

LEGISLATIVE PROTECTION OF CULTURAL HERITAGE RESOURCES: A SOUTH AFRICAN PERSPECTIVE

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I INTRODUCTION

The scope of past environmental protection generally focussed on the conservation of the natural environment, which includes *inter alia* micro-organisms, plant and animal life, land, water and the atmosphere of the earth. The role of *Homo sapiens* was only recognised in this fine equation, in that he vitally contributed to the hierarchical content, management and use of these biological properties.¹

Communities however, increasingly recognised the significance of human processes in the phenomenon of an integrated environment. A vital component of the human process includes cultural heritage, which broadly consists of the intellectual, artistic, social and historical record of the human species that constitutes the common cultural patrimony of the human race.² It is thus accepted that, central to the cultural paradigm, is *Homo sapiens*, who is the sole agent responsible for creating belief systems regarding the environment and exploitation of biological and non-biological resources.³ Cultural properties and conditions of the natural environment that influence human health and well-being are therefore heeded to be valuable considerations in modern environmental and non-environmental protection instruments.⁴ Policy makers on international and

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¹ M Naude, "Cultural Heritage and the Environmental Impact Assessment Process" [2000] *Research by the National Cultural History Museum* 38.

² E Brown-Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989) 257. There exists a clear distinction between natural cultural heritage and common cultural heritage. A state may base its claims of national heritage on its historical self-concept, whereas common cultural heritage highlights the universal interest of all nations in cultural objects. H C Roodt, *Legal Aspects of the Protection of Cultural Heritage* (LLD thesis, University of the Free State, 2000) xxii-xxiii.

³ Naude, above n 1, 40.

⁴ Various protection and conservation methods are included in a number of national and international environmental and non-environmental instruments. These instruments include *inter alia*: the *Treaty on the Protection of Artistic and Scientific Institutions and Historical Monuments* 1935; the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954; the *European Cultural Convention* 1954; the *European Convention on the Protection of the*

national levels are accordingly sensitive to the fact that human-derived heritage currently forms an integral part of the global environment and should therefore be conserved alongside the natural environment.

As far as could be established, no clear-cut definition exists for cultural heritage. Cultural heritage is often described in various legislative instruments as having resourceful properties. In order to formulate an acceptable definition of cultural heritage, the need consequently emerges to determine what is considered to be the difference between *source* and *resource* (emphasis added). The earth consists of biological processes, namely sources. *Homo sapiens* is however a reality in this process and the only species that has the ability to select, change and add value to the biological *status quo* of the earth.⁵ The moment that *Homo sapiens* starts to identify, name, use, alter and exploit these sources, they are transformed into resources. This implies that when *Homo sapiens* turns its mind to anything in the natural environment, it becomes “man-made” or “culture”, resulting in the creation of artefacts, sociofacts and mentifacts, or cultural resources.⁶

The aforementioned differentiation between source and resource implies that cultural heritage could be defined by referring to only those properties that are not included in the ambit of natural resources. This however, is not the case. Fowler presents a wide definition of cultural heritage.⁷ According to this definition, cultural heritage can be described as:

Physical features both natural and manmade, associated with human activity. These would include sites, structures and objects possessing significance either individually or as a grouping in history, architecture, archaeology or human (cultural) development...cultural resources are unique and non-renewable resources...

It is generally accepted in national and international legal instruments that cultural heritage should constitute cultural significance for present and future generations.⁸ Heritage may be culturally significant because of its importance to the community or pattern of the world's history, its possession of rare aspects of the world's resources, or its strong or special association with a particular cultural group for social, cultural or

Archaeological Heritage 1969; the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970; the *Convention Concerning the Protection of the World Cultural and Natural Heritage* 1972; the *Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations* 1976; the *European Convention on Offences Relating to Cultural Property* 1985; the *Convention for the Protection of the Architectural Heritage of Europe* 1985; the *UN General Resolution (A/RES/48/15) on the Return or Restitution of Cultural Property to the Countries of Origin* 1993; the *Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage* 1994; the *Convention on Stolen or Illegally Exported Cultural Objects* 1995; the *Final Communiqué of the NATO Partnership for Peace Conference on Cultural Heritage Protection in Wartime and in states of Emergency* 1996.

⁵ Naude, above n 1, 42.

⁶ Ibid.

⁷ D D Fowler, “Cultural Resource Management” in M B Schiffer (ed), *Geography, the Study of Location, Culture and Environment* (1982) 1. The definition of cultural heritage presents one of the most troubling issues in the area of cultural heritage. A variety of slightly differing definitions thereof exists in national and international instruments. The definition of Fowler will however suffice for the purposes of this paper.

⁸ SAHRA <<http://www.sahra.org.za/intro.htm>> at 27 May 2002.

spiritual reasons.⁹ Culturally significant heritage may therefore include: places to which oral traditions are attached, places associated with living heritage, including monuments, historical settlements, landscapes and natural features of cultural significance, archaeological and palaeontological sites, graves and burial grounds, graves of victims of conflict, movable objects recovered from soil and water, ethnographic and decorative art, objects of scientific interest, books, documents, photographs, film material and sound recordings.¹⁰

Cultural self-determination is of a growing importance in the modern world and the following factors might subsequently be responsible for an emerging conservation consciousness regarding cultural heritage resources:

- cultural heritage is deemed to be of outstanding interest and therefore needs to be preserved as part of the world heritage of mankind;¹¹
- the physical and non-physical cultural heritage resources are increasingly threatened by causes of decay, degradation, damage and destruction;¹²
- the conservation of cultural heritage is threatened by progress and globalisation;¹³
- the increasing demand for material objects of history, artistic or other cultural significance causes prices to soar and investors to flood the international market;¹⁴
- cultural heritage is fundamental to well-being because it associates with the person, grouphood and symbolism;¹⁵
- cultural heritage is essential for the well-being of future generations because it provides them with a sense of ongoing community with the past;¹⁶
- cultural heritage provides a sound base upon which to build and continue the functions of societies;¹⁷
- cultural heritage provides essential knowledge for living in and usage of natural systems;¹⁸ and
- cultural heritage provides communities with continuous artistic pleasure.¹⁹

South Africa abounds with cultural heritage resources that manifest themselves in the wide variety of ethnic groups, their languages, traditions and customs. The multi-cultural and multilingual community that comprises South Africa's rich and diverse scenery is furthermore subdivided along various political and religious lines. Having noted the aforementioned considerations, together with the recognition of the importance of protecting the local communities' cultural heritage, the South African legislator recently adopted the *National Heritage Resources Act 25 of 1999* (hereafter the NHRA). The NHRA replaces pre-Apartheid legislation that manifested in the *Bushmen Relics Protection Act 22 of 1911*, the *National and Historical Monuments Act 6 of 1923*, the *Natural and Historical Monuments, Relics and Antiques Act 4 of 1934*

⁹ SAHRA <<http://www.sahra.org.za/intro.htm>> at 27 May 2002.

