responsible for heritage protection in South Africa, administers the National Estate. The concept of a National Estate is a more encompassing term, which includes that aspect of any property, movable or otherwise, which by virtue of its importance to the heritage of the country, remains the property of the people, held in trust and controlled by heritage authorities.

SAHRA has set up a system under which heritage is not a commodity with a value that can be traded, altered or even destroyed by someone who has rights to use the land where heritage is located. Section 3(1) of the South African Heritage Resources Authority provides for heritage resources, which are of cultural significance or other special value for the present community and for future generations, to be considered part of the National Estate and fall within the sphere of operations of heritage resources authorities. The Act gives a list of what is expected to be included in the National Estate which includes places with oral traditions and those associated with the living traditions.

The South African 1999 Act does not contain categories or definitions of heritage such as ‘ancient monuments’ or ‘relics’, which are typical of older colonial legislation. It would appear that the new legislation was informed by the current trends and debates in heritage management worldwide.

Key issues

Most legislation will state clearly at the beginning the purpose of the legislation and then provide a glossary of definitions of specific terms used. It is within these definitions that the type and categories of heritage to be protected is provided. In rare cases, for example the Nigerian Heritage Decree no 77 of 1979, the definition of terms is not on the first few pages but appears towards the end of the legislation. It is important to have a clear definition of what is supposed to be covered by the law.

Although there are significant differences between the various heritage legislations, some similarities are also noticeable: the definitions of what is to be protected are very clear and usually cover tangible heritage; values, time-frames and certain dates of execution are included; and most definitions are historical or commemorative.

It has been pointed out that the colonial history has a major influence on the way the laws have defined heritage, as most legislation was originally promulgated during the colonial period. It is also the case that concepts of heritage have changed

around the world. However, it would appear that in most countries in Africa these new concepts have not been filtered through into the laws defining heritage. The result of the colonial laws was that the heritage laws excluded indigenous perceptions of heritage. For example, anything associated with African religion was excluded as it was regarded as paganism, although other legal instruments, for example environmental or planning laws, sometimes cover these areas.

Most definitions have categorized immovable heritage under three main areas: antiquities, ancient monuments and relics. From the way these categories of heritage are defined it becomes very difficult to include cultural itineraries and landscapes and the intangible aspects of heritage within the legal definition of heritage. Acceptance of the importance of indigenous cultures is a crucial aspect in defining the heritage of the country and in including this as part of the law.

Thus it is crucial to know how the law defines the heritage to be protected and it is clear that rarely is this comprehensive enough to cover all aspects of heritage in one legal instrument. Perceptions of heritage are also changing all the time and until recently concepts of cultural landscape or cultural itineraries were not considered as viable heritage places. The most important question to consider is what aspects of the heritage the law is supposed to protect, and how they can be incorporated into the legal definitions.

Various approaches to definitions

English-speaking sub-Saharan countries use at least four main methods to define their heritage:

- i) A definition of protected heritage that specifies particular places by giving the list of items and places to be protected. For example, the Zambian National Heritage Conservation Commission Act 1989 gives a list of what are to be considered relics and ancient monuments. The main disadvantage of using this system is that the list may exclude important places or areas which at present may not be considered heritage but in future could be considered. However, the list is specific and makes it clear what is being considered.
- ii) A definition of protected heritage based on values of the heritage resource. Most laws give some indication of values, for example archaeological, historical, architectural, scientific, and aesthetic or artistic. This definition may not cover all the values, and the values may also be subject to various interpretations.
- iii) A definition of protected heritage based on land management or demarcation of places to

provide general protection. Here areas can be declared conservation or protected zones. This provides blanket cover but only to those areas which are declared protected. Thus the danger of the heritage being destroyed before declaration can be real. This approach is found mostly in the laws relating to environmental management and physical planning, and only occasionally in heritage legislation, for example the Tanzania Act of 1964.

iv) A definition of protected heritage based on time-scales (chronology) or historical value. In

this case a termination calendar date for what is to be protected is provided and at times the age of the heritage to be protected is given. With the termination calendar date it means that as the years pass the extent of heritage protected does not grow. The alternative of specifying an age of the heritage, for example anything older than 100 years, provides for an accumulative build-up of the protected heritage, which enables the extent of heritage protected to increase with the passing of years.

TABLE 2 **Definitions**

		Specific places (list)	Time scale	Values	Land management
1	Gambia	Ancient Monument Ancient Working Ethnographic article Relics	Ethnographic -1937	Archaeological Architectural Ethnographic Historical Scientific	
2	Ethiopia	Antiquities		Artistic Cultural Historical Scientific	
3	Kenya	Antiquity Monument Architecture Group of buildings Works of humanity	Antiquities -1895 Object of Historical interest - 1800		Protected Area
4	Lesotho	Monument Relic Antiquity		Aesthetic Archaeological Historical Scientific	
5	Malawi	Monuments		Anthropological Archaeological Artistic Ethnographic Geological Historical Prehistoric Scientific	Protected Monuments

		Specific places (list)	Time scale	Values	Land management
6	Mauritius			Aesthetic Archaeological Architectural Artistic Historical Scientific Traditional	
7	Nigeria	Antiquity Object of Archaeological interest - 1800	Antiquities 1918	Archaeological Historical Artistic Scientific	
8	Seychelles	Ancient Monument Relic	Ancient Monument 1900	Aesthetic Archaeological Historical Scientific	
9	South Africa	Archaeological Living Heritage Victims of conflict	Structures- 60 yrs old Archaeological –100 yrs Old. Military structures-75 yrs old.	Aesthetic Architectural Historical Scientific Social Spiritual Linguistic	Protected areas Heritage area-Local Authority
10	Sudan		Antiquity-1821 Human remains -1340 AD		Protected Monuments
11	Swaziland	National Monument		Archaeological Historical Aesthetic Scientific Sacred/ religious	Nature parks Nature reserve
12	Tanzania		Relic-1863 Protected object 1940	Local Authority By-laws. Conservation Area.	

		Specific places (list)	Time scale	Values	Land management
13	Uganda			Archaeological Palaeontological Historical Ethnographic Traditional	
14	Zambia	Ancient Heritage Relic	Ancient Heritage-1924 Relic-1924	Aesthetic Archaeological Historical Prehistoric Scientific	
15	Zimbabwe	Monument Relic	Ancient workings-1890 Relic-1900	Historical Scientific	

Discussion

One of the fundamental decisions in setting the foundation of a country's cultural legislation is how to define heritage. Definitions are diverse but they have a direct impact on the scope of the national legislative instruments. They determine the regulation of powers, what is to be protected and how. Heritage definitions in English-speaking sub-Saharan countries are very narrow and specific except in South Africa. With narrow and specific definitions the danger is always that much heritage (such as intangibles, cultural landscapes and itineraries) will not be covered. The tendency is to concentrate on the built heritage. Broader definitions have an obvious advantage in being all-inclusive. However, they may suffer from a lack of detail about the types of heritage actually protected. It is important that where a broad definition exists; protection is provided in practice as well as theory. Equally importantly, definitions of heritage should include not only objects and sites but also the areas surrounding them. Legislation should be able to protect the surrounding environment which provides a context for the heritage.

Most legislation uses a combination of any of the four methods outlined in Table 6.2 to define the heritage it covers. This approach ensures a balanced way of defining heritage, while at the same time eliminating the disadvantages of using only one method. Several legislations on cultural heritage, such as that of Lesotho, also include natural phenomena.

Legislation gives precise definitions of what the law considers to be heritage. At times the definitions are so precise that they list what is to be protected either as a specific list or as categories. These are usually based on some identification criteria which correspond to some assumed values, time-scale (chronology) or perceived commemorative order. Legal documents need to spell out what they are protecting and this is done through definitions. It is important that the definitions or categories also reflect the country's history and its wider cultural heritage. The definitions should avoid favouring particular categories at the expense of others.

It is evident that the criteria for identification and definition of heritage resources in English-speaking Africa, as provided for in the historical and existing legislation, are heavily influenced by the national histories of colonization. Many definitions are western in their orientation. It has been repeatedly noted by various observers (e. g. Ndoro 2001, Ndoro and Pwiti 2001, Kamamba 2005, Mumma 2005) that much of the legislation is out of date and emphasizes material based definition and identification criteria. However, more recent legislation, for example the laws of South Africa, Kenya and Namibia, have tried to incorporate definitions of heritage which encompass the perceptions of the general public. There is no justification for legislation elsewhere in Africa remaining out of tune with modern realities. It has also been noted that provisions for the definition of heritage in these African states do not recognize intangible aspects of heritage.

There is need to define clearly the type of heritage to be protected, as it is not possible and realistic to protect everything. However the definitions must be based on wide consultations with the public and it should not be left to specialists alone (such as archaeologists and architects) to define what has to be protected. A people's heritage is much more than just archaeological sites and historic buildings; it includes many more dimensions than the strict academic definitions currently considered by the present laws.

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ROCK



21-20



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HERITAGE



Much heritage legislation, apart from providing categories of heritage, also ranks the different heritage resources. In most cases heritage resources are classified and ranked according to their perceived values and significance. However, as Thompson (1981) notes, the concept of significance is difficult to deal with because it involves consideration of diverse attributes and, in the end, some things will be discarded rather subjectively. Relatively, not all heritage resources are equal in significance or in the eyes of the law. Such significance may emanate from the resource's perceived potential values. Lipe (1984) identifies four categories of heritage based on European and North American experience on the values and significance as informational, associative, economic and aesthetic. Feilden (1982) assigns three values to cultural property: emotional, cultural and use values.

[WEBBER NDORO AND DONATIUS KAMAMBA]

The ranking of heritage resources and sites in legislation

The ICOMOS Australia Burra charter (1999) has four categories similar to Feilden's: social, historic, scientific and aesthetic. Some have argued that values such as use, economic, political tourism and similar categories are derived values and therefore not primary. By using these categories, we can begin to rank heritage according to the values attached to each category. As indicated in the previous chapter most legislation in English-speaking Africa categorizes heritage as monuments, relics and antiques.

Present situation

In most African countries, with a few exceptions such as Namibia, South Africa and Tanzania, the Government or the state agency owns designated ancient and national monuments. In South Africa and Tanzania, on the other hand, national monuments

can belong to individuals or institutions. Thus the legislation gives guidelines on how to look after nationally valued property. This means that the designation of a place as a national monument does not necessarily take away the individual or group rights to land ownership. However, these guidelines restrict the owner's rights with respect to what can and cannot be done on the site of a declared national monument.

The experience of some African countries, such as Tanzania, is that owners will let the monument deteriorate because of these imposed restrictions. Owning a national monument is not viewed with pride in some communities, particularly once it is declared to be a monument under the existing law. In most of the countries therefore, the enactment of protective legislation makes cultural property Government property; the interest of Government equals adherence to national and international regulations whose formulation had no input from the local communities.

The transfer to state ownership of much of the cultural or archaeological resources through designation also resulted in displacement of local people and disempowerment with regard to control and access to cultural resource utilization and management. Even where ownership is not transferred to the State, as in South Africa and Tanzania, such declaration leads to the disempowerment of traditional custodians of the land and therefore cultural heritage. In countries like Tanzania, once a cultural property is declared a national monument, values of such property are spelt out as part of the declaration. These values, in most cases, are defined by a different group of people, typically professionals. In South Africa, the property laws, which allow individuals to own land and therefore cultural sites, also led to the disempowerment of the traditional custodians of the land and therefore of the cultural heritage.

The other higher designation which applies in most countries is World Heritage status. The World Heritage Convention (1972) has been ratified by almost all the countries in sub-Saharan Africa. A few such as South Africa have enacted a separate law to administer this category of heritage. This 1972 Convention, while accepting the significances and values of the cultural property in question, spells out in its Operational Guidelines the criteria to be used for placing a cultural property on the list. It is not enough that the heritage has significances and values: these values must have extra qualities of a universal character.

The Malawian legislation ranks heritage according to its perceived archaeological, geological, anthropological, ethnological, prehistoric, artistic, or scientific value or interest. In Malawi the Monuments Act of 1965 differentiates between a monument and a protected monument, a relic and a protected relic. Once an area is declared protected, then Government takes care of it except where it is private property, in which case the Minister will enter into an agreement with the owner on the terms of how to take care of the said property. Such an agreement also curtails the owner's rights to use the place as he pleases and sets out rules on public access.

The South African Act (1999) has a clearly laid out system for ranking heritage resources. Section 7 (1) of the South African Heritage Resources Act provides for the South African Heritage Resources Authority (SAHRA) in consultation with the Minister responsible and the member of the Executive Council of a province responsible for cultural matters to establish, by regulation, a system of grading of places and objects which form part of the National estate. There are three grades:

Grade 1: Heritage resources with qualities so exceptional that they are of special national significance;

Grade 2: Heritage resources which, although forming part of the national estate, can be considered to have special qualities that make them significant within the context of a province or a region; and

Grade 3: Other heritage resources worthy of conservation and which meet heritage resources assessment criteria consistent with those set out in Section 3 (3). That section must be used by a heritage resources authority or a local authority to assess the intrinsic, comparative and contextual significance of a heritage resource and the relative benefits and costs of its protection, so that the appropriate level of grading of the resources and the consequent responsibility for its management be allocated in terms of section 8.

Sub-section (2) of Section 7 provides that a heritage resources authority may prescribe detailed heritage assessment criteria, consistent with those set out in Section 3 (3), for the assessment of Grade 2 and Grade 3 heritage resources in a province.

The current Lesotho legislation (Act no 41, 1967) does not differentiate with respect to protection between relics and antiques except that they have to be proclaimed in order to be deemed protected by Government authority. In the current legislation the declared properties are then listed. This seems to be the case also with the heritage legislation of Tanzania (Antiquities Act, 1964 and its amendment of 1979) where proclamation by the Minister responsible for antiquities is required for protection, but there are no categories to assist with ranking heritage resources. This is also the case with the Sudanese heritage law, the Antiquities Ordinance No. 2 of 1952. However, in the case of Tanzania the Minister may also declare a conservation area for purposes of management. But such a declaration may only be made after consulting the Minister responsible for land. This is usually done if specific threats to a heritage place are identified. For example, Kilwa Kisiwani and Kondoa sites have been declared World Heritage sites to safeguard them by putting in place specific regulations not covered by the law.

Tanzanian legislation does not provide for the ranking of heritage resources. Nonetheless, Kamamba (2005) points out that there are many types and categories of cultural property, such as movable and immovable objects. Movable objects includes archaeological objects of stone, wood, metal and other materials which depict the historical and cultural development of man from the earliest period. Also included in this category are human skeletal remains, both the fossilized remains of hominids and the skeletal remains of more recent populations.

Fossilized remains of animal and plants associated with the activities of early man also form part of this category, as well as those that are, in themselves, testimony to the evolutionary development of various species of animals and plants. Historical and ethnological objects of different materials that are a testimony to the cultural and historical development of the more recent populations also fall into the category of movable cultural property.

Immovable cultural property comprises: sites such as open-air caves and rock shelters containing archaeological objects; fossilized animal bones and plants, and historical and ethnological objects; human burial sites of both the prehistoric and historic periods; ruins of buildings and tombs, either single or in groups; rock shelters or caves containing paintings; defensive structures such as fortifications, ditches and banks; and ritual and religious sites. Buildings and urban quarters of historical and architectural importance, as well as monuments that commemorate important historical events, form part of immovable cultural property in Tanzania. Both categories carry the same weight in terms of significances. The protection applied to both is the same and does not grade them differently. However, in terms of conservation guidelines, different principles, theories and methodologies are used, depending on the type of cultural property.

The application of different principles, theories and methodologies of conservation depends on the values assigned to the property. Indeed, these values have to be preserved and protected not only from external and internal natural threats but also from human interventions. Treatment, preservation, restoration, rehabilitation, consolidation or revitalization have the noble role of maintaining the significances and values of the cultural properties in question.

Various approaches to ranking sites

The ranking of sites in countries such as Belgium and France has been carried out purely for economic reasons. This is due to the fact that the state cannot provide the same level of protection to all cultural assets on its territory (see Pickard, 2001)

In Gambia, the Monument and Relics Act 1974 differentiates between national monuments and ordinary heritage resources. The national monuments acquire extra protection by being proclaimed as such and, by implication, the care of the site and place becomes the responsibility of the nation. However,

the protection given to a site, proclaimed or not, is the same. The only difference is one of custodianship: the state has to take more care of proclaimed resources.

In Mauritius, the National Monuments Act no. 9 of 1985 clearly ranks the resources into national monuments and monuments. The provisions of the Act seem only to protect national monuments although it recognizes that other monuments exist. Thus the declaration of a national monument means legal protection for the identified resource. This seems to be a common trend in a number of countries such as Ghana (National Museum Regulations 1973), Swaziland (the National Trust Commission Act 1972) and Kenya (Antiquities and Monuments Act 2006) Only the declared or proclaimed monuments are protected. The implications of this is that those not proclaimed or declared can be lost or destroyed before the process of declaration is implemented. The protection of undeclared heritage places is equally important; ranking should not prejudice the legal protection to all sites.

In Zambia, the National Heritage Conservation Commission Act No. 23 (1989) ranks sites for purposes of protection. Declared national monuments acquire extra significance as national assets and private ownership is curtailed. In Nigeria the National Commission for Museums and Monuments Decree no. 77 of 1979 deals differently with the issue of private ownership: the declaration of an area as a monument requires the State to take control and to compensate the owner.

In countries where private ownership of national monument is permitted, certain regulations will ensure that the property is maintained and conserved. In Ethiopia, for example, Proclamation No. 36 (1989), though not ranking antiquities, contains a provision for nationalizing heritage if it is deemed to be in danger. This echoes the Nigerian decree.

TABLE 1 Definitions from Nigerian Decree

National Monuments Act
<p>In Nigeria: Where an antiquity has been declared to be a national monument as provided in this Decree, the owner thereof shall be entitled to compensation for the value at the date of such declaration and thereafter any estate, right, title and interest in and to such antiquity shall be extinguished.</p> <p>In case of dispute as to the amount of compensation payable under this section such dispute shall be referred to a court of competent jurisdiction in the area concerned.</p>

Discussion

On the whole, the legislation of most countries provides for the differentiation of heritage into categories. The commonest element is a ranking of national monuments, relics and monuments. In most countries, although the legislation might rank cultural heritage for priority of attention by heritage organizations, very often the level of legal protection given seems not to change.

Whilst most legislation in the region categorizes heritage assets with a view to identifying the heritage values, ranking of resources is sometimes included in legislation. Most protective legislation ranks heritage resources into two broad categories: national monuments and monuments/relics. At the national level the highest designation is a national monument. This designation is a means of recognizing in law those places deemed to be of national importance. To reflect this high national status, in all the legislation the Minister responsible for heritage is the one who has to proclaim or declare this status. This is clearly the case in Botswana, Nigeria, Malawi, South Africa, Zambia and Zimbabwe and elsewhere.

The levels of ranking may differ from country to country, but it is clear that this is done to establish priorities for management by the heritage organizations.

Ranking of heritage in some countries also affects property rights, public access, and the management responsibilities of the state. Ranking can also be used to determine the degree to which the values of the site have meaning for different levels of authority, including local, regional, national and international. Ranking is used as a tool to rationalize the allocation of resources. This has implications for the management and conservation

of heritage resources. For example, a site declared a national monument may receive more attention than one which has not been so declared. The legal protection might also differ with respect to penalties or activities permitted on the site. This translates into the degree of protection accorded to the site.

It must be noted that the protection of heritage resources that have not been declared as such is equally important. Therefore, formal declaration and ranking of heritage sites should not prejudice the legal protection afforded to all heritage sites.

Culturally important heritage is particularly likely to suffer in a system based on ranking where, as in Africa, cultural heritage is not manifested only through monuments. What this calls for is some general protective provisions in the law to ensure that all heritages be accorded legal protection and sound management, regardless of whether or not it has been declared a monument and ranked as such. The declaration of a monument should therefore serve only to put a greater spotlight on certain categories of heritage resources.

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Pre-colonial management practices

In discussing existing forms of heritage management in southern and eastern Africa, one must recognize the fact that there were administrative structures in pre-colonial times, as in the kingdom of Buganda where the fifty-two clans that formed the Buganda society contributed voluntarily to the maintenance of palaces of kings both dead and living. Individual clans had hereditary roles which were passed from father to son such as thatching, decorating the interior of palaces and shrines. Due to the impact caused by colonial occupation these systems have not only failed to make an impression on modern systems of management, but have also passed almost entirely unrecorded.

GODFREY MAHACHI AND EPHRAIM KAMUHANGIRE

Administrative arrangements for heritage resources management in sub-Saharan Africa

Present systems vary considerably from country to country. However, they all bear common characteristics in that they have in varying degrees evolved from models imposed by European colonial administrations. We are constrained in any reconstruction of pre-colonial scenarios for an area as large as sub-Saharan Africa by a lack of published data. Reference will therefore be limited to our knowledge of eastern and southern Africa. Even then the data is sketchy on account of the lack of detailed research on this subject.

Management under traditional systems

In pre-colonial Africa, active custody of monuments

and sites, tended to focus more on those places that were held sacred by local communities. Sacred places included rainmaking shrines, rock shelters, royal and chiefly burials, perennial springs, trench systems, tree groves and forests with an abundance of wild fruits or animals.

Some abandoned settlements and villages obtained the status of shrines. A case in point was Great Zimbabwe, a centre of rainmaking, thanksgiving and other religious functions even after it had been abandoned in the fifteenth century (Ndoro 2005). Sites like Kasubi tombs, Tanda pits, Biggo bya Mugenyi and the Mubende tree in Uganda also played a religious-cultural role. In general, such sites seem to have been protected by a culture of avoidance of abandoned villages and homesteads that were considered to be the abodes of the spirits of former inhabitants.

Many sites such as Great Zimbabwe, Kasubi Tombs, Mubende Hill, and some in the Matobo Hills, had permanent resident site custodians or curators appointed to keep them and to receive pilgrims. Most, however, were without any form of regular stewardship. With no keepers and a reliance on occasional inspection visits, the sites had to be respected by the people living around them in order not to be destroyed or tampered with. To this extent local communities played a central role in heritage management.

The respect was expressed in and strengthened by a set of rules, especially on what must not be done at a sacred site held. For lack of an alternative suitable terminology these prohibitions have been called taboos. But they are in effect by-laws or unwritten legal instruments for the protection of heritage.

The taboos held at Great Zimbabwe may shed light on this aspect of pre-colonial heritage management. There was a resident keeper on site and several rules were observed which warrant citing here as being equivalent to legal instruments to support heritage management:

- strangers were required to seek prior permission to enter the site;
- people were not allowed to take things from the site or to alter the site. Early European visitors, e.g. the German explorer, Carl Mauch, was surprised to see the site overgrown with bushes and climbers which he mistook a signs of abandonment and neglect;
- for all the fascination that children have, they were not allowed into Great Zimbabwe in pre-colonial times;
- visitors were forbidden to speak ill of the site, e.g. making a passing remark about the wild fruits found therein. They were allowed to take only what was enough for their immediate consumption and not for a future reserve; and
- those people who were visiting for a particular purpose had to use designated entrances called *mijejeje*. These points were ritually opened and closed upon entry, and opened and closed again upon exit (Summers 1971).

The foregoing shows that pre-colonial management of heritage sites was connected with religious functions and this was the point of overlap or convergence between heritage management and the functions of the state. Shrines in the Matobo Hills, Great Zimbabwe and elsewhere communicated with each other through messengers. The shrines became more vital in times of stress (e.g. when there was a war or drought) and in those times messengers shuttled between them and state involvement increased.

The last pre-colonial state on the Zimbabwe plateau, the Rozvi, controlled the priesthood of the

sites in the Matobo Hills and Great Zimbabwe. Subsequently from 1840 the Ndebele kings realized the power of the shrines in the Matobo Hills and at Khami (both now World Heritage properties) and maintained and consulted them through their priests. At this level central government had a role to play in heritage management.

During the war of resistance against Rhodesian occupation in 1896-7 several shrines in western, central and northern Zimbabwe became very active, with their priests coordinating the resistance throughout the country.

In the case of Kasubi Tombs there are five categories of keepers. The Nalinya, the ceremonial sister of the reigning King (Kabaka), is the Guardian of the site. She has a Prime Minister known as the Katikiro who is the overall administrator of the site. The Kaddulubaale is in charge of the other women in the palace and the Lubuga is in charge of the gardens at the site. The fourth category is the Kings' widows. These are descendants of the wives of the kings buried at the site who take monthly turns to sleep in the round building known as Muzibuzaala Mpanga. The taboos which are observed include:

- removal of shoes at the entrance to the house;
- wearing of long dresses (those with trousers have to cover them with long cloths);
- sitting down while inside the house (it is not allowed to squat).

This pre-colonial scenario is characterized by taboos of heritage desecration, local community participation and state involvement at the major shrines, especially in time of emergencies.

The pre-colonial administration of monuments and sites in other African countries in those times would not have been fundamentally different from the one described above. One of the tragedies to befall African heritage with the imposition of colonial rule was that the traditional frameworks of heritage management were dismantled and new systems were put in place without considering the past administrations. In these modern times this has frustrated new efforts to involve local communities in awareness programmes. Furthermore, the pre-colonial structural link between heritage and spirituality was downplayed and downgraded. Colonial respect for heritage looked more at issues of aesthetics and monumentality, ignoring the spiritual essence, and this has shaped the approaches of current administrations.

Existing management frameworks

As noted above, current administrative frameworks

are derived from systems imposed during the colonial period.

In the western world most heritage organizations are the responsibility of municipal and county authorities; the central state plays only a supervisory role in their administrative affairs. But in most countries in sub-Saharan Africa the administration of heritage is vested in centralized national government heritage administrations. Some are departments of ministries while others are parastatals autonomous of ministries. But all are run directly or indirectly by government ministries.

In Botswana the National Museums was until recently under the Ministry of Home Affairs. In Uganda the Department of Museums and Monuments falls under the Ministry of Tourism, Trade and Industry. In Zimbabwe the National Museums and Monuments is a parastatal semi-independent organization but under the Ministry of Home Affairs. In Kenya the National Museums of Kenya, under which the Directorate of the Sites and Monuments also falls, is a semi-parastatal body under the office of the Vice President (who is also the Minister of Home affairs and the Minister of Heritage).

The administrative structure of the National Museums of Kenya is summarized in Table 1.

Centralized administrative systems

A few countries in sub-Saharan Africa have a centralized administrative system. In Botswana, while regional and other local structures exist, they are all under direct government control through the Ministry of Home Affairs (now under Ministry of Culture). In Sudan, the Ministry of Education holds the same mandate over archaeology and museums.

In Uganda, the management of heritage resources is under the Department of Museums and Monuments of the Ministry of Tourism, Trade and Industry. It operates through the Historical Monuments Act of 1967 and the Amendment Decree of 1977. The Department is headed by the Commissioner, answerable to the Permanent Secretary who is the Accounting Officer of the Ministry. The Administrative Structure of the Ugandan system is shown on Table 2.

Under the centralized administrative system, the Commissioner, as the Head of Department, does not have the power to make independent decisions concerning the management of the institution. The institution is a programme within the Ministry's budgetary system. Funds for its operations are controlled by the Permanent Secretary who is the Accounting Officer of the Ministry. Additionally,

TABLE 1 Administrative structure of Kenya National Museums



whatever funds are generated by the Department of Museums and Monuments are deposited as part of the consolidated fund in the Government's Central Bank. The Department does not operate its own bank account for managing its internally generated funds.

The main advantage of this centralized system is that the staff is assured of drawing their salaries and allowances from central government's funds. But the disadvantages are many. They include:

The internally generated funds are rarely returned to the Department to manage its recurrent and development needs.

Without a bank account the institution is deprived of its internally generated funds as well as grants, gifts and donations from its internal and external sources.

TABLE 2 Administrative structure, Uganda



The allocations for projects, research and programmes for heritage work are minimal. Capital development allocations are rare. This leads to delays in the Department's activities and programmes.

It should be noted that activities and programmes of the institutions responsible for the management of heritage resources are field oriented. Most of the palaeontological, archaeological, historical and colonial sites and monuments are out in the countryside. On the other hand, museums are typically established in the capitals of the respective countries, although small satellite museums are set up in provinces, districts and towns. Centralized administrative systems make it difficult for heritage management institutions to be responsive to the needs of communities and local stakeholders. Heritage management in such systems becomes the preserve of a few self-selected professionals, operating from the capital and from regional offices.

