

Can Intangibles be Tangible?

**Safeguarding Intangible Heritage in the New South Africa: Towards Formulating
Policy for the Conservation and Sustainable Management of Living Heritage**

By

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DECLARATION

I the undersigned hereby declare that this work has not been previously submitted in a whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or work of the other people has been attributed, and has been cited and referenced.

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DEDICATION

This work is dedicated to the intrepid and undying ambitious spirit of my late father Mr Aubrey Joseph Manetsi. Thanks Papa for the daring courage to walk in your footsteps as you always strive for the best in life.

ABSTRACT

This dissertation takes its lead from ongoing research associated with the process of formulating policy and developing instruments for safeguarding living heritage or intangible heritage as it is commonly known. In the absence of a national policy and management guidelines for the conservation and sustainable management of living heritage, the South African Heritage Resources Agency (SAHRA) has initiated a process of formulating minimum standards and guidelines for the protection of intangible elements of heritage associated with tangible heritage resources (objects and sites). In terms of the National Heritage Resources Act (NHRA) of 1999, SAHRA has a mandate to manage heritage resources to which oral tradition or living heritage is attached. Being the designated head of the living heritage unit at SAHRA, I have the responsibility to ensure the proper conservation and management of living heritage. As such I have been charged with a number of key responsibilities such as formulating policy and developing management guidelines for living heritage.

As part of the process toward developing policy, a major facet of this research project reviews and draws a comparative analysis of existing heritage legislation, legal instruments and best practices in the world that may be useful in the South African context. Drawing from the review and comparative study process, this dissertation also seeks to identify and define key management issues for safeguarding aspects of intangible heritage. The outcome of the literature review stimulates a critical discussion about the findings which explore the challenges and opportunities related to the strengths and weakness of existing heritage policies and management guidelines for the protection of intangible elements of heritage resources. This eventually informs the conclusion and recommendations which provides not only a summary of closing remarks but also suggests a way forward regarding appropriate measures to be adopted for safeguarding living heritage. In this way, this project takes the form of research and policy recommendations, premised on a real-world situation in which I am personally responsible for guiding national policy on the issue at stake.

ABBREVIATIONS

AIA – Archaeological Impact Assessment

ACCU – Asia Pacific Centre for UNESCO

ARIPO – The African Regional Intellectual Property Office

CMP – Conservation Management Plan

CRL – Commission for Protection and Promotion of Cultural, Religious and Linguistic Communities

DAC – Department of Arts and Culture

EIA – Environmental Impact Assessment

HIA – Heritage Impact Assessment

ICH – Intangible Cultural Heritage

ICOM - International Council on Museums

ICOMOS – International Council on Monuments and Sites

IK – Indigenous Knowledge

IKS – Indigenous Knowledge System

INCP - International Network on Cultural Policy

IP – Intellectual Property

IPR – Intellectual Property Rights

NGO – Non Governmental Organisation

NHC – National Heritage Council

NHCA – National Heritage Council Act 1999

NHRA – National Heritage Resources Act 1999

PHRA – Provincial Heritage Resource Authority

SAHRA – South African Heritage Resources Agency

SAOTA - Southern African Oral Tradition Association

SIA – Social Impact Assessment

TRIPS – Trade Related Aspects of Intellectual Property Rights

UNESCO – United Nations Educational, Scientific, Cultural Organization

WTO – World Trade Organisation

WIPO – World Intellectual Property Organisation

DEFINITION OF TERMS

Heritage Resource

According to the National Heritage Resources Act (1999), the term refers to any place or object of cultural significance (NHRA 1999). However, in broad terms, it refers to both intangible and tangible forms of heritage resources deemed to be of cultural significance.

Living Heritage

Living heritage, sometimes referred to as 'living culture', 'Amasiko' in Nguni or 'Ditso' in seSotho languages. Universally there are many possible definitions of living heritage, however all seem to relate to an intangible resource. Hence the term intangible heritage, sometimes referred to as intangible cultural heritage or non-material or non-physical form of heritage resource. According to the National Heritage Resources Act 1999, living heritage means the intangible aspects of inherited culture, and may include: Cultural Tradition; Oral History; Performance; Ritual; Popular Memory; Skills and Techniques; Indigenous Knowledge Systems; and the Holistic approach to Nature, Society and Social Relationships.

The UNESCO definition on Intangible Cultural Heritage acknowledges language within the domain of oral traditions. In terms of the UNESCO Convention (2003) on Safeguarding Intangible Cultural Heritage, intangible forms of heritage are defined as the practice, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural space associated therewith – that communities, groups and, in some cases, individuals recognized as part of their cultural heritage. Article 2.2 of the Convention presents five key domains in which intangible heritage is manifested: Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; Performing arts; Social practices, rituals and festive events; Knowledge and practices concerning nature and the universe; Traditional craftsmanship.

Most often the terms living heritage and intangible heritage are used interchangeably and there is no clear distinction in their definitions. Therefore in the context of this document both terms will be used interchangeably.

Tangible Heritage

Unlike intangible or living heritage, tangible heritage refer to the material forms of heritage or physical aspects of heritage such as objects and sites or places of cultural significance.

Cultural Significance

According to the NHRA it means aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance. In broad terms cultural significance is synonymous with heritage significance and cultural heritage value. Its purpose is to help in identifying and assessing the attributes which make a place or object of value to us and to our society. Its definition may change as a result of the continuing history of the place, depending on the place itself, its fabric, setting, use, associations, meanings, records, related places and objects. Also given the understanding that cultural significance may change as a result of new information (Australian ICOMOS Burra Charter). Acknowledging the term has a range of meanings and values for different communities and individuals. The definition of cultural significance by Indigenous groups or local communities, especially in Africa, may differ vastly from interpretations provided by other race or cultural groups in the Western or European context. Indigenous knowledge systems may be useful in providing a non-European or non-Western definition of cultural significance that represents the values and aspirations of indigenous communities in Africa .