¹⁰ <<http://www.sahra.org.za/intro.htm>>.

¹¹ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, preamble 1972.

¹² Ibid.

¹³ Roodt, above n 2, xxiv.

¹⁴ Ibid.

¹⁵ Ibid 218.

¹⁶ Brown-Weiss, above n 2, 257.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

and the *National Monuments Act* 28 of 1969. The provisions of this legislation generally provided inadequate means for the protection of cultural heritage.²⁰ This legislation also paid little thought to the interests of suppressed ethnic groups during the Apartheid era. The practice and the desire to conserve the cultural heritage of South Africa are therefore sensitive political considerations under the new constitutional dispensation.²¹

A sensible rationale for the protection of heritage resources may be to foster a sense of national pride, unity and identity in South Africa.²² Recognising the injustices of the past and striving to be united in diversity, the provisions of the NHRA strive to celebrate South Africa's achievements, to educate, to deepen understanding of society and to empathise with the experience of others. The NHRA acknowledges the importance of establishing a culture of understanding and redress. It facilitates healing and material and symbolic restitution and it promotes new and previously neglected research into South Africa's rich traditions and customs. Compared to the scope of protection offered under the previous legislation, the provisions of the NHRA furthermore offer comprehensive protection of the cultural heritage of South Africa as a whole.²³

This article will investigate the influence, relevance and importance of international law with regard to the current cultural heritage protection regime in South Africa. The provisions of the *Convention Concerning the Protection of the World Cultural and Natural Heritage* 1972 will be investigated for this purpose. The article will furthermore explore the influence of the provisions of the *Constitution of the Republic of South Africa* 1996 (hereafter the Constitution) on the desire manifested in the NHRA to protect cultural heritage resources of the South African community as a whole. The provisions of the NHRA for the conservation and protection of human made objects, human modifications of the natural environment, natural sites and systems of knowledge in South Africa will also be discussed.

An important step in cultural resource conservation and management is the assessment of what are deemed to be cultural heritage resources. The NHRA does not contain a charter to guide the process of heritage assessment. For this reason the provisions of the Australian Burra Charter are employed by the South African Heritage Resource Agency and various other heritage practitioners, as a guide to developing strategies for understanding the problem of heritage assessment, managing resource assessment and developing policies with regard to the assessment. The applicable provisions of the Burra Charter will therefore be investigated by way of a comparative legal study.

²⁰ J Glazewski, *Environmental Law in South Africa* (2000) 603.

²¹ Ibid 595.

²² Ibid.

²³ The provisions of the NHRA take into account that South Africa constitutes a destination market as well as a potential transit state for African art. The protection offered by the provisions of the NHRA therefore not only serves as a measure to remedy the unequal protection of cultural heritage of the past, it also serves to protect cultural heritage from theft, dereliction and mismanagement. Roodt, above n 2, 284.

II THE IMPORTANCE AND RELEVANCE OF INTERNATIONAL ENVIRONMENTAL LAW IN THE NEW SOUTH AFRICAN CONSTITUTIONAL DISPENSATION

There are several reasons why international law must be taken into account when the constitutional right to have the environment protected, through reasonable legislative and other measures, is interpreted. Firstly, South Africa ratified one of the primary international environmental conventions namely the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (hereafter the CCPWH) on 10 June 1997. This Convention is regarded to form part of the corpus of South African international law.

International law is traditionally described as those rules that are binding upon states in their relations with one another.²⁴ International law can also be defined in terms of a broader description, which determines that international law not only regulates relations between states, but also regulates relations between international organisations, states and individuals. In order to form part of international law, these relations between states, international organisations and individuals must operate at international level.

According to article 38(1) of the *Statute of the International Court of Justice*, treaties, customary international law, general legal principles, as well as judicial decisions and works of jurists form part of the sources of international law. Treaties, which are also known as international agreements, are agreements between states or between states and international organisations. Express consent, by means of the signing and ratification of a treaty, is necessary to make it binding on the state party involved.

Common law furthermore recognises customary international law as part of South African law.²⁵ This is confirmed by s 232 of the Constitution, which grants customary international law legal force in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.²⁶ Section 231 of the Constitution deals with international agreements and the signing, ratification and transformation thereof.²⁷ In order for an international agreement to become law in the Republic, it has to be signed

²⁴ J Dugard, *International Law: A South African Perspective* (2000) 1.

²⁵ Ibid 47-9.

²⁶ Section 233 provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

²⁷ Section 231 states as follows:

(1) The negotiating and signing of all international agreements are the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements that were binding on the Republic when this Constitution took effect.

by the national executive, approved by parliament and enacted into law by national legislation.²⁸

A common law presumption furthermore exists which requires a court to interpret legislation in consistence with international law.²⁹ This common law presumption is given force by s 233 of the Constitution, which provides that when interpreting any legislation, a court must give preference to any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.³⁰

Secondly, even in those instances in which South Africa is not legally bound by obligations under a treaty, s 39(1)(b) of the Constitution compels adversarial bodies, when interpreting the Bill of Rights, to consider international law.³¹ This can be interpreted as an “international friendly” approach. According to the Constitutional Court decision in *S v Makwanyane and Another*,³² public international law includes non-binding as well as binding law. International agreements and customary international law thus provide a framework within which the Bill of Rights can be evaluated and understood.³³ In *S v Makwanyane and Another*,³⁴ the court further emphasised that non-binding international law must also be taken into consideration. This implies that soft law must also be considered. Soft law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of “law”.³⁵ The court further held that, although the

²⁸ For the government to give effect to these environmental resolutions, the NEMA provides for the incorporation of international environmental instruments into South African law. Section 25(1) of the NEMA states that where South Africa is not yet bound by an international environmental instrument, the Minister of Environmental Affairs and Tourism may make recommendations to the government regarding accession to and ratification of international environmental instruments.