This situation is compounded by the lack of resources to enable the institutions to conduct field activities. With limited funding it cannot build and expand its human resources. It is therefore perennially understaffed, staff turnover is high, and interaction with communities is very limited.

Autonomous administrative systems

In some countries, administrative systems are partially autonomous. A Board of Trustees or Directors is constituted to implement government policy and directives and to supervise the chief executive and management team. Trustees/Directors are elected to serve terms ranging from three to five years. Although the terms are renewable, trustees do not hold permanent tenure.

In reality semi-autonomous or autonomous institutions responsible for the management of heritage resources are not really autonomous or independent. In the first instance, the Board of Trustees/Board of Directors is politically appointed. They must adhere to the Government's policy directives. The Minister appoints them and typically considers the suitability of each member of the Board from the perspective of his/her support for the Government and its policy. Similarly the Chief Executive of the institution, in addition to academic qualifications, must also adhere to the Government policies. That is why in some cases even if one is highly qualified, if one is perceived unfavourably in Government circles the second, third or even fourth ranked candidate can take the post. Politically appointed members of Boards and chief executive officers

therefore depend for their appointment on their loyalty to Government.

Agencies responsible for the management of heritage are either departments falling directly under the supervision of Government or they are quasi-Government organizations also called parastatal bodies. The merits and demerits of the two systems seem to depend on the situation in each country. A parastatal body enjoys a large measure of independence in choosing its Board of Trustees. It has the independence to fund raise, to retain revenue (instead of remitting it to central Treasury), and to use it at the discretion of the Board of Trustees. In practice, however, opportunities for heritage agencies in Africa to fundraise are very limited. This means that in spite of parastatal status governments continue to exert strong leverage on the functions of most heritage agencies, as they are the main financial benefactor. In most African countries, funding from central government is crucial for managing the heritage.

Decentralization

Whether managed directly by a Department of the Ministry or through a semi-autonomous parastatal, most administrative frameworks provide for a measure of decentralization within a centralized administrative system in which ultimate decision-making power remains with the central authorities. In Zimbabwe the Minister of Home Affairs appoints a Board of Trustees presided over by a Chairman. The Board is in a sense decentralized as legislation provides for the establishment with the consent of the responsible Minister of local or regional committees to assist the Board in carrying out its duties.

In South Africa the management framework is more elaborately decentralized, providing for three levels of management. SAHRA, (the South African Heritage Resources Authority) is responsible for the administration of heritage resources at national level. Below SAHRA are provincial heritage resources authorities responsible for the nine provinces, and in the lowest tier are districts or local authorities which enjoy a measure of independence. Policy guidance is given by the Council, which is the equivalent of the Board of Trustees. The responsible Minister at both national and provincial levels appoints Council Members after they have gone through a process of public nomination.

Article 189(1) of the Uganda Constitution (as revised 15 February 2006) spells out in the Sixth Schedule those functions and services which are the

responsibility of the central government. Functions of the central government include the responsibility for National Monuments, antiquities and other movable heritage objects such as archives and public records. Section 2 of Article 189 of the Constitution allows for District Councils, but the Councils of lower Local Government Units may be allowed to exercise the functions and services specified in the Sixth Schedule to the Constitution when requested or delegated to do so by Government, Parliament, or by law.

Section 34 of the Local Government Act 1997 in Uganda also stipulates the delegated functions which local Councils can get from Central Government in the management of heritage resources. These include urban museums, libraries and public parks. In most cases however, either due to the financial implications attached to the maintenance and upkeep of sites and monuments and museums, regional or provincial Government/council rarely take up the above delegated responsibilities. It is also probable that in some regions the appreciation of the importance of cultural resources development is still minimal. However, in South Africa the local authorities and provincial Governments do have responsibility for heritage issues in their city or provincial area.

Community participation in administration

The continued function of some monuments as shrines and the taboos held about these sites should be sufficient justification for the active involvement of local indigenous communities in heritage management.

In the pre-colonial past, communities were involved at a the local and the state levels, the latter especially in matters affecting general security, such as the need for good rains to ensure good harvest, and the prosecution of war. Colonial legislation and most post-colonial legislation has no provision or respect for the role of local communities in heritage resource management.

However, new legislation in Botswana, South Africa and Namibia has made some important concessions in favour of local communities. In Botswana, the Monuments and Relics Act of 2001 makes provision for the practice of eco-tourism as a means of protecting the interests of local communities. South African legislation of 1999 is more explicit about the involvement of local communities. Section 25 of the National Heritage Resources Act provides for the South Africa

Heritage Resources Agency (and its subsidiary agencies) to:

- a) furnish information, advice and assistance to enhance public sensitivity towards and awareness of the need for management of the national estate; and
- b) endeavour to assist any community or body of persons with an established interest in any heritage resource to obtain reasonable access to such heritage resource, should they request it.

In Section 42 1(a) SAHRA may:

negotiate and agree with a community for the execution of a heritage agreement to provide for the conservation, improvement or presentation of clearly defined heritage resources A heritage agreement may include such terms and conditions as the parties think fit, including provision for public access, and provision for financial or other assistance from the heritage authority concerned.

In this regard, the South African legislation is conforming to policy guidelines enunciated by the UNESCO World Heritage Centre and affiliate bodies such as ICOMOS and ICOM which underline the need to re-involve local communities in heritage management.

In practice, however, the accommodation of local communities is a contentious issue in heritage management today. In South Africa, for example, despite the said positive legislative steps taken to involve local communities, the question as to what roles local communities will actually play remains a twilight area. A museum exhibition mounted in 2000 entitled 'Musuku: Our Golden Links with Our Past Exhibition' provided a test case. A wide range of audiences was invited to this exhibition on Venda history and culture, including indigenous communities. The indigenous communities used the occasion of the opening of the exhibition to showcase their indigenous knowledge systems including oral traditions with respect to the themes on exhibition. Unfortunately, this seemed to upset established histories and anthropologies, and their guardians (the professional managers in the national museums and universities) were quick to dismiss them as unfounded mythologies and an affront to scientific knowledge. An apology was demanded. The local communities viewed this as a perpetuation of apartheid practices of exclusion and the paternalistic paradigm that indigenous knowledge must be screened by the scientific establishment before it becomes acceptable (Mafune 2004, unpublished).

In Zimbabwe, preparations are underway to revise the existing legislation that was inherited from colonial times without amendment. There is

no provision for the role of local communities in this legislation. In practice, however, significant achievements have been made at sites such Great Zimbabwe and Domboshava Caves.

One of the controversial problems has been to find a generally acceptable definition of a local community. A local community is usually one that holds historical associations with the site either by having built and/or occupied that property and/or by usage. But in some cases, for example that of Great Zimbabwe, two groups contest ownership and usage of the site.

In 1993 the Uganda Government reinstated the traditional institutions including kingship and returned cultural assets such as old palaces, tombs and land to the previous owners. An example was the reinstatement of the Kabakaship in Buganda, a region with the largest tribal group in the country. Kasubi Tombs which houses the tombs of four previous consecutive kings of the Buganda Kingdom was returned to the restored king (Kabaka) Ronald Muwenda Mutebi II. As mentioned previously, the site is under the guardianship of the ceremonial sister of the king called Nalinya who in turn has subordinates to help her manage the site. Kasubi Tombs were inscribed in the UNESCO World Heritage list in November 2001.

It is, however, important to note that rather than traditional leaders being included on the Board of the National Heritage bodies, it is the central Government official responsible for heritage resource management who is appointed to the Management Committee of Kasubi Tombs as an ex-officio member to drive the proper management of the site. He acts as the liaison between UNESCO, World Heritage Centre and the Buganda Kingdom on matters of technical and financial assistance to the site.

This situation calls for redress. Under the reviewed National Museums and Monuments Bill that will repeal the outdated Historical Monuments Act 1967 of Uganda, there is provision for committees drawn from the local people who reside near heritage sites and associated museums to participate in their management. One of the incentives for community involvement in the management of heritage sites is the production and sale of their products such as crafts and food stuffs as well as associated employment opportunities. Those who provide entertainment for tourists in the form of cultural performances will share in the revenues which accrue to the heritage site and museum on a percentage basis, for example 20% of the total income per month. However, apart from specific sales of products or donations and gratuities

to performers, the funds are usually used for community development projects.

Combined or separate administrative frameworks for the management of immovable and movable heritage

It is a debatable issue among the heritage professionals whether museums and monuments (movable and immovable) should be combined. It can be argued that combining them will affect the balance between the typologies, with preference being given one of them. It is also argued that such a law regulating the two might not have sufficient details to reflect the specificities of the different typologies. However, others point out that museums naturally need to be together with monuments in order to coordinate objects found on sites and the context of the monument. Thus heritage may be seen as including the artefacts that make up the movable and immovable cultural heritage. In the United Kingdom, the regulatory legal instruments are separate and they even go further separating archaeology (Ancient Monuments and Archaeology Areas Act 1979) from architecture (Listed Buildings and Conservation Act 1990) (see Pickard 2001).

In colonial and post-colonial management models it has been customary to divide the administrative arrangements for heritage management into immovable and movable property. Movable heritage, otherwise called objects or artefacts, is usually found in museum repositories and exhibitions. Since most objects housed in African museums are rarely of foreign origin there is in many cases a contextual relationship between museums, monuments and sites, with the latter being the provenance of the bulk of objects in museum collections.

African museum collections stand in sharp contrast to the collections of, for example, the British Museum, where a significant part of the collections is made up of imperial acquisitions. Maybe this is the reason that museums and monuments often fall under the same administrative organization in a number of countries such as Botswana, Ghana, Kenya, Nigeria, Uganda, and Zimbabwe. While until recently Kenya had two separate laws dealing with museums and monuments respectively, the sole agency for their administration is the National Museums of Kenya. The two laws have since been repealed and replaced by the Museums and Heritage Act of 2006.

But there are also situations in which the laws allow various entities to manage heritage sites and artefacts directly and independently of the national administrative authorities. In South Africa the situation is different as several custodians are involved such as urban authorities, universities and national parks. This is a remarkable deviation from the common practice in the rest of Africa. The universities of Pretoria and Witwatersrand hold collections for which they seem to hold ownership rights. Mapungubwe, a site of the Zimbabwe stonemasonry type and now World Heritage, is under the administration of the Department of Archaeology at the University of Pretoria. Thulamela another Zimbabwe-type site in the Kruger National Park is also the property of the National Park. This scenario may be a legacy of apartheid administrative arrangements for heritage. It is said that some important sites remain in the private possession of the landowners upon whose property they are located. South African property owners jealously guard their rights to private property, which are enshrined in the new South African Constitution.

The South African legislation (1999) provides for the establishment of a 'South African Heritage Resources Agency (SAHRA) to manage the national estate and makes provision for the establishment of provincial and local heritage resources authorities to manage provincial and local heritage resources [respectively]' (see the National Heritage Resources Act, 1999: Article 4d). The agency having been formed in 2000 is relatively new and it is premature to make a statement on the emerging power relationship between it and the various authorities dealing with heritage resources in South Africa.

In Zimbabwe, an Act of Parliament vests management of both movable and immovable heritage in National Museums and Monuments. No private museums of significance have been set up in the country. A Danish non-Governmental organization initiated a rural museum project in the communal lands of Binga. This would have been one of a few private museums (including the National Railways and Geology Museum) in the country, but the museum was eventually handed over to NMMZ for its administration, while the NGO continues to support development projects. In Uganda there are institutional museums such as the Zoology Museum and the Anatomy Museum at Makerere University and the Queen Elizabeth National Park Museum at Mweya Lodge. What is important to note is that researchers who are attached to universities such as palaeontologists and archaeologists, by law, have to associate with the Department of Museums and Monuments in

order to obtain an excavation licence before going to the field. Furthermore, permission is required to deposit the finds in the museum and permits to export on loan some of the finds for laboratory analyses and study.

At times, however, management of certain immovable heritage is vested in authorities other than the national museums such as wildlife authorities which can lead to institutional conflicts arising from an overlap of mandates. In Zimbabwe there have been difficulties in defining roles with respect to those monuments and sites located in National Parks. A different Act of Parliament governs the National Parks and Wildlife Authority (NPWLA), which is under the Ministry for Environmental Affairs and Tourism. In principle there is no conflict of definition between the two Laws, the NPWLA and NMMZ Acts, but in practice NPWLA has been reluctant to allow National Museums and Monuments to implement its mandate over monuments and sites situated in National Parks and vice versa.

In 1998 NMMZ took a unilateral initiative to monitor sites in the Matobo National Park, now a World Heritage property, and to levy entrance fees. The NPWLA was not pleased by this. The rivalry between NMMZ and NPWLA was reflected in the structure of the dossier prepared for the nomination of Matobo as world heritage status. The World Heritage Centre has since advised that a consolidated management plan be developed as a way to resolve this issue. In pursuance of this objective, a co-management committee comprising members of organizations, other authorities and local communities was constituted to oversee the management of the property.

NMMZ and NPWLA have also had disagreements over the management of the Victoria Falls National Monument and World Heritage site. The area designated national monument is in fact separate from a wildlife park situated nearby, but the NPWLA insists that the Victoria Falls is a National Park. NPWLA also argues that it has been running the Victoria Falls for several decades before that responsibility was contested by NMMZ, hence the status quo must be accepted as *fait accompli*. The matter was sent for arbitration before the Government's chief lawyer, the Attorney General, who ruled in favour of NMMZ taking over the administration of the property. This ruling was based on the merit of existing legislation. The ruling, however, has not been implemented as NPWLA has refused to cooperate. This is so despite the fact that NMMZ has not been demanding exclusive rights over the site, but an opportunity to implement its

obligations in terms of the legislation. The stand-off is yet to be resolved. Interestingly, on the Zambian side there are no similar stakeholder conflicts as the sole responsible agency is the National Heritage Conservation Commission.

Discussion

Heritage issues should ideally be dealt with under the Government ministry responsible for culture. However this has been the practice only with regard to movable heritage, rather than immovable heritage. The typical framework is for immovable heritage to be placed under the Ministry responsible for wildlife and national parks or similar. This reinforces the dichotomy between movable and immovable heritage resources. The situation is made much more complex where, as in the African experience, the responsibilities of ministries are changed from time to time or ministries are merged or de-merged. Consequently, arrangements made at one point in time are always susceptible to being changed subsequently.

In Zimbabwe, National Museums and Monuments is placed under the Ministry of Home Affairs. The rationale for this situation, inherited from Rhodesia, has never been made clear, but it appears that the Rhodesian Ministry of Internal Affairs wanted to monitor and contain public views on the origin and ownership of Great Zimbabwe. Opinions crediting indigenous people with the construction of the site were considered to be subversive and proscribed. The need by the Government to have direct access to Great Zimbabwe has not diminished after the attainment of independence, as the site plays a crucial role in the body and spirit of the nation (Matenga 1998). Thus it has been deemed necessary by the post-colonial Government to maintain this status quo.

In Uganda cultural heritage was previously under the Ministry of Culture and Community Development. However, by 1998 it was under the Ministry of Tourism, Wildlife and Antiquities. From 1998 it has been under the Ministry of Tourism, Trade and Industry. The change from culture to tourism related function is aimed at promoting cultural tourism as opposed to the mere conservation of cultural heritage. Attempts have been made to transform the museums service and give it a semi-autonomous status. The advantages in this have been elaborated earlier in this chapter.

The Ugandan Government has made unsuccessful attempts to put the administration of cultural resources under the President's Office. One of the

reasons why cultural resource management can benefit if it is put under such a powerful office is that it can source funding for its programmes quite easily. The second reason is that being well resourced it becomes active and its programmes are felt and appreciated countrywide.

The major arms of Government under the Zimbabwe Ministry of Home Affairs are the Police, Immigration and National Archives. The only department to bear a close resemblance to National Museums and Monuments in terms of responsibilities is obviously the National Archives. There are, however, some advantages in this rather odd circumstance. The core business of the Ministry of Home Affairs is internal security and law enforcement. Therefore, one of the strategic opportunities has been easier access to police protection and reaction. Ministerial association with the police has been found to be vital in dealing with cases of theft and vandalism. A major setback is that a bulk of the resources allocated to the Ministry is committed to security and over the years the competition for resources has always weighed heavily against National Museums and Monuments and the National Archives, which are generally viewed as minor departments.

On the other hand, placement in the Ministry of Education and Culture would not have brought any substantial benefits either, as most resources would have been expended on primary and secondary education. The advantage would be the ease of the links of heritage education programmes with those of mainstream education and other cultural activities organized by this ministry.

As can be seen, heritage management can be placed under almost any Ministry, and there are various advantages and disadvantages. There is thus no ideal administrative arrangement. Further, responsibility for several aspects of heritage is often split among several ministries. This is not likely to change. What should be emphasized during policy or legal formulation is the cross-cutting relationships between government departments and institutions that deal with movable and immovable cultural resources management within their portfolios and the importance of including them as partners or stakeholders in a collaborative framework.

Regardless of the structure and connection to government, it is important that the heritage authorities have full responsibilities to perform the management and conservation of heritage efficiently. They must be able to provide those services related to heritage preservation.

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This section examines the management mechanisms introduced by the heritage laws in English-speaking Africa. It explores the legal management mechanisms for the protection of heritage resources. In particular, it, examines the formal legal frameworks. In order to understand the complexity of heritage legislation in English-speaking Africa and its enforcement in respective states, it's important to bear in mind that the current laws have their roots in the colonial days. In this context, it is observed that the legislation did not recognize the traditional community-based systems of looking after the heritage. Whereas the new system is aimed at preserving sites and monuments that bore witness to indigenous development, the traditional systems on the other hand strived to maintain respect for and the survival of cultural sites as these sites represented points of communication with the ancestral world.

WEBBER NDORO, AND HERMAN KIRIAMA

Management mechanisms in heritage legislation

In most African countries the management of the heritage is done through a Government department, for example in Tanzania through the Antiquities department, or through a statutory/body cooperate like the National Museums and Monuments of Zimbabwe or the South African Heritage Resources Agency. It is through these organizations that the management mechanism is exercised on behalf of the general public. In Gambia the law establishes the Monuments and Relics Commission with powers to make by-laws for the purpose of protecting the cultural heritage as defined by the Act.

The legal framework for the management of immovable cultural heritage in any country comprises statutes (or Acts of Parliament), subsidiary legislation (made up often of regulations, rules and by-laws) and agreements and memoranda of understanding. Some countries also provide for the development of guidelines. However, in all the English-speaking sub-Saharan countries these legal instruments are all

aspects of a state-based legal regime. Hardly is use made of management instruments which originate from community systems.

Recognition of traditional or customary mechanisms

Prior to colonization, the custody of both the tangible and intangible heritage of African societies was vested in the elders, special custodians, chiefs or/and kings. With the coming of colonization however, the African Customary legal systems were destroyed and replaced with European legal systems which unfortunately only recognized and therefore protected the tangible heritage to the exclusion of the intangible heritage. This European system was later to be adopted by independent African Governments as the formal national legislation. This adoption of European formal legislation has had the effect of

alienating the local people from the administration of their natural and cultural heritage. As such in most of the English-speaking states in Africa, provision is made for formal legal management mechanisms at the expense of traditional mechanisms.

Some African countries such as Nigeria, South Africa, Uganda, Zambia and to some extent Zimbabwe have, however, attempted to adopt both formal and traditional community-based legal frameworks. In Nigeria, Eboreime (2005) notes that there exist kingdoms, cities, states and local communities whose customs and traditions still order some aspects of their lives and environment side by side with the corpus of the national legal systems. This is derived from the western legal tradition associated with the country's colonial heritage. He notes that to some extent, traditional laws and customs have been incorporated into a plural legal system that recognizes the values of the local communities. It is also worth noting that Nigeria is a plural society in which at least three systems of laws exist: there are state legal systems and Islamic law operating in most parts of the North; and customary laws and practices sanctioned by traditional rites and rituals operating side by side with canonical codes and the western-derived legal system in most parts of southern Nigeria. Provisions for recognizing customary practices and traditions are made. In particular the most representative case of the existence of the traditional forms of protection of cultural heritage in Nigeria is in the Benin kingdom where age grade systems, underpinned by a strong religious and cosmological system are the basis for the survival of the cultural landscapes.

In Uganda the heritage resources statutes have provisions for both formal legislation and traditional heritage management systems (Kamuhangire 2005). For example Statutes 7 and 8 of 1993 provide the legal framework for the restoration of important traditional institutions and practices. The Statutes also provide for the restoration of traditional rulers and the return of their assets and properties, including royal tombs and palaces which were confiscated by the Government of Milton Obote in 1967.

Legislation passed in Zimbabwe during the colonial era denied local people the right to their cultural sites. These were declared National Monuments and placed under the Historical Monuments Commission and the National Museums and Monuments. Despite the attainment of independence, however, the National Museums and Monuments of Zimbabwe Act did not correct this anomaly and provide for traditional management of heritage. Instead some provisions for traditional management are made in the Traditional Leaders Act and the Communal Areas Management Programmes.

The NHRA of South African legislation recognizes the role and importance of traditional leaders in the management of heritage and, as such, community-based systems, are incorporated in the law relating to cultural heritage. In this sense, South Africa is the exception as far as community-based management and participation are concerned.

What should be noted is that even in these cases however, the traditional management provisions are not as solid as those in the so-called formal legislation; in most cases these provisions are not made in the main legislation concerned with the protection of heritage resources, but are contained in the regulations that confer powers on the Minister responsible for culture or national heritage.

Agreements and memoranda of understanding

Most of the countries reviewed here now have legislation that allows the relevant ministry or heritage agencies and departments to enter into agreements or memoranda of understanding for specific aspects of the management of heritage. These may involve among other things issues of ownership, preservation and access to heritage resources. Management of heritage resources by way of agreements and memoranda of understanding enables private and local owners of heritage resources, and others who may have custody of the resources, to be involved in the management of the resources through a consensual and collaborative approach. It limits the necessity for the heritage authorities to rely on coercive management mechanisms, except as a last resort.

In Botswana, provisions are made for the Minister to enter into agreements with the owners of monuments. Section 9 provides that the Minister may, after consultation with the Commissioner, enter into a written agreement with the owner of any national monument, recent artefact, recent historic monument or protected heritage area, for its protection or preservation. Sub section (2) of Section 9 provides for the agreement on such matters as the maintenance of the national monument, recent artefact, recent historic monument or protected area; and the custody of the national monument, recent artefact, recent historic monument or protected area, and the duties of any person who may be employed in connection therewith.

In Kenya, Part VII Section 40 of the National Museums and Heritage Act of 2006 provides for agreements to be entered into by National Museums of Kenya and the owner of a monument for the

protection and preservation of a monument. Such an agreement made under this section may provide for all or any of the following matters: the maintenance of the monument; the custody of the monument and the duties of any person who may be employed in connection therewith; the occupation or use of the monument by the owner or otherwise; the restriction of the right of the owner or occupier to build or to do other acts or things on or near the site of the monument; the facilities of access to be permitted to the public or to any portion of the public and to persons deputed by the owner or the authority to inspect or to maintain the monument; the notice to be given to the authority in case the owner intends to offer the land on which the monument is situated for sale, lease or other disposal thereof, and the right to be reserved to the authority to have first refusal of any such sale, lease or other disposal; the payment of any expenses incurred by the owner or by the authority in connection with maintenance of the monument; the removal of the monument or any part thereof, subject to the provisions of the Act to a place of safe custody; any other matter connected with the protection or preservation of the monument which is a proper subject of agreement between the owner and the authority; the duration of the agreement, with provision for earlier termination thereof by any party thereto; and the procedure relating to the settlement of any dispute arising out of the agreement.

In Lesotho, the Historical Monuments, Relics, Antiques, Fauna and Flora Act of 1967, sub-section (c) of Section 4 provides that the Commission may purchase or otherwise acquire any such object or by agreement with the Government or any public body or with any private persons having the ownership or control of any such object and take such steps as may be practicable to preserve it.

Section 9 (1) of the Monuments Act of 1965 of Malawi provides for the Minister to enter into a written agreement with the owner of any protected monument or protected relic for the protection and preservation of such monument or relic. Agreements made under section 9 may provide for all or any of the following matters: the maintenance of such monument or relic; the custody of such monument or relic and the duties of any person who may be employed in connection therewith: the restriction of the owner's right to develop, alter, use, destroy, remove or deface any such monument or relic or to build on or near the site of such monument or relic: the facilities of access to be permitted to the public or to any portion of the public and to persons deputed by the owner, the Minister or a local authority to inspect or maintain such monument or relic; the notice to be given to the Minister in case the land

on which such monument or relic is situated is offered for sale by the owner: and the right to be reserved to the Government to purchase such land or any specified portions of such land at its market value; the payment of any expenses incurred by the owner or the Government or the local authority in connection with the protection and preservation of such monument or relic; the procedure relating to the settlement of any dispute arising out of the agreement; any matter connected with the preservation of such monument or relic which is the proper subject of agreement between the owner and the Minister; and the removal of, subject to this Act, of such monument or relic to a place of safe custody.

Paragraph (b) of sub-section (1) of Section 12 of the National Commission for Museums and Monuments Decree no. 77 of 1979 of Nigeria stipulates that the Commission may, by agreement with the owner of any antiquity, other than a monument, undertake its maintenance or any other measures which the Commission would have power to undertake if such antiquity were a national monument

In South Africa, provisions for heritage agreements are provided for under Section 42 of the National Heritage Resources Act (NHRA), 1999. It stipulates that-

- 1.a SAHRA, or a provincial heritage resources authority, may negotiate and agree with a provincial authority, local authority, conservation body, person or community for the execution of a heritage agreement to provide for the conservation, improvement or presentation of a clearly defined heritage resource: Provided that the consent of the owner of such resource must be given.
- 1.b Such a heritage agreement must be in the form of a binding contract.
2. A heritage agreement may include such terms and conditions as the parties think fit, including provision for public access, and provision for financial or other assistance from the heritage authority concerned.
3. Without limiting sub-section (2), a heritage agreement may be expressed to have effect in perpetuity or for any specified term, or to terminate upon the happening of a specific event.
- 4 A heritage agreement may, with the consent of the owner of the resource concerned, be varied or cancelled by agreement between the parties.
- 5 The consent of the owner of the resources concerned to the heritage agreement or any variation of the heritage agreement may be given, subject to the inclusion in heritage management of any additional provisions or modified provisions,

or to the deletion of such provision, as the owner giving the consent considers necessary.

- 6 Nothing in this Act requires a heritage resources authority to negotiate or agree with any person or authority to enter into or execute any heritage agreement.
- 7 A heritage agreement in respect of a place attached to the land is binding on the owner of the place, as at the date of execution of the agreement while the agreement remains in force.
- 8 The owner of a national heritage site, a provincial heritage site or a place listed in a heritage register may, by a heritage agreement entered into with the heritage resources authority or local authority responsible for the protection of such place, on any person or body approved by such authority, appoint the heritage resources authority or the local authority or the person or body concerned, the guardian of the place.

Heritage Agreements allow a heritage authority and the owner or the community to enter into a contract regarding how a heritage resource will be managed. The covenant system used in South Africa, as elsewhere, is felt to be particularly relevant in an African context. It is argued that Covenants have for a long time been used to bind communities or owners into a process of upkeep of historic buildings in return for the injection of capital expertise required to raise the state of conservation to an acceptable level. In Africa, the system can be used to recognize traditional practices which are not codified in law, but which nonetheless ensure the conservation of a heritage resource.

Section 3, sub-section (1) of the Historical Monuments Act, 1967 of Uganda stipulates that when the Minister has declared any object to be a protected object under the provisions of sub-section (1) of Section 2 of this Act, he may enter into a written agreement with the owner or any person beneficially entitled to the object for the protection thereof. Sub-section (2) of Section 3 stipulates that an agreement entered into under the provisions of the preceding sub-section may provide for all or any of the following matters: the maintenance of the object to be carried out by the Minister; the custody of the object; and the restriction of the owner's right or any person entitled thereto, to destroy, remove, alter or deface the object or build on or near the site of the object.

There is general support for processes which encourage agreements between government authorities, landowners and custodians about protection of heritage including clearance for development, management of areas where there are important sites, and access for traditional purposes.