Heritage Management

According to the Policy of the South Africa Heritage Resources Agency (SAHRA), 'heritage management', refers to the identification, protection, conservation, research,

recording, documentation, dissemination, revitalisation, and promotion of heritage resources based on the best practices and world standards of management. It is commonly used in the local context of South Africa. Internationally heritage management is sometimes used interchangeable with the term safeguarding.

Safeguarding

This is an international term used to refer to the conservation and management of heritage resources both tangible and intangible heritage. According to the 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage, the term was used in reference to measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage (UNESCO General Conference; 2003).

Indigenous Knowledge System

The Indigenous Knowledge Systems (IKS) developed and maintained by South Africa's indigenous peoples pervades the lives and the belief systems of a large proportion of the country's population. Such indigenous knowledge manifests itself in areas ranging from cultural and religious ceremonies to agricultural practices and health interventions. Indigenous knowledge (IK) is generally used synonymously with traditional and local knowledge which is the knowledge developed by and within distinctive indigenous communities (IKS Policy ; 2004).

Community

It is a highly contested and politicised term. In this document the term 'community' is used to refer to a group of people who live in a common geographical area and sometimes share the same cultural interests, values, beliefs, norms, traditions, experiences, background and history, even if people reside in different locations. Drawing from the UNESCO-ACCU expert meeting on 'Community Involvement in

Safeguarding Intangible Cultural Heritage', community is defined as a network of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their intangible cultural heritage (recommendation adapted on 15 March 2006 at the UNESCO-ACCU Expert Meeting on Community Involvement in Safeguarding ICH, Tokyo).

Practicing community

The term 'practicing community' refers to a group of people who still continue practicing or observing their culture, traditions, knowledge systems, and other aspects of living heritage in relation to a site of cultural significance, heritage objects or intangibles per se.

Living Human Treasures

According to the 2003 UNESCO Convention on Safeguarding of the Intangible Cultural Heritage, Living Human Treasures refers to persons who possess to a very high degree the knowledge and skills required for performing or creating specific elements of the intangible cultural heritage that the Member States have selected as a testimony to their living cultural traditions and to the creative genius of groups, communities and individuals present in their territory.

Note:

Many of these terms remain problematic, but they will be used here in the sense in which they appear in the current literature on heritage management.

1. Chapter One

1.1 Personal Background

The South African Heritage Resources Agency (SAHRA) has a mandate in terms of the National Heritage Resources Act of 1999 (NHRA) to conserve and manage both intangible and tangible heritage resources for the present and future generations. At this phase of transformation in the heritage sector, SAHRA has embarked on a mission to attract professional staff from diverse backgrounds to play a competitive role: firstly, in transforming the heritage management approach which has largely been influenced by the colonial and apartheid orders; and secondly, to redefine heritage resources management to make it more relevant to the current situation in the post-apartheid South Africa and the world (see SAHRA Strategic Planning Workshop document -2005).

I joined the South African Heritage Resources Agency in March 2005. I was officially appointed to manage living heritage or intangible heritage in the organisation. Living heritage is a new field within the South African heritage sector, particularly in the government structures and institutions. In this respect the portfolio of the Living Heritage Officer has just been created, at SAHRA, within the past few years in 2002 - 2003. My predecessor was the second appointee to head the Living Heritage Unit at SAHRA, and he only lasted for a year and a half before the post was re-advertised as vacant.

I can clearly remember the advertisement for the position of the Living Heritage Officer which had specific requirements related to the suitability of the potential candidate for the post. One of the remarkable highlights of the advertisement was its emphasis on diversity of the official languages spoken in South African such as ‘ the applicant had to speak one or two African languages’ (SAHRA 2005). The prescribed categories in the advertisement were a perfect match to my personal qualities and attributes of my expertise. I consider myself fortunate to be at the right place and at the right time, especially being mindful of the previous colonial and apartheid regimes that once denied black people certain opportunities in the job market, more especially in the heritage sector.

The advent of democracy in South Africa has provided unique and exciting opportunities. For the first time in the history of South Africa, democracy and its new legislative imperatives such as 'affirmative action' and 'Black Economic Empowerment' has at least made it possible for black South Africans like myself who were subject to oppression and denied opportunities in the past to compete equitably in socio-economic developments in the country. This captures one of the many reasons I feel empowered to be working in this new dispensation in South Africa. Most importantly I feel empowered to be involved in the transformation process occurring in the heritage sector, especially considering that heritage resources management has been a white dominated field under the previous heritage authorities and legislation in South Africa. Amongst the several recommendations stipulated in the 1995 report by the Arts and Culture Task Group (ACTAG) there is also an important suggestion concerning, the biases of the past must be redressed through re-assessment and change in priorities at all levels of heritage conservation, to give every citizen the opportunity to contribute towards a common identity and national pride (ACTAG 1995:64).

In contemplating the background to transformation, I firmly believe that the establishment of the Living Heritage Unit within the South African Heritage Resources Agency (SAHRA) marks new developments in the conservation and management of heritage resources. As it has been generally noted that under the former heritage authority, namely the National Monuments Council, heritage resources management largely concentrated on the preservation of tangible forms of heritage such as colonial monuments, statues and architecture, while intangible heritage (living heritage) was left in limbo (Mokwena 2002:01). At this phase of transformation intangible heritage is being integrated into the mainstream of heritage resources management in order to provide a holistic approach to the conservation of both intangible and tangible heritage resources. The holistic approach to heritage resources management symbolises the indivisible link between tangible and intangible heritage. According to the National Heritage Resources Act of 1999, it is the policy of SAHRA to manage heritage resources (both objects and place) associated with Living Heritage (NHRA 1999). In this context living heritage accrues meaning and value to the tangible heritage resources (Dondolo 2004:04).