²⁹ Dugard, above n 24, 48-9. See *The Government of the Republic of South Africa and Others v Grootboom and Others* [2000] 11 BCLR 1169 CC.

³⁰ Ibid 62-4. See *The Azanian Peoples Organization (AZAPO) and Others v The President of the Republic of South Africa* [1996] 4 SA 671 CC.

³¹ The following constitutional cases are some examples where the South African Constitutional Court considered binding as well as non-binding international law when interpreting the Bill of Rights: *S v Williams* [1995] 3 SA 632 CC; *Ferreira v Levin NO* [1996] 1 SA 984 CC; *S v Rens* [1996] 1 SA 1218 CC; *Coetzee v Government of South Africa* [1995] 4 SA 631 CC; *Bernstein v Bester* [1996] 2 SA 751 CC; *In re Gauteng School Education Bill 1995* [1996] 3 SA 165 CC; *The Government of the Republic of South Africa and Others v Grootboom and Others* [2000] 11 BCLR 1169 CC.

³² *S v Makwanyane and Another* [1995] 3 SA 391 CC; *S v Makwanyane and Another* [1995] 6 BCLR 665 CC.

³³ For this purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.

³⁴ Above n 32.

³⁵ Dugard, above n 24, 36. Examples of soft law for purposes of environmental law are a number of initiatives of the United Nations Environment Programme and various codes of the International Maritime Organisation.

court must take into consideration and may be assisted by public international law, it is in no way bound to follow it.³⁶

In order to introduce a comprehensive environmental legal protection regime in domestic law, the ratification and implementation of international conventions as well as the consideration of the legal principles of international customary law and soft law are regarded as high priorities by the South African government in environmental framework legislation.

This intention of government is clearly illustrated by the provisions of the Constitution. Section 24(b) of the Constitution states in clear terms that everyone has the right to have the environment protected through reasonable legislative and other measures³⁷ that secure and justify economic and social development.³⁸ Furthermore, s 39(1)(b) compels a court, tribunal or forum, when interpreting the Bill of Rights (such as the rights laid down in s 24(b)), to consider international law.³⁹ It is thus commendable that this “international friendly” approach was followed by several constitutional and other court cases. This is also in accordance with the requirements of the Constitution.

All of the above-mentioned provisions underline the importance and relevance of international law and international environmental treaties in the new South African constitutional dispensation.

A The Convention Concerning the Protection of the World Cultural and Natural Heritage

Recognising the need to conserve cultural heritage that is of outstanding and universal value, the international community established the CCPWH in 1972. The enactment thereof in 1975 not only initiated the development of a more comprehensive concept of cultural objects that includes immovables, groups of buildings and sites, but also widened the scope of activities of the World Heritage Committee which is responsible for the nomination of World Heritage Sites.

The CCPWH falls within the ambit of the definition of an international environmental instrument contained in the *National Environmental Management Act* 107 of 1998 (hereafter the NEMA) that includes “any international agreement, declaration, resolution, convention or protocol which relates to the management of the environment”.⁴⁰

³⁶ See *Prince v The President of the Law Society, Cape of Good Hope* [1998] 8 BCLR 976 C. In the case *The Government of the Republic of South Africa and Others v Grootboom and Others* [2000] 11 BCLR 1169 CC, the court states as follows:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

³⁷ For example international environmental instruments.

³⁸ The environmental rights contained in s 24 of the Constitution are based on the notion of intergenerational equity which underlines the importance of sustainability and the need to have cultural heritage protected for the benefit of future generations. Brown-Weiss, above n 2, 34-40.

³⁹ For examples where the South African Constitutional Court considered binding as well as non-binding international law when interpreting the Bill of Rights, see above n 31.

⁴⁰ Section 1(1).

For the purposes of environmental law, "environment" is defined in s 1 of the NEMA as *inter alia* "the physical, chemical, aesthetic and *cultural properties and conditions...that influence human health and well-being*" (emphasis added).

According to this section, historical and cultural resources fall within the scope of the natural environment. Being part of the natural environment, South African heritage resources are therefore subject to the protection and conservation measures offered under national and international law. South Africa accordingly ratified the CCPWH in 1997 in order to provide for the possibility of the domestic establishment of protection measures offered by an international environmental instrument.

Articles 1⁴¹ and 2⁴² of the CCPWH set out to define in clear terms what is to be understood under cultural and natural heritage respectively. Article 3 however leaves a wide discretion to state parties to identify and delineate the different properties situated on its territory mentioned in articles 1 and 2.

The CCPWH places several duties on state parties (and consequently on the South African government) who have ratified the document. Each state party has to recognise the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in articles 1 and 2.⁴³ Each state party has a further responsibility to take active and effective measures to protect, conserve and present their respective cultural and natural heritage, by *inter alia* adopting policy measures, setting up territories, conducting research and taking appropriate measures.⁴⁴ Furthermore, every state party has the duty to submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, as defined in articles 1 and 2 of the CCPWH, which it considers as having outstanding universal value in terms of such criteria as it shall have established.⁴⁵ Finally each state party has a duty to submit a report to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, giving information on the legislative and administrative provisions which they have adopted and other measures they have taken

⁴¹ Article 1:

...architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

⁴² Article 2:

...natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

⁴³ Article 4.

⁴⁴ Article 5.