The benefits of agreements are that they can cover a much wider range of issues than can be covered under the Act or heritage protection legislation. They can, for example, include a comprehensive approach to development in a large area.

By-laws, rules and regulations

The provision of allowing for the formulation of by-laws, rules and regulations allows the Minister to be able to make detailed rules governing the management of heritage resources, which cannot be made in the principal legislation. These are mechanisms which supplement the framework for the protection of the cultural heritage in most countries.

Section 15 of the Monuments and Relics Act, 1974 of Gambia provides for the Minister to make regulations generally for the better carrying into effect of the provisions of the Monuments and Relics Act. Provisions are made under Section 16, sub-section (1) for the Commission to make by-laws:

The access of the public to any monument, relics, ethnographic articles and other articles of archaeological, ethnographic, historical, or other scientific interest, which are the property of the owner and are under its control or for which it is trustee for the Government

- i) Fixing fees which shall be payable to the Commission for such access;
- ii) Safeguarding national monuments, ancient monuments, tablets, relics, ethnographic articles and other articles of archaeological, ethnographic, historical or other scientific interest from disfigurement, alteration, destruction or export;
- iii) Regulating the excavation of ancient workings and the removal of relics, ethnographic articles from ancient monuments or ancient workings; and promoting the exploration, investigation and research of relics; and
- iv) The loan and refund of archaeological material for exhibition in the museum.

However, sub-section (3) provides that such by-laws shall only come into effect after publication in the Gazette and approval by the Minister.

Part VI, Section 34 of the National Museums and Heritage Act 2006, provides for the Minister to make or authorize the National Museums Board to make by-laws for controlling access to protected areas, with or without payment, and the conduct therein of visitors thereto.

In Malawi, provisions are made under Section 23 of the Monuments Act of 1965 for the Minister to

make rules for the carrying out of the provisions of this Act. Such rules may provide for: anything which is required to be prescribed under the Act; regulating the access of members of the public to any protected monument or protected relic and prescribing access fees if any, for such access; safeguarding protected monuments and protected relics from disfigurement, alteration or destruction; and regulating the excavation of monuments and digging on search for relics.

In Mauritius, no provisions are made for by-laws. Nonetheless, provisions are made for the Minister responsible for culture to make regulations (Section 9, sub-section 1). Such regulations made under sub-section 1 provide for the levying of fees (see Section 9 sub-section 2)

Provision is made in Sections 29 and 30 of the Nigerian National Commission for Museums and Monuments Decree no 77 of 1979 on making regulations. Section 29 provides for the Commission to make regulations relating generally to the conditions of service of the employees of the Commission. Section 30 provides that the Commission, with the approval of the Federal Executive Council, may make regulations generally for the purposes of this Decree and the due administration thereof.

There are no provisions for by-laws in Seychelles. However, provisions are made for the Minister after consultation with the Board to make regulations (Section 10). Such regulations may provide for the regulation of the access of the public to any monument or relic which is the property of the Government or the Board or which is held or controlled by the Board with the agreement of the owner; prescribe fees which shall be payable for such access; safeguarding national monuments, ancient monuments, tablets and relics from disfigurement, alteration, destruction, damage or export; regulation of excavation of monuments; or prohibition or regulation of any specific act in or in respect of any monument.

Section 31 of the South African Heritage Resources Act 1999, allows a heritage authority to create protections for an area by means of regulations rather than by direct provisions under the Act. Provisions for by-laws are made in sub-section (1) of Section 54. It provides that the local authority with the approval of the provincial heritage resources can make by-laws. Paragraph (a) of the sub-section provides for by-laws regulating the admission of the public to any place protected under this Act to which the public is allowed access and which is under its control, and the fees payable for such admission. By-laws regulating the conditions of use of any place protected under the Act which is under the control of the heritage authority are provided

for in Paragraph (b). Paragraph (c) provides for by-laws for the protection and management of a protected area while Paragraph (d) provides for the protection and management of places in a heritage register, and Paragraph (e) provides for the protection and management of heritage areas. Provisions for by-laws providing incentives for the conservation of any place protected under this Act within its area of jurisdiction are made in Section F.

In Swaziland, Section 43 of the National Trust Commission Act, 1972 provides that the Commission after consultation with the Minister can make regulations not inconsistent with the Act.

Section 25 of the National Museum Act, 1979 of Tanzania states that the Minister may make rules for the better carrying into effect of the provisions of the Act. Such rules may provide for the regulation of the procedure and practice of the Advisory Council, the sale and exchange of monuments and the conduct of excavations. The rules made may also prescribe the powers and duties of Honorary Antiquities Wardens which may include powers and duties conferred or imposed by the Act on the Conservator other than those under Sections 2,8,13,14,15,17, 20 and 21.

Section 20 of the Ugandan Historical Monuments Act, 1967 provides that the Minister may by statutory instrument, make regulations:

- i) prescribing conditions relating to excavations under this Act;
- ii) prescribing conditions relating to any sale of a protected object;
- iii) regulating the right of access by the public to preserve or protected object; and
- iv) generally for better carrying into effect the object and purposes of this Act.

In Zambia, provisions for regulations are made under Section 49 of the National Heritage Conservation Commission Act No. 23 of 1989. Sub-section (1) of Section 49 stipulates that the Minister may upon the recommendations of the Commission:

- i) regulating the access of the public to any heritage which is the property of the Commission or which by agreement with the owner is under its control;
- ii) fixing fees payable to the Commission of admission to any heritage;
- iii) safe-guarding any heritage, national monument, tablet, or relic from disfigurement, alteration, destruction, unauthorized export or removal;
- iv) regulating the excavation of any ancient heritage and the removal, export or collection of any relic;
- v) regulating the conditions for the erection of any building or structure of any area of land declared to be a national monument; or

- vi) regulating the conditions of use by any person of any area of land which has been declared to be a national monument and which is under the control of the Commission; or
- vii) prohibiting or regulating any specified acts in or in respect of a heritage.

Sub-section (2) stipulates that any regulation may prescribe fines not exceeding ten thousand (10,000) kwacha for any contravention of, or non-compliance with the regulations.

Section 42 of the NMMZ Act 1972, Cap 313 provides that the Board of Trustees can make by-laws:

- i) Regulating the access of the public to museums, ancient monuments, national monuments, relics, specimens, models or displays which are owned or controlled by the Board and prescribing the fees payable by the public for such access;
- ii) Safeguarding
 - a) national monuments, ancient monuments or museums, models or displays owned or controlled by the Board, or
 - b) relics, specimens or the contents of the museums, models or displays referred to above; or
 - c) tablets or notices erected or displayed by the Board;
- iii) Regulating the possession of any relic;
- iv) Regulating the excavation of national monuments or ancient monuments and the removal of relics from national monuments, ancient monuments or ancient workings.

Sub section (2) provides that such by-laws may provide penalties for a contravention thereof. However, sub-section 3 stipulates that such by-laws shall be approved by the Minister and published in the Gazette before coming into effect.

Thus regulations and by laws can also provide flexibility on how the law can deal with special case scenarios.

Traditional culture/religion

As already noted above, most of the existing heritage legislation in English-speaking Africa continues to reflect its western colonial origin and, as such, traditional culture and religion are not catered for in the management of heritage and its protection. A few countries, however, have made provisions to cater for such situations in their legislation.

Section 36 of the South African National Heritage Resources Act, 1999 deals with 'burial grounds and graves'. The Act recognizes the strong attachment of most South African cultures to ancestral burial

places by providing a general protection for all graves older than sixty years. The Act also creates a system where consultation with descendants is required and agreement must be reached with them as to how the graves are to be treated in the course of any development that is likely to affect them. As Hall (2005) points out, the heritage authority can in effect act as an arbitrator in that it is required to issue a permit on the basis of the agreement reached. Agreement could, amongst other things, require a developer to move an aspect of a development away from a burial site, if that is possible, or to exhume and re-inter remains at its own costs. Of importance is the fact that provisions are made to recognize the graves of the victims of the Liberation struggle and other victims of conflict.

In Zambia and Nigeria as well as South Africa, the legislation provides for the protection of objects and places associated with traditional rituals and ceremonies. However, apart from South Africa, no provisions are made for the protection of the intangible traditional rituals themselves as part of heritage.

Inventories

The legislation of almost all countries spells out that the relevant heritage authority should compile a register or an inventory of all cultural heritages in the country. Only a few examples are therefore cited in this review.

Paragraph (h) of Section 7 of the Botswana legislation provides that among his/her duties, the Commissioner shall compile a register of all national monuments, recent historic monuments, recent artefacts, protected heritage areas and of such other monuments or relics as have been brought to his notice.

Paragraph (c) of sub-section (2) of Section 7 of the Gambian Monuments and Relics Act 1974 stipulates that the Commission may make a register of all national monuments and ancient workings such as relics, articles of archaeological, ethnographic, historical or other scientific interest, as it may have acquired or have been brought to its notice.

Sub-section (2) of Section 4 of the Lesotho legislation stipulates that the Commission can make a register of all the monuments, relics, antiquities, fauna, and flora proclaimed as natural and cultural heritage.

Section 30 of the South African Act provides for provincial heritage resources authorities to compile a heritage register listing those heritage resources in the province which it considers to be worthy of conservation in terms of the heritage

assessment criteria set out. Sub-section (1) of Section 39 provides for the inventory of the national estate. For the purposes of the consolidation and co-ordination of information on heritage resources, SAHRA must compile and maintain an inventory of the national estate, which must be in the form of a database of information on heritage resources which it considers to be worthy of conservation, including:

- a) all places and objects with which it and its predecessors have been involved;
- b) all places and objects protected through the publication of notices in the Gazette or Provincial gazette, whether in terms of this Act or provincial legislation;
- c) places and objects subject to general protections in terms of this Act or provincial legislation for the management of heritage resources; and
- d) any other place and object which it considers to be of interest, and for this purpose it must coordinate and may prescribe national standards for the recording of information by the provincial heritage authority.

Paragraph (d) of sub section (2) of Section 4 stipulates that the Board shall compile and keep a register of all national monuments and of any relics, objects and specimens that it has acquired or that have been brought to its notice. Paragraph (e) of sub-section 20 stipulates that these will be managed and catalogued according to international professional standards.

Sub-section (1) of Section 6 of the Seychelles legislation provides for the notification of the Board about the discovery of any ancient monument or relic. Sub-section (2) states that the Board shall have the right of option to acquire ownership of the ancient monument so discovered, and upon payment to the owner the sum of money agreed upon as fair and reasonable compensation.

The provision of a registrar or inventory ensures that heritage organizations have a basis for an audit of the cultural heritage in the country. It also provides the nation with planning tools by providing details on the provenance and categories of heritage in the country.

Incentives (such as tax breaks)

South Africa is the only state in English-speaking sub-Saharan Africa where legislation includes incentives for people involved in heritage conservation. Sub-section (1) of Section 43 provides that on advice from SAHRA the Minister, in concurrence with

the Minister of Finance, may publish regulations on financial incentives for the conservation of heritage resources which form part of the national estate, or otherwise promote the purpose of this Act. According to sub-section (2), the Minister for Culture and Education or a Local Authority may in planning schemes or in by-laws under this Act or by any other means provide incentives for the conservation of heritage resources as provided in sub-section (1).

Impact assessment prior to development

Botswana, Namibia and South Africa are the only sub-Saharan countries that have unambiguous provisions for impact assessments to be carried prior to the commencement of any major development project. However, for some countries such as Malawi, Zambia, Zimbabwe and Tanzania, provisions are to some extent implicit in the legislation. There are also other statutes and policy positions that are not part of the heritage legislation but may achieve similar ends if properly interpreted and used. This is in line with an increasing recognition in the world that all heritage resources are at risk from modern development. There is always a chance of possible loss, injury damage, etc (Darvill and Fulcon 1998).

In Botswana, a pre-development Archaeological Impact Assessment (AIA) study and an Environmental Impact Assessment (EIA) are compulsory for any persons wishing to undertake major development such as construction and excavation for the purposes of mineral exploration and prospecting, mining, laying of pipelines, construction of roads or dams, or the erection of any other structure, which will in any way disturb the earth's surface. Such provisions are made in Section 19 of the Monuments and Relics Act, 2001. Sub-section (3) provides that a report from the studies conducted shall be furnished to the Commissioner within 60 days of completion of both studies, together with a written application for the development of the area in which the studies have been conducted. Developments cannot begin until written permission by the Commissioner stipulating the conditions of the project has been issued. Sub-section (5) makes it an offence for a person who commences or undertakes developments contrary to the conditions stipulated on the permission, and upon conviction, such a person would be liable to a fine not exceeding P10 000 (Ten thousand pula) or to imprisonment for a term not exceeding one year, or to both.

In South Africa, provisions for impact assessments prior to developments are made in Section 38. A holistic approach that establishes clear connections between heritage and natural resources is provided for by the Act. The NHRA makes formal connections between the two existing systems of EIA and requires that heritage resources be taken into consideration by these two systems. NHRA also establishes an independent system of assessment for use only in situations where a proposed development is not covered by the provisions of environmental and mining legislation.

In Malawi, the Monuments Act, 1965 does not provide for impact assessments prior to any major developments. However, provisions are made in the legal instruments geared for the protection of the natural environment. The Environment Management Act, 1996, provides that the Minister may, on the recommendation of the Council, declare any area of Malawi, other than an area declared to be a wild reserve, forest reserve, game reserve, national park or monument under any written law, to be an environmental protection area.

The Antiquities Act of Tanzania to some extent provides for cultural impact assessments as part of the Environmental Impact Assessment. The only limitation, as Kamamba (2005) points out is that usually the teams involved in such an assessment do not include experts in cultural resources assessment. As a result of this, nothing of significance is reported. Kamamba (ibid.) further asserts that in the event that a report does include cultural resources, it does not always reach the relevant authorities.

Section 43 of the National Heritage Conservation Commission Act (no 23 of 1989) of Zambia states:

‘upon receipt of the report of heritage finds, the Commission shall order a suspension of the operations not in excess of 30 days to carry out EIA or Archaeological survey or recovery analysis of the area’.

The provisions are, however, somewhat vague. There is no explicit requirement for Archaeological Impact Assessment studies prior to development projects in Zimbabwe. However, the Zimbabwean legislation is implicitly strong in implying that damage to cultural heritage is a crime punishable by law. This implies the need to assess potential damage. In addition, although not part of the legislation as such, a general environmental policy document exists that requires the carrying out of environmental impact assessment prior to any development project. The fact still remains, however, that it is only Botswana, Namibia and South Africa

that have explicit legislation. Other countries appear to be contemplating taking this direction.

Ownership

In all the countries surveyed, the legislation assumes that the antiquities belong to the State but with provisions that, in some instances, the owners of such antiquities may be allowed to use them but in trust for the State. For example, in the Kenyan legislation Section 46 states that ‘All antiquities which are lying in or under the ground, or on the surface of any land already protected under any law as a monument or being objects of archaeological, palaeontological or cultural interest are discovered in a part of Kenya after the commencement of this Act, shall be the property of the Government’.

Section 47 continues: ‘A person shall, if so required in writing by The National Museums, within such period not being less than one month as may be specified by the notice, furnish the National Museums with full particulars of all objects in the person’s possession which he knows or has reason to believe to be antiquities or protected objects’.

In Botswana, Section 22 of their statute states: ‘Any object declared to be a natural and historical monument or relic or monument under the provisions of section 7 of the Bushman Relics Proclamation shall, unless the declaration is cancelled under section 10 (2) of this Act be deemed to be a national monument for the purposes of this Act’. This implicitly means that such items belong to the State.

Key issues

We can summarize the key issues emerging from the above overview and discussion as follows:

Other than in a few countries, heritage legislation in most of English-speaking Africa is still heavily reliant on colonial legislation.

In nearly all legislation, there is no recognition of traditional (African communities) management mechanisms.

Other than Zambia, Uganda, Nigeria and South Africa, countries do not recognize intangible heritage. These countries’ legislation provides for the protection of areas associated with traditional rituals and ceremonies. For example in Section 2 (xxi) of the South African legislation it is stated that:

‘living heritage’ means the intangible aspects of inherited culture, and may include

- a) cultural tradition;
- b) oral history;

- c) performance;
- d) ritual ;
- e) popular memory;
- f) skills and techniques;
- g) indigenous knowledge systems; and
- h) the holistic approach to nature, society and social relationships; (xxi);

Again, apart from South Africa law which recognizes burial and sites of conflict (struggle), legislation does not recognize sites of memory and is generally silent on places associated with independence struggles.

Legislation in all countries has provisions for agreements and memoranda of understanding between heritage institutions and third parties on the care and management of sites and monuments.

Nearly all the legislation has provisions for the making of by-laws that will strengthen the enforcement of the main Act.

All the countries recognize the need to have proper inventories of heritage resources in their jurisdiction.

Other than South Africa, the other countries do not offer incentives or tax breaks to people who are or who intend to maintain heritage resources.

The protection of landscapes is not included in most legislation. Where it is mentioned, it is with reference to their scenic beauty and not as part of an active cultural heritage and of identity creation within a community. For example, the Lesotho legislation quoted above describes landscape as ‘any area of land having a distinctive or beautiful scenery or geological formation, any area of land containing a rare or distinctive or beautiful flora or fauna’. Even in the South African legislation, where landscapes are mentioned, they are lumped together with nature (Section 3, sub-section 2(d) has ‘landscapes and natural features of cultural significance’).

A few countries such as South Africa, Mozambique and Namibia explicitly recognize maritime and other underwater heritage in their legislation.

A suggested alternative

In order for cultural heritage management to be effective in English-speaking Africa, legislation has to be passed that gives priority not only to community definitions of cultural heritage but also ensures the promotion and protection of the values, symbolism and social practices of communities. According to Davis (1999), such a process not only encourages the continuation of

traditions, beliefs and practices, but also facilitates a wider understanding of and respect for cultural heritage. Finally, if African governments wish to manage the wider cultural heritage that is valued by communities, then they will have to define this heritage from within the system of these communities. To do such requires a ‘recognition that the concept of cultural heritage can include all elements of life, not merely the built and material world’ (Turnpenny 2004: 303).

Discussion

In most of the heritage legislation there is no clear-cut provision for local communities to exercise any control over the process or to have responsibility for decisions relating to the protection of their significant heritage, nor any provision for a consultation on what is to be protected. In most cases it is the state which has the mechanism to manage and define the heritage. In some countries the mechanisms for managing heritage are fragmented and thus knowledge of other legislation is paramount in order to understand what exists in each country. The lack of clear definition of the respective roles and responsibilities of the States in regard to heritage protection leads to uncertainty and delays.

Nearly all legislation reviewed here focuses on the built historical environment and material culture and on the form and fabric of the material culture. There is no consideration on how this cultural heritage is expressed and represented by the various communities that created or live around this heritage. The Seychelles National Monuments Act of 1980, for example, was clearly meant to cater for the interest of academicians and antiquarians.

Another aspect of this legislation is the emphasis on the preservation of the physical environment. The legislation is concerned with defining a monument, site, relic, etc. There is no consideration of issues ‘beyond traditional characterizations of history, archaeology or architecture. There is an implicit assumption within the system that significance is inherent in the fabric of the place. This approach presumes that assessments of significance can or should be entirely detached from the communities in which features are located’ (Turnpenny 2004). Within the legislation, therefore, there is no framework that allows heritage managers to involve the communities in the identification or the management of the cultural heritage.

The idea that it is only the national heritage agency that should have powers to manage the

TABLE 1 **Seychelles Act**

In this Act, unless the context otherwise requires—
'ancient monument' means any building, ruin, pillar, statue, grave or other site or thing of a similar kind, or any remains thereof, which is known or believed to have been erected, constructed or used before 1st January, 1900;
«monument» means—
any ancient or national monument;
any area of land which is of archaeological or historical interest or which contains objects of such interest;
any old building or other structure;
any other object (whether natural or constructed by man) of aesthetic, archaeological, historic or scientific value or interest;
«relic» means—
any fossil of any kind;
any object of aesthetic, archaeological, historical or scientific value or interest;
any anthropological or archaeological contents of any monument.

country's heritage needs to be reviewed, given the fact that local communities have generally managed the heritage over many generations. The law must accommodate the fact that local communities and private individuals can manage their own heritage on behalf of the state. In many instances the heritage organization should act as a regulatory authority rather than an owner and provide expertise were necessary on how the heritage should be managed. Local communities may also have specific rights to cultural heritage e.g. sacred ceremonies through cultural connections, dependency on the heritage resources and occupancy (Gathercole & Lowenthal 1990).

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Most English-speaking sub-Saharan African countries provide heritage authorities with considerable powers over heritage; many provisions are similar, doubtless a product of a shared history and geographical proximity. However there are areas of marked difference in approach, most notably in countries that have recently rewritten or revised heritage legislation. Whilst powers over heritage are fairly strong and relatively unrestricted, generally heritage authorities lack many of the innovative measures that have in recent decades transformed the way state authorities manage heritage conservation in many parts of the world. At a time when there has been much innovation in the management of heritage resources Africa, by and large, has tended to stay with tried and tested methods of conservation rather than developing new measures specifically geared to its situation or adopting measures that have worked elsewhere.

[ANDREW HALL]

Powers and obligations in heritage legislation

Nevertheless there are a wide variety of ways in which the powers of the state and its ability directly to control heritage resources are constructed in different countries, and analysis of how these operate on the ground and the possibilities and problems they present is worthy of undertaking.

Intervention powers of the state

The primary methods by which state heritage authorities are given power to intervene in management of heritage resources is by institution of protective measures, taking control of property, usually by means of acquiring title thereto, or by instituting punitive measures. These matters are all topics for discussion elsewhere so are not dealt with at this juncture.

Very few heritage authorities possess other means of intervention in critical areas that plague the ability of the state to enforce conservation of heritage that is by and large not owned by it. Many of these relate to enforcement by means other than legal process, that is to say in ways that are more subtle, less costly and time-consuming than prosecution.

The fairly recent South African National Heritage Resources Act (1999) provides several such measures. Many of these are mechanisms of which the threat of use provides sufficient disincentive to uncooperative owners, to the extent that they are rarely actually carried out to a logical conclusion. As a general principle, the National Heritage Resources Act takes as a point of departure the idea that it is more positive to create mechanisms that are an incentive towards cooperation than to take the route of prosecution. The most important such measures are as reviewed below.

At many points in the Act, e.g. Section 30(11) (e), heritage authorities are provided with rights to order the cessation of work in instances where it believed that such work is in contravention of the provisions of the Act. The same clauses permits an authority to instruct the owner to make right the damage that has been caused and, in the event of lack of cooperation in this regard, to intervene by itself to complete such work and recover the costs from an owner. Another provision of the Act provides that where damage cannot be made right, e.g. in the case of demolition, a court may order that a sum assessed against the costs of making right illegal action be paid to the heritage authority.

Another intervention that works in conjunction with the power to order a work stoppage as set out above may technically be viewed as punitive, but the effect of the preparatory phase of its application in most instances ensures a rapid reversion to cooperation in situations where for whatever reason this has not been the case. This is the so called forfeiture clause, Section 51(14), which states that in the event of an accused being found guilty of an offence under the terms of the Act all equipment used in the commission of that offence may be forfeited to the heritage authority. The measure is based on the principle of asset forfeiture that was pioneered in legislation designed to combat organized crime. Its application in the heritage sector works along the lines that where a heritage authority becomes aware that the terms of the Act are being broken, as part of its intervention it records the equipment being used on the site, usually construction machinery. The implication of such an action is usually such that the owner of the equipment immediately withdraws it from the site in effect ensuring that a work stop order is unnecessary, or is complied with without debate.

Possibly the most important power of intervention afforded South Africa's heritage authorities is the ability to issue 'compulsory repair orders' under the terms of Section 45 of the Act. This measure is specifically designed to provide authorities with powers to combat the phenomenon of 'wilful neglect' that plagued the heritage sector under previous legislation. This is the situation when an owner, faced with refusal of consent to demolish a heritage resource, simply abandons it, leaving it deteriorate to a point where it cannot be salvaged. In terms of current provisions an authority may instruct the owner to take steps to ensure that the heritage is maintained or secured to a minimum standard and, if that is not done, to effect such measures itself and recover costs from the owner.

Further to the above, in an instance where an owner has succeed in illegally destroying a place with heritage value, Section 51(9) provides that a Minister on advice of a heritage authority may issue a 'no development order' that prevents development of the site for a period of up to ten years. As with the above measure, this one is designed to discourage those who wish to destroy heritage resources in order to derive economic benefits from the sites on which they are located.

Most other legislation in English-speaking Africa works from the perspective that the three basic interventions, protect, acquire and prosecute, together with the two duties on the public to notify discoveries and apply for consent to change use, are sufficient measures to maintain an adequate national heritage conservation system.

In Botswana Section 19(2) of the heritage legislation provides a limited right of seizure of ill-gotten gains or equipment used in an offence. This may only be undertaken by an arresting officer and the articles in question are seized as evidence rather than being forfeited.

In Malawi, under Section 11 of the national legislation, the Minister may, where it is anticipated that a monument or relic is about to be damaged, order that the relevant activity may not take place. Under the same section the Minister may also instruct an owner to take steps to preserve or protect a monument or relic and, if the steps ordered are not taken, may require others to do so and recover the costs from the owner. However, the effect of these measures is limited in that it only applies to owners with whom there is a prior agreement and terms of restriction applicable thereafter.

Compulsory acquisition and compensation

Most heritage legislation in English-speaking Africa provides for heritage conservation authorities to acquire ownership of heritage resources. These are all founded on the principle of reasonable compensation. However, there are two ways of accomplishing this.

Legislation either provides that for acquisition of heritage sites by the State to take place, it should be either on the basis of mutual agreement upon compensation to be paid or, alternatively, via a system of compulsory purchase where the state may take title to property without the agreement of the owner, but with just compensation being determined via legal mechanisms. In some instances the State may exercise either option and in most

the category of property it may acquire is restricted to those enjoying some form of formally instituted protection and/or to situations where there is a threat to the well-being of a site.

Without going into great detail, as with most countries, African states generally have constitutional guarantees concerning land rights and it is often not an easy matter to trespass on those via mechanisms other than mutual consent. This is particularly so in countries that during the colonial period saw an influx of settlers, the guarantee of whose land rights are often behind particularly strenuous land rights provisions in post-liberation constitutions. Similarly, the removal of traditional land rights of indigenous people during colonial times, usually without compensation, is another determinant of strict respect for such rights in post-colonial states.

South Africa is a case in point, but its heritage legislation has sought to get around this by borrowing the concept of the 'National Estate' from Australian heritage law and setting it up in such a way that the heritage value of a site is removed from land value and held by the State in trust for the people, being something that cannot be traded as part of a surface rights land transaction. That is to say, heritage value, being the property of the State is not sold along with the property to which it is attached. The concept draws heavily upon another pillar of the colonial state, also often provided for in post-colonial dispensations, being that of mineral rights which are also separated from title to land and are separately traded.

In Botswana, Section 8 of the National Monuments and Relics Act of 2001 provides for the acquisition of heritage resources by the Minister in consultation with the senior official responsible for heritage matters who may purchase a property that is a proclaimed monument, ancient working or archaeological or palaeontological artefact (relic). Section 9 (e) of the same Act provides that by agreement with an owner the State may acquire a right of first option of purchase national monuments. In Section 11 it goes on to say that where the State wishes to acquire a property with heritage value (a national monument, ancient monument, relic or ancient working) the price shall be mutually agreed to or, if there is failure to agree, the High Court shall determine fair compensation. This system is a hybrid of the systems of mutual agreement and expropriation, in that what is in effect expropriation may only take place after negotiation.

In Gambia, Section 11(2) of the Monuments and Relics Act provides for the Commission managing heritage resources to acquire ownership thereof on their discovery and compulsory notification thereof

by the owner. The requirement is that the owner be paid fair compensation which, if it cannot be mutually agreed upon, may be determined by a suitably 'qualified person' to be chosen by the Minister. This system is one that is similar to the hybrid used in Botswana, but is complicated by the fact that it is connected to required notification of discovery on the part of the owner. This, together with the fact the Minister ultimately has powers to expropriate through the appointment of a valuator of his choice, would seem to mitigate against discoverers of heritage of significant value declaring it to the State.