However the integration of living heritage into the ambit of heritage resources management and the development of the Living Heritage Unit at SAHRA continues to present numerous challenges and opportunities. One of the noticeable challenges has been the urgent need for recruitment of more expertise to maximise capacity and enhance skills development, especially since intangible heritage is a relatively new field which demands both extensive and intensive research. At this point in time there are few experts focusing in the safeguarding of intangible aspects of heritage in South Africa, often working in isolation for each other.

On the other hand, I personally think the opportunities associated with safeguarding living heritage has been the exposure gained through the interaction, in exchange of information and experience, with experts from other parts of the world. In particular I have recently participated in two expert-meetings organised by the United Nations Educational Scientific and Cultural Organisation (UNESCO) in Paris and Tokyo. At the meeting in Tokyo, March 2006, I was privilege to be amongst experts who drafted operational directives towards the implementation of the 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage. These expert meetings have proved to be important for setting up a global network for interregional cooperation amongst experts working and residing in different parts of the world.

Since there is no policy in place for safeguarding intangible elements of heritage resources in South Africa, this deficiency in particular has provided the opportunity to formulate policy and guidelines towards the sustainable management of intangible heritage. The drafting of policy and protective measures has also been inspired by the fact that living heritage or intangible heritage is under threat of disappearance due to several factors such as globalisation, modernity, migration, urbanisation, death of practitioners of intangible heritage and so on.

Research on the formulation of the living heritage policy constitutes an integral part of the function of the Living Heritage Unit at SAHRA. As such the drafting of the living

heritage policy has been one of the key responsibilities and an urgent deliverable since my appointment in March 2005. The process of developing policy and management guidelines has started with the review of volumes of heritage legislation, conventions, standards and best practices in the world for safeguarding intangible heritage. This approach constitutes a major facet of the research process in the development of appropriate instruments for safeguarding living heritage. Experts in the field of intangible heritage management are being identified and consulted to provide ongoing comment and input. At the same time an extensive public participation process is under way.

At this juncture I want to draw your attention to the process of formulating policy for safeguarding living heritage, which constitutes the subject matter for this study and the main reason for undertaking the huge task of writing this dissertation. Without deviating much from the subject matter, it is important to draw your attention to the role I am assuming as the main author behind the formulation of a policy document for living heritage or intangible heritage. I want to locate my role within the process of drafting policy as a mediator whose task is to interpret and translate information to fit specific accepted criteria. In the context involving a comparative study and a review of heritage management practices and legislation or policy for heritage conservation, the author is induced to assume a crucial position of mediating experiences, regulating knowledge and ordering certain views of others to achieve a prescribed objective. This happens as a result of the self-imposed authority that naturally tends to take precedence when one has the power, autonomy and is at liberty to select, interpret, make choices and take conscious decisions on what strands of information or experience ought to constitute the contents of a document such as the living heritage policy.

By virtue of being a mediator or agent the author is not immune from any form of biases, especially in the absence of a neutral space for objective rationale. Maintaining objectivity proves difficult in the context where the subjective self cannot be removed entirely from the process of mediating experience or interpretation of knowledge. Bruner argues the human subject creates itself, it is based on consciousness and free will, capable of making decisions, and agentively engaged in both world-and self-making, particularly

in narrative self-constructions (Bruner 1990). It is difficult for the author to remove himself or herself (ie feelings, ideas, perceptions and opinions) completely from the work they produce. Similarly the work produced by the author represents his or her version of the 'truth' about the issue at hand and the 'truth' cannot simply be dismissed as false without proof, even if the work is a reflection of the subjective self that characterise the aspiration and views of the author. In social anthropology the objective 'truth' remains an illusive phenomenon, highly problematic and often trapped within the discourse of power and knowledge or rather in what Foucault has termed power/knowledge discourse (Foucault 1987). In my opinion I bring into this process of policy formulation, my own preconceived notions about the 'truth', yet at the same time try to adhere to the National Heritage Resources Act (1999) amongst other pieces of legislation which sets specific conditions and guiding principles that governs my function as an employee of the South African Heritage Resources Agency, as I begin to draft policy on behalf of my organisation.

This background serves as a point of departure to highlight the underlying issues that need to be taken into account when executing the task of developing policy for safeguarding living heritage. Most importantly such background information is intended to provide the reader of this dissertation with an understanding of the base on which I am constructing my argument.

Without much deviation, the focus of this research project is centred on ongoing research on the process of formulating policy and management guidelines for the conservation and sustainable management of living heritage.

1.2 Introduction to the Research Problem

Attention to living heritage is of paramount importance for the reconstruction and development process in South Africa. Means must be found to enable song, dance, story-telling and oral history to be permanently recorded and conserved in the formal heritage structure (White Paper on Arts, Culture and Heritage 1996).

The formulation of policy towards safeguarding living heritage has become an urgent matter, long overdue, as there are no specific legal instruments to safeguard intangible forms of heritage resources in South Africa. A report by the Art and Culture Task Group confirms there are no existing formal structures for *Amasiko* (living heritage), but oral histories and living culture are being recorded at an ad hoc level by some museum specialists and university researchers and some archives include sound and video tapes (ACTAG:09:1995).

The deficiency in legislation for safeguarding intangible heritage resources underpin that living heritage is relatively a new field within the institutional framework of government. However this does not imply that intangible forms of heritage resources such as oral tradition, folklore, craftsmanship, rituals and customs, Indigenous knowledge system and traditional or Indigenous methods of conserving such heritage resources, are new cultural heritage forms especially in the Africa context. It has been generally noted that living heritage, such as the aforementioned elements of intangible cultural heritage, predate the imperial and colonial era (Jordaan 2005: 02). Despite the passage of time these elements of intangible heritage still constitute an integral part of the daily life experiences as well as lived experiences of the various population groups in South Africa.