⁴⁵ Article 11.

for the application of this Convention, together with details of the experience acquired in this field.⁴⁶

Whilst s 2(4)(n) of the NEMA acknowledges that South Africa's environmental responsibilities form part of its broader international obligations, s 25(3) states that the Minister of Environmental Affairs and Tourism may introduce legislation or regulations that may be necessary to give effect to international environmental instruments to which South Africa is a party. Based on these considerations, the CCPWH was accordingly enacted into South African law by the *World Heritage Convention Act* 49 of 1999 (hereafter the WHCA). The WHCA establishes a legal framework for the management and development of World Heritage Sites in South Africa and is therefore primarily concerned with the domestic conservation of cultural heritage on international level.⁴⁷

Although the WHCA mainly provides for the identification, management and nomination of World Heritage sites, it nevertheless functions alongside the NHRA as an instrument to protect cultural heritage. The WHCA has as its main objectives to give effect to the values of the Constitution and to provide for the cultural and environmental protection and sustainable development of World Heritage Sites.⁴⁸ Section 4(2) of the WHCA defines sustainable development with reference to the underlining principle that cultural and natural heritage may promote reconciliation, understanding and respect and contribute to the development of a unifying South African identity. This implies that cultural heritage management should take cognisance of the fact that the use of this heritage should not be for the purposes of threatening a culture based on equality and freedom or for political gain.⁴⁹ This principle is in line with the objectives and underlining principles of the NHRA and the Constitution.⁵⁰

The ratification of the CCPWH played an influential role in the preparation and drafting process of the NHRA. Being the first global attempt to emphasise the need to protect cultural heritage resources, the provisions thereof raised not only universal, but also local consciousness of the necessity to conserve the past legacy for future generations. The relevance thereof is furthermore apparent from the fact that South African courts are under an obligation to take into account the provisions of the CCPWH when interpreting the Bill of Rights. The CCPWH may furthermore enable the legislator to refine certain provisions of the NHRA and connected legislation. The adoption of the CCPWH also resulted in the adoption of the WHCA. Although this Act deals with the universal conservation of cultural heritage resources, it nevertheless functions as a supplementary regime for cultural resource protection and management in South Africa. The provisions thereof may also serve as guidelines when interpreting the application possibilities of the NHRA and the provisions of legislation closely connected thereto.

⁴⁶ Article 29.

⁴⁷ World Heritage Sites mainly consist of natural landscapes. Natural environments are therefore included in the protection regime where they reflect cultural heritage. These sites may accordingly be considered for the World Heritage List because of their natural and cultural significance. Glazewski, above n 20, 594.

⁴⁸ Article 3. See Roodt, above n 2, 321.

⁴⁹ Ibid.

⁵⁰ See chapter 5 for a discussion on cultural heritage management principles contained in the NHRA.

III THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Several provisions of the Constitution are relevant to the conservation of cultural heritage in South Africa. Although no definition of culture is to be found in any of the constitutional provisions, it is submitted that culture, in the context of the Constitution, refers to something that one enjoys, shares and in which one participates.⁵¹ The various contexts in which culture is therefore used in the Constitution encompass the objects, actions, products and conditions of conduct.⁵²

Section 30 of the Constitution provides that everyone has the right to use the language and to participate in the cultural life of their choice. Section 31 states that persons belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practise their religion or to use their language, provided that the exercise of this right is consistent with all the provisions of the Bill of Rights in the Constitution. Although no explicit right or duty is granted for the protection of cultural heritage, it is submitted that the logical implication of granting the rights contained in ss 30 and 31, is to further equal protection of human dignity, freedom and equality.⁵³ These fundamental values will accordingly promote an open and democratic society provided that *inter alia* cultural heritage is conserved for members of society that will enable them to enjoy, participate in and live the cultural life of their choice.

Of more direct importance, is the significance of Schedule 4 of the Constitution that places "cultural matters" concurrently under national and provincial jurisdiction. Schedule 5 clearly indicates that provincial cultural matters will fall within the ambit of competence of each of the nine provinces. The implication of these provisions is that both national and provincial spheres of government may enact legislation concerning cultural matters. All legislation, procedures and administrative practices carried out by heritage authorities must give further content to the fundamental rights set out in the Constitution.⁵⁴ These provisions accordingly act as a mandate and obligation to protect, care for and promote culture and cultural heritage within the framework of constitutional rights, duties and principles.⁵⁵

Of further importance is the constitutional Property Clause contained in s 25 of the Constitution. Ownership of something is vested in an object by way of property rights.

⁵¹ F Venter, "The Protection of Cultural, Linguistic and Religious Rights: The Framework Provided by the Constitution of the Republic of South Africa, 1996" [1998] *SA Publiekreg/Public Law* 438-439. For the purposes of legal discourse, "culture", as it is used in the context of cultural heritage, may be defined as an all-determining concept consisting of texts, images, talk, codes of behaviour, narrative structures, law and legal science that is created within an ethnical context to ensure survival, adaptation and development. Roodt, above n 2, 36.

⁵² Roodt, above n 2, 252. Direct and indirect reference to "culture" is made in ss 15, 30, 31, 143, 181, 185, 186, 235 as well as Schedule 4 and 5 and chapter 12 of the Constitution.

⁵³ These values constitute some of the foundational values of the Constitution.

⁵⁴ Section 5(3)(c) of the NHRA.

⁵⁵ Roodt, above n 2, 259. A number of state institutions are created under section 181 of the Constitution. Amongst them are the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the South African Human Rights Commission. These institutions act independently and have as their primary objective to assist government by accounting, strengthening and promoting respect for the Constitution and the law. The establishment of these institutions will accordingly assist heritage authorities on national, provincial and local level to care for and promote culture and cultural heritage within the framework of the Constitution.

Property rights are however not absolute and can be constrained by the South African common law doctrine of *sic utere tuo ut alienum non laedas* as well as a number of other statutory provisions that provide for reasonable use of property.⁵⁶ The need may arise for heritage authorities to acquire from private owners of cultural heritage property, the said property for the sake of providing adequate protection thereof. With reference to this scenario, to what extent can property rights accordingly be limited in the public conservation interest?