Kenya's National Museums and Heritage Act is interesting in that it connects issues of compensation to restriction of land rights and devaluation of property value due to application of the Act, prescribing that fair compensation must be paid in instances where the owner demands it. In such cases compensation does not include transfer of ownership. However, the provision is very limited, being applicable only to declared monuments and for use in instances where the heritage resource in question is 'in danger of being destroyed, injured or allowed to fall into decay'. In such an instance, what is termed 'compulsory purchase' is affected under the provisions of another body of legislation, in this case the Land Acquisition Act, a system which, as will be seen, is used by several other countries. The provision is further restricted via a provision that prevents compulsory purchase in instances where the site is used for religious observance and if there is in existence an authority that is responsible for the well-being of the monument, or where the owner is willing to constitute such an authority. Similar provisions exist in Section 28 for purchase of movable property that predates 1895.

In Malawi the powers of compulsory acquisition or purchase of 'protected monuments' are for use in very similar situations to those set out above for Kenya, but the right to acquire the property rests with the Minister responsible for land matters on advice of the Minister responsible for heritage. These powers are provided for under Section 12 of the Monuments Act of 1965. Whilst there is no mention of just compensation, this is presumably provided for in the terms of the Lands Acquisition Act and Land Acts which are cited as the mechanisms for compulsory acquisition. As regards protected movable heritage, the right of acquisition by the State is limited to instances where the rightful owner cannot be ascertained, in which case the 'relic' that is threatened may, if the Minister so desires, become the property of the State. Again in a similar vein to the Kenyan legislation, in Malawi property that is subject to an agreement concerning its care

and conservation and to which necessary access is guaranteed may not be the subject of a compulsory purchase.

Coming two years later, sub-section 1(2) of the Ugandan Historical Monuments Act seems to be based on the same model in that the Minister may 'for purposes of preservation of any object declared under this Act, request the Minister responsible for land matters to acquire ... any land which appears to the Minister to be required for the purposes of preserving or affording access to the object.' Once again, the Land Acquisition Act is used as the mechanism for such alienation. Section 12 provides that whilst movable artefacts found on protected sites are forfeit to the State for deposition in a museum, the owner of the site is 'entitled to a reasonable compensation'.

In Tanzania, the Antiquities Act of 1979 also provides for the Minister to acquire any monument or conservation area via means of the Land Acquisition Act, which presumably provides for a system of fair compensation of the owner. In terms of Section 6 he may acquire any monument in this way. Interestingly, in Section 7 roles are reversed and an owner who, due to its status under the Act, has been refused a licence to do with his property as he wishes may require the Minister either to purchase the land or permit the activities for which consent has been refused. It is a somewhat unusual check and balance system which, on the one hand, prevents severe restriction of owners' rights, but on the other, provides the uncooperative owner no other recourse than loss of property. In terms of Section 20, as will be seen also is the case in Sudan, valuation of the property excludes the value of the heritage thereon, but in this instance subject to the owner not having paid for that value when the property was acquired.

Zimbabwe's National Museums and Monuments Act of 1972, Section 24, stipulates that the Board of Trustees of the national heritage institution may acquire a national monument or relic located on a piece of land via a 'mutually agreed settlement with the landowner'. If agreement cannot be reached the Board may apply to the President for authority compulsorily to acquire a monument or relic. There is no basis set out for the reasonable compensation to be determined in such an instance.

Section 3(2)(a) of Nigeria's National Commission for Museums & Monuments Decree of 1979 provides the Commission with very broad powers to acquire and dispose of any interests in land and other property without restriction or condition, but also without any powers of compulsory acquisition or expropriation.

In South Africa, the system for compulsory acquisition is provided for in Section 46 of the National Heritage Resources Act and is like the Nigerian provision of similarly wide scope. It stipulates that the Minister may on the advice of the heritage authority and after consultation with the Minister of Finance either purchase or expropriate a property if he deems it to be in the public interest and the reason has to do with public use thereof. In the event that it is an expropriation, this must be carried out under the terms of the Expropriation Act.

Swaziland is another country in English-speaking Africa that specifically provides for expropriation. This is not as clearly set out in the National Trust Commission Act as in South Africa's National Heritage Resources Act: the precise mechanism for expropriation is not set. It is, however, presumed that the effect would be the same. The provision is also narrower in that it may be applied only to proclaimed national monuments and/or for purposes of provision of access thereto or securing a site. The South African mechanism is wider in that it does not require that the site to be expropriated enjoy a particular, formal protective status. This determines that the measure could, for example, be used for sites that enjoy general protection, without need for proclamation, e.g. under the South African legislation archaeological sites that are perhaps mistreated by a land owner, or ancestral graves to which a land owner denies access to descendants of those buried could be expropriated.

Ethiopia too has a mechanism for forced transfer of ownership in its proclamation on heritage matters. This concerns both movable and immovable heritage. In this instance Section 12 of the Proclamation provides an instrument for 'nationalization' in cases where it is considered that the antiquity is not being properly cared for or is subject to 'spoilage' (presumably wilful neglect) or misuse. In the case of movable heritage an artefact may be nationalized if it is considered that it is best housed in a museum. Only items being used for religious purposes are exempt. It is only in the case of an artefact being moved to a museum that there is provision for 'payment of appropriate compensation', but the legislation is silent on who determines what is 'appropriate'.

Whilst very differently constructed, heritage legislation in the Sudan effectively nationalized much of the national heritage through a provision (Section 6) stating that all movable and immovable heritage that existed prior to 1 January 1921 is the property of the State unless the Government disclaims ownership. Section 7 of the Antiquities Ordinance further provides for the Government to acquire any historical site and any right of way or means of access

thereto provided that compensation is set in terms of the Land Acquisition Ordinance and subject to the value of the antiquities on the site not being a factor in determination of the value of the property

Section 47.1 of the *Zambian Heritage Conservation Commission Act of 1989* only provides for the Heritage Commission to acquire ownership of movable relics. This is by payment of an agreed sum, failing which two arbitrators must be appointed under the terms of the *Arbitration Act*. The preceding section provides that where a relic has no owner (presumably where it is an archaeological artefact) and is removed by the Commission from the land on which it is found, the landowner may only be compensated for the temporary loss of use of the land and damage caused to it during the duration and process of extraction.

The provisions applying in the Seychelles are similar to Zambia in that Section 6 of the *National Monuments Act of 1980* requires that where a price cannot be agreed upon the matter is referred to arbitration. As with the Gambia it is required that, upon discovery of a 'relic or ancient monument', the owner must report the matter to the authorities who then have six months to determine whether they wish to acquire such property.

In general, one of the advantages of a system that provides for compulsory purchase, expropriation or nationalization over one that only requires mutual agreement is that the persuasive threat of loss of title to property can be used to positive effect without the land actually having to be purchased by the State. On most occasions it is likely that the threat of expropriation will prove sufficient to assure the cooperation of a landowner who would otherwise not value the heritage resources of which he/she is custodian. Unfortunately, in many of the instances cited limitations on ability to compel transfer of land ownership to the State does not enable such a mechanism to be used as an effective means of ensuring compliance with other less intrusive provisions of heritage laws.

Providing a Minister or heritage authority with powers to negotiate purchase is also important. This is an ability that few nations in English-speaking Africa possess. Compulsion is not usually the best way to set about heritage conservation, and negotiation of a deal to purchase land or an artefact in situations where the owner is a law abiding citizen is more likely to create a positive environment for a national heritage conservation programme than a more coercive measure associated with expropriation, nationalization or compulsory purchase. Even in situations where a Land Acquisition or Expropriation Act provides for

negotiation as a first recourse, the fact that they are associated with an element of compulsive transfer of title mitigates against their effectiveness as a tool for positive negotiation. It is nevertheless understood that in most instances the use of a formal legal framework for determining reasonable land value rather than negotiation is probably associated with the level of resources available to the State and, in particular, African heritage authorities.

Power to carry out traditional rites, rituals and sanctions

Provisions applicable to this issue are not always obviously suited to the purpose or framed in such a way that they are easily recognizable as being appropriate. In this regard, ability to carry out a ritual such as showing respect for ancestors may be as simple as ensuring that there are rights of access to burial sites that are located on private land. In the case of more elaborate rituals and ceremonies more complex measures may be needed.

Most legislation does provide in some measure for community access or for the State to facilitate access either to the site of the place of ritual itself, or the creation of rights of way over intervening areas of land. This is, for example, the case in the Seychelles where there are various rights of public access to national monuments, but only in the case of those owned by the State. In Zimbabwe one of the bases upon which the President may determine whether or not to authorize acquisition of a monument is on the basis of restriction of access by the owner. In Swaziland land may specifically be acquired for the purpose of providing access to a monument or access to it across adjacent land. In South Africa it is specifically stipulated that the management and promotion of heritage resources shall include the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance, putting access firmly into the realm of cultural rights. Heritage authorities are also required to assist communities to gain 'reasonable access' to heritage resources through negotiation with an owner, conclusion of a heritage agreement that sets out the terms of access, or in the last resort by referring the matter to a political authority. In Ghana access to the monuments is a right of all members of the public within set hours.

The association of intangible heritage with ritual and ceremony and in general the practice of traditions is perhaps the most important means of protecting

rituals, although it does not necessarily imply a right to practice a tradition. More often than not sites where such traditions are currently being practiced are protected more as a means of recognizing the significance of a place than as a means of ensuring a right to conduct a ceremony, collect medicinal plants or whatever the case may be. The mere act of protection does not of necessity guarantee access for perpetuation of such rites and given the importance of intangible cultural heritage in Africa it is perhaps surprising that this should be the case.

South Africa's National Heritage Resources Act of 1999, being among the most recent heritage legislation in Africa, is also the only body of legislation that specifically mentions intangible heritage which, for the purposes of the Act, is defined as 'living heritage'. In specific terms this recognition does not go much beyond the stipulation that care for this aspect of heritage is a legitimate area of activity for heritage authorities, that it is the duty of such authorities to identify them, and that sites associated therewith are part of the national estate.

Zambian heritage legislation deals with aspects of the matter, taking a very broad approach by defining 'ancient heritage' as being amongst other things 'any site for holding council, any cult site or any place where objects were thrown for purposes of magic, any well, spring or other place with which archaeological finds, tradition, belief, legends or customs are associated.'

Ugandan legislation, which dates from 1967, refers several times to objects of 'ethnographic' or 'traditional interest', which appears to allow some room given the age of the legislation for interpretation of meaning to include intangible heritage. Nigeria's Decree from twelve years later, well after independence, only uses the words 'traditional' and 'ceremony' once in the same sentence, but significantly in connection with artefacts that might be used in such contexts within the definition of 'antiquity'. Interestingly, the schedule of monuments attached to Lesotho's Act lists the famous mountain refuge and a national shrine of the Basotho people in the following terms:

'Thaba-Bosiu Fortress, Maseru District, taking into due cognizance the full rights and traditions of the Basotho chiefs and people.'

The definition of the attributes of a monument in terms of Lesotho's legislation does not specifically refer to places where people exercise intangible values such as 'rights and traditions'. In this case declaration as a monument (along with the system of application for consent to destroy, alter, remove, etc. that go therewith) is still relevant as a primary means of conservation and management of

intangible heritage. As with most legislation, under the Lesotho Act, monuments may, amongst other things, have historical or archaeological attributes and presumably, in the case of Thaba-Bosiu, proclamation as a monument could be justified on one or both of those grounds even if there are other more important attributes that it is thought necessary to mention in the schedule of declaration. Most sites that have intangible value can probably be treated in similar fashion, using other properties that the legislation provides to effect protection and recognition. Whilst it is submitted that it would be far better to mention specifically intangible heritage as an area of specific concern, it is submitted that most English-speaking state legislation in Africa does permit heritage authorities to provide some form of protection to most sites that have intangible heritage value.

Perhaps what is of most concern is that in the majority of countries protective measures are limited to the category of 'monument', that is a site that in most instances requires a conscious act of protection (e.g. publication of a notice) and has the force of a permit system behind it as the basis for management. Most countries also have blanket or general protections, usually only for archaeological sites, the basis of which is also a permit system. These methods of protection are not necessarily the best way to protect heritage resources that are of an intangible nature, and measures that provide for a specific and appropriate protective framework to be set out in regulations, such as the provision for Heritage Areas included in the South African legislation, are in many cases better for dealing with such situations. In similar vein, the same legislation provides for Heritage Agreements, a measure based on the 'covenant' system used in other parts of the world, that allow for agreements between individuals or a community on the one hand and a heritage authority on the other. These are very well suited to situations pertaining to intangible heritage in that they can be used in a very personal way, allowing a community to agree on how it will treat a site that has specific value to it in terms of its rituals, ceremonies and rites, and may include an undertaking on both parties to take steps that actively encourage the continuation of a traditional practice.

These Agreements and the provisions for Heritage Areas are also very useful methods of giving recognition to traditional systems of protection contained in traditional land management practice or unwritten indigenous law, which are often a vital ingredient in ensuring that sites with intangible value have survived to the present day.

In Nigeria, the decree governing heritage matters provides that agreements may be entered into concerning how an owner is to maintain ‘antiquities’ which may be a monument or an artefact. The provisions of the decree are much broader, but also limited to monuments. Agreements may be entered into with owners or others and pertain to maintenance, custody, use, rights, alternation, protection and conservation, to name those provisions that are appropriate to this context. Whilst it is probable that the intention of the drafters of the Nigeria legislation was not to cover intangible heritage issues, the provisions nevertheless contain useful mechanisms for addressing this aspect of heritage conservation.

An area of international heritage and environmental conservation law that holds out much hope for the protection of sites associated with traditional rites and rituals, but is not available in most English-speaking African countries, is the ability to require that impact be assessed in advance of commencement of a development that is a potential threat to a heritage resource. In the case of sites that have intangible value, a measure of this nature is particularly important because to outsiders the value of site is not usually obviously self evident on the ground. Usually it is only the local people who use the site for a particular ritual or ceremony that will know the value of the site.

Such sites are hence by their very nature prone to inadvertent damage by outside developers.

A provision for impact assessment is useful in such instances because it obliges any person wishing to undertake major development to investigate the existence of heritage amongst the other values of a site. Such an investigation if properly conducted should reveal the existence of intangible values and warn inappropriate development off before damage occurs. Similarly, measures applying to public consultation on heritage matters, discussed at the end of this chapter, are also an important tool in the protection of intangible heritage.

In English-speaking Africa impact assessment measures exist in only a few countries. In South Africa’s National Heritage Resources Act what the provisions of Section 38 provide for in the primary instance is that heritage resources be investigated as a component of the national system for Environmental Impact Assessment. This requires developers to assess impacts on natural resources and issues of pollution, etc. It also makes heritage authorities in South Africa’s provinces bodies to which Environmental Impact Assessments (EIAs) have to be referred for comment before their recommendations are endorsed or approved by environmental agencies. In the second instance, where the national system does not require

an EIA but it is considered necessary that heritage resources be assessed, there is a separate requirement for a Heritage Impact Assessment that is adjudicated upon by heritage authorities.

Other countries in which law has provided for impact assessment include Botswana and Namibia. Whereas in Botswana impact assessment is specifically provided for as part of the heritage legislation, in Kenya this is part of general environmental impact assessment requirements, which include the assessment of the cultural impact of a development activity. More broadly based impact assessment, unlike impact assessment targeted at heritage resources, is likely not to capture the full extent of impacts on heritage.

Another important issue, specifically associated with the issues addressed by this section, relate to restitution of cultural property, specifically artefacts with associated rituals, ceremonies and other traditional and religious practices. During the colonial period, many such artefacts were removed to museums and universities often outside the country, usually to the colonial metropole, but also to institutions established in the former colony itself. Few countries have provisions giving heritage authorities rights to negotiate return of such property, Ethiopia being a notable exception where the Minister is obliged to take up such issues. In this regard, the problems associated with implementation of international conventions governing restitution of artefacts held in countries other than that of their origin is well known and is primarily dealt with under provisions of international law. However, the issue of internal restitution is something that can and should be dealt with under national heritage legislation.

As far as can be ascertained, without a study of museological legislation also being conducted, South Africa is the only English-speaking African country that has a provision of this nature. Section 41 of the Heritage Resources Act provides that when an artefact lodged in a publicly funded institution is claimed by a community, the institution concerned is obliged to enter into negotiations. In the event that agreement cannot be reached the Minister is ultimately obliged to rule on the matter, giving due consideration to the conservation of the artefact and its safety and security, and is obliged to do so in a spirit of compromise. Such a compromise being for example restitution of part of a collection, or access to a certain artefact for certain ritual uses on specific ceremonial days.

In conclusion, whilst there is a desire to accommodate traditional rites, rituals and sanctions within the framework of heritage conservation,

and much discussion as to how to accommodate such provisions in laws, the rights or powers under discussion are not generally mentioned in English language heritage law in Africa. If anything, because of the colonial legacy and the sanctity of land rights, many heritage laws in fact restrict ability to practice such traditions at protected sites. A case in point is Zimbabwe (Ndoro 2001; Pwiti 1996; Pwiti & Mvenge 1996) and is also reflected in the case of Benin City, Nigeria where it is said that a bill designed to protect the remnant city walls, said to be a mystical site, 'almost totally alienates the community for management and ownership of its material heritage' (Eboime 2005: 11)

Right of use and control of use

In general, as the examples cited below illustrate, use of heritage resources and the control thereof rests with the relevant Minister of Government and the heritage authorities under him/her. In virtually all countries, heritage authorities, whether in the person of the Minister, a senior manager in the public service, a board with powers to act independently, or combinations of the above acting in concert or in consultation with one another, have powers to restrict or provide access to heritage sites and generally to control their use.

In Gambia, a fairly typical provision in Section 7(1) (e) provides for the Monuments and Relics Commission to assume control over any heritage resource if requested by the owner and thereafter to act as trustee. In the case of Botswana, the Minister has a right to purchase movable and immovable heritage after consultation with the Commissioner of Monuments, a senior civil servant. In Tanzania such right rests solely with the Minister.

There are some exceptions, of which Mauritius is particularly worthy of note. Its National Trust Act states in Section 5 that, if a national monument is privately owned at the time of declaration, it shall remain so. The effect of this measure is to prevent the national authority from taking control of, and directly managing, heritage resources. In order to get around this, the Government of Mauritius has on two occasions now introduced legislation to create separate heritage institutions to manage important sites on behalf of the nation, the first being for the Aapravasi Ghat World Heritage Site and the second for LeMorne de Brabant, a site that has recently been nominated for the same status.

The Mauritian method of handling ownership of heritage sites raises an interesting issue. The world

over there is a debate around the ethics of permitting heritage conservation authorities to own and occupy or otherwise control property which it also protects. In many places it is considered best practice that heritage sites which are held in trust for the public in order for them to be adequately conserved and/or to be open for public access should be managed by a separate authority, often a museum service. In some instances a separate heritage authority has been established for that purpose.

The reason for this is that there is a potential conflict of interest in situations that allow a heritage authority both to manage a property and determine how it should be conserved. Can authorities with such a dual role be objective in considering what is permissible in terms of management and conservation status of properties that they both own and use? It is not clear how a heritage authority that is required to grant consent for maintenance measures or alteration of a certain category of protected site should behave in a situation where it is the owner of such a site. Clearly it is not ethical for it stand in judgement of its own proposed actions or to issue a permit to itself.

Fundamentally, the easiest solution to this problem is separation of the function of land ownership from that of regulation of heritage resources, but on a continent where both financial and professional resources are scarce this is not always possible. That said, there is a need for thought on how best to ameliorate the potential conflict inherent in such a situation. Unfortunately, it does not appear that this has been the case in the body of English-language African heritage conservation law and there is clearly a need to address situations where a heritage authority acts without independent adjudication of the course of action it wishes to take concerning sites under its care.

Restrictions on disposal

In most countries there are restrictions on disposal of heritage properties owned by the heritage authority. In some cases these usually also apply to heritage sites in private ownership. Generally, the requirement is that the Minister responsible for heritage matters be informed of intention to alienate property. Zambia is a typical example where the consent of the Minister is required before the Heritage Commission can dispose of property or encumber it with a mortgage or by other means. A very similar provision applies in Swaziland.

In Nigeria it is the Commission responsible for heritage that has unfettered powers to dispose of property. By contrast in Zimbabwe, where

the Museums and Monuments Board has similar powers, these are tempered by requirements that the Board apply its mind to the reasons for disposal. It is stipulated that such property must either be 'supernumerary to requirements', not of sufficient importance to retain, or is damaged beyond repair.

As regards property in private hands the requirements are usually only for purposes of information and make sense in that they enable heritage authorities to keep track of ownership of heritage resources. Zambia is a fairly typical example with a simple requirement that the Heritage Commission be provided with the name and contact details of the new owner. The Ugandan provision goes a little further. Section 13(1) of the legislation requires that the Minister on advice of an advisory panel must issue a licence to anyone wishing to sell a protected object, and 13(2) permits him to set conditions of sale. In this case, the provisions only apply to movable heritage and provide a useful control over sale for export.

The system set out in section 10 of the Ethiopian Antiquities Proclamation is interesting in that it requires not only that the Minister be advised, but that he consent. This measure goes further than the Ugandan law in that the Minister may presumably refuse to allow a transfer of ownership.

Obligation to protect heritage

The obligation to protect the heritage is implicit in all the legislation in English-speaking Africa, but how this is achieved varies from state to state and is once again probably dependent upon the ability of the state to apply conditions to property ownership. In most instances legislation does not go beyond prohibitions on actions that are potentially damaging to heritage and hence seldom requires positive conservation action on the part of the custodian.

In South Africa it is difficult for a heritage authority to require an owner adequately to manage property and the legislation instead focuses on the requirement that the state set an example in the maintenance of its own heritage properties. A large part of Section 9 of the National Heritage Resources Act deals with the setting of minimum standards for maintenance of properties with heritage status that are owned by Public Works Departments. The legislation of other countries is remarkably silent on the requirements of the state to maintain its properties, but many of the provisions cited below are presumed to apply equally to state and private property, although it is generally the case that unless there are specific provisions or mention of state responsibility it is difficult for one

organ of state, in this case the heritage authority, to enforce its standards on another.

Other than for the provisions discussed elsewhere in this chapter, South African authorities may also intervene in situations where deliberate neglect of a site is used as a ploy to secure its destruction. There are no provisions that require maintenance on the part of a private owner. The provincial legislation for KwaZulu-Natal Province, however, has some innovative ways of getting around its inability to enforce standards of conservation on private owners. In this regard Section 8(30) of the KwaZulu-Natal Heritage Act no. 10 of 1997 requires the provincial heritage authority to maintain a store of restoration materials. These are collected as a condition of demolition permits and then provided at low cost to those working on restoration projects. In Section 10(a) it also provides that the provincial Minister may expropriate a property if it is felt that it 'is neglected to the extent that it will lose its potential for conservation.' One of the intentions of this clause is to provide for situations where owners do not have the means to maintain valuable properties.

Nigeria is another country where there is no provision for an owner to be required to care for heritage property, but Section 3(2)(b) of the Decree governing heritage gives the Commission responsible for heritage matters a right to take its own steps to maintain heritage, provided this has the consent of the owner. Botswana and Kenya have similar provisions that allow the Minister to enter into agreements with owners concerning the maintenance of property.

Ethiopia's proclamation has some of the most far-reaching provisions of English-language heritage law on the continent. Section 5 states that it is a duty of an owner to 'preserve, repair and restore' an antiquity (movable and immovable heritage) and that there is an obligation to observe regulations and directives for the proper handling and use of antiquities. Section 6 goes further, placing a similar onus on users of property which they do not own, and Section 7 states that approval is required for actions related to conservation and that they should be carried out at cost to the owner, although where it is beyond his/her means the State may assist. Section 9 allows the Minister to issue directives regarding use of antiquities and specifically allows him to impose restriction on use for 'economic purposes'. As mentioned elsewhere, in Ethiopia failure to maintain a heritage property presents grounds for its nationalization.

In Zambia the heritage authority may require an owner to take 'reasonable steps' to maintain heritage property.

Obligation to report heritage finds

This is one area where almost all legislation in English-speaking Africa places an obligation on the public. Most of these provisions appear to be designed specifically, though not exclusively, for application with regard to discovery of archaeological or palaeontological material and sites. Generally, an expedition to survey collect and excavate archaeological sites and material is restricted and requires a permit. Hence provisions requiring notification of finds applies to accidental finds usually by an owner or user of a site.

The provisions of the Kenyan legislation are fairly typical in requiring the discoverer of a site or material to immediately report to and if necessary deliver material to National Museums. Zimbabwe, South Africa, Malawi and Nigeria have similar provisions and the relevant section of Sudanese legislation provides for similar responsibilities, but goes further in placing the same requirement on traditional authorities who learn of such discoveries. In Uganda provisions are very similar, with an additional requirement in Section 10(2) of the Historical Monuments Act that the discoverer take reasonable steps to secure the protection of the heritage resource.

In Zambia, provisions require that work in the vicinity of a discovery cease for a period of thirty days after the reporting in order to allow authorities to examine the site.

As already mentioned, in the Gambia the obligation of reporting a discovery is coupled with the right of the heritage authority to take ownership thereof. Botswana and Seychelles have very similar provisions (Sections 11 and 6.1 respectively). In previous discussion of such measures it was mentioned that provisions of this nature militate against reporting on the part of the public. In this regard it is interesting to note the provisions of Ethiopian legislation which in Section 25 provide for those reporting ‘fortuitous’ discoveries to be rewarded for reporting them. The Ethiopian legislation goes further than others in that where the heritage authority does not react to a report on a find the discoverer is released from responsibility for the heritage resource.

Obligation for public participation

Very few states provide for an obligation on the part of heritage authorities to consult with owners and stakeholders. This is a gap that militates against

assuring the cooperation of communities and owners and their use as heritage watchdogs. It also makes it difficult to secure the voluntary assistance of those with specialist or local knowledge of heritage.

Some states provide for very basic processes of consultation, mostly in the form of permitting objection to the imposition of restraints on heritage resources. For example in Nigeria, Section 13(1) c) provides that an owner may object to a Government notice imposing protection on a property. However, it does not say how such an objection should be handled and it does not appear to constitute grounds for withdrawal of the notice, particularly considering that the notice is only served on the owner after its publication. Section 21 of Zimbabwe’s legislation goes a little further in requiring that notice of intent to protect a site be served at least a month in advance of publication. The Minister must also be provided with a copy of any objections along with other documents that might assist him in making a decision on whether or not to institute protection. In Swaziland objections are only permitted in the case of a prohibition on exports, with the Minister being required to consider whether such a prohibition warrants modification in light of an objection.

It should be noted that neither of the above provisions constitutes consultation with anyone other than the owner of the heritage resource in question and that the provisions are weak in the sense that they do not take into consideration the fact that whilst the right of owners are particularly important to consider, the owner is usually not the only person with an interest in the well-being of a particular heritage resource.

In this regard, the Botswana legislation, whilst also providing for similar objections on the part of an owner, goes further by specifically stating in several places that heritage is to be used for the benefit of the community, e.g. Sections 6(c), 11(3) and 12(2). In so doing it recognizes a broader scope of interested parties. This goes beyond the simple issue of the spirit of the legislation in that it also provides for interests broader than simply land ownership to establish rights. For example sections 12, 13 and 14 allow for any person with an interest in a heritage resource or requiring access thereto to have such a right considered by the High Court.

The South African legislation goes much further than others. Whilst owners have a right to be consulted upon any encumbrance placed on property and there are procedures set out for objections to be lodged and considered, Section 5(4) firmly establishes the rights of communities over heritage resources and their right to be consulted on heritage matters and to be involved in the

management of heritage resources. In most instances in which an owner has to be consulted there is a similar obligation to consult with a community. The provision for the establishment of heritage areas is typical in that Section 31(5) (a) states that the owner and community have to be consulted not just on the establishment of the heritage area, but also the restrictions that will apply within it.

Specific mechanisms are in place to identify communal association with heritage resources: heritage authorities are obliged under Section 25(1) (b) to register bodies that have an interest in a specific category of heritage or heritage that lies within a certain geographical area. It then obliges heritage authorities to keep such bodies informed of decisions on heritage resources in their areas of interest that are pending. Such groups and the general public also have a right to object to any action on the part of a heritage authority and, like owners, to appeal against its decisions. Section 6(3) also obliges a heritage authority to call for comment on principles or policies that it wishes to establish and to take these into consideration in finalizing such documents. Similar provisions apply to consultation processes around environmental impact assessments (Section 38. (3)(e).