The urgency in drafting appropriate instruments for safeguarding living heritage is also highlighted in the White Paper on Arts, Culture and Heritage, which states that means must be found to enable song, dance, story-telling and oral history be permanently recorded and conserved in the formal heritage structure (White Paper on Arts, Culture and Heritage 1996). In terms of the National Heritage Resources Act (NHRA) of 1999, the South African Heritage Resources Agency (SAHRA) has a mandate to manage

heritage resources to which oral tradition or living heritage is attached (NHRA 1999). As such SAHRA has embarked on a process of formulating policy and guidelines for the sustainable management of living heritage associated with material heritage or tangible forms of heritage.

A major facet of developing policy and legal instruments, to a large extent, has placed emphasises on the urgent need to review existing heritage legislation, legal instruments and best practices in the world that may be useful in the South African context. It is noteworthy to mention, at this point, that there has been important work done in South Africa in the area of policy formulation pertaining to the protection of intangible heritage, by Harriet Deacon, Luvuyo Dondonlo, Mbulelo Mrubata and Sandra Prosalendis. Their collective contribution resulted in a publication entitled "Legal and Financial Instruments for Safeguarding our Intangible Heritage" which was developed for the Human Science Research Council (HSRC) and the South African Department of Arts and Culture. In particular the aim of their study concerned the development an inventory of the financial and legal instruments that exist internationally to underpin the development, promotion and preservation of intangible heritage (Deacon et al 2003; 03). The publication was presented jointly by the Ministers of Arts and Culture, Ben Ngubane (South Africa) and Amadou Tidiane Wone (Senegal), to the International Network on Cultural Policy (INCP-RIPC) meeting in Croatia, October 2003.

The difference between Deacon et al's book and this dissertation it is not completely huge but there is significant evidence of contrast and progression from their work in this research project. The main difference is that this dissertation presents an approach to be adopted specifically by the South African Heritage Resources Agency (SAHRA) towards the holistic conservation and sustainable management of heritage resources which are considered to be part of the national estate. As such this research project proposes a SAHRA approach to the management of living heritage. Another fundamental difference is that this dissertation places high premium on the latest trends concerning key heritage management issues which complements the work previously done by Deacon et al in 2002 – 2003. As research is an ongoing process towards improving legal instruments for

protection, this dissertation seeks to be another contribution, along side other national efforts, for the development of best practices and standards for safeguarding our living heritage in South Africa.

As a point of departure, the process of formulating policy has begun with the review and assessment of the current National Heritage Resources Act (NHRA) of 1999. The NHRA makes provision for the conservation of intangible aspects of inherited culture, such as: cultural tradition; oral history; performance; ritual; popular memory; skills and techniques; indigenous knowledge systems; and the holistic approach to nature, society and social relationships. However, as I will demonstrate later, the scope of living heritage remains limited within the Act.

In view of the evolution of heritage legislation in South Africa which dates back to the Bushman Relics Protection Act of 1911 and the development of current National Heritage Resources Act of 1999, the latter particularly marks the first step towards the democratisation of heritage resources management. According to section 5 (4) of the NHRA, heritage resources form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management (NHRA 1999). One of the principles for a democratic arts and culture policy, as stipulated in the report by the Arts and Culture Task Group, states that conservation shall be committed to conserve the full diversity of South African heritage and tradition (ACTAG 1995: 09). However the report also underlines the difficulty and challenge associated with transformation of the heritage legislation, that:

“ We realize transformation will be a long process, but we have no South African precedents for redress to work from. Whereas the Nationalist government in the 1940s sought redress through promotion of the Afrikaner culture, we are seeking redress through national reconciliation in which all South Africans should have an equal share...the cornerstones are a structure that allows for local participation in decision-making on the

one hand, a strong outreach for affirmative action training and public education in the centre, and government commitment to funding for the process of nation-building through reconstruction and development on the other hand” (ACTAG 1995:55)

The official recognition of living heritage and its integration into the mainstream of heritage resources management epitomise a measure of new developments in the South African heritage sector. In retrospect the field of heritage has been noted to be fragmented and skewed in a manner that does not reflect the true demography and diverse experience of South African people, particularly those who have been oppressed over the centuries (Mangcotwa 2005). This view concurs with the perceptions that decades of conservation work in South Africa and elsewhere in Africa largely focused on the promotion and protection of European history, culture, traditions, language and architecture in Africa whilst indigenous heritage was left in limbo (Mokwena 2003:01). In this regard indigenous forms of heritage, being mostly intangible, were often neglected and to a large extent excluded from the mainstream of heritage resources management (Dondolo 2004).

The previous heritage legislation, namely the 1911 Bushmen Relics Protection Act; Natural and Historical Monuments Act of 1923; the Natural and Historical Monuments; Relics and Antiques Act of 1934 and the National Monuments Act of 1969, collectively placed much emphasis on the protection of material heritage that served the interest and welfare of the white South Africans throughout the various phases of the colonial and apartheid eras. The former National Monuments Council, in line with policies of the previous colonial and apartheid regimes, has been accused of focusing attention only to places with significance to European or colonial history rather than on places with historical significance for the black community (Fortune et al 1999:127). A report by the Arts and Culture Task Group also highlights the significant marginalisation of certain cultural groups from heritage resources management, by illustrating that the majority of people in South Africa have been excluded from history books, museums, monuments,

and archives. It concludes that the recording of popular culture and popular memory is a massive task that has hardly begun. (ACTAG 1995:67).