Section 25(1) of the Constitution provides that no one may be deprived of any property except in terms of law of general application of which the NHRA is an example.⁵⁷ Property is not only limited to land but includes other real rights for example servitudes as well as customary and communal property rights.⁵⁸ This wide concept of property therefore arguably encompasses cultural heritage resources defined in s 3 of the NHRA. Section 46(1) to s 46(3) of the NHRA deal with the expropriation of cultural heritage property. The Minister responsible for Arts and Culture may purchase or expropriate any property for conservation or for any other purpose under the NHRA, provided that the purpose is a public purpose or in the public interest.⁵⁹ Although the provisions of the *Expropriation Act* 63 of 1975 will apply to all expropriations of cultural heritage property, the amount of compensation and the time and manner of payment must be determined in accordance with s 25(3) of the Constitution.⁶⁰ The owner of the property must furthermore be given a hearing before any property is expropriated.

It is clear from the above that neither statutory law, nor South African common law regulating heritage conservation, support property rights as absolute rights.⁶¹ For the purpose of executing adequate protection, heritage authorities are given a mandate by the provisions of the NHRA to limit property rights on cultural heritage if public interest in conservation necessitates such expropriation. Any limitation on property rights is however subject to the constitutional Property Clause that provides for a standard of public interest and compensation that must reflect a just and equitable balance between the public interest and the interests of those affected.

Although no explicit guarantee is formulated for the protection of cultural heritage in the Constitution, the existing provisions unquestionably articulate the support for the protection of a multi-cultured society. The constitutional provisions furthermore strengthen the conservation functions of heritage authorities, which may result in the recognition and guarantee of the particular way of life that a plural community leads around and among its cultural heritage.

⁵⁶ Glazewski, above n 20, 90.

⁵⁷ Whilst no law may permit arbitrary deprivation of property, restrictions of property rights may be justifiable if they meet the criteria set out in the Limitation Clause. Section 36 provides that the rights contained in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

⁵⁸ Glazewski, above n 20, 91. See s 25(4)(b) of the Constitution.

⁵⁹ Section 35(2) of the NHRA states that all archaeological objects, palaeontological material and meteorites are the property of the State and are therefore not subject to any provisions dealing with expropriation.

⁶⁰ Section 25(3) of the Constitution states that the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected.

⁶¹ Roodt, above n 2, 301.

IV LEGISLATIVE PROTECTION OF CULTURAL HERITAGE RESOURCES UNDER PREVIOUS LEGISLATION

The recent democratically adopted Constitution of South Africa aims to create a new dispensation of acceptance, tolerance and mutual well-being amongst South Africans.⁶² The intention is to fulfil this aim by recognising the injustices of the past, by respecting those who have worked to build and develop the country, honouring those who suffered for injustice and freedom and by acknowledging the fact that South Africa belongs to all who live in it.⁶³

These constitutionally entrenched principles imply that the South African legislator is under the obligation to adopt legislation that is in accordance with the aims set out by the principles of the Constitution.⁶⁴ The practical implications suggested by this obligation require the legislator to furthermore discard previously discriminatory and racially exclusive legislation.

The provisions of the following acts served as the protection and conservation base of cultural heritage resources in the previous dispensation: the *Bushmen Relics Protection Act* 22 of 1911 (hereafter the BRPA), the *National and Historical Monuments Act* 6 of 1923 (hereafter the NHMA), the *Natural and Historical Monuments, Relics and Antiques Act* 4 of 1934 (hereafter the NHMRAA) and the *National Monuments Act* 28 of 1969 (hereafter the NMA). The provisions of these legislation focused primarily on the conservation of the colonial heritage of minority groups that were incidentally responsible for the drafting of this legislation. The rich cultural heritage of the African and other indigenous cultures was therefore limited or excluded from the formal conservation and protection policy.⁶⁵

The rationale of the NHRA however, is to break from this past approach. It is nevertheless important to briefly discuss the scope of protection offered under the previous legislative provisions, because of the interpretative relevance it may suggest with regard to the provisions of the current protection regime.

A *The Bushmen-Relics Protection Act*

The BRPA was the first post-union attempt to protect cultural heritage in South Africa. The scope of protection offered by the provisions of the BRPA in ss 1 and 2, was limited to the conservation of Bushmen and aboriginal paintings as well as Bushmen-owned contents of graves, caves and rock shelters. Section 2 of the BRPA provided that the aforementioned items could not be removed without a consenting permit from the

⁶² Prior to the new constitutional dispensation, South Africa was a sovereign unitary state. No Bill of Rights existed and the State was consequently able to limit the scope of fundamental rights as it chose. Virtually no judicial control over the legislator existed, with the inevitable result that the legislator had a *carte blanche* with regard to the drafting of discriminatory legislation and the implementation thereof.

⁶³ Preamble of the Constitution.

⁶⁴ The assumption is based on a teleological interpretation of the preamble of the Constitution.

⁶⁵ The concept of culture (and subsequently cultural heritage) was mainly used during the previous Constitutional dispensation as arguments to forward the idea of racial separation and segregation. This resulted in the disparagement of the notion that ethnic cultures should receive the same protection of their cultural heritage as the heritage of the governing colonials. Roodt, above n 2, 235-6.

Minister of the Interior. Any person contravening this provision was liable to a fine or imprisonment.

It is clear from the above that the protective measures of the BRPA are very narrow in scope. They merely extend to the protection of the cultural heritage of a very small segment of South Africa's population, rendering them ineffective for general and sufficient protection. No adequate technical and regulatory measures were furthermore provided for the effective management of Bushmen paintings and cultural property.

B *The Natural and Historical Monuments Act*

Section 8 of the NHMA extended the protection offered under the BRPA to areas of land with distinctive scenery, waterfalls, avenues of trees, old trees and buildings, fauna and flora and to objects of aesthetic, historical and scientific value. Section 1 thereof deals with the establishment of the Commission for the Preservation of Natural and Historical Monuments of the Union. The duties of the Commission included the composition of a register of national monuments that, in the opinion of the Commission, *ought to be preserved* (emphasis added), and the assessment of the legal ownership of any monument. The Commission was furthermore responsible for the undertaking of steps to preserve and prevent impairment of monuments (if the requisite funds were available) and to act as trustee of monuments.⁶⁶ The Commission also had the authority to make by-laws with regard to the *access of the public* (emphasis added) to monuments and to fix fees payable for such access.⁶⁷

The authority conferred upon the Commission to regulate the protection of and access to monuments it regards as worthy of protection, was indeed very wide. This implied discretion inevitably resulted in discriminatory practices with regard to the protection of cultural heritage. The primary protection measures were aimed at the conservation of colonial heritage alone, while the broader spectrum of South African society was denied access to monuments and the enjoyment thereof through the strict regulation of access to the monuments and the fees payable for access.