Given the strong attachment of communities in Southern Africa to places of ancestral burial, provisions in South African legislation (Section 36) are particularly onerous when disturbance of a grave site is at issue. In such an instance the applicant is required not only to consult with a community that has a traditional attachment to such a site, but also to reach agreement with them. Similar provisions apply to discovery of graves in the course of work.

As already mentioned, Section 42 of the South African legislation provides for a system of heritage agreements. These are an important means of providing for a community not only to be consulted, but to exercise a collective responsibility for care of its heritage resources by, for example, committing to a particular course of action or provision of resources.

Presentation and information

In many countries, the law provides for the provision and presentation of information on protected heritage. This is generally achieved via the erection of plaques or information boards at sites.

In Botswana, Section 7(h) of the Monuments and Relics Act, provides a general clause applying

to all heritage resources whether protected or otherwise, that allows tablets to be erected to provide information ‘about events which have occurred at or near such places’. In Uganda, Lesotho, the Gambia and Seychelles legislation has very similar general provisions and in Zambia, in addition to these, Section (8) (3) (a) provides for the marking of monuments.

In some countries ability to provide information is restricted to specifically protected sites, for example in Malawi where Section 18 of the Monuments Act provides a Ministerial power to erect tablets at protected monuments or protected relics giving information ‘about historical events which have occurred at or near such monuments or relics’. Section 16 of Tanzania’s Antiquities Act is very similar, except that the ability to erect plaques on sites rests with local authorities.

Only Zimbabwe and South Africa have provisions for extensive dissemination of information. In Zimbabwe there is a useful and uncomplicated provision that exhorts the Museums and Monuments Board to maintain a ‘continuous flow of information to the public regarding the professional activities, programmes and projects of the organization’ and hence provides for dissemination of information via a variety of means.

South Africa has more elaborate stipulations regarding the provision of information. Section 44 of the National Heritage Resources Act provides for heritage resources authorities and local authorities to coordinate and promote the presentation and the use of places of cultural significance and heritage resources which form part of the national estate and for which they are responsible in terms of section 5 for public enjoyment, education, research and tourism, including erection of plaques and interpretive facilities, training and provision of guides, mounting of exhibitions, erection of memorials and any ‘other means necessary for the effective presentation of the national estate’.

Section 25(1) (a) creates an obligation for heritage authorities to disseminate ‘information, advice and assistance to enhance public sensitivity towards and awareness of the need for management of the national estate’. Further on, in Section 25(2) (b), there is a non-obligatory provision to publish or by other means distribute knowledge and information relating to the national estate. There is also an obligation on the national authority to maintain a specialist library for use by itself, provincial authorities and the public.

Whilst in most countries there are provisions that require a minimum distribution of information,

in most instances this is only made available in English. If the purpose of dissemination is to create public awareness, these measures fail in that there is little dissemination in the indigenous languages of the people. The exception in this regard is that Swahili is used in Tanzania and, in some cases, in Kenya and in Lesotho where it is specifically stated that explanatory plaques must use both English and Sesotho.

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An assessment of the legal frameworks in Africa shows that they are generally strong in terms of powers vested in authorities to protect and preserve cultural heritage. Generally, the laws make adequate provisions for the proper maintenance, management and conservation of the heritage as they forbid, and are strict on, the alteration, defacement, damage, degradation, destruction, or any other unauthorized infringement of monuments and sites without written consent. However, the laws also range from vagueness to precision in terms of mechanisms for enforcement, with the more recent statutes being more precise on procedures and practical steps. The most common legal sanctions against any violations of the heritage are fines and imprisonment or both.

[PAUL MUPIRA]

Implementation and enforcement of heritage laws

It is, however, argued that most of the protection given to heritage is negative as it relies on penalties rather than positive management or upkeep of sites and monument. Positive management includes setting up proper administrative structures, financing enforcement and systematic monitoring. Although some legislation stipulates mechanisms for providing these necessary management tools, generally very little has been achieved on the ground. Using legal frameworks from English-speaking countries this paper discusses the institutional arrangements, powers, incentives and penalties in implementation and enforcement.

Formal institutional arrangements for enforcement

The effective and efficient enforcement of legal provisions requires an institutional structure. The

nature of the institutions is influenced mainly by historical processes, and the economic and political set-up in different countries. In most African countries the management of heritage is the sole responsibility of central or local Government bodies. The commonest body is a Board appointed by a Minister. In other countries Ministers can appoint similar organs like an Agency, a Commission or a Council to oversee the implementation of the Act.

In a few countries (e.g. Ethiopia, Liberia, Malawi and Uganda) the systems are more centralized as the Minister does most of the work related to enforcement, ranging from declaration of monuments, issuing permits, drawing up of regulations to erecting information tablets. In such instances, as in Uganda and Malawi, the Minister may appoint an advisory body to give advice on heritage matters and help him/her implement the legal provisions. In either case the systems are unified, as the different functions are implemented by a single body. Such a unified system may be a very powerful political tool: heritage

matters can be presented with a cohesive voice and more money channelled towards fulfilling the legal mandate rather than maintaining the administration.

However, where the heritage institutions are just small departments in large ministries they can be a low priority for allocation of resources and undertaking of heritage activities as provided for in legislation. This is particularly so in centralized systems where the Minister wields most of the decision making powers and very often may take time to react due to other pressing national commitments.

Furthermore, advisory bodies tend to be ad hoc and may sometimes lack adequate or appropriate background on heritage management issues. In Uganda, for instance, the Minister may appoint an advisory panel which comprises a member nominated by the Trustees of the Museum, a member nominated by the Principal of Makerere University College, two members nominated by the Minister responsible for Mineral and Water Resources, a member nominated by the Minister responsible for Education, and a member nominated by the Minister responsible for Information, Broadcasting and Tourism. While it may be advantageous to have such broad-based advisory bodies it can also create tensions or conflicts. There are a variety of ways in which these people interact, but usually there are different aims, perceptions and priorities among the members who are essentially either politicians or heritage professionals. Where such an uneasy relationship exists, the balance of power is normally in favour of politicians who may ignore advice from heritage managers.

While most laws in English-speaking sub-Saharan Africa provide for the drawing up of special regulations and by-laws to regulate things like access to monuments and sites, safeguarding of national monuments and associated properties, excavations, etc, these control measures are usually non-existent in practice. Instead the most common regulations are in connection with other routine administrative issues such as leave, tenure of office of Board members, the rates for travel and subsistence allowances to be paid to members of the organization, promotional procedures, etc, that is, matters related to internal management issues rather than the regulation of external threats to heritage. In Zimbabwe, for example, while these internal regulations have constantly been reviewed, those dealing with external regulation are not well publicized.

The enforcement of the law could be strengthened to a great extent if institutions developed policies regulating aspects like community involvement and custodianship, excavation and documentation standards, restoration, alteration, restitution, etc. By-laws should ideally be developed together with

important stakeholders so that they are bound by them. To provide long-term protection for local rights, heritage conservation may entail harmonization of the heritage laws with local traditional regulations. For example, special regulations may be developed providing for the appointment of local leaders in charge of enforcing traditional rules as custodians.

The role of traditional institutions in enforcement

Today all over the world there is growing recognition of the important role played by traditional institutions in safeguarding heritage places. There is also greater appreciation of the effectiveness of institutional arrangements in place in different communities to deter would be offenders. It is generally agreed that these measures are usually better understood and respected than the formal legal mechanisms (Mupira 1995). Although legal frameworks in countries such as Botswana, Namibia and South Africa recognize community ownership of heritage places, generally for most English-speaking Africa, there are no explicit provisions in the heritage laws for traditional enforcement mechanisms in relation to prohibition, arrest, prosecution and imposition of fines. In Botswana, Tribal Land Boards should be consulted when relics are being removed from places. The Namibian law stipulates that management of places should be in conjunction with traditional authorities. Apart from these few references, the traditional institutions' powers thus remain informal and are operational only in community-based systems of heritage management and protection.

In countries like Zimbabwe, the powers of Chiefs to convene local courts and impose fines have recently been restored through the Traditional Leaders Act 1999. In line with these developments and with greater recognition of community ownership and stewardship, heritage laws in Africa should also vest enforcement and prosecution powers in the traditional institutions and courts respectively. Further, court procedures under traditional systems seem to be less prolonged than in the formal justice system; therefore cases are likely to be resolved reasonably faster. This ensures quick social learning and would-be offenders are likely to be dissuaded.

Powers of entry and arrest

In most countries the legal frameworks empower the management bodies to appoint officials with appropriate skills to look after relics, sites and

monuments. The laws of Botswana, Namibia, Uganda and South Africa provide for the appointment of Monuments or Heritage Inspectors. The mandates of the inspectors vary from country to country but their primary responsibilities include reporting, recording, protecting, preserving and maintaining heritage places.

In Botswana, South Africa and Namibia they also have powers to arrest, to enter properties where heritage places are located and to search without warrant for relics or antiquities. For example Section 50 (11) of the South African National Resources Act states that:

A heritage inspector may require any person who he or she has reason to believe has committed an offence in terms of this Act to supply his or her name and address and reasonable evidence of his or her identity, and may arrest a person who refuses to comply with those requirements.

The new Kenyan legislation gives the heritage warden the powers to arrest without a warrant. Similarly in Botswana, the Commissioner, every Inspector and every Custodian may arrest without warrant any offenders. The granting of arresting and investigative powers to inspectors may save time in finalizing cases, as police investigations in Africa can be hampered by a number of constraints and problems (such as bureaucracy, insufficient resources and corruption). This implies that inspectors require specific training in investigation techniques if they are to discharge this duty professionally and build up water-tight cases against offenders.

Granting access to inspectors to private properties has often posed problems. In Zimbabwe, for example, the law allows reasonable access, but archaeologists and inspectors have occasionally encountered difficulties, and in the 1980s and 1990s were often denied access to commercial farms owned by white farmers. The major problem related to the definition of reasonable access and the existing privacy laws which prohibit entry into a property without the consent of occupiers.

In order to avoid this problem some countries like Kenya, Mauritius and Swaziland make it an offence to obstruct any authorized person from carrying out inspections or maintenance or exercising any other powers vested in an authorized person by the Act. Thus in Kenya, according to Section 45 of the National Museums and Heritage Act, a person who 'obstructs the exercise by a heritage warden or duly authorized person' commits an offence and shall on conviction be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding twelve months or to both. In Mauritius any person who interferes with, hinders or obstructs any maintenance work or any officer in the exercise of his

powers commits an offence. Similarly in Swaziland obstruction of authorized officers in the execution of their functions or duties is a punishable offence.

In Nigeria, the power of entry upon properties is not restricted where there is reasonable suspicion that an offence related to the trafficking of movable cultural objects has been committed. In such cases the laws sanction entry, searches and arrests by authorized officers without a warrant. With the problem of illicit trafficking of relics and antiquities still prevalent, provisions for search without warrant are necessary. In Kenya section 59 of the Act provides that a police officer or heritage warden may:

- a) require any person whom the heritage warden has reason to believe has committed an offence ... to supply his name and address and reasonable evidence of his identity ... and may without warrant arrest a person who refuses to comply;
- b) at any time search any person or the premises occupied by any person whom he reasonably suspects of having acquired ownership or possession of a protected object, or of having bought or taken by way of exchange an antiquity.

In addition a customs officer may at times without warrant search anything intended to be removed from Kenya, or any person intending to leave Kenya, if he reasonably suspects a case of illicit trafficking.

Under Nigerian law (Section 22: 1 and 2):

1. Any police officer may at any time search without warrant any person or the property of any person he reasonably suspects of:
 - a) buying any antiquity while he is not an accredited agent; or
 - b) selling any antiquity to a person who is not an accredited agent and he may seize anything he reasonably suspects to be an antiquity together with any container in which it is kept.
2. Any officer of the Department of Customs and Excise may at any time search without warrant anything intended to be exported from Nigeria if he reasonably believes that the thing intended to be exported from Nigeria contains any antiquity.

In Botswana and Namibia, in addition to the appointment of inspectors into the Heritage Council or agency structures, any officer of the police or customs is deemed to be a Heritage Inspector. This arrangement is ideal, as it increases the number of people engaged in surveillance work of potential infringement and alleviates the policing problems often faced by heritage institutions. Generally heritage institutions are operating below the minimum

required professional capacity. Broadened policing arrangements are a deterrent measure and increase the likelihood of offenders being caught and punished. The involvement of the police services in heritage places inspection is also extremely important as they would be expected to have a good understanding of the law and investigative powers and skills.

However, such an enforcement arrangement may have its own problems if the implementation of the legal provisions is not well coordinated, and may result in unsynchronized actions. While customs officers may be effective in preventing the illegal import and export of relics or antiquities they cannot possibly carry out other enforcement tasks required of them in some laws, such as inspecting any protected heritage resource or work being done under permit. Similarly police services may not be adept at recognizing subtle infringements such as the removal of objects from sites, unless they are familiar with the heritage places. Instead of treating police and customs officers generally as inspectors, in countries such as Kenya and Nigeria they have more specific powers such as searching and arresting suspects without warrant where they believe somebody has committed an offence, especially with respect to movable objects. Synergy between the traditional law enforcement agents and heritage institutions can be achieved through close cooperation on implementation mechanisms.

Countries such as Botswana, Kenya, Swaziland and Tanzania also rely partly on Honorary Officers or Wardens and Custodians, paid or unpaid, for the purpose of assisting in the carrying out of the provisions of the Act, in particular in the prevention and detection of offences. Such mechanisms usually work very well in preventing infringement. Due to funding problems institutions should take up more unpaid honorary officers and custodians, particularly from communities living on or near heritage places. For this arrangement to work efficiently and effectively there is need to provide specific incentives for these unpaid honorary officers in the legislation or through regulations. Failure to make such provisions could lead to low commitment in monitoring breaches, especially where honorary officers lack special attachment or relationship to heritage places. The aspect of incentives is further discussed below.

Community and local authority enforcement

Only to a lesser extent does legislation vest enforcement powers in users and owners. In many countries, the general public's responsibility requires them to notify the discovery of relics, sites and monuments. In

Zimbabwe, the discovery of any ancient monument or relic 'shall be notified in writing to the Board without delay by: (a) the discoverer thereof, and (b) the owner or occupier of the land ... when the discovery comes to his notice'. The enforcement of this provision is very difficult as most heritage places are found in remote inaccessible areas, where it may be a bit unreasonable to expect the local communities to travel to the nearest heritage or Government office to make a report of discovery, given the travel, resource and other constraints which they face. Further the word 'discovery' sometimes does not apply or have meaning to the people who have had a long history of interaction with local heritage places and sacred sites. The obligation to report is therefore contested, especially when such places are traditionally regarded as private and sacred.

The alternative would be to mandate traditional institutions at village, ward, district and provincial levels to help compile lists of heritage places in their areas. After all, they are more familiar with their landscapes and know the locations of many sites, but do not report them for various reasons. The main reason for this is fear of alienation from and intrusion on their heritage places, which were typical practices of most colonial protection policies (see Ngoro and Pwiti 1999 and 2001). The general public's responsibility should lie not only in being compelled to report relics and monuments, but also playing a crucial role in the active management of the identified heritage places in their surroundings. In this context there is need for greater legal recognition of traditional knowledge and community stewardship, particularly where communities are directly associated with protected areas. In most cases, they are not only the rightful owners and users of the heritage resources, but also the traditional custodians who should be empowered to enforce both formal and informal laws, rules and regulations.

Some legal frameworks have taken steps to make the protection of heritage places a broader public responsibility. The South African legislation unequivocally acknowledges this broader responsibility. It states in the preamble that it seeks:

to introduce an integrated and interactive system for the management of the national heritage resources; to promote good Government at all levels, and empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations.

Section 51(6) of the same Act states that:

any person who believes that there has been an infringement of any provision of this Act, may lay a charge with the South African Police Services or notify a heritage resources authority.

Administration of the heritage in South Africa is at three levels: national, provincial and local. Namibian legislation stipulates that heritage places should be managed by the Heritage Council in conjunction with other Government departments, any person or traditional authorities. This is an appealing arrangement and augers well for the implementation of protective mechanisms. Reliance on formal structures is not always the best solution where the heritage is widely spread and the responsible institutions are often under-resourced to fulfil their management mandates. Such devolution of administrative mechanisms also allows the participation of local communities in the enforcement of the law.

The other way in which the implementation of the legislation has been devolved in Africa is to give enforcement powers to local authorities such as local Governments and municipalities. However, except for a few cases, most legal frameworks are silent on this important partnership. The best example of devolution to a local authority is perhaps in South Africa where the municipalities are given wide ranging enforcement powers almost on a par with those of the heritage agency, SAHRA, and other heritage authorities. The South African Act gives guidelines on how SAHRA and the local authority identified as competent to manage protected heritage should interact so as to facilitate synergy in implementation. In Malawi, every protected monument or protected relic should be maintained by the local authority within whose area of jurisdiction it is situated, unless the Minister directs otherwise. In Zimbabwe, municipalities are represented on national and local Boards of the National Museums and Monuments on an advisory basis. However, such an arrangement should be expanded so that the local authorities play a more active role in enforcement, as many sites lie within their jurisdiction. Integrated enforcement mechanisms are the best way forward to ensure sustainable conservation in an environment where heritage preservation is usually competing with other, wider, strategic local and national development needs.

Management agreements and guardianship

In several African countries such as Botswana, Kenya, Malawi, Namibia, South Africa, and Uganda, owners of the heritage places or relics may be involved in the protection and conservation of heritage places through formal management agreements. In South Africa such agreements are not only restricted to

owners of the heritage, but can also be signed with a provincial authority, local authority, conservation body, or community. These agreements usually provide for, among other things, maintenance, custody, the restriction of the owner's right to undertake certain activities that threaten the heritage, public or official access, use, presentation and financial obligations of the parties. With respect to financial obligations, some Acts specify that the heritage institution should give grants so that the owner carries out effective management or cover any expenses incurred in connection with management activities.

A related arrangement of guardianship exists in Kenya and South Africa. Section 40 (1) of the Kenyan National Museums and Monuments Act states:

The National Museums may enter into a written agreement with the owner of a monument and other person or persons for the protection or preservation of the monument.

Similarly in South Africa section 42(8) of the Act states that:

the owner of a national heritage site, a provincial heritage site or a place listed in a heritage register may, by a heritage agreement entered into with the heritage resources authority or local authority ... appoint the heritage resources authority or the local authority or the person or body concerned, the guardian of the place.

The purposes of guardianship are the same as that of the management agreements. Usually legislation forbids destruction but doesn't specify that anybody should maintain the sites and monuments. This arrangement is ideal, especially where the heritage is widely distributed and is located on private property. It ensures better protection and regular monitoring of activities around the heritage places. Management agreements and guardianship provide heritage institutions with options for more effective enforcement of the legal frameworks. The national agencies should nevertheless guarantee the effectiveness of these instruments by offering advice and instruction for protection of sites.

Prohibition or restriction or restoration order

The South African legislation provides for a compulsory repair order. Provisions for this are made under various sub-sections of Section 45. Restoration orders are issued when the heritage resources authority responsible for the protection of a heritage site considers that it has been allowed to fall into disrepair and is neglected to such an extent that it will lose its potential for conservation.

If the owner of the heritage place fails to comply with the terms of the order within a specified time, the authority serving the order may itself take such steps as may be necessary for the repair or maintenance of the heritage in question, and recover the cost from the owner. This provision ensures that heritage resources are taken care of by private individuals and relieves the heritage authority the burden of having to allocate extra public funds for the maintenance of private heritage resources.

Incentive mechanisms

The issue of incentives for the public to report relics and sites has already been alluded to and cannot be over-emphasized. In Ethiopia the Act empowers the Minister in Section 25.4 to:

ensure that the appropriate reward is granted to a person who has handed over an antiquity discovered fortuitously, such person shall be entitled to reimbursement, by the Ministry, of expenses, if any, incurred in the course of discharging his duties.

Similarly, in South Africa (Section 43):

the Minister, in concurrence with the Minister of Finance, may publish regulations on financial incentives for the conservation of heritage resources which form part of the national estate, or otherwise promote the purpose of this Act.

According to Section 10 of the Sudanese Heritage Act when the discovery of any antiquity by a person not holding a license has been reported:

the Commissioner may either (I) claim the antiquity on behalf of the Government; in which case he shall pay to the finder:

- a) if the antiquity be an article consisting of gold or silver or precious stones, the intrinsic value of the metal or precious stones without reference to the artistic or archaeological value of the article; and
- b) if the antiquity be any other article, the market value thereof, which value shall be assessed by the Commissioner, subject to the right of a finder who is not satisfied with such assessment to appeal within three months of the tender of the assessed value to a Judge of the High Court.

The risk with the latter arrangement is that it may encourage illicit search, excavation and dealing in relics. Nonetheless, carefully thought out incentives are necessary. In Zimbabwe experience shows that the public is a key player in reporting sites, but the system does not provide for any incentives such as reimbursement of transport costs.

Often people from rural areas have been taken aback on learning that the National Museums and Monuments of Zimbabwe cannot pay anything. This has discouraged poor peasants from making further contributions in reporting sites or bringing relics accidentally uncovered. It is therefore important for other heritage institutions to consider developing guidelines or regulations on incentives.

Penalties, fines and imprisonment

Across the continent, the legal frameworks define punishable offences and lay down the penalties for infringement. The nature and definition of offences vary from country to country although there are some common themes. The most commonly stated punishable offences are alteration, damage, defacement, destruction, removal and excavations without a permit and illegal export of heritage. The legislation is on the whole very strict with respect to these criminal offences. However, it is ironic that some governments find it impractical to implement the laws, as they are viewed as preventing any activity, especially in places where there is a dense concentration of sites and monuments. One such example is the Nyanga archaeological agricultural landscape in north-eastern Zimbabwe where the Historic Monuments Commission had this to say:

The position at Inyanga is that the whole area of 2000 square miles is dotted with ruins and pits, whilst every hillside is terraced Our problem is that every land owner who digs a foundation or ploughs a land is virtually destroying some relic or monument of the past. Therefore if the letter of the law is to be enforced it appears that no new township can be developed in the area It is felt that to prosecute in these cases would neither give the commission nor the preservation of our monuments any help, because no conviction would be justified (Cooke 1963).

The sad thing is that most Governments have supported other development, particularly economic, in preference to heritage preservation. As a consequence, legislation is sometimes selectively implemented focusing primarily on sites and monuments of national importance. In Zambia, for example, there is a prohibition or consent waiver for mining, engineering, or agricultural operations if land is owned under customary law, or a person is the holder of a valid mining licence or certificate of title and the ancient heritage or relic affected had not been known, or if the heritage had not been declared to be a national monument before

the performance of that Act. There is thus a need for consistency in the implementation of the law, as there is a collective relationship between the strictness of the law and its application.

The ultimate strength of legislation lies in prosecution. Cases of contravention are usually brought before a Magistrate's court for trial. Generally, there are no provisions in the laws for traditional courts in relation to the prosecution of criminal offences. There are different types of penalties that a Magistrate may impose. These range from fines or jail sentences (or both) to confiscation of equipment used in the destruction of the heritage, and to requiring the offender to pay for the damage and repairs.

While some countries have a blanket penalty for all offences, others have different penalties for specific infringements. The latter is more ideal as it takes into consideration the severity of the offences. Across the continent however, with the exception of Botswana, Namibia, Kenya and South Africa, it is noted that the fines imposed as penalties are hopelessly out of date and not in keeping with inflationary trends. Thus, heritage can be destroyed, damaged or altered, but the fine will be a paltry sum of money.

Heritage places or resources are irreplaceable, and each site contains a unique record of human experience. Therefore, any form of punishment should take into account the transcendent and irreplaceable value of cultural heritage resources. The best way to deal with the problem of low fines will be to provide for periodic update through regulation. This is what the South African legislation has done by stipulating in Section 51(4) that: 'The Minister may from time to time by regulation adjust the amounts ... in order to account for the effect of inflation'. The jail terms are on balance reasonable and could be deterrent if the option of a fine is not preferred. In most countries, the stipulated jail sentences do not exceed six months. The longest jail term is in Ethiopia where one could serve up to twenty years for destroying or damaging antiquities.

However, although the stipulated penalties may act as a deterrent, they will never be adequate when the non-pecuniary value of heritage is taken into account. In many countries prosecution is very rare partly because of lack of evidence and lax monitoring. You need to have sufficient evidence of the nature of violation and the name of the person or people involved. This is difficult because not all sites are closely monitored and the chance of seeing someone damaging a site is very slim. In addition, the heritage inspectors are unlikely to have

sufficient investigative skills to bring an offender to book where an offence has been committed in their absence. This leads to reliance on the police services who usually do not appreciate the importance and urgency of heritage cases and may therefore take time to conduct their enquiries. Because of these and other problems prosecution is not used very often. Thus, relying on the strength of the law in relation to prosecution is futile unless the monitoring mechanisms are strengthened. Notwithstanding, apart from punishing offenders, prosecution could also produce publicity in the press, thereby raising awareness.

The development of conservation management plans is increasingly becoming a standard requirement for national and international heritage planning. This is one positive management tool, which normally has specific objectives that can improve general protection and monitoring. The importance of management plans as positive management tools (as opposed to the usual reliance on prohibitions) is reinforced by inclusion of specific provisions for them in the Namibian and South African statutes. However, countries which do not have such a provision do not necessarily have to amend their legislation, but can accommodate this aspect through special regulation.

Summary and conclusions

To summarize the various institutional arrangements for legal protection and its enforcement, it is necessary to inspect protected monuments as often as possible and report on the condition of the sites in order to identify the action to be taken. Inspection serves a number of purposes: it is a way of reminding the landowner and the community that there is a site which needs protection; it can act as a way of increasing the general public's awareness of archaeology, and it is a way of giving advice about the protection of the heritage place to the land user. Legal frameworks should therefore give specific guidance on what and how inspection and monitoring mechanisms are to be implemented and by whom.

Inspection and monitoring are usually given low priority. It must be remembered that sites can be destroyed very quickly whilst they cannot be replaced. It is no good protecting sites by law and then being in a situation where the protected sites are destroyed without the person responsible being punished because of lack of enforcement systems. The financing of such activities should also be provided for in the Act. In most countries the

finance has been publicly generated. It means that heritage has to compete with other organizations or departments for meagre resources. In economies doing badly heritage may be considered a luxury, and this heavily affects enforcement.

There are various mechanisms and tools enshrined in African legal frameworks to protect heritage places which heritage institutions can rely on. Overall, the laws are very strong and clear on offences and penalties but fall short at implementation. The current problem in many African countries is on the one hand, the lack of skilled heritage managers and inspectors to facilitate effective and efficient monitoring and, on the other, the failure to give a role in enforcement to local communities who can supplement the role of professional heritage bodies.

It is observed that traditional heritage protection mechanisms have been effective in preserving and safeguarding the immovable and movable heritage before the introduction of formal western-derived management systems. To be effective, heritage protection and conservation policy must call upon a wide range of approaches and methods, which entails giving enforcement powers to traditional institutions. Traditional institutions often have well laid out rules and regulations and inbuilt penalties for infraction, which can be implemented *pari passu* with the formal legislation.

Whereas prohibitions can be effective, heritage institutions need to do more in practice so that their presence is felt on the ground. The laws should stipulate the need to provide for staff training (see for example, Namibian law) and the continuous flow of information to the public regarding the professional activities, programmes and projects of heritage institutions. The latter is important to increase awareness of the existence of the law and appreciation of the need to manage.

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Resources provision is key to the success of any Heritage Act. The pace at which we attain success is largely determined by how many resources have been allocated for conservation. Equally important as allocation of adequate resources is the issue of strict measures and controls to ensure that the resources are properly and correctly applied for the intended purpose. Since most heritage conservation institutions raise external funds to carry out conservation work, an integral part of resources provision is the reporting mechanisms that ensure financial transparency. In English-speaking sub-Saharan Africa, several Heritage Conservation Acts have attempted to embrace one or more aspects of accountability, with provision for accounting books and records; and an audit and reports. Other Acts are, however, silent on how financial resources are received and allocated. Human resources are as important as financial ones. These are mainly the public servants implementing the Acts. Most Acts do provide for employment of key personnel to implement the Acts.