It is only with the advent of democracy in 1994 and the subsequent inscription of volumes of new legislation that marginalised forms of culture and heritage are being recognised within the official legislative and institutional frameworks. The White Paper on Arts, Culture and Heritage explicitly stipulates that attention to living heritage is of paramount importance for the reconstruction and development process in South Africa (White Paper on Arts, Culture and Heritage 1996). While the constitution of the republic of South Africa states in section 31 of the Fundamental Rights in Chapter 3, “ every person shall have the right to use the language and participate in the cultural life of his or her choice” (South African Constitution 1996:15)

At the face of transformation, institutions such as the National Heritage Council (NHC) have been established to coordinate heritage activities and to drive transformation in the heritage sector (NHCA 1999). The NHC is currently drafting a ‘Heritage Practice Transformation Charter’ to address and facilitate change in the heritage sector. In April 2005 the NHC organized a Heritage Transformation Indaba (conference) where in his opening address the honourable Pallo Jordan, Minister of Art, Culture and Heritage, vehemently expressed concern on the subjugation and marginalisation of indigenous forms of cultural heritage from the mainstream of heritage resources management, in the following words:

“You have to be deaf as well as blind if after travelling through this country you did not realize that South Africa at one time was part of the British Empire. Our museums, memorials, monuments and place names tell that story very eloquently. Some epitomize of the British Empire, giving expression to and exalting the heroes, soldiers, statesmen, the values and aesthetics of that Empire. The dominant narrative is the story of the Empire, with indigenous culture and heritage, if it is included at all, is there as an appendage to the grand narrative of the British Empire and

as a foil to throw into higher relief the exploits of those who created it".
(Jordan 2005:02).

However there are many other important reasons why safeguarding living heritage has attained a measure of prominence and is now a priority in heritage resources management, in this new political order. It is simply not sufficient to conclude that because living heritage has been subject to exclusion in the past therefore that justifies its inclusion or integration into heritage resources management at present. Probably a universal reason that also affects South Africa, in a profound way, recognises that the processes of globalization and social transformation did not only provide conditions for renewed dialogue among communities on socio-cultural issues but also gave rise to the disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for safeguarding such heritage (UNESCO 2003). A resolution emerging from the Istanbul Declaration of 2002, adopted by the Third Round Table of Ministers of Culture, stressed that " the extreme vulnerability of the intangible cultural heritage, which is threatened by disappearance or marginalisation, as a result inter alia of conflicts, intolerance, excessive merchandising, uncontrolled urbanisation or rural decay, requires that governments take resolute action respecting the context in which the intangible cultural heritage is expressed and disseminated"(Istanbul Declaration 2002).

Living heritage enriches people's lives, often providing a deep and inspirational sense of connection to community and heritage resources, to the past and to lived experiences (Munjeri 2003:02). Most importantly, living heritage represents knowledge and information sustained through memory and transmitted orally or by use or practice from one generation to the next. This means by its nature it is a fragile resource often vulnerable and susceptible to disappearance if not adequately managed in a way consistent with its cultural value, essence and conservation needs. Therefore there is an urgent need to prevent further losses, as heritage is irreplaceable, non-renewable and the need to conserve it for posterity is extremely important (NHRA 1999).

As part of the latest efforts in the conservation of heritage resources, the NHRA makes provision for an interactive and integrated system of heritage resources management. In this regard it has become SAHRA's mandate to apply a holistic conservation approach that also considers the associational links between intangible and tangible heritage, particularly the management of heritage resources associated with oral tradition or living heritage (SAHRA 2001). Critics consider the significance of living heritage in relation to tangible forms of heritage, that 'physical heritage only attains its true significance when it sheds light on its underlying values. Conversely, intangible heritage should be made incarnate in tangible manifestations, in visible signs, if it is to be conserved' (Luxen 2003:01). However it is worth noting that intangible heritage is by its nature not fixed to a physical permanent format, like tangible heritage, as it is subject to significant change always. This makes it very vulnerable to loss, but also very difficult to safeguard using the same legal and financial mechanism established for heritage places and objects (Deacon et al 2003).

The formulation of appropriate instruments and policy for safeguarding living heritage or intangible heritage remains a serious challenge in South Africa. However this challenge is not only unique to South Africa. Many other countries, as I will demonstrate later, are confronted with the unavoidable challenge of deficiency of legal instruments for safeguarding intangible heritage. At the same time other parts of the world present best practices and conservation measures specifically established for the protection of intangible heritage.

In October 2003 the member states of United Nations Educational, Scientific and Cultural Organisation (UNESCO) adopted the Convention for Safeguarding Intangible Cultural Heritage. This marks a major step at international level for cultural heritage protection. The convention places high premium on the promotion of the conservation of heritage resources, and it complements the World Heritage Convention by introducing the protection of intangible components of heritage resources.

To date, UNESCO has developed and adopted a range of heritage policies. Some of these policies are: the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore in 1989, the UNESCO Universal Declaration on Cultural Diversity of 2001, and the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture. The World Intellectual Property Organization (WIPO), in collaboration with UNESCO, has also contributed enormously in developing instruments for the protection of aspects of traditional cultural expression and knowledge. Other organisations such as the Trade Related Aspects of Intellectual Property Rights (TRIPS), the African Regional Intellectual Property Organisation (ARIPO) and the African Intellectual Property Organisation (OAPI) are striving to develop well defined instruments for the protection of intangible heritage.