C *The Natural and Historical Relics and Antiques Act*

The provisions of the BRPA and the NHMA were consolidated by the NHRAA in 1934. The Commission for the Preservation of Natural and Historical Monuments of the South African Union however remained operative under the NHRAA with similar and additional authority as under the previous Act. Under s 6 of the NHRAA the Commission *inter alia* had the additional authority to make a list of all objects it deemed to be desirable for proclamation as monuments and to erect tablets in suitable places giving information in Afrikaans and English about historical events that occurred at such places.

Although the regulatory framework for the protection of cultural heritage was notably enhanced under the NHRAA, the scope of protection was still limited to objects of cultural heritage that, in the opinion of the Commission, were worthy of conservation. This discretion again did not further the adequate protection of South Africa's cultural

⁶⁶ Section 4.

⁶⁷ Section 7.

heritage as a whole. The explanatory information regarding cultural heritage sites furthermore limited access to and enjoyment and understanding of these sites to the small segment of the community that was proficient in Afrikaans and English.

D *National Monuments Act*

The NMA repealed the NHRAA and acted as the central legislation dealing with the conservation and management of South Africa's cultural heritage for thirty years until it was replaced by the NHRA in April 2000. Under the NMA, the National Monuments Council of South Africa (hereafter the NMC) served as the main regulatory body. The objective of the NMC was to protect and promote protection of the historical cultural heritage and to co-ordinate activities with regard to the protection thereof.⁶⁸

The NMC developed a regulatory policy with regard to the exportation of cultural heritage objects, a permit system that was designed to prevent damage to cultural objects and a system for the declaration of objects as national monuments or cultural treasures.

In order to gain control over a declared object, the NMC acquired real rights in moveable and immovable property.⁶⁹ The NMC was further authorised to acquire limited real rights in someone else's cultural property⁷⁰ and to confer real rights over any monument under its control to any museum or public institution.⁷¹ The NMC could also acquire personal rights, *ex contractu*, conferring capacities in respect of land.⁷² It could therefore hold pre-emptive rights or options that consequently resulted in restrictions on the real rights on the land or cultural property. This wide discretion of the NMC to limit the real rights of cultural property owners inevitably resulted in the widespread expropriation and limitation of legal holders of proprietary rights in such property.⁷³ The holders of these rights, more often than not, included members of the native community.

The provisions of the NMA proved in general to be ineffective for the protection of the cultural heritage of ethnic groups. The underlining theme of the Act proposed to offer adequate and comprehensive protection to South African cultural heritage as a whole. Past practice however illustrated that the NMC was largely committed to the conservation of the cultural heritage of the governing minority. The results were that the cultural property (including land or sites of cultural significance) of certain communities was either expropriated or the proprietary rights on the cultural objects limited. This questionable administrative action and infringement of rights are consequently incompatible with internationally enshrined human rights.

For the greater part of the twentieth century, South African society was characterised by segregation. On the ground of colour, people were living separate lives in two different

⁶⁸ Section 2.

⁶⁹ Section 5(1)(e).

⁷⁰ Section 13.

⁷¹ Section 5(1)(h).

⁷² Roodt, above n 2, 223-4.

⁷³ Property rights can currently only be limited in terms of the provisions of the Constitution. The current approach stands in sharp contrast with the practices under previous legislation. See chapter 3 above.

worlds.⁷⁴ In the context of cultural heritage, Apartheid-policy fragmented victims that inevitably resulted in the unification of beneficiaries alongside ethnic identity.⁷⁵ Legislation under the previous dispensation did not effectively identify the significance and meaning of common South African cultural heritage. The provisions thereof mainly reflected the history and values of white South Africans.⁷⁶

V THE NATIONAL HERITAGE RESOURCES ACT

The new constitutional dispensation brought about the necessity to enact legislation for the establishment of an all-encompassing cultural heritage protection regime. The NHRA was accordingly enacted during 1999 and became operative in 2000.⁷⁷ The NHRA aims to create an integrated framework for the protection of cultural heritage with regard to the management and development thereof, as well as participation in and access to heritage resources.⁷⁸ The NHRA is currently the central legislation regulating the management of South Africa's heritage resources and has as its main objective to maximise co-ordination across all fields of natural heritage conservation.⁷⁹

A *Heritage resources subject to the protection regime under the NHRA*

Heritage resources are defined in s 2(xvi) as any place or object that is of cultural significance. Section 2(vi) describes cultural significance with reference to the aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance that these resources should possess. Those non-renewable heritage resources that are of cultural significance for the present community and future generations are accordingly considered to be part of the national estate that falls within the ambit of the NHRA's protection regime.⁸⁰

⁷⁴ Past legislation divided the South African community into separate White, Black, Coloured and Indian communities.

⁷⁵ Roodt, above n 2, 235.

⁷⁶ Ibid 236.

⁷⁷ It should be noted for the purpose of clarity, that the provisions of the *National Heritage Council Act* 11 of 1999 are aimed at promoting and protecting the *national* heritage, which is broader than the national estate or national heritage resources. The Heritage Council established under the Act will incorporate the activities of the National Monuments Council, various museums and the National Archives. The provisions of this Act will not be discussed for the purposes of this article.

⁷⁸ Roodt, above n 2, 292. The NHRA emphasises the relevance, importance and significance of cultural heritage and the protection thereof. The preamble of the NHRA *inter alia* states that:

This legislation aims to promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations. Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character.

⁷⁹ Ibid. The general purpose of the NHRA is progressive and wide-ranging. It aims to introduce an integrated and interactive system for the management of the national heritage resources (s 11) and to empower civil society to nurture and conserve heritage resources so that they may be bequeathed to future generations (s 14).