[MUNDUMUKO SINVULA]

Legal provisions on financial and human resources for heritage conservation

This chapter reviews the legal provisions for financial and human resources for heritage conservation, and discusses the implications for conservation of heritage in Africa. The legislation of Zambia is used as a point of reference for comparing and contrasting its financial provisions, which are different from other Acts in English-speaking sub-Saharan Africa. This approach also has the advantage of enabling us to follow logically the different approaches in a thematic and sequential manner.

Finances

There does not seem to be one standard method of providing for resources in the heritage legislation.

Several Acts provide for funds mainly from central government, while others are silent on the subject. This is especially true of those Acts in which heritage conservation institutions operate wholly as government departments.

Effective heritage legislation should at least give an indication of how to ensure the financial resources needed for the conservation and management of heritage resources (Pickard 2001). Traditionally, heritage resources conservation and management have been the responsibility of the state. There are two ways in which the state has contributed financially to heritage protection: directly through grants and subsidies, and indirectly through incentives and relief from tax regimes. Funding through budgetary appropriation is the normal practice in most of English-speaking Africa. However, given

the priorities of governments on the continent, most African countries' heritage institutions are generally under-funded. The direct dependence on government subsidies mean that the Ministry determines priorities for heritage institutions. One of the ways heritage institutions can be autonomous is through innovative market-like incentives and creative approaches. In several European countries, this has led to private sector participation in funding heritage programmes and projects (Pickard *ibid*).

Direct government funding

In Zambia, Part IV of the National Heritage Conservation Act, Chapter 173 of the Laws of Zambia is dedicated to financial provisions. Section (2) gives the major sources of income for the Commission, the institutional entity charged with the conservation of heritage. These are Government allocations through Parliament, grants, donations and any other funds that may accrue to the Commission from other sources.

Sub-section (2) (a) provides for the Commission to raise funds by way of grants or donations from any source within Zambia and, with the approval of the Minister, from any source outside Zambia.

Sub-section (2b) empowers the Commission to raise funds by way of loans. The Commission is also authorized under sub-section (2c) to charge and collect fees in respect of programmes, seminars, consultancy services and other services. Further, the Commission is permitted under sub-section (4) to invest in any manner, funds that it does not immediately require.

The above is true for legislation in other English-speaking African countries. In Swaziland, Kenya, Tanzania, South Africa and Nigeria, financial provisions are respectively in Part VI, section 8, section 11(1-4), and section 21 of the respective Acts. These provisions deal essentially with sources of funding mainly given as government grants, loans, fees chargeable and own investments. Other issues include provisions for reporting mechanisms, usually audited accounts at the end of each financial year, and the details of what must be included in the annual report.

A few differences do, however, exist. The South African Act for example provides in section 21 (12) for public inspection of accounts and annual financial statements. The South African Act also is more detailed in the manner it addresses financial provisions. In 21 (9)(a), for example, it calls on SAHRA, the heritage conservation institution, to 'keep full and correct accounts of all its financial

transactions and affairs, including all its transactions in its capacity of trustee of any trust fund, and all properties under its control and to ensure that all payments out of its funds are correctly made and properly authorized and that adequate control is maintained over its assets, or those in its custody, and the incurring of liabilities.

This level of detail is very interesting, given the fact that it is virtually missing in all the other Acts. The South African legislation goes much further to ensure that finances are properly accounted for in the most stringent manner by providing for this in the Act rather than leaving it to general provisions in the financial regulations.

The South African and Swaziland Acts, unlike all the others, provide for supplementary budgets in sections 21(7) and 37(4) respectively, despite their seemingly independent institutional existence. This provides an added advantage of presenting an opportunity for such supplementary budgets within the provisions of the law and hence helping to tighten loose ends that may otherwise work against the financial well-being of the heritage conservation organizations.

In Zambia, for example, where such a provision does not exist in the Heritage Act, several requests for a supplementary budget have in the recent past not been met. Supplementary budgets have, however, been paid out to Government Ministries while the requests of the Heritage Commission go unheeded. Conflicting responses have been given for this lack of a positive response. In one instance, the response given was that the Heritage Commission, as a statutory organization, was not entitled to supplementary funding. In another instance the response was that the parent Ministry should budget for the supplementary funding requirements of the institutions under its control. Whereas the latter probably represents the correct legal position under Zambian law, the confusion that has sometimes arisen demonstrates how the system can be susceptible to abuse if no specific provisions dealing with supplementary funding exist in an Act.

The Acts for Ghana, Malawi, Liberia, Mauritius, Seychelles and Sudan are completely silent on financial provisions. This is perhaps because their heritage conservation institutions operate as departments of parent ministries and do not, therefore, have the autonomy to administer their own funds. The effectiveness or otherwise of this arrangement is not discussed here. Suffice to note that most institutions moved away from government control to become autonomous or semi-autonomous so as to lessen government bureaucracy in the conservation and management of heritage. The grant of autonomous status, especially in respect of heritage resources, gives

more fiscal incentives for positive management, which in turn encourages more pro-active conservation of heritage.

The application of all funds raised from different sources is provided for in the case of Zambia under sub-section (3) of the Act. These funds are to be used for salaries, allowances and loans to staff of the Commission; travelling and subsistence allowances for Board members when engaged on the business of the Commission; and any other expenses incurred by the Commission in the performance of its functions under the Act.

It is important when making payments that a coordinated, coherent and uniform system be used. Hence the importance of providing universally accepted guidelines and accounting procedures. This also helps to enhance accountability, which should be provided for in the legislation.

Section 23 of the Zambia Act provides for the Commission to 'cause to be kept proper books of accounts and other records relating to its accounts'.

A system of reporting is also provided in sections 24 and 25. This is mainly through the Minister. Reports are required to be prepared in the first six months of the year succeeding each financial year. Section 25 sets out the financial information to be included in the annual report: (a) an audited balance sheet; (b) an audited statement of income and expenditure; and (c) any other information that the Minister may require. Once in receipt of this report, the Minister lays it before Parliament within seven days of the first sitting of Parliament after the Minister's receipt of the report.

The above accounting requirements and reporting systems are similar in all the Acts under discussion that contain financial provisions. The common thread is the requirement for proper or correct accounts and records of all financial transactions.

A few variations, however, do exist, especially in the process of making these accounts and records available for public scrutiny or consumption. In Zambia and Kenya, the accounts are considered classified before they are tabled in Parliament by the relevant Minister. Thereafter, they become public records.

Under section 40 of the Swaziland Act, public use of accounts and records of the heritage conservation institution is possible simultaneously with the presentation of the reports for tabling in Parliament. The relevant Act provides that after audit of such records by the Director of Audit 'the balance sheet, together with a revenue and expenditure account, shall be published in the gazette, and laid on the table on both houses of Parliament'. The public can therefore access these records more or less at the

same time as they are being tabled in Parliament.

The South African legislation is imprecise on the above issue: no indication is given as to whether these records are available to the public before or after they are tabled in Parliament. Section 21 (12) merely states that 'the accounts and annual financial statements ... must be available for public inspection'. No direction is given as to whether this is before or after they have been tabled in Parliament.

In Zimbabwe, the National Museums and Monuments of Zimbabwe Act, section 18 provides for the audited reports to be submitted to the Minister not later than 1 July of the preceding year. It is silent as to whether or not this should be tabled in Parliament or whether it is subject to the general provisions in the law on tabling such reports in Parliament.

The Nigerian legislation, as also that of Gambia, Lesotho and Tanzania, is silent about the manner in which the financial reports are to be prepared, audited and tabled before the Ruling Council or Parliament.

There are other issues meriting consideration in heritage funding. For example, many laws state that the accounts of heritage conservation institutions shall only be audited by the Government Auditor (in Kenya known as the Auditor General). The Auditor General audits the accounts of all public institutions, and typically is unable to carry out audits in a timely manner. There is usually a backlog of several years in the audits being conducted. This has often rendered the auditing function ineffective in controlling the financial management of public institutions, including institutions responsible for the management of heritage.

By the time financial irregularities are discovered and reported on, several years have passed, and those responsible may well no longer be working with the heritage conservation body. This is compounded by the fact that the Auditor General can only make recommendations to Parliament. Penal action, if any, lies in the hands of other Government departments, particularly the organs responsible for prosecution. The Auditor General has often therefore been helpless to check financial irregularities in public bodies. One step that has been taken in Kenya to speed up the pace of auditing has been to permit parastatal organizations to engage private sector auditors, who then send their reports to the Government Auditor.

Yet another problem has been that the audits relate only to the financial affairs of the public body. They do not extend to 'technical audits', which would review the technical proficiency and effectiveness of the public body in fulfilling its statutory mandate. This has also limited the utility of audits.

A review of the laws from other parts of the world outside Africa indicates a number of similarities. The National Heritage (Scotland) Act, chapter 28 of 199, sections 8 and 9 provides for grants and loans. Grants are channelled through the Secretary of State who in turn receives reports on behalf of Government. However, unlike the African Acts, the Scottish Act has one important provision. Section 9(1) states that the 'Scottish National Heritage may ... give financial assistance by way of grant or loan ... to any person, including a public body, in respect of expenditure incurred or to be incurred by him in doing anything which, in the opinion of Scottish National Heritage, is conducive to the attainment of its general aims and purposes ... of this Act'. This is a major departure from the provisions restricting funding to only Government agencies since it recognizes that other players in the sector are equally in need of funding.

In Africa, much heritage in the form of buildings, structures, and sacred sites, is in the hands of private individuals, groups or communities. The National Heritage Conservation Commission in Zambia has in the past paid out grants, especially to Chiefs, for the maintenance of sites under their care. Though these payments were inadequate, they were very significant in that they were a form of recognition of the importance of the heritage under the Chiefs. They helped to spread the financial burden of conserving heritage and to foster closer working relations between the Commission and the Chiefs. The payments have not now been made for more than ten years due to lack of funds. The situation might have been different had such grants been mandatory through the Act. Inclusion of grants would also help to enhance private/public partnerships and community participation in heritage conservation.

As indicated, some laws allow heritage conservation institutions to raise money by way of loans. This raises an important policy issue. When loans are borrowed, security often needs to be provided in the form of the title deeds of assets or some other security. The assets of a heritage management institution are the heritage resources of the country. Can these heritage resources be used to secure loans? Is there not a risk that in case of default in payment these resources would be sold off and pass into private ownership? This concern has perhaps limited the extent to which heritage management institutions have been allowed by law to raise funds through loans.

Another issue has been that heritage conservation institutions, like all public bodies, are funded on an annual basis through Parliamentary grants. Any revenues they raise are surrendered to the Government. Often the law does not allow the institution to keep

and put to direct use any revenues raised. This has often meant that the heritage conservation institution cannot plough back funds it generates and is entirely dependent upon the Government for funding. This often leads to a shortage of funds and compromises the effectiveness of the institution in fulfilling its mandate.

Tax exemptions and subsidies

Indirect funding by the state is another way to support financially heritage conservation and management. Different forms of tax relief are often used as a means to encourage the private sector to contribute to heritage resources protection. The fiscal measures may include different sets of tax relief such as reduction of taxable profits, or income for a company or individuals upon making a donation or contribution to heritage conservation and management. These are systems which are working very well in such countries as Denmark, The Netherlands, Spain and Italy (Inkei 2001). In countries such as the United Kingdom and South Africa, funds from state lotteries are also made available to heritage institutions.

Tax exemptions are some of the most important methods of offering incentives and building up revenues. In several cases, tax exemptions are offered to Government institutions. Generally, Government does not pay tax to itself. As for statutory organizations, heritage management institutions may sometimes find themselves paying taxes, as in Zambia. Countries that have provided for tax exemptions in their heritage legislation represent a tiny minority of those surveyed.

Swaziland (under Section 41) and Zimbabwe (Part 1, 4.2a) are examples. The other laws are silent on this aspect mainly because those organizations that are still operating as government departments receive their exemptions in accordance with their respective Acts of Taxation. Other statutory bodies whose legislation does not mention any tax exemptions may or may not be exempted from paying taxes, depending on the general tax laws of the country. Some may, however, benefit from general provisions applying to such public sector organizations.

Tax exemptions can be an important way of encouraging private entities to take measures to protect heritage resources on their land. The law may, for example, provide that a private person or organization whose property is made subject to a protection order because it is a heritage resource will be exempt from property tax or will pay tax

at a reduced rate. This may encourage individuals to take measures to place property with significant heritage qualities under protection. Subsidies to offset the cost of maintenance of the property may serve the same objective. However, very few heritage laws contain provisions dealing with subsidies and tax exemptions. The reason is that many of these laws were enacted in days when measures to harness the participation of private persons in heritage protection were not seen as necessary.

Staff, administrative and technical expertise

Immovable cultural heritage constitutes some of the most popular cultural, educational and leisure venues in sub-Saharan Africa. Cultural heritage, as was observed in one study, is about people and in particular, the enjoyment, education and search for knowledge and understanding of people of all ages and all backgrounds who are alive today and in the generations to come. The extent to which they succeed in their objective depends in turn on people and in particular, on encouraging and enabling staff at all levels engaged in whatever task to realize their potential. Technical and competent staff will determine the success of an institution.

Despite this important link between the success of an institution and indeed the Act, the availability of manpower and the provision of technical expertise does not seem to have taken centre stage and been properly addressed in most Acts.

The Zimbabwe Act under Part I, section 14 provides for the employment of a Chief Executive and other civil servants necessary for the execution of functions under the Act. Similarly, the Kenyan Act, 2006 provides under section 14 and 15 for the hiring of the Director General and other staff upon terms and conditions of service determined by the Board. Clause 7, section I (a) of the Gambia legislation also provides for the employment of the Secretary and other servants depending on availability of funds. A similar provision exists under part III, section 15 of the National Heritage Conservation Commission of Zambia Act.

The Nigerian decree, unlike the other legislation, mentions key officers to be employed by the Commission under section 6(I) (a–c). Section 6(2–4) outlines their main responsibilities as well as their reporting mechanisms.

The employment of staff on public service terms and conditions of service has at times been cited as disadvantaging heritage management and other public institutions in a competitive employment

field. Because of an inability to offer competitive remuneration, public institutions, among them heritage conservation authorities, have at times been unable to attract and retain highly qualified personnel, and have experienced a high turnover of staff, leading to a lack of continuity of service and of the implementation of programmes. The need to free public institutions from the restrictions of the civil service terms and conditions of service has been cited as a justification for setting up autonomous heritage management bodies, instead of working through Government departments.

The Tanzanian Act is unique in its provisions for the selection of Council members. Unlike the other Acts which are silent over the qualification and representation of Board Members, the Tanzanian Act under section 1 draws most of its members from the University of Dar es Salaam. These are:

- Dean of the Faculty of Arts and Social Sciences
- Dean of the Faculty of Sciences
- Dean of the Faculty of Medicine.

Other members are the Commissioners for National Education, a representative of the Historical Association, and a member appointed by the Board of the National Museum of Tanzania from amongst its employees, and not less than four and not more than six appointed by the Minister. Apart from the Ministerial appointments, the composition of the Board is of people with technical competence. Another interesting part of this Council is that it maintains a balance between the experts and those appointed by the Minister who may not necessarily possess technical skills.

Nevertheless, a common concern expressed with respect to the composition of Boards is that the Minister's appointees at times have little knowledge of heritage issues and do not therefore effectively discharge their mandate. This has led to questions being raised about the desirability of specifying the qualifications of Board members, although this has not been implemented in many of the heritage laws under review.

Assets, materials and equipment

Equipment and Material are only included in the Acts for purposes of providing guidelines for their disposal, when selling, letting or exchanging them. This is so under section 13(5) under the powers of the Board of the National museums and Monuments of Zimbabwe. Most other Acts are silent on materials and equipment in a fast-changing technological world.

Being public assets, the disposal of heritage resources must be carried out strictly in accordance with the procedures set out in the laws of the land for disposal of public assets. Care needs to be taken to ensure that heritage resources are not alienated from the hands of the public institution. Most laws are silent on whether and how the heritage conservation institution can dispose of the national heritage which it is responsible for managing. Several other laws deal with mechanisms for removing heritage resources from the status of national heritage resources, for instance through a de-gazetting. These provisions need to be carefully reviewed to ensure that this kind of disposal is not carried out at the expense of the public and purely to benefit private interests.

Conclusion

Resource provision is widely covered by many Acts on heritage conservation in sub-Saharan Africa. Marked similarities and differences as discussed above have been noticed. Similarities include lists of sources of funds, mainly given as Government, subventions, donors, and fees charged for services. Books of accounts and records, audit of accounts and reports are also common to most Acts. With the exception of the office of the Chief Executive, most Acts hardly mention technical expertise. Materials and equipment are also rarely mentioned. Tax/duty exemptions, except for a few laws, are not provided for despite being an important area where huge savings can be made and where an incentive can be given to private and community owners and custodians of heritage resources to encourage them to engage in the management of the heritage resources under their care.

It is important to note that heritage legislation in Africa needs harmonization. It is important for all the Acts to give direction on sources of funds for heritage conservation, books of accounts, audit and reports so as to have a uniform system of resource provision. This will further indicate how transparent heritage institutions are in the manner they expend their resources. Most Acts do not provide for grants to individuals, groups or communities involved in heritage work either as owners, tenants and so on. It is important to integrate this aspect, especially as community participation is increasingly becoming an integral and important part of heritage conservation.

It is not common to provide for materials, equipment and manpower in an Act. This is because these were left to be dealt with by Government from

time to time depending on the environment and individual site needs.

Variations have been noticed in the area of tax/duty exemptions. Two countries among those surveyed have included this in their legislation. The other countries have not, although a few may still benefit from tax exemptions through relevant provisions in other laws. A few others do not, despite the fact that they are Government agents in heritage conservation. Prohibitive taxes paid by these institutions when purchasing or importing goods and equipment have led to operational difficulties. This highlights the need to provide for tax exemptions, where possible, in heritage legislation.

Equally important for heritage organizations in Africa is the need to find innovative ways of engaging the private sector in heritage conservation and management. This is one way to overcome the perennial problems of insufficient state funding. In Italy, government or public spending on culture accounts for only a tenth part of total expenditure in this sector, and most of the funding for cultural programmes comes from private sources. Thus, Italy has become a model in Europe, with considerable funding flowing from private investors into cultural heritage programmes. This is so because the 1982 law declares money spent on restoration of monuments works of art and exhibitions to be tax deductible (Andersen 1992; Bodo 1994).

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Management of immovable cultural heritage refers to the range of activities carried out on a day-to-day basis which have an impact on the immovable cultural landscape. Management of immovable cultural heritage, inevitably, is carried out by a whole host of managers, among them public bodies, local authorities and private organizations and individuals. Some of these institutions have statutory responsibility to control others, with a view to ensuring that the adverse impacts of management activities are avoided or minimized and that the heritage values of cultural landscapes are conserved and enhanced. These perform a regulatory function. The others are simply actors, intentionally or unintentionally causing an impact on immovable cultural heritage. Wherever possible management frameworks should facilitate rather than marginalize the involvement of local communities in the management of cultural landscapes.

[ALBERT MUMMA]

Framework for legislation on immovable cultural heritage in Africa

In order to facilitate effective management and regulation, certain key management tools must be available to the managers. First, it is necessary to identify the immovable cultural heritage and categorize and prioritize it on the basis of its heritage value. Second, it is necessary to impose restrictions on the rights of use and abuse of the heritage which, under the ordinary laws of land ownership, the owners inherently enjoy. Additionally, it is necessary to impose obligations on owners and occupiers of heritage sites to take certain actions. It is also necessary to establish a mechanism (management plans) for planning the ways in which the resources are to be managed to ensure that the heritage values are conserved. Finally, it is important to provide for sanctions in case of failure to comply with statutory requirements. This

entire system constitutes the legal management framework.

Identification of heritage: Immovable cultural heritage encompasses the entire corpus of a people's experiences. A country's legal system should therefore contain a general provision requiring the conservation and sustainable management of the country's entire immovable cultural heritage, whether or not perceived to have particular value. This kind of general requirement is most likely to be found in the laws dealing with physical planning or similar legislation.

For the conservation of the country's cultural heritage, the first step is the identification of the heritage to be conserved. Given that immovable cultural heritage within a country may be accorded different heritage values by the people of that country, the identification may accord different

cultural resources of the country different levels of significance or heritage value. Thus, aspects of the country's heritage may be identified as of universal significance, national significance, or only of local significance. The criteria for applying the different levels of significance should be specified in the law.

The attribution of different levels of significance to categories of heritage implies that different levels of protection of the heritage value are required. Therefore, along with the identification of the heritage value and its categorization as of universal, national or local significance, the law must specify the appropriate level of protection for the particular category of heritage, and the institutional arrangements for the conservation of that category. Institutionally, responsibility for the conservation of heritage of international and of national significance may be placed upon a national heritage management body, whereas responsibility for the management of heritage of local significance may be given to local authorities or local community groups.

Strictly speaking, given that under international law, responsibility for immovable cultural heritage is vested in the sovereign state within which the particular resource is to be found, no immovable cultural heritage is international as such. Even those categories of a country's heritage that are listed on the World Heritage List because of the universal significance of their values remain the national heritage of the state in which they are located.

Indeed, in the procedure for listing a heritage place on the World Heritage List, the applying State Party commits itself to ensuring that the particular resource receives a level of protection, within domestic legislation and by its authorities, that is appropriate to its status as of universal significance. To honour its commitments in respect of national cultural heritage included in the World Heritage List, a state may introduce a preferential system of conservation and management for these resources in its policies and laws. South Africa, for example, has enacted legislation dealing specifically with the conservation of landscapes on the World Heritage List (Hall, 2005).

Whether or not it is appropriate for a country to develop legislation dedicated to the conservation of heritage listed on the World Heritage List only is a matter to be considered carefully by each country. An advantage of doing so, of course, is the enhanced level of protection it accords to those places which have heritage values of universal significance. The dedicated legislation will put the spotlight on these categories of heritage, and may establish a specialized institution for the management of this category. It may also bring in its wake enhanced funding and other specialized technical expertise for conserving this category of heritage. It can be argued that a

heritage with values of universal significance deserves management of 'international' standards.

On the other hand, concentrating resources and effort on a small number of places with values of universal significance may detract attention and take resources away from the pressing needs of the remaining heritage sites, even if not of universal significance. This is particularly pertinent given that the majority of African states have only one or two sites on the World Heritage List, and several states have no listing at all. There is a danger that, by prioritizing action in support of those places at the highest level, elements of the wider resources may not be properly considered and this may result in detriment to the heritage.

Restriction on property rights: The identification of resources as possessing heritage value (of whatever category) may result in the need to restrict the use to which the place may be put. In effect, the property rights of the owner or the person in possession of the place (which may be public, private, or even of traditional rulers) may have to be restricted in order to protect the heritage. At times, this may require that the ownership of the property in question be transferred to another entity, for instance, from private to public ownership.

Within the governing Constitution of each country the protection of heritage may be defined as being in 'the public interest.' If the right of private owners to use heritage is allowed to take precedence this may cause harm to the public interest. Thus the regulation of heritage property by law is necessary in the interests of the majority. Therefore a property owner whose right of use is restricted in the public interest is not, under the Constitutions of most countries, entitled to compensation for the 'loss of use.' Where, however, ownership of the property is required to be transferred from the private owner to a public body in order to better protect it (a procedure known as 'compulsory acquisition' – since the ownership is compulsorily acquired by the state), the Constitutions of most countries require that compensation at market price be paid to the owner.

The procedures to be followed in determining the nature and level of restriction on use to be imposed must be transparent to the public and understandable for owners and occupants alike. Decisions on the heritage to be given protected status should be made after consulting other persons or organizations or established boards of experts possessing specialist knowledge. The law must make provision for consulting the owner and specify under what conditions the state may overrule representations against protection in order to protect the cultural landscape.

Generally, in order to secure the maintenance of heritage properties, it is important that they are kept in active use. But as the nature of use often changes over time the original use may no longer be viable or appropriate. It may be necessary to develop policy approaches concerning the issue of utilization and re-utilization. Utilization is legitimate and should be encouraged so far as it is compatible with the conservation of the heritage (Feilden 2003). This should be controlled by authorization procedures. It may be inappropriate to give priority solely to cultural uses. This might give rise to lifeless sites that have lost all utility value to their owners and custodians, who consequently will not see any point in conserving them. An appropriate new use should give preference to the maintenance of everyday life (Feilden *ibid*). At times, in order to promote continued use of a heritage place, it may be necessary that the state give financial assistance (or subsidies) to the owners or users. This is provided for in the legislation of several European states, which target farming communities in order that the rural landscapes continue to function as living communities (UK Statutory Rule 2001)

The conservation of a heritage place will be made easier if it serves a socially or economically useful purpose. So long as heritage has an active use it is more likely that it will be maintained. Use must mean economically viable use, and new uses will often necessitate some degree of alteration. Judging the best use is one of the most important and sensitive assessments that the relevant heritage authority will have to make. It will require balancing the economic viability of possible uses against the effect of any change to the heritage significance of the property.

In order to assist the process of ascertaining the degree of flexibility to accommodate a new use, the law should require that, during the process of identification of heritage places, the heritage management authority needs to specify the heritage significance for which it is being singled out. Where alterations to provide a new use would deprive the immovable heritage of its recognized significance, they should not be permitted. Where different levels of protection are introduced for different categories of the heritage, this may provide a mechanism for addressing the issue of alternative and adaptive use. Every effort should be made to protect heritage places with outstanding value, but those given protection at a lower level may be afforded more scope for change. The assessment of proposed changes of use is best undertaken in the context of an overall 'impact assessment' of proposed development activities.

Zones of protection may be used to preserve the traditional setting of an area of immovable heritage. A zone of protection should be operated less strictly than the zone directly associated with the heritage. Its purpose should not be to preclude new development activity per se, but rather to allow an opportunity to consider whether the impact of such development would be detrimental to the context of the heritage, balancing other needs of society. Zones of protection are often referred to as buffer zones since that is their purpose, and they are provided for in most planning and other heritage legislation.

It may be worthwhile and effective to have a single authorization system along the lines of those that exist for the granting of planning or development permission. As a supplementary measure to normal authorization procedures it may be appropriate to consider the use of voluntary agreements in limited circumstances.

The obligations of owners: The law often imposes obligations on owners or occupiers of property within a heritage place of significance. Obligations should be operated reasonably and may be linked to financial and other mechanisms to support the owner. Rules may require an owner to undertake certain works within a specified period or allow the relevant heritage authority to undertake the works at the owner's expense. In all cases the owner should be afforded an opportunity to appeal against such actions where there are reasonable grounds. It may be necessary for an administrative court to define the reasonableness of the works required. Where an approved activity becomes damaging to the integrity of the heritage value, it may be appropriate for the relevant authority to halt such an activity. However the legitimate rights of individuals should not be infringed unnecessarily. In such circumstances it may be necessary to provide a mechanism in the law for the payment of compensation to mitigate the loss of income or profits from a legitimate activity.

Coercive measures for ensuring that the heritage is conserved may go as far as expropriation, although such measures should only be used exceptionally. The operation of compulsory acquisition powers must give adequate opportunity for an owner to implement the required conservation measures. In the event that expropriation procedures are implemented the owner must be adequately compensated for the loss of property according to its relative value in the market place. On the whole, compulsory acquisition is an expensive mechanism for protecting heritage and therefore should be resorted to only in few cases where actual transfer of ownership from the owner to the state is necessary for the conservation

of the heritage. In addition, owners tend to resist it strongly, leading to protracted legal procedures.

Other, less expensive mechanisms should also be provided for in the law. A preliminary measure could be taken to encourage action through the levy of a punitive property tax applied to unoccupied property. Another method to encourage conservation may be through voluntary management agreements. The mechanism could be tied to economic or financial backing (subsidies) for the owner or the grant of tax rebates or waivers. However, the plan must not fetter the ability of the heritage authority to exercise its normal powers of control.

In some countries, such as Kenya, the law has introduced a facility known as ‘an environmental easement.’ This is a consensual restriction on the owner’s use of property in favour of environmental conservation measures in exchange for some payment (Environmental Management and Coordination Act 1999, Kenya). These options are not as expensive as compulsory acquisition since the ownership of the property stays with the owner, and what is compensated for is the loss of the opportunity to put the property to a particular more profitable use.

Sanctions: The laws of most countries provide for sanctions for failure to conserve immovable cultural properties of heritage value as required by the terms of the law. Sanctions may include fines, or a term of imprisonment, or the loss of the permit to carry out development works on the property. The level of penalty should be sufficient to be a deterrent to further unauthorized action, or, by relevant publicity, to deter other potential transgressors. Sanction provisions must be fair and the right of appeal against legal action should be offered on the ground of reasonableness.