The latest piece of legislation is the adoption of recommendations, at the 32nd session of the general conference in Paris in October 2003, of the 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage. Article 11 of the convention requires every state party (signatories to the convention) to take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory (UNESCO 2003). Furthermore, article 11 of the UNESCO Convention (2003) states that each state party shall: a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory; and b) identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations (UNESCO 2003)

Apart from the urgency to safeguard living heritage, it has not been easy for state parties to formulate policy and appropriate guidelines towards the sustainable management of intangible cultural heritage. South Africa could be counted amongst several countries or regions in the world which has not yet developed a national strategy or policy towards the conservation and management of living heritage or intangible heritage. Other countries such as Kenya, Botswana, Brazil, Mexico, Panama, Spain and many others do not possess well defined legal instruments and are in the process of developing national policies that adequately address the conservation needs of intangible cultural heritage in

their territory. This is apart from the growing political will amongst head of states and governments, especially in developing countries, to take heritage conservation seriously. Most of these countries, no matter what status of their economy and infrastructure, are beginning to allocate some resources and deploy responsibility to heritage resources management. South Africa, in particular, has achieved a significant measure of success through the Ministry of Art and Culture, allocating resources for the establishment and appointment of authorities such as Provincial Heritage Resource Authorities (PHRAs), National Heritage Council (NHC) and the South African Heritage Resources Agency (SAHRA) whose primary responsibility are to ensure the sustainable management of heritage resources. However much still has to be done to address skills shortages and lack of capacity in the heritage sector.

The integration of living heritage into the ambit of heritage resources management not only provides an opportunity for the formulation of legal instruments in the absence of policy and measures to safeguard living heritage. In this context the process of formulating policy also provides an opportunity to frame a research project or a dissertation such as this one which seeks to draw a comparative analysis and review existing heritage management practices, policy and legislation in order to produce knowledge as a resource, for the formulation of policy and guidelines for safeguarding living heritage or intangible heritage. It is the intention of this research project to develop a body of knowledge that could potentially inform the formulation of policy. This can happen in several directions, however, for the purpose of this research project a set of key literatures, in the form of records of heritage management practices and draft policies or legal instruments for heritage resources management, will be consolidated and reviewed. Ultimately this will lead to the synthesis of knowledge to be used in the process of formulating policy for safeguarding living heritage for the South African Heritage Resources Agency.

Within the framework of formulating policy the process of drawing a comparative study and review of literatures constitutes the premises on which new knowledge can be developed. Research leading to the production of new knowledge, through a rigorous

process of comparative analysis and literature review, is a valid case study in its own right. It is a case study, in this context, that discusses how, why and what body of knowledge ought to inform the drafting of a policy document such as the one for the conservation and sustainable management of living heritage.

Knowledge production tends to be a complex and time consuming process. For knowledge to be produced someone must think of an idea and then decide to pursue it further through research. Sometimes the idea takes years to germinate in a person's mind. Most importantly knowledge represents power, as it is not neutral but its production is informed by a set of guiding ideas being social constructs that tend to govern in this world. In the power/knowledge axis, Foucault sets out to explain that knowledge as an integral part of discourse is produced and it is not discovered. This is an underlining factor in the social formation of the 'truth' and its constituents, as the critic Allen quotes Foucault:

“We misunderstand the relation between knowledge and power when we assume that any ‘knowledge’ convenient for power must be mere so-called knowledge that is really false (or otherwise defective). Like more and more of what we ask from knowledge or find it plausible to expect its authorities to say, the production of new knowledge had become aligned with corporate, disciplinary, and administrative power” (Foucault in Allen 2000)

Following on Foucault's argument knowledge and power are inseparable, thus a body of knowledge is produced in the service of power. Similarly a policy document as a piece of legislation represents the power/knowledge discourse with all associated social formations symbolic of the dominant regime.

The success in developing appropriate standards and legal instruments for safeguarding living heritage will, to a certain extent, depend on the body of knowledge to be produced in this research project. Thus it is the purpose of this dissertation to produce a body of knowledge, through research involving a comparative study and review of heritage

legislation and associated heritage management practices, that potentially informs the development of policy and guidelines for the conservation and sustainable management of Living Heritage.

1.3 Aims and Objectives

In view of developing an informed policy and management guidelines, the aims and objectives of this research project are:

- To review and analyse literature, in the form of heritage legislation and related heritage management practices;
- To develop a body of knowledge, through the review and analysis of literature, that can potentially inform the process of formulating policy and guide the management of living heritage or intangible heritage in South Africa.
- To determine and define key heritage management issues, and make recommendations for the development of better instruments for safeguarding living heritage or intangible heritage in South Africa.

It should be noted that the this research project is not an attempt to produce a draft policy or be a draft policy, but is rather an attempt to review and analyse relevant literature and policies globally, with a view of producing knowledge for the formulation of appropriate legal instruments and policy for managing living heritage in South Africa.

1.4 Problem Statement

In the absence of policy and guidelines, as it is the case in South Africa, the conservation and management of living heritage tends to be subject to the sole discretion of heritage practitioners and officials. In this regard ad hoc decisions and interim interventions, which may not necessarily be the most appropriate protection measures or best conservation practices, tend to be adopted and implemented. This highlights a serious challenge in heritage resources management that requires the formulation of appropriate policy guidelines to set a standard practice for safeguarding living heritage. The need to formulate appropriate policy and management guidelines which are adequately informed and considerate of other instruments, standards and best practices in the world is of

paramount important. However the process of formulating policy relies on extensive research to determine and develop appropriate protective measures and best instruments for conservation. In this regard research presents the opportunity to determine and construct a body of knowledge, through a comparative analysis and review of literature, that potentially can inform the process of formulating instruments for the sustainable management of living heritage.

However the question remains, what body of knowledge could potentially inform the formulation of policy and guidelines for the conservation and sustainable management of living heritage? The success of this dissertation rests in addressing this fundamental question.