⁸⁰ Section 3(1) should be read together with s 3(3) that contains guidelines for the assessment of the value or significance of an object. These indicators *inter alia* include the importance of the object in the community, its possession of uncommon aspects, its potential to yield information pertaining to South Africa's cultural heritage and its strong or special association with a particular community.

The national estate may *inter alia* include: structures, buildings, historical settlements, landscapes, geological sites, archaeological sites, palaeontological sites, graves, burial grounds, movable objects and sites relating to the history of slavery in South Africa.⁸¹ An original development is to be found in s 3(i)(ii) which states that moveable objects subject to protection also include objects to which oral traditions are attached or which are associated with living heritage, ritual or popular memory.

The provisions of the above sections do not intend to limit the scope of potential heritage resources that may be subject to protection under the NHRA. The widely formulated definition corresponds with the definition of cultural heritage contained in the CCPWH and the WHCA.⁸² The definition of the national estate accordingly ambitiously offers the widest possible protection and is meant to encompass everything, whether movable or immovable, tangible or non-tangible, privately or publicly owned which is regarded and valued as the cultural heritage of South Africa.⁸³

B *Principles of heritage resource management under the NHRA*

The management of cultural heritage is to be performed on national, provincial and local levels of government.⁸⁴ Management on a national level is entrusted to the South African Resource Agency⁸⁵ (hereafter SAHRA) and the South African Resource Agency Council⁸⁶ (hereafter SAHRA Council). The NHRA furthermore provides for the establishment of provincial heritage resource agencies by the Member of the Executive Council of each province.⁸⁷ The duties, powers and functions of provincial authorities are set out in s 24 of the NHRA and are similar to the duties of national authorities, with the additional duty to notify SAHRA of the presence of any heritage resource in the province that it considers as qualifying for protection at national level.⁸⁸ Heritage resource management on local level is to be performed by municipalities and entails the management of Grade 3 heritage resources.⁸⁹

⁸¹ Section 3(2).

⁸² See chapter 2 above.

⁸³ Glazewski, above n 20, 617.

⁸⁴ Section 8(1). Difficulties might arise when the scope of competence of national, provincial and local authorities are to be distinguished. There will certainly be matters that will be of interest to all three spheres of government. It is submitted that Schedules 4 and 5 of the Constitution may act as guidelines for the division of cultural heritage protection authority amongst the different spheres of government. Glazewski, above n 20, 602.

⁸⁵ According to ss 11 and 12, SAHRA has as its main objective to co-ordinate the identification and management of the national estate. The functions, powers and duties of SAHRA are set out in s 13. The content of s 13 deals with the administrative regulation of SAHRA and will not be discussed for the purpose of this article.

⁸⁶ Section 14 states that the SAHRA Council is a governing body established to control, manage and direct SAHRA. The functions, powers and duties of the SAHRA Council are dealt with in ss 14 and 16. The contents of these sections deals with the administrative regulation of the SAHRA Council and will not be discussed for the purpose of this article.

⁸⁷ Section 23.

⁸⁸ Section 24(1)(e).

⁸⁹ A system of grading is provided for by s 7. Grade 1 heritage resources are described as resources with qualities so exceptional that they are of special national significance. Grade 2 heritage resources are defined as heritage resources that, 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 region. Grade 3 heritage resources are described as other heritage resources worthy of conservation. National, provincial and local heritage resource agencies will be responsible for the management of Grade 1, 2 and 3 heritage resources respectively (s 8(2) to s 8(3)).

Sections 5 and 6 of the NHRA set out a number of heritage resource management principles. It is required of resource management authorities on national, provincial and local levels to recognise and accordingly apply *inter alia* the following principles in the execution of their management duties:

- heritage resources have lasting value in their own right and provide evidence of the origins of South African society;
- heritage resources are valuable, finite, non-renewable and irreplaceable and should accordingly be managed carefully in order to ensure their survival;⁹⁰
- every generation has a moral obligation to act as trustee of the national heritage;
- heritage resources should be managed in the interest of all South Africans;⁹¹
- heritage resources have the capacity to promote reconciliation, understanding and respect and to contribute to the development of a unifying South African identity;⁹²
- heritage resources form an important part of history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management;⁹³
- heritage resources contribute significantly to research, education and tourism and should therefore be developed and presented in a way that ensures respect and dignity for cultural values;⁹⁴
- the identification, assessment and management of heritage resources must take account of all relevant cultural values and indigenous knowledge systems;⁹⁵
- management of cultural heritage should contribute to socio-economic development;⁹⁶ and
- management should safeguard the options of present and future generations.⁹⁷

The aforementioned principles recognise international trends and are meant to give effect to the provisions of the NHRA and the constitutionally entrenched rights to have cultural heritage protected.⁹⁸ The underlying principles of these provisions furthermore correspond in a large degree to those contained in the CCPW and WHCA.⁹⁹ A significantly different approach is established by the principles of the NHRA when compared to the inadequate protection offered by the conservation principles of previous legislation.¹⁰⁰ By heeding and implementing these principles in the management of cultural heritage, heritage authorities will ensure that the cultural heritage of the total South African community will be preserved for current and future generations.

⁹⁰ Section 5(1)(a).

⁹¹ Section 5(1)(b).

⁹² Section 5(1)(c).

⁹³ Section 5(4).

⁹⁴ Section 5(5).

⁹⁵ Section 5(7)(a).

⁹⁶ Section 5(7)(d).

⁹⁷ Section 5(7)(e).

⁹⁸ See chapters 2 and 3 above.

⁹⁹ See chapters 1 and 2 above.

¹⁰⁰ See chapter 4 above.