Typically, the suspension or revocation of a permit is the responsibility of the heritage regulatory authority. An appeal against the decision of the heritage authority is often available, either to a tribunal or to the regular courts. Some jurisdictions, especially those with a continental European legal tradition, provide that the heritage regulatory authority can also impose a fine administratively. This is less common in those countries with a common law tradition, where fines can only be imposed by courts, and basically as an alternative to imprisonment.

In most jurisdictions a term of imprisonment can only be imposed by a court of law. Some laws provide that the heritage regulatory authority can take action on its own to prosecute the charge. In other countries, the prosecution is undertaken by the Government’s prosecution service, at the instigation of the heritage authority. A common complaint by heritage site managers is that the Government prosecutors often

do not give priority to offences against heritage properties, and when they take action, are often unfamiliar with the issues involved. For this reason they have argued that heritage authorities should be vested with the mandate to carry out prosecution in their own right. Whether or not this is possible depends on the laws and constitutional arrangements in the particular country.

Enforcement action should be flexible enough to provide for optional responses depending on the circumstances of each case, including the power to require restoration or alleviation of the damage where this is practicable, confiscation of the items used to cause the damage, cancellation of the license, imposition of fines and imprisonment. The authority should also be empowered to take action (for instance, by issuing a ‘stop order’, at times called a ‘cease-and-desist order’) to bring an immediate halt to unauthorized works, as the effect of such works may be totally destructive to the heritage significance of the area. Typically, imprisonment is reserved for the most serious violations, and usually in cases of deliberate destruction of a site of heritage value. Since most damage to heritage arises inadvertently, rather than deliberately, imprisonment is rarely imposed by the courts. (Mumma, 1995)

Institutional and administrative frameworks for immovable cultural heritage

Notwithstanding the need to enable local communities to be involved in the management of heritage resources, it is necessary for effective management that the law establish a dedicated regulatory authority. The functions of such an authority include to:

- i) Identify and categorize immovable cultural heritage;
- ii) Establish and maintain an inventory of the immovable cultural heritage;
- iii) Define the standards, rules and other mechanisms for the management of immovable cultural heritage;
- iv) Offer specialized technical assistance to those engaged in the management of immovable heritage;
- v) Advise on policy and make decisions concerning activities associated with or otherwise affecting protected areas;
- vi) Mobilize resources and administer any established fund to provide financial support for conservation work;

- vii) Monitor and enforce laws and regulations for the conservation of immovable cultural heritage; and
- viii) Promote awareness of the heritage values of the immovable cultural landscapes of the country.

The prevailing legal frameworks in Africa typically impose on many heritage authorities the twin functions of managing protected heritage sites and regulating the activities of others on heritage sites. This institutional design arose because the majority of heritage sites in Africa that have been protected are natural sites within which human activity is prohibited, or, alternatively, museums and archives, preserving fossils, antiquities and artefacts. Rarely were heritage sites retained under private ownership, and rarely was the community's continued use of the site permitted, with the exception, of course, of visits by the public, during which the heritage would be presented. This has been the case notwithstanding that many of these heritage sites originally belonged to communities who bitterly resented, and for years resisted, their exclusion from these sites (Ndoro and Taruvinga, 2003).

The concept of immovable heritage resources fundamentally challenges the appropriateness of the traditional institutional design of heritage authorities. Immovable cultural heritage resources are quite often owned by private persons and a transfer of ownership to the heritage authority is often either not possible (on account of the cost involved in paying compensation) or not recommended (because the heritage values of the site are better conserved if the site remains a living site which is under active use of the owner). Further, the heritage tends to be whole landscapes, which are difficult to delimit and protect. Vesting ownership of such sites in a heritage management authority is therefore likely to be inimical to the conservation of its heritage values. Consequently, the appropriate role for the heritage authority is not that of a manager but rather that of a regulator.

The institutional and administrative arrangements for regulating conservation of immovable cultural heritage will depend on how the state in the particular country is organized. It must take into account the extent to which powers have been decentralized to local or regional authorities as well as the nature of the powers transferred. In many countries heritage management is the responsibility of the central or federal state. Local authorities however tend also to have significant delegated authority over the management of heritage at local level.

Centralism can introduce heavy bureaucracy and inefficiency, although it can also lead to a uniform system of heritage management. Devolution or decentralization of functions can have certain advantages in ensuring the proper treatment of

the heritage in its local or regional context. But decentralizing powers or devolving responsibility for immovable heritage management depends on the way in which the state is organized. The extent of autonomy of the provincial and local institutions from the state authority will depend on the constitutional arrangements within the country. In federal states, in which heritage management is considered to be a mandate of the autonomous member states of the federation, powers and functions can be devolved to an autonomous provincial or local heritage authority.

In all cases, for effective heritage management local authorities must be involved. There are a number of ways in which this can be achieved even in cases where devolution of authority is not possible constitutionally. The central heritage regulatory authority can decentralize its functions to local branches. Local heritage protection initiatives can be set up. The law can establish a protection system for the community heritage at local level, provide for local control over proposed actions to protected areas, and so on. Giving local authorities more responsibility for the supervision and granting of authorizations is also an option.

Another common issue with respect to the institutional and legal frameworks relates to whether the heritage authority should be structured as a department of the Ministry in charge of heritage, or whether it should be set up as a stand-alone parastatal organization. The justification for setting up parastatals in most countries relate to the autonomy of the parastatal from civil service regulations which are seen as restrictive. This enables the parastatal to remunerate its staff on a different scale from the civil service and thus offer competitive pay, and to maintain its own account for its funds (which a government department often is not allowed to do). It is also freed from certain bureaucratic procedures, for example with regard to procurement, which are considered to hamper efficiency.

In many countries however, the perceived autonomy of parastatals is more apparent than real. The parastatal remains a public body and the Government retains a considerable measure of control over parastatals, giving it the power to place a cap on the remuneration payable to officers of parastatals, to appoint and dismiss the members of the Boards of Directors of parastatals and even to give directions to parastatals on the exercise of their functions. That having been said, the extent of autonomy of parastatals will depend a great deal on the culture that appertains to the conduct of public affairs in various countries, and in some countries there will be real advantages to be derived from setting up a dedicated institution to regulate heritage affairs.

In those countries in which the heritage regulatory authority is a department of a Ministry, and to a lesser extent in those countries in which the heritage authority is a parastatal, whether Ministerial responsibility for cultural heritage should be placed with the Ministry responsible for culture or for other natural environment (e.g. wildlife or forest resources) can be problematic. Traditionally, Ministerial responsibility has been split, with responsibility for cultural heritage being placed with the Ministry in charge of culture, and responsibility for natural heritage being placed with one of the Ministries dealing with environmental resources. This dichotomy is not sustainable when dealing with immovable cultural heritage, which combines natural and cultural features. In due course, ways of bringing responsibility for natural and cultural heritage under one Ministry may have to be found, difficult as this may be.

Another critical issue with regard to the institutional arrangements for heritage management is institutional cooperation and coordination. The management of immovable cultural landscapes encompasses the entire range of the management of the country's affairs. Examples of some sectors with direct relevance for heritage management include environment, agriculture and soil management, planning and development, public infrastructure works and services, and tourism activity at national, regional and local levels. Therefore, all public institutions in some aspect of their functions exercise responsibility with regard to an issue of heritage conservation. Institutional coordination is therefore essential to avoid overlap and possible institutional rivalry and conflict.

Mechanisms for institutional cooperation and coordination include legal requirements for consultation and comment, the establishment of inter-ministerial consultative committees, and provisions for institutional conflict avoidance and dispute resolution. Moreover, a hierarchy of legislation must be established: effective protection calls for legal and policy mechanisms which give precedence to the wider national considerations, such as heritage conservation, over narrower institutional interests.

Integrating immovable cultural heritage into the country's legal frameworks

Immovable cultural heritage encompasses the entire corpus of national life. Legislation applicable to immovable cultural heritage, therefore, is to be found embedded in other legislation, administrative

mechanisms and policy tools, dealing with physical planning, environmental management, agriculture, wildlife conservation, forest management and so on. Even seemingly unrelated areas such as legal frameworks for taxation, import and customs duties, regulation of non-state actors, protection accorded to the spoken languages of the country, policy on education, ownership and use of land, and control of parastatal organizations, can all have direct implications for the management of immovable cultural heritage.

The conservation of cultural heritage cannot, therefore, effectively be achieved without integrating heritage conservation policy and law into all areas of national life. Integrated planning and conservation of heritage is best achieved by means of legislation and policy mechanisms. It involves imposing responsibility on state organs, municipal authorities and communities to take into account and give effect to the conservation of heritage in their day-to-day activities. Heritage conservation should be considered as a major national policy objective that cuts across policies and laws affecting all other areas of national life, and not just physical planning, environmental management, land use and so on, which, in conventional thinking, are seen as being more directly related to heritage conservation.

Given the predominance of economic development imperatives in the national priorities of African countries, special attention must be given to designing policies that seek to integrate heritage protection within the socio-economic objectives of planning and development. This enhances the chances of influencing the economic development agenda to take on board the heritage conservation ethic far more than any heritage conservation policy pursued in isolation, as is commonly the case. Prohibiting development activities within heritage sites is only rarely a viable option. Demand for new development activities within immovable cultural heritage places is inevitable, particularly within sites of living heritage, of which cultural landscapes are a prime example. Such demands must be managed according to pre-determined acceptable limits of change to the heritage environment. This calls for the implementation of an effective mechanism for the prior assessment of the potential impacts on heritage values of proposed development activity.

Environmental Impact Assessment: Environmental Impact Assessment is commonly provided for in physical planning or in environmental management laws (see, for example, the Kenyan Physical Planning Act, Chapter 286). Planning, also known as development planning, refers to the system for

organizing the use of physical space. It comprises two components: the preparation of a development plan, and the process of development control.

The development plan is a policy document which states the objectives that the planning authority wishes to achieve with respect to a defined physical space. It thus serves two critical purposes. First, it provides the context for defining the objectives to be pursued with respect to the management of physical space. It must, for instance, spell out the policy objectives with regard to the conservation of the heritage values of cultural landscapes. Second, it provides the basis for development control.

Development planning, of necessity, must be all encompassing and integrated. It must also be participatory, and opportunity must be given to the public to articulate views with regard to the policy objectives which they wish to see incorporated in the development plan. It must aim to balance the aspirations of the local communities for economic development with the national imperative to conserve the heritage values of cultural landscapes. The outcome must be anchored in binding legal documents, if it is to be of enduring value.

Development control is the process of evaluating each proposed activity for compliance with the objectives of the plan. Ordinarily, law will require that a developer apply for 'planning permission' to a designated agency, typically the local authority, or the environmental management authority. The consideration of the application provides an opportunity to evaluate the potential impacts of the proposed development on the development plan. A key tool for bringing environmental considerations to bear upon development control (which, if spelt out as part of the objectives, can include issues of heritage conservation) is the instrument of environmental impact assessment.

Environmental Impact Assessment (EIA) is a process designed to bring environmental considerations to bear on the decision-making process of a planning application. Traditionally, EIA focused on a project, with the result that the methodology is now well developed. However, project EIA has often suffered from an inherent limitation. Of necessity, by the time a project has been conceptualized, the possibility of not going ahead with it on account of potential negative environmental impacts tends to be limited. Consequently, project EIA often ends up making only mitigatory recommendations.

Moreover, traditionally project EIA tended to focus only on the evaluation of impacts on the physical environment. Account was rarely taken of impacts on cultural integrity, including religious and social well-being. In the context of heritage

management this meant that heritage management was seen in terms of protection of the 'physical object.' There was little appreciation of the cultural context within which heritage is managed. This, by default, led to the loss of cultural heritage sites, as the cultures upon whose continued integrity the heritage depended unravelled as a result of the development activity.

More recently EIA has begun to look beyond the development project to higher decision-making arenas, particularly the policy-making arena. EIA has begun to be carried out with respect to the development plan, evaluating the potential impact of various alternative policy objectives. EIA has also become more integrated in nature, looking beyond the physical environment to the entire management framework, and has brought cultural and social issues within its scope. Consequently, in assessing the potential impact of a policy or project, good practice now requires that account be taken of its impact on the cultural integrity of the affected community. This more holistic approach is in accord with the concept of sustainable development, and has enhanced the utility of EIA as a tool for advancing the conservation of heritage, in particular cultural heritage, within the context of economic development activities.

Sectoral Laws: The physical planning system is but one stage in the management of heritage. Additionally there are many sectoral laws, whose provisions have significance for heritage management and conservation, either directly or incidentally. Often these laws do not have the ostensible objective of making rules for heritage conservation. In practice however, they have considerable significance for the management and conservation of heritage.

At times sectoral laws seek to implement objectives which are directly at odds with heritage conservation. For instance, much plant protection legislation in Africa typically tends to focus on the protection of plants meant for use as crops (particularly commercial crops), and often requires the eradication of plants posing a threat to crops, which are therefore considered to be weeds (see *The Suppression of Noxious Weeds Act*, Chapter 325). Such legislation also tends to encourage monoculture, and encourages the use of pesticides to eradicate all other vegetation. Sectoral plant protection legislation thus tends to be inimical to the protection of biological diversity in general and cultural landscapes in particular. In fact, much agriculture legislation has tended to promote exotic plants (because of their commercial potential) at the expense of indigenous plants, resulting in the loss of much indigenous knowledge about subsistence food crops and medicinal plants.

Historically, laws dealing with the management of biological diversity revolved around the creation of protected areas, such as forest reserves and game parks. Protected areas were often designated as being areas which were reserved for wildlife or forests, and from which the local people were excluded. Heritage management was viewed as a technical and specialized intervention in which local people could play no role, and indeed, local communities were viewed as being part of the problem to be eliminated in the effort to conserve the wildlife and forest heritage (see *The Convention Relative to the Preservation of Fauna and Flora in their Natural State*, 1933).

More recently, the philosophy with regard to the management of biological diversity has changed. Recognition is increasingly given to the role of local peoples and local culture in this process. It is now realized that management of heritage need not necessarily be within only protected areas. Each heritage place is deserving of sustainable utilization and management, within the context of its particular values. Whereas the level of protection accorded to a particular heritage may vary depending on its values, the conservation ethic must be applied to all.

This same integrationist philosophy and approach to heritage conservation must be extended and applied to all other areas of law and policy in the country. An appropriate legal framework should therefore impose: requirements for prior assessment of potential impacts of policies, plans and decisions on heritage values across the board; a statutory responsibility on all state organs to give effect to the imperative to conserve cultural heritage in the course of implementing their respective mandates; and an obligation on citizens to manage their heritage in a sustainable manner. These latter must not derogate from the rights of citizens and communities over their heritage. These rights extend quite often to actual ownership of the cultural places that are the repository of the heritage. Obligations must, finally, be backed up by an adequately resourced and responsive institutional framework for the conservation of the nation's heritage, in which local communities participate on an equal footing.

The place of culture in the management of immovable cultural heritage

UNESCO defines cultural heritage as follows: 'The present manifestations of the human past. These are usually those elements of our past that have a capacity

or a potential to contribute to our understanding or appreciation of the human story or which are an important part of continuing cultural tradition in a spiritual and emotional sense' (UNESCO World Heritage Convention 1972). People, their perceptions, their values and their aspirations are therefore at the centre of the definition of heritage. In modern parlance, immovable cultural heritage is a cultural landscape.

The imperative to conserve immovable cultural heritage is, in essence, that of conserving the culture of the people who belong to it. The sustainable management of immovable cultural heritage necessitates the sustainable management of those cultural processes and systems that have created it, the continuing function of which are necessary to sustain it. The protection of heritage resources requires that one deals with fundamental issues of governance, development, and cultural integrity.

However, at a time of dramatic cultural evolution, reliance on cultural processes and systems as the basis for heritage management presents significant challenges. Cultural change introduces new understandings of people, landscapes, boundaries, governance and leadership, and aspirations. In sum, cultural change necessitates the adoption of new cultural paradigms. A legal framework that would be appropriate for the management of immovable cultural heritage in Africa today must build on and consolidate the new cultural paradigms. The legal framework must, at a minimum, provide a basis for:

- identifying the cultural heritage
- defining the people whose heritage it is
- facilitating the adoption and operation of appropriate governance systems and structures; and
- providing mechanisms that can respond to the people's aspirations for progress and change while also conserving the heritage values in question.

At a time of dramatic cultural change, the definition of a 'people' is itself not constant. People means both the citizens of a nation state or those with an interest in a particular cultural landscape, now commonly referred to as stakeholders. For the purposes of the management of immovable cultural landscape, people is defined to mean 'the community of persons who are dependent on the heritage for their livelihood.' Therefore, the heritage values of a place are best defined from the perspective of those communities who are dependent on it, or, in other words, to whom the heritage belongs.

Ownership of heritage can be controversial. Under the prevailing state-based laws of African countries, heritage of value tends typically to be vested in the

State. Vesting ownership of heritage in the nation-state has meant that the local communities who perceive the landscape as belonging to them have been divested of their perceived entitlement. The result has been an alienation of local communities from their heritage. To the extent that ownership facilitates management, the divestment of the communities of ownership of the heritage has undermined their ability to manage it.

In managing their heritage, communities resort to community systems and processes, including community authority structures. In some cases, community systems and structures are based on traditional authority systems and leaders. In others, particularly in cases where traditional systems and leaders are no longer viable, new or alternative community-based systems and leadership structures have been developed. Community systems and authority structures, whether or not traditional, depend for their legitimacy and effectiveness on the acceptance and cooperation of the particular communities. They are, in effect, community-based management systems.

The disintegration of community systems and community leadership structures has undermined the sustainable management and the conservation of the heritage in most of Africa. The restoration of the cultural integrity of communities, including community management systems, leadership structures and economic bases is therefore a prerequisite for the sustainable management of heritage resources in Africa. In our view, communities must function as viable entities if community management of heritage resources is to be viable.

Restoring communities does not necessarily mean a revival of traditional systems and structures, unless these have remained viable and continue to command legitimacy. Traditional leadership and authority systems have, at times, been undemocratic (excluding marginalized groups within the community), allocated local resources inequitably (to those close to power), and looked backwards rather than forwards (i.e. looked for legitimacy and justification of their demands in past practices rather than their relevance to today's circumstances). These features have undermined the legitimacy of traditional management systems in the eyes of many community members, particularly at a time when societal change, induced by trends such as the introduction of western-style formal education, a cash-based economy and different religious and cultural beliefs and practices, have undermined the authority of traditional systems (Mumma 2004).

Consequently, the restoration of the integrity of community systems may require the reconstruction of communities on the basis of present-day concepts

of democratic and accountable governance systems and structures (including in the selection of leaders); of equity in resources distribution; and of knowledge-based rationalizations, which depend on science and technology rather than on past practice per se. With regard to the management of cultural heritage resources, community management systems would need consciously to foster a conservation ethic in order to ensure the balanced utilization of the resources. Thus, communities have to recreate themselves in the image of today's heritage managers.

The way forward: legal pluralism

The concept of immovable cultural heritage, therefore, has far-reaching implications for the legal management frameworks. These frameworks must be designed to conserve not just natural phenomena, but cultural processes and systems as well.

In many societies the legal system in place is pluralistic in nature. Legal pluralism refers to a situation in which there are a number of legal systems, all operating and all simultaneously valid. This is particularly true of African countries, in which there are several operational legal systems.

There is a system of laws which was introduced by the colonial administrations and has continued to operate even after the attainment of independence. These laws derive their validity from the State, and are almost always enacted through a formal process. Although only recently introduced into the country, the state-based laws have tended to override the other local laws, which were in place before their advent. In almost every country, their remit has been expanding at the expense of the other systems of law, largely on account of state intervention, cultural change and the disintegration of traditional structures.

The other systems of law derive their validity from the local communities. These community-based laws operated before the advent of colonialism and have continued to operate with varying degrees of effectiveness. These laws are largely unwritten and operate on the basis of the support and respect that they command from the community members.

Although most states are legally pluralistic, the relationship between the two systems is inherently antagonistic. The two systems compete for legitimacy and influence. But state-based systems have been the more hegemonic, particularly in Africa, given the backing of the colonial state. At times, states have openly sought the elimination of community-based legal systems. For example, many jurisdictions determine the validity of community-based legal

systems through criteria such as ‘repugnance to morality and fairness’ (Mumma 2005) so that, where a given practice is judged to be repugnant, it is invalidated. It is often assumed that concepts such as morality and fairness are neutral, but in fact they represent particular value judgments, based on cultural perceptions, the effect of whose application is to undermine the validity of community-based legal systems.

More commonly, community-based legal systems have unravelled as a result of the decline of the community itself through processes often seen as modernizing. These include the replacement of traditional community leaders with leaders appointed by the State; the disintegration of the local economy leading to an exodus of young people from the community; and the introduction, through education and religion, of alternative value systems; and so on.

The hegemony of state-based legal systems is manifested in a number of ways: historic rights derived from community-based legal systems have been revoked, nationalized and at best, reduced to permit based rights; community historical uses of, for instance, cultural landscapes have been criminalized; community rights have been opened up to exploitation and use by people typically considered outsiders by the community; community-based traditional leaders and authority systems have been invalidated and replaced by state appointed leaders; and community enforcement systems have been invalidated and derided.

The effect has been to alienate local communities from their heritage and to reduce community-based legal systems to a peripheral management system, often ineffective and secondary in status.

Despite the decline in community-based legal systems it is now widely realized that state-based legal systems on their own are incapable of providing a holistic and sustainable management of immovable cultural heritage, including those on the World Heritage list. Key among the reasons is resource limitations which make it impossible for a highly resource-dependent systems, like state-based legal systems, to function effectively. This is particularly so in poor countries, such as those in Africa. This is due to the fact that, while in western countries there is a long history of reliance on state-based legal systems, in Africa the state-based legal systems have not been internalized widely and depend for their enforcement almost exclusively on state organs.

Arising from the inability to rely wholly on state-based enforcement, it has become necessary to integrate communities into management systems and structures in order to utilize community-based legal systems, and therefore to improve the effectiveness of

the management of heritage sites. A call to resort to community-based legal systems to conserve heritage is a call for legal pluralism. Legal pluralism operates in the context of local cultures, local languages, local religions, and therefore local governance structures. In effect, the challenge of cultural heritage management in African countries today is how to integrate legally pluralistic frameworks into the management of cultural landscapes.

Legal pluralism involves reinstating historic ownership and/or use rights, particularly with respect to land. Restitution of historic rights reinstates the confidence of communities, enabling them take charge of managing local resources. It involves a fundamental shift in power relations between the central state and local communities. At the same time, the communities must evolve in the direction of democratic governance, equity, and the articulation in their systems of a heritage conservation ethic.

Concluding remarks

Giving effect to the concept of immovable cultural heritage resources requires a paradigm shift in the design and implementation of legal frameworks in African countries. These legal frameworks were, in the majority of cases, developed before the advent of new concepts and trends in heritage management, for example the concept of cultural landscape or cultural itineraries. They did not, and probably could not have, made provision for the management of such issues. Their design suited the preservation of natural protected areas and museum artefacts. Additionally, they were overly influenced by a European conception of heritage as monuments. This European influence has survived the advent of independence and can be seen in even relatively recent statutes, such as the Botswana Antiques and Monuments Act, 2001.

This review has highlighted key issues upon which the reform and further development of heritage legislation in Africa must be based, if it is to provide an appropriate framework for the management of immovable cultural heritage. The legal framework must provide for the recognition of the central role of communities in the management of cultural heritage and put in place measures to re-invigorate local community systems and structures. These include restitution of property rights, restoration of leadership systems and support for the enhancement of internal democratic governance. The legal framework must also provide robust yet flexible heritage management mechanisms. These measures must also be integrated into other legal frameworks so that heritage management becomes a key national policy objective.

Finally, the legal frameworks require a redesign of the heritage management institutions to be predominantly facilitators and regulators of heritage conservation, rather than managers of heritage sites.

The reforms of legal frameworks outlined here have far-reaching implications for the organization of the management of the affairs of African countries. If implemented successfully they will enable African peoples to reclaim their heritage.

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Given their historical background as former colonies of the United Kingdom, English-speaking sub-Saharan African countries apply the English legal system as their basic law. The main exception to this general situation is to be found in a few Southern African countries, principally, the Republic of South Africa, Namibia, Lesotho, and Zimbabwe, whose common law is the system of law known as Roman Dutch law, which they inherited from the Dutch who originally colonized the southern part of South Africa.

The common law is defined as the body of law based on the English legal system, as distinct from the civil law system, which applies in much of the continent of Europe, and also in those African countries that were colonies of the continental European powers, such as France. The origins of the civil law system can be traced back to Roman law. The common law comprises not just the substantive body of law and legal principles, but also the techniques of applying the law, the principles of interpreting the law, and the methods for law-making.

[ALBERT MUMMA]

Heritage policy and law-making processes

Roman Dutch law, on the other hand, refers to the system of law applied in Holland in the period between the fifteenth and nineteenth centuries, and which was based on a mixture of Germanic customary law and Roman law. This system of law was introduced into southern Africa by the Dutch settlers and survived the advent of British colonial administration of Southern Africa. However, with regard to the processes for policy and law making, the Southern African countries apply the parliamentary systems that largely mirror those applied in the rest of the British Commonwealth. Under these systems, the process of law making is based on parliamentary approval of the law.

The legal framework

The legal framework governing immovable cultural heritage comprises the whole array of legal instruments,

systems and processes, which are used to manage and regulate immovable cultural heritage. Whereas the terminology used to describe components of the framework may differ from country to country, the key features are essentially similar in all of the English-speaking sub-Saharan African countries within which the English common law system applies.

The legal framework comprises: Policies; Acts of Parliament; subordinate legislation (known as regulations and rules); ordinances, edicts, by-laws; court decisions; directives; Ministerial Circulars; and guidelines as well as principles of the common law. In the former British colonies, customary law is also considered to form part of the laws of the land. These components of the legal framework are discussed further below.

The terms ‘statute’, ‘Acts of Parliament’, ‘decree’, ‘ordinances’ and ‘edicts’ are all alternative terminologies which at one time or another have been used to describe the principal laws governing

an issue. Thus, for instance, the terms ‘decree’ and ‘edict’ are commonly used to describe laws made by a military regime; the term ‘ordinance’ was in common use to describe laws made by the British colonial administration; and the term ‘organic or basic law’ is commonly used to describe the laws of the civil law system, whereas in the common law system the term Act of Parliament is more typical.

In regard to the manner in which the legal system functions, the position in Kenya is typical of that prevailing in other former British colonies. Section 3 of the Judicature Act, Chapter 8 of the Laws of Kenya states that the jurisdiction of the courts shall be exercised in accordance with:

1. a) The Constitution;
b) subject thereto, all other written laws, including Acts of Parliament of the United Kingdom;
c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity, and statutes of general application in force in England on 12th August 1897 (the date of the introduction of the colonial administration in Kenya) and the procedure and practice observed in courts of justice in England at that date.
2. The courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law ...’.

This legal framework is hierarchical in nature, and typically, apart from the Constitution, Acts of Parliament are at the top of the hierarchy. In all countries, the Constitution is at the top of the hierarchy above the Acts of Parliament, and is considered to be the supreme law. All other laws and other subsidiary legislation forming part of the legal framework must conform to the Constitution. Below the Constitution are: Acts of Parliament and other written law (such as subsidiary legislation); and principles of the common law and doctrines of equity (which deal with the mandate of the court to do justice to the parties before it).

The continuing influence of the English legal system in the post-independence period can also be seen, since the Judicature Act stipulates that, in the absence of a local written law, Acts of the British Parliament made before the advent of colonization of the country will still be applied as valid law. These English legal concepts continue to influence the management of immovable cultural heritage in English-speaking sub-Saharan Africa.

African customary law occupies a subordinate position in the hierarchy. The first section 3(2) states that it shall only guide the court. Secondly, it only

applies in civil cases, and not in criminal cases. This means that one cannot be prosecuted for an offence against African customary law and practices. Thirdly, even where there exists some African customary law which applies to the issue the court can decline to apply it if the court considers that it is ‘repugnant to justice and morality or inconsistent with any written law.’ This gives the court latitude to impose its own concepts of justice and morality (which are often derived from western culture) in determining a dispute. This provision has been used over the years to strike down and eliminate many African taboos and beliefs, which were used to govern much of African immovable cultural heritage.