1.5 Research Questions

The National Heritage Resources Act of 1999 requires the South African Heritage Resources Agency to manage heritage resources in accordance with their conservation needs. As such a host of specific research questions need be investigated in order to respond to the issue of conservation needs required for the safeguarding of living heritage. These questions are:

- Why it is important to formulate appropriate legal instruments and policy for the safeguarding of living heritage in South Africa?
- How will these legal instruments and policy be developed?
- What approach is being pursued, in this dissertation, towards formulating legal instruments and policy for safeguarding living heritage?
- How come it is crucial to review and draw a comparative analysis of literature, in the form of heritage legislation and related heritage management practices, for the purpose of formulating legal instruments and policy for the safeguarding of living heritage?
- How can the review and comparative analysis of literature assist in the development of appropriate measures for safeguarding living heritage or intangible heritage?

- What body of knowledge will be constituted from the review and comparative analysis of literature, and that will serve as the basis for the development of legal instruments and policy?
- How can this body of knowledge help in the development of legal instruments and policy?

These questions arise as a result of an urgent need to establishing the basis upon which policy on living heritage or intangible heritage could be developed.

1.6 Research Process and Methodology

The Centre for African Studies at the University of Cape Town makes provision for an interdisciplinary research approach rather than confined to a specific traditional scientific methodology or discipline. As such the nature of this research project is a critical review and comparative study of existing heritage legislation, conventions, protocols, standards and best practices in the world for safeguarding intangible forms of heritage. In particular the literature under review is based on resource material (conventions, protocols, policies and standards) that are primarily written in English or translated from other languages into English.

The methodological approach used for gathering information involves archival, library-based and desktop research. This includes a process of identification, collection and analysis of sources of information or literature published on the internet sites of government and non governmental organisations, libraries and archives. More specifically, a major portion of the literature reviewed is archival sources such as documents in the form of draft heritage policies and conventions, academic articles and papers, position papers/documents by state parties, constitutions, public addresses and speeches, minutes of meetings, correspondence (emails and letters), notes from workshops and conference proceedings, annual reports, publicity material (brochures and pamphlets), newspaper clippings and transcripts based on oral testimonies or interviews. Many of these sources are from the SAHRA archive. The sources are reviewed and analysed in a critical manner within the framework of this dissertation.

2. Chapter Two – Literature review: Heritage Legislation

2.1 A retrospective view of heritage legislation in South Africa

In retrospect South Africa has a long history of heritage conservation. The first piece of legislation, namely the Bushmen Relics Protection Act, was passed in 1911. However archival records also show that in 1905, before the promulgation of the Bushmen Relics Protection Act of 1911, a group of conservation activists and individuals by the likes of Marie Koopmans de Wet, played an important role in preserving various aspects of South Africa's heritage. In particular Marie Koopmans de Wet is considered to be the one who saved the Castle from partial demolition to make way for the railway into Cape Town as well as preventing alterations to Groot Constantia (Pistorius at el 1996: 02).

However there are numerous others whose names do not appear or feature prominently in any archival records, who also played an important role in protecting South Africa's heritage, including the Indigenous San people who were not only responsible for the production of numerous rock art but also maintained this precious heritage resource. The so-called Bantu people of southern Africa also developed highly sophisticated Indigenous knowledge based systems to ensure the conservation and sustainable management of their heritage resources, both intangible and tangible. In particular George Abungu argues that traditionally in Africa, heritage was managed either communally or through a group of elders or kingship being the custodians, the advent of colonialism drastically altered this management (Abungu 1996: 01). He further asserts that the colonial period in Africa saw the rise of museums to assume custodianship of African heritage (Abungu 1996: 02). In essence the practice of heritage conservation and management has pre-colonial origins in Africa and it is unfortunate that this knowledge is scarcely documented in historical text records.

In 1905 the South African National Society (SANS) was established. This was an era of accelerated colonial expansion and scientific enquiry which involved the legitimization of colonialism. Drawing from historical records the SANS was dedicated to the conservation of heritage resources that expressed colonial interests in cultural heritage, particularly the preservation of heritage of the white settler community in South Africa.

The main objective of the SANS was 'to preserve...from destruction all ancient monuments and specimens of old colonial architecture remaining in South Africa, to keep systematic records of such places...where they cannot be saved; to compile a register of old furniture and other objects still in the colony and to take all possible measures to discourage their removal from the country,...to collect records, and endeavour to promote...a conservative spirit towards the remains and traditions of old colonial life' (SANS 1906: 03). Clearly this marks the historical beginnings of a biased approach to heritage resources management in South Africa. This view is no different from the popular colonial narrative that history and civilization in South Africa began in 1652 with the arrival of the first European settlers, regardless of the pre-colonial historical events that took place before the arrival of the white settlers. In part this was the result of the suppression of the history of South Africa's marginalized and working-class people which pervaded the public history of the apartheid era (Worden et al 1998: 201).

The SANS primarily focused its energies on the conservation of both natural and cultural heritage resources which included the exhibition of antique furniture, wild birds, wild flowers, the establishment of a national botanical garden, the protection and restoration of historical buildings, and the railway on Table Mountain. The work of SANS is also considered to have spurred the promulgation of the 1911 Bushman Relic Protection Act in its campaign to protect rock art and archaeological sites. The SANS annual report of 1911 stipulates that members of the society will note with extreme satisfaction that a bill is at present before parliament dealing with the protection of Bushmen paintings (SANS 1911: 17).

The Bushman Relics Protection Act of 1911 is considered to be the first piece of legislation for the conservation of cultural heritage. Under the Act, Bushman relics are defined as any drawing or painting on stone or petroglyph of the kind commonly known or believed to have been executed by the South African Bushmen or other aboriginals, and shall include any of the anthropological contents of the graves, caves, rock, shelters, middens or shell mounds of such Bushmen or other aboriginals (Act No.22 of 1911: 658). The act was promulgated due to mounting concerns of damage and loss of rock art through exports. As a result the Act made it an offence to damage or destroy rock art and

archaeological sites and relics. But critics have noted that no mechanism were created to administer the law (Deacon and Pistorius 1996:04). In reference to the evidence presented on the trade in human remains, between 1907 and 1917 in ‘Skeletons in the Cupboard’, both Legassick and Rassool state that “...the Bushman Relics Act of 1911...was also directed against the foreign trade in skeletons, and was introduced as a direct consequence of what even officials regarded as a ghastly business, of unwholesome and reprehensible trafficking in human remains” (Legassick et al 2000: 01) However, Legassick et al also contend that the Bushman Relics Act could not prevent the increasing popularity in illicit trafficking of human remains that museums and professional scientists participated in (Legassick et al 2000: 01).

A practical case concerning the deficiency in the Bushman Relics Act is clearly summed up in a correspondence (Letter dated 06th October 1917) between John Orr and Robert Broom. The former (John Orr) makes specific objection to the trade of cultural heritage resources of the country by the latter compatriot (Robert Broom), to foreign countries, that ‘the fossils of the country should not be regarded as a source of revenue to anyone’ (Letter/correspondence, 06/10/1917: 01). This is a response to Robert Broom’s prior letter (dated 12th September 1917) when he strongly contended that “The collection which I sold to New York, South Africa could have had for a ten pound note but deliberately rejected my offer...I had resolved that having rejected my offer it was not going to be repeated and that wherever my collection went it was not going to remain in South Africa...the question remained to decide between London and New York and for many reasons it was best that New York – the leading palaeontological centre of the world – should have a good South African collection (12/09/1917 01). In this particular case the law could not do much to prevent, even, renowned scientists from the illicit trade in cultural heritage resources. In fact this case underpins the lack of ethics in the process of scientific research and knowledge production by scientists in the early twentieth century, in South Africa. Critics have observed that ‘early archaeological work in Africa has to be understood against this background in European studies...colonial collectors saw themselves as representatives of their home countries, rather than their colonies, and often sent specimens back to Europe for study...Africa, however remote, had become an

extension of the Victorian drawing room, rather than a place in its own right' (Hall 1996: 22-23).

The exceeding interest and obsession in the study of 'Bushmen relics' , including their genetic make up and physis was also propelled by the 1905 British Association for the Advancement of Science (BAAS) conference .It is at this particular meeting that the then president of BAAS, A.C Haddon urged scientists in South Africa to " make an accurate account of the natives of South Africa ...for scientific use, and as a historical record ...before the advance of civilization began to obscure and even obliterate all the true traditions, customs and habits of the South African people" (Legassick at el 2000: 05). What followed after the meeting is what Legassick and Rassool, have described as a ghastly business of the trade in human remains. As a result of the absence of legal instruments prohibiting these gruesome activities, little could be done to prevent this from happening.

The launch of the 'Miscast Exhibition' in 1996 by the Artist/Curator Pippa Skotnes marks the significant interventions in both academic and public domain to expose irregularities and injustices in scientific research leading to the construction of a 'typical' Bushmen identity. This was done in the hope to dispel or debunk misconceptions around the Bushmen people, but also generate public debate. However the misconceptions based on the popular imagery of the Bushmen people still prevail in spite of the increased acceptance of them, as ordinary civilized human beings, in the post-apartheid South Africa.

At the time of the promulgation of the Bushman Relics Protection Act , architecture and the environment had not yet been recognized as worthy of conservation and consequently not included in the act (Viney 2004: 01). This is despite the earlier conservation efforts under the SANS, especially in the Cape where focus was mainly on sites such as the Castle in Cape Town and grand Cape-Dutch homesteads.

In broad terms the early 1900s marks the beginning of the discipline of archaeology gaining momentum and claiming authority in heritage resources management in South Africa. It is noteworthy that as a result of the SANS's campaign, the first heritage legislation in South Africa was concerned not with monuments, but with the country's archaeological heritage (Deacon et al 1996: 04).

In particular the field of archaeology has been instrumental in the making of history and heritage under the colonial and apartheid eras. A number of renowned archaeologists in South Africa, including Janet Deacon, John Parkington, Martin Hall, Nick Shepherd and many others, strongly argue that despite efforts by some archaeologist to maintain academic freedom and independence, the discipline of archaeology could not be divorced from the service of both colonial and apartheid project. In several publications, including ' Archaeology and Post- Colonialism in South Africa: The Theory, Practice and Politics of Archaeology after Apartheid', Nick Shepherd systematically traces archaeological activities (development of archaeology) and the role of archaeologists in knowledge production pertaining to the framing of history and heritage in colonial, apartheid and post-apartheid South Africa. In particular he makes specific reference to the relationship between the development of archaeology and politics, in 1923 and 1948 – a relationship personified by early archaeologists such as Van Riet Louw, Goodwin, Malan and the political backing including financial support by General Jan Smut, Prime Minister of the Union of South Africa – such that “ Malan begins by recalling the early history of archaeological research in South Africa, drawing on Goodwin's two papers on the subject...when he comes to discuss the Archaeological Survey his theme becomes the importance of the political patronage of General Jan Smuts in the early establishment and institutionalization of archaeology in South Africa” (Shepherd 1998: 129).

In essence such a relationship had a huge impact not only to the development of archaeology but, as I will show later, it had substantial influence to the approach of heritage resources management in South Africa. Indeed, in certain respects archaeologists were at the forefront of shaping policy around the notion of national heritage in this period (Shepherd 1998: 165).

In 1923 a new piece of legislation was promulgated and it replaced the Bushman Relics Protection Act of 1911. The Natural and Historical Monuments Act of 1923 became the first legislation