VI THE APPLICATION POSSIBILITIES OF THE BURRA CHARTER IN THE PROCESS OF ENVIRONMENTAL ASSESSMENT

Prior to any development that may affect the natural environment, South African environmental law requires the implementation of an Environmental Assessment as part of the integrated environmental management process.¹⁰¹ In its simplest form, Environmental Assessment describes the analysis of the likely environmental consequences of a proposed human activity.¹⁰² Environmental assessment is a tool to facilitate sound, integrated decision-making in which biophysical and socio-economic environmental considerations are explicitly and systematically taken into account in the development process.¹⁰³

Section 23(2)(b) of the NEMA states that the general objective of integrated environmental management entails the identification, prediction and evaluation of the actual and potential impact of development on *inter alia* cultural heritage. The NEMA accordingly acknowledges the importance of Heritage Impact Assessment in the Environmental Assessment process. Section 38(1) of the NHRA furthermore compels any party who intends to undertake a development,¹⁰⁴ to notify the responsible heritage resource authority and furnish it with details regarding the location, nature and extent of the proposed development. If the heritage resource authority has reason to believe that heritage resources will be affected by such development, it will require of the developer to submit a heritage impact assessment report.¹⁰⁵

The NHRA does, however, not contain detailed criteria to guide the process of Heritage Impact Assessment. The Australian Burra Charter is accordingly employed by South African heritage resource practitioners for the purpose of providing guidelines for the assessment of heritage resources.¹⁰⁶

The Burra Charter is based on the *International Charter for the Conservation and Restoration of Monuments and Sites* 1964 and was adopted by the Australian International Council on Monuments and Sites (ICOMOS) in 1979. The Burra Charter sets a standard of practice for those who provide advice, make decisions about or undertake works to places of cultural significance and is applicable to all places of cultural significance including natural, indigenous and historic places of cultural value.¹⁰⁷

The Burra Charter provides for a flow chart that sets out the sequence underlining the process of heritage assessment. The logical order of this sequence entails that the significance of assessed heritage resources should be understood foremost. A policy should accordingly be developed and managed by way of a management plan.

¹⁰¹ Sections 21 to 23 of the *Environmental Conservation Act* 73 of 1989 read together with chapter 5 of the NEMA.

¹⁰² Glazewski, above n 20, 270.

¹⁰³ Glazewski, above n 20, 269.

¹⁰⁴ Section 2(viii) of the NHRA defines development as:

...any physical intervention, excavation, or action other than those caused by natural forces, which may in the opinion of a heritage authority in any way result in a change to the nature, appearance or physical nature of a place, or influence its stability and future well-being...

¹⁰⁵ Section 38(2)(a).

¹⁰⁶ Naude, above n 1, 51.

¹⁰⁷ Australian ICOMOS <www.icomos.org/australia/burra.html> at 27 May 2002.

The detailed guidelines employed by South African heritage resource practitioners are based on this logic and include the following: In order to understand the significance of heritage resources, the assessment must first identify the heritage resource. Information pertaining to the significance of the resource must be gathered, the significance should accordingly be assessed and then reported in a statement of significance. Obligations arising from the significance must then be identified, information that may affect the future of the resource must be gathered, a policy must be developed and a statement of policy must be formulated. In the last instance the process requires strategies to be developed which must be implemented through a management plan. The process will be concluded with monitoring and review of the assessment.

The Burra Charter is considered to be an advancement on similar instruments that are currently used by heritage resource practitioners.¹⁰⁸ The provisions of the Burra Charter provide clear definitions and terms that explain the process of heritage assessment by way of a flow chart. While it recognises that the use or function of heritage resources may be of significance, the provisions thereof deal extensively with social values, community input and indigenous issues by providing for participation.¹⁰⁹

Currently, no scheme for guiding heritage assessment exists in South Africa. The aforementioned, coupled with the clear guidance and logic of the heritage assessment process contained in the Burra Charter, are essentially persuasive considerations for the employment of the Burra Charter as a guide in South African heritage assessment processes. The process of Heritage Impact Assessment is a vital component of integrated environmental management and the process of Environmental Assessment. The Burra Charter therefore underlines the necessity for establishing a similar charter in South Africa. The provisions of the Burra Charter with regard to the process of heritage assessment will however, in the meantime, suffice as comparative and interpretative guidelines for the South African heritage practitioner.

VII CONCLUSION

The NHRA represents a paradigm shift in the South African approach to cultural heritage protection and conservation. By taking cognisance of internationally established cultural heritage protection principles and practices, South African policy makers devised an effective conservation mechanism that ensures adequate protection of local cultural heritage and the accessibility thereto.

Compared to the previous protection regime, the NHRA is wholly transformational, comprehensive, well structured and effective in enforcement action.¹¹⁰ The scope of protection offered by the provisions of the NHRA, is in line with the constitutionally entrenched obligation of the State to respect, realise and protect heritage resources. This corresponds with the implied rights of the South African community to have its cultural heritage protected. It is submitted that whilst the provisions of the NHRA establish equality and efficiency with regard to cultural heritage conservation, they also show sensitivity towards the values that underlie the fine art of cultural diplomacy.¹¹¹

¹⁰⁸ Naude, above n 1, 51.

¹⁰⁹ Ibid 53.

¹¹⁰ Roodt, above n 2, 311-2.

¹¹¹ Ibid 314.

SAHRA currently envisages the drafting of a South African charter containing guidelines for the process of Heritage Impact Assessment.¹¹² This charter will arguably be based on the Australian Burra Charter.¹¹³ Until such a charter is established, the logical order and system of heritage assessment offered by the Burra Charter will continue to be employed by South African heritage practitioners in the process of Heritage Impact Assessment.

The NHRA however does not stand protected from criticism. The objectives envisaged by the provisions of the NHRA are ambitious and idealistic and may prove difficult to attain in a new democratic society that is plagued by poverty, a less than stable economy and corruption. Whether sufficient financial resources will be available to fulfil adequate protection responsibilities remains doubtful.

The possibility of confusion arising with regard to the governmental resource authorities' jurisdiction and competence seems to be imminent. Although the NHRA provides for community involvement, no clear indication is given as to the extent of participation and obligations of communities, non-governmental organisations and community-based organisations in the process of cultural heritage conservation. The aforementioned considerations are however presupposing and speculative in nature and only future practice and experience with regard to the NHRA will dictate the manner in which the cultural heritage of South Africa will be conserved for generations onwards.

¹¹² Naude, above n 1, 51.
¹¹³ Ibid.