Policy may be defined as a set of principles which is used as a basis for making decisions to further objectives. Policy is articulated by the Minister in charge of immovable cultural heritage. It forms part of the regulatory framework but differs from law in so far as it comprises broad Government objectives, and does not stipulate binding rights and obligations. Failure to adhere to a policy does not, in itself, attract criminal or civil sanctions, although it may attract administrative sanctions from the Minister.

The principal law dealing with the management and regulation of immovable cultural heritage is a statute or legislation. In countries which inherited the British common law system (as well as in the Southern African countries applying the Roman Dutch tradition) this legislation is known as an Act of Parliament. It defines the key regulatory framework for immovable cultural heritage. It sets out the regulatory and management institutions, and the key rights and obligations of the citizens with regard to the management of immovable cultural heritage.

Acts of Parliament often provide for the Minister in charge of immovable cultural heritage to make subsidiary legislation, known as either Rules or Regulations. Subsidiary legislation spells out in greater detail the provisions of the principal statute. Failure to comply with the provisions of subsidiary legislation can attract criminal sanctions, for which the penalties are often stipulated in the subsidiary legislation. It is a cardinal rule in making subsidiary legislation that its provisions must conform to the principal statute. A subsidiary legislation cannot introduce new rights and obligations, which are not provided for in the principal statute. Any provision of the subsidiary legislation that does not conform to the provisions of the principal statute risks being nullified by the court as *ultra vires* (made outside of the authority of the principal statute).

There is a particular category of subsidiary legislation known as a by-law. This is a rule or an administrative provision adopted by an organization

for its internal governance and its external dealings. By-laws are best known in the context of rules made by local authorities under powers given to them in the principal statute setting up the local authority. By-laws made by a local authority apply only within the area of jurisdiction of the local authority. By-laws can also be made by a immovable cultural heritage management agency, if the law setting up the agency provides for this to be done.

Statutes often provide for administrative Directives to be issued by the Minister or, in certain instances, by the Board or the Chief Executive Officer of the heritage management agency. Directives may be of general application or they may apply specifically to those at whom they are targeted. Being administrative in nature, directives cannot provide for criminal penalties, although they can make provision for administrative sanctions. Typically, Directives are issued in the form of Circulars (which can be Ministerial, Presidential or even Board, depending on who issues them).

Guidelines are often technical in nature. They set out the management agencies, technical guidance on an issue. Guidelines are not legally binding, although failure to adhere to the guidance may constitute evidence of a criminal offence. Guidelines are a principal way in which the management agency facilitates compliance with technical requirements.

The policy-making process

As stated above, Policy may be defined as a set of principles which is used as a basis for making decisions to further defined objectives. Almost any institution, public or private, operating for profit or voluntary requires a policy to guide its operations. In the area of regulation, the Government as well as the regulatory authorities, use policy to guide decision making and implementation of legal requirements. This applies to cultural heritage management as it does to any other field of regulation.

In an ideal situation a country would have a formal written cultural heritage policy, which has been endorsed by a body with the required authority to endorse it. Although the policy-making process differs from country to country, in many countries, formal policy statements are endorsed by the Cabinet. But in the countries with an English common law legal tradition, the typical procedure in policy-making is that a proposal for a policy statement is prepared by the Minister within whose portfolio the matter at issue lies. This proposal is then presented to the Cabinet for approval. Once approved by the Cabinet, it is presented to Parliament for debate and if approved,

is gazetted as a Sessional Paper. The Sessional Paper is the authoritative policy statement on the particular issue. A policy statement, which has been adopted through these formal procedures, can be described as a de jure policy (i.e. the policy in law).

It is quite common that a country does not have a formal written policy statement on a given issue. This notwithstanding, the country's policy on an issue can be gleaned from the practice adopted by the country, from ad hoc statements, and from the practices of the country with regard to the issue. Additionally the country's policy may be implicit in the legislation on the issue. Policy which is implicit rather than express may be described as de facto policy.

Policy needs to be reviewed periodically so as to align de jure policy to de facto policy; policy to the law; and policy to emerging principles and best practices. The review of policy may well lead to the development of new policy. The policy-making, implementation and review process therefore is a dynamic one, and policy constantly evolves.

The typical policy-making process can be divided into seven steps as follows:

- i The Initiation phase when the need for a policy review is recognized;
- ii The Policy analysis phase when the key policy issues are identified;
- iii The Policy formulation and decision phase when the policy is prepared;
- iv The Legalization phase when a law is adopted to give effect to the Policy;
- v The Implementation phase when the Policy is put into effect;
- vi The Monitoring Phase when the effectiveness of the Policy is monitored and shortcomings identified; and
- vii The Review phase when the process of policy review starts again.

The implementation of policy requires the formulation of a Strategy and an Action Plan which sets out strategic goals, specific targets, measurable performance indicators, and a time frame for implementation. It is commonly the case that in the area of immovable cultural heritage, an Action Plan is further broken down into site-specific management plans, which are developed for a particular site. In order to ensure effective implementation the process requires the provision of financial and technical resources, including a budget. In order to fund successfully the process, a resource mobilization strategy will be needed.

Best practice requires that the process of policy-making be a participatory one, with the active involvement of stakeholders. Stakeholder involvement leads to more informed decision making;

the identification of more appropriate solutions to problems; reduced potential for conflicts; greater public confidence; greater trust by civic society; and greater commitment by cooperating partners. Involving stakeholders requires that, as part of the policy-making process, the key stakeholders be identified, their interests assessed, and a stakeholder participation strategy elaborated.

Policy-making can be a time-consuming exercise, particularly where stakeholders are involved. This is due to the fact that building consensus over key policy proposals is a slow process, requiring repeated consultations at various levels. This process can take several years. However, the time taken in building consensus will be gained during the implementation process, since there is likely to be greater commitment to the achievement of the objectives of the policy if consensus was built around the key objectives and principles.

The law-making process

Ideally the process of making a law should follow the policy-making process, but at times these two processes are carried out simultaneously. The exact process followed however, will depend on the particular legal requirements applicable in that country as well as on the exigencies of the situation. There may well be pressures which make it necessary for legislation be passed urgently, even before a Policy has been fully developed.

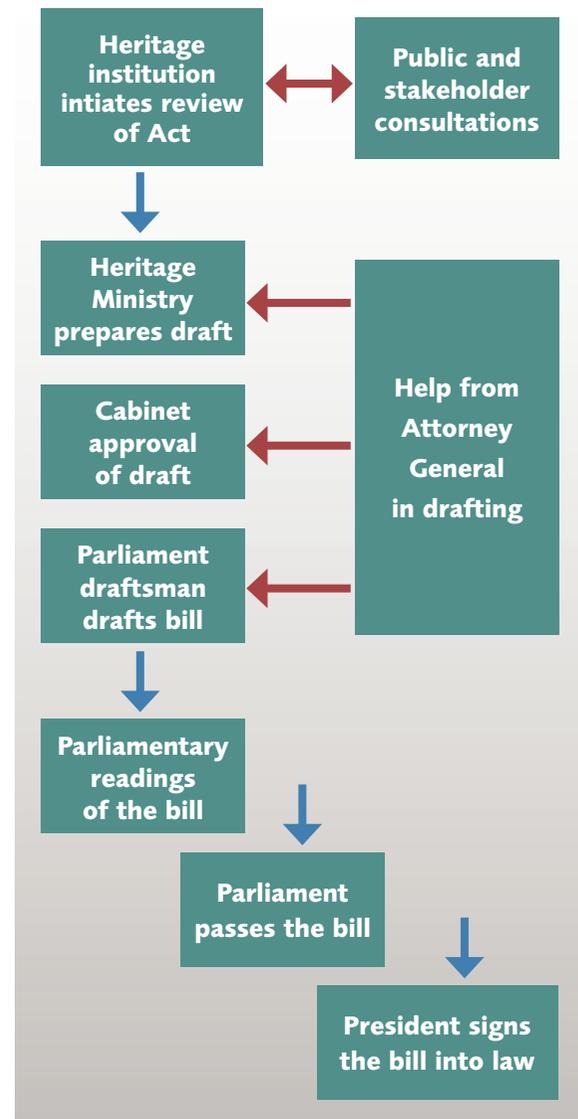
In nearly all countries in English-speaking sub-Saharan Africa the mandate to make laws lies with Parliament. In a few instances, in which the country has been under military rule and Parliament abolished, laws were made by the military authorities. In nearly every case, countries have built on laws which they inherited from the colonial regime. Thus, no country has started off with absolutely no legal framework governing the management of immovable cultural heritage. Indeed, the experience in African countries has been that only a handful of countries (of which South Africa may be the main example) have taken steps to develop entirely new immovable cultural management laws, the majority preferring to retain and make some minor amendments to the inherited laws.

The passage of legislation through Parliament can be a protracted process, at times lasting several years. The reason for this is that legal reform has not been given high priority by many African countries. The one notable exception is that of post-apartheid South Africa where a comprehensive legal reform programme to overhaul apartheid era laws was embarked on immediately following the end of the

apartheid period. The rather low priority given to legal reform generally, coupled with resources constraints and the low ranking of immovable cultural heritage management in many countries, means that it would not be unusual if reforming immovable cultural heritage laws took three or more years.

The processes of most jurisdictions require that the Ministry within whose mandate the management of immovable cultural heritage falls prepare a draft of the legislation. Following approval of the draft by the Cabinet, it will be sent to the Attorney General for final drafting. The actual drafting is undertaken by the Parliamentary draftsman, which is an office dedicated to drafting principal statutes before these are presented to Parliament.

TABLE 1 **Reviewing an Act**



Following the conclusion of the drafting, the proposed legislation (known at that time as a *Bill*) is published in the official government publication, known in some countries as the Gazette and in others as the Official Bulletin. The stage after official publication is the stage of presentation to and debate in Parliament. A Bill is presented to Parliament for debate by the Minister within whose mandate the subject matter of the Bill falls. This Minister also has the task of explaining and defending the proposals of the Bill.

In those countries which inherited the British Parliamentary system, the process of debates of Bills in Parliament involve three Readings. The first Reading is a formal reading of the Bill. During the second Reading the Bill is debated in detail, after which it is presented to a Committee of Parliament for detailed consideration. Amendments may be introduced into the Bill during the Committee stage. The Bill is then presented to the full house of Parliament for the third Reading and, if approved, is passed either with or without amendments.

Before a Bill becomes law, it requires Presidential Assent. The Constitutions of most countries give power to the President to give assent to the Bill, or to veto the Bill. If vetoed, the Bill must be sent back to Parliament for further debate, and Parliament may amend it to take account of the President's objections. A veto by the President is rare, however, since before presentation to Parliament, the Bill will have been approved by the Cabinet. Once it receives assent by the President, the Bill becomes known as an Act of Parliament.

Typically, there is little room for public involvement in the Parliamentary debates. Therefore any involvement by the public must come before the Bill is presented to Parliament. In many cases, little public consultation precedes the official publication of the Bill, a situation that should be rectified in order to develop legislation likely to receive widespread public support.

Once it becomes law, the process of implementation begins. This may require the establishment of institutions as well as the promulgation of subsidiary legislation.

The process of promulgating subsidiary legislation requires that the technical officers within the immovable heritage agency develop drafts of the subsidiary legislation, which are then presented by the Minister to the office of the Attorney General. Following final drafting by the Parliamentary draftsman, the subsidiary legislation is published in the official Gazette, either as Regulations or as Rules. In some countries subsidiary legislation must be laid before Parliament for a stipulated period

(say, fourteen days) during which period Parliament may pass a vote to nullify the proposed subsidiary legislation. If Parliament takes no action then the subsidiary legislation goes into effect.

Conclusion

The processes outlined here may vary in detail from country to country and there is no intention to set out a rigid template of policy and law to be followed in all countries. Despite those minor variations, the principles of policy and law reform, the processes, and the key stages in the reform process can be adopted and applied in many of the countries involved in this study.

Heritage laws in sub-Saharan Africa

Country	Title of Act	Date of Legal Act
Angola	Décret n° 80/76 du 3 septembre 1976	1976
Benin	Ordonnance n° 35/PR/MENJS relative à la protection des biens culturels	1967
Botswana	Monuments and Relics Act	2001
Burkina Faso	Ordonnance n° 85-04/CNR/PRES portant protection du patrimoine culturel	1985
Burundi	Loi n° 1/6 du 25 mai 1983 portant protection du patrimoine culturel national	1983
Cameroon	Loi fédérale n° 63-22 du 19 juin 1963 organisant la protection des monuments, objets et sites, de caractère historique ou artistique	1963
Chad	Loi n° 14-60 du 2 novembre 1960 ayant pour objet la protection des monuments et sites naturels, des sites et monuments de caractère préhistorique, archéologique, scientifique, artistique ou pittoresque, le classement des objets historiques ou ethnographiques et la réglementation des fouilles	1960
Comoros	Loi n° 94-022/AF portant protection du patrimoine culturel national	1994
Congo	Décret n° 68/45 du 19 février 1968 fixant les modalités d'application de la loi 32/65 du 12 août 1965, article 5 donnant à l'Etat la possibilité de créer des Musées	1968
Côte d'Ivoire	Loi n° 87-806 du 28 juillet 1987 portant protection du patrimoine culturel	1987
D.R. Congo	Ordonnance-Loi n° 77-016 du 15 mars 1971 relative à la protection des biens culturels	1971
Ethiopia	Proclamation n° 36/1989 A proclamation to provide for the study and protection of antiquities	1989

Country	Title of Act	Date of Legal Act
Gabon	Loi n°2/94 du 23 décembre 1994 portant protection des biens culturels	1994
Ghana	National Museum Regulations.	1973
Guinea	Décret n°93/021/PRG/SGG portant attributions et organisation de la Direction Générale du Musée National de Guinée	1992
Kenya	National Museums and Heritage Act	2006
Lesotho	The Historical Monuments, Relics, Fauna and Flora Act	1967
Liberia	An Act to amend the executive law to create the department of information and cultural affairs	1965
Madagascar	Exposé des motifs de l'ordonnance relative à la protection, la sauvegarde et la conservation du patrimoine national	1972
Malawi	Monuments Act	1965
Mali	Loi n°85-40/AN-RM relative à la protection et à la promotion du patrimoine culturel national	1985
Mauritania	Loi n°72-160 relative à la sauvegarde et à la mise en valeur du patrimoine national, préhistorique, historique et archéologique	1972
Mauritius	National Monuments Act	1985
Namibia	National Heritage Act	2004
Niger	Loi n°97-002 du 30 juin 1997 relative à la protection, la conservation et la mise en valeur du patrimoine culturel national	1997
Nigeria	National Commission for Museums and Monuments Decree n° 77	1979
Rwanda	Décret-loi du 26 avril 1974 portant confirmation et modification de l'ordonnance-loi du 18 juin 1973 portant création de l'Office Rwandais du Tourisme et des Parcs Nationaux	1973
Senegal	Loi n°71-12 du 25 janvier 1971 fixant le régime des monuments historiques et celui des fouilles et découvertes	1971
Seychelles	National Monuments Act	1980
South Africa	National Heritage Resources Act	1999
Sudan	The Antiquities Ordinance	1952
Swaziland	The National Trust Commission Act	1972
Tanzania	Antiquities Act	1964
The Gambia	The Monument and Relics Act	1974
Togo	Loi n°90-24 relative à la protection du patrimoine culturel national	1990
Uganda	The Historical Monuments Act	1967
Zambia	National Heritage Conservation Commission Act	1989
Zimbabwe	National Museums and Monuments of Zimbabwe Act	1972

Glossary and definitions

Archaeological site

Archaeology is the study of physical evidence from the past. Archaeological sites can provide evidence of important elements of human settlement. They can add valuable information to our existing understanding of the past. An archaeological site can include both above and below-ground features.

Community

All people, including those with special interests such as owners, managers, architects, builders, developers, local and state Government, technical heritage experts.

Compatible use

A use that respects the cultural significance of a place. Such a use involves no, or minimal, impact on cultural significance.

Conservation

All the processes of looking after a place so as to retain its cultural significance.

Cultural significance

Cultural significance means aesthetic, historic, scientific, social or spiritual value for past, present or future generations.

Cultural heritage

Cultural heritage can be defined as those things and places associated with human activity. The definition is very broad, and includes both indigenous and historic values.

Heritage

The word ‘heritage’ is commonly used to refer to our cultural inheritance from the past that is the evidence of human activity.

Object

An object means a movable article, artefact or relic, and may include furniture, ornaments, cutlery, glass, crockery, works of art, honour boards, jewellery, and vehicles. Groups of objects are commonly referred to as a collection if there is a shared theme that links the objects.

Relic

Deposit, object or material evidence of human past.

Site

A particular focus of past human activity, usually (but not exclusively) characterized by physical evidence of this activity.

Significance

Significance is a term used to describe an item’s heritage value. Values might include natural, indigenous, aesthetic, historic, scientific or social importance.

Sustainability

Sustainability is the ability to maintain the qualities that are valued in the built and natural environment. Sustainability can be measured in terms of economic, environmental and social factors.

Value

A term used to describe the heritage qualities of an object or place. See also Significance.

Legal terms

Accessory: A person who assists in the commission of a crime, either before or after the fact.

Action: Also called a case or lawsuit. A civil judicial proceeding where one party sues another for a wrong done, or to protect a right or to prevent a wrong.

Adjudication: A decision or sentence imposed by a judge. Giving or pronouncing a judgment or decree, or the rendering of a decision on a matter before a court.

Admissible evidence: Evidence which can legally and properly be used in court.

Affidavit: A written statement made under oath. A written and sworn statement witnessed by a notary public or another official possessing the authority to administer oaths. Affidavits may be admitted as evidence.

Allegation: Saying that something is true. The assertion, declaration, or statement of a party to an action, made in a pleading, establishing what the party expects to prove.

Appeal: Asking a higher court to review the decision or sentence of a trial court because the lower court made an error.

Arbitration: Submitting a case or dispute to designated parties for a decision, instead of using a judge.

Arraignment: The first court appearance of a person accused of a crime. The person is advised of his or her rights by a judge and may respond to the criminal charges by entering a plea. This usually takes place the morning after a person is arrested.

Arrest: When a person is taken into custody by a police officer and charged with a crime.

Charge: The statement accusing a person of committing a particular crime. Also the judge's instructions to the jury on its duties, on the law involved in the case and on how the law in the case must be applied.

Circumstantial evidence: All evidence of an indirect nature. Testimony not based on actual personal knowledge or observation of the facts in controversy.

Community Service: Work that convicted defendants are required to perform in order to repay the community for the harm caused to the community by the crime.

Complaint: A legal document that tells the court what you want, and is served with a summons on the defendant to begin the case.

Contract: An oral or written agreement between two or more parties which is enforceable by law. A legally enforceable agreement between two or more persons or parties.

Conviction: To be found guilty of committing a crime. In a criminal case, a finding that the defendant is guilty.

Corroborating evidence: Evidence supplementary to that already given and tending to strengthen or confirm it.

Decree: A decision or order of the court. A final decree is one which fully and finally disposes of the litigation.

Defamation: The making of false, derogatory statements about a person's character, morals, abilities, business practices or financial status. (includes libel, which is written, and slander, which is spoken).

Default: Occurs when a defendant fails to respond to the plaintiff's complaint within the time allowed, or fails to appear at the trial. The court may then enter a default judgment. To fail to respond or answer to the plaintiff's claims by filing the required court document; usually an Appearance or an Answer.

Defendant: In civil cases, the person who is given court papers, also called a respondent. In criminal cases, the person who is arrested and charged with a crime.

Deferred sentence: The court retains jurisdiction to sentence the defendant at a later time.

Dismissal: A judge's decision to end the case.

Docket: A brief entry or the book containing such entries of any proceeding in court.

Due process: The guarantee of due process requires that no person be deprived of life, liberty, or property without a fair and adequate process. In criminal proceedings this guarantee includes the fundamental aspects of a fair trial, including the right to adequate

notice in advance of the trial, the right to counsel, the right to confront and cross-examine witnesses, the right to refuse self-incriminating testimony, and the right to have all elements of the crime proven beyond a reasonable doubt.

Estate: A collective term meaning all real and personal property owned by a person.

Eviction: Legally forcing a tenant out of rented property.

Evidence: Testimony, records, documents, material objects, or other things presented at a trial to prove the existence or non-existence of a fact.

Expert testimony: Testimony given in relation to some scientific, technical or professional matter by experts, i.e., persons qualified to speak authoritatively by reason of their special training, skill or familiarity with the subject.

Fine: A sum of money paid as part of a penalty of conviction for a particular criminal offence.

Forfeiture: The concept of forfeiture is used in a variety of settings in the legal system. For example, property such as an automobile or house that is used in the commission of a crime i.e., selling a controlled substance, may be forfeited to the state in a civil proceeding.

Garnishment: A court order to take part of a person's wages, before he gets them, and apply the amount taken to pay a debt owed to a creditor.

Grievance: A complaint filed against an attorney or judge, claiming an injury or injustice.

Immunity: Legal protection from liability. There are many categories of immunity in civil and criminal law. For example, sovereign immunity protects Government agencies from civil liability and judicial immunity protects judges acting in their official capacities.

Incarceration: Confinement to a state correctional institute or prison.

Injunction: A court order forbidding or requiring a certain action.

Judgment: The official decision of a court disposing of a case.

Jurisdiction: The legal authority of a court to hear

a case or conduct other proceedings; power of the court over persons involved in a case and the subject matter of the case.

Jurisprudence: Formal study of the principles on which legal rules are based and the means by which judges guide their decision making.

Liability: A legal responsibility, obligation, or debt.

Material evidence: Evidence which is relevant to the issues in a case.

Mistrial: A trial which is void because of some error.

Mitigating Circumstances: Circumstances that may be considered to reduce the guilt of a defendant. Usually based on fairness or mercy.

No Contest: A plea in a criminal case that allows the defendant to be convicted without admitting guilt for the crime charged. Although a finding of guilty is entered on the criminal court record, the defendant can deny the charges in a civil action based on the same acts.

Oath: To swear/affirm to the truth of a statement/document.

Order: A written direction of a court or judge to do or refrain from doing certain acts.

Ordinance: A written law enacted by the legislative body of a county, city, or town.

Pardon: Action by an official of an executive branch of Government relieving a criminal from a conviction.

Parties: The persons who are actively involved in the prosecution or defence of a legal proceeding, including the plaintiff or prosecution, the defendant and any 'third party defendant'.

Perjury: Making false statements under oath.

Plaintiff: A person who files a lawsuit.

Power of attorney: A written instrument authorizing another (not necessarily a lawyer) to act as one's agent or attorney.

Prejudicial evidence: Evidence which might unfairly sway the judge or jury to one side or the other. For example, photographs of a gory murder scene might inflame a jury without providing useful evidence.

May be excluded in criminal cases if prejudicial effect outweighs probative value.

Preliminary hearing: A probable cause hearing which screens felony criminal cases by deciding whether there is enough evidence to warrant a trial. If the judge determines there is sufficient evidence, the defendant is 'bound over' for trial. The defendant may waive this hearing.

Premeditation: The planning of a crime preceding the commission of the act, rather than committing the crime on the spur of the moment.

Prima facie: Literally, 'on its face.' A fact presumed to be true unless disproved by some other evidence. In a criminal case, when the prosecution rests, the state's case is said to be prima facie, if the evidence so far introduced is sufficient to convict.

Prosecutor: The name of the public officer who is appointed in each county to conduct criminal prosecutions on behalf of the state or people.

Punitive damages: Money awarded to an injured person, over and above the measurable value of the injury, in order to punish the person who hurt him.

Quid pro quo: What for what; something for something; giving one valuable thing for another.

Reasonable doubt: A person accused of a crime is entitled to acquittal if, in the minds of the jury or judge, his or her guilt has not been proved beyond a 'reasonable doubt'; the jurors are not entirely convinced of the person's guilt.

Rebuttal evidence: Evidence given to explain, contradict, or disprove facts offered by the adverse party. In criminal cases, the state has the opportunity to rebut the defendant's case because it has the burden of proof.

Respondent: 1) the person who is the subject of a petition, 2) the prevailing party in a court case against whom an appeal is taken.

Restitution: Court-ordered payment to restore goods or money to the victim of a crime by the offender.

Restraining order: Similar to an injunction, commanding the party to leave the other party alone, usually in a divorce proceeding.

Sentence: The judgment formally pronounced by the court upon the defendant after conviction in a criminal prosecution, imposing the punishment to be inflicted.

Sovereign immunity: The doctrine that a Government or Governmental agency cannot be sued without consent.

Subpoena: An official order to appear in court at a specific time. Failure to obey a subpoena to appear in court is punishable as a contempt of court.

Summons: A notice to the named person that an action has been commenced against him in court and that he is required to appear, on the day named, and answer the complaint.

Suspended sentence: A sentence ordered by the court but not imposed, which gives the defendant an opportunity to complete probation.

Trial: A judicial examination of issues between parties to an action.

Verdict: The formal and unanimous decision or finding made by a jury.

Waiver of immunity: A means authorized by statutes by which a witness, in advance of giving testimony or producing evidence, may renounce the fundamental constitutional right that no person shall be compelled to be a witness against himself/herself.

Warrant: A written order issued and signed by a judge or magistrate which allows the police to search a place and seize specified items found there (search warrant), or to arrest or detain a specified person (arrest warrant).

With prejudice: A dismissal 'with prejudice' bars the right to bring or maintain another action on the same claim or cause.

Without prejudice: A dismissal 'without prejudice' allows a new suit to be brought on the same cause of action.

Witness: One who testifies under oath to what he/she has seen, heard or otherwise observed.

Writ: A petition to a court for some extraordinary relief, such as asking the court to release a defendant from imprisonment.

Charters and conventions

Charters adopted by ICOMOS

International Charter for the Conservation and Restoration of Monuments and Sites (The Venice Charter), 1964

The Florence Charter (Historic gardens and landscapes), 1981

Charter on the Conservation of Historic Towns and Urban Areas, 1987

Charter for the Protection and Management of the Archaeological Heritage, 1990

Charter for the Protection and Management of the Underwater Cultural Heritage, 1996

International Charter on Cultural Tourism, 1999

Charter on the Built Vernacular Heritage, 1999

Principles for the Preservation of Historic Timber Structures, 1999

ICOMOS Charter – Principles for the Analysis, Conservation and Structural Restoration of Architectural Heritage, 2003

ICOMOS Principles for the Preservation and Conservation-Restoration of Wall Paintings, 2003

National ICOMOS Charters

1. The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance (The Burra Charter) (Australia ICOMOS)
2. Charter for the Preservation of Quebec's Heritage (Deschambault Declaration) (ICOMOS Canada)
3. Appleton Charter for the Protection and Enhancement of the Built Environment (ICOMOS Canada)
4. First Brazilian Seminar About the Preservation and Revitalization of Historic Centers (ICOMOS Brazil, 1987)
5. Charter for the Conservation of Places of Cultural Heritage Value (ICOMOS New Zealand, 1992)
6. A Preservation Charter for the Historic Towns and Areas of the United States of America (US/ICOMOS, 1992)

UNESCO Conventions

1. Convention on the Protection and Promotion of the Diversity of Cultural Expressions
2. Paris, 20 October 2005
3. Convention for the Safeguarding of the Intangible Cultural Heritage
4. Paris, 17 October 2003
5. Convention on the Protection of the Underwater Cultural Heritage
6. Paris, 2 November 2001
7. Convention concerning the Protection of the World Cultural and Natural Heritage
8. Paris, 16 November 1972
9. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970
10. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954

UNESCO Recommendations

1. Agreement on the Importation of Educational, Scientific and Cultural Materials, with Annexes A to E and Protocol annexed, Florence, 17 June 1950
2. Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989
3. Recommendation concerning the Status of the Artist, 27 October 1980
4. Recommendation for the Protection of Movable Cultural Property, 28 November 1978
5. Recommendation concerning the International Exchange of Cultural Property, 26 November 1976
6. Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas
7. Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, 16 November 1972
8. Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works, 19 November 1968
9. Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, 19 November 1964
10. Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites, 11 December 1962
11. Recommendation on International Principles Applicable to Archaeological Excavations, 5 December 1956
12. Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone, 14 December 1960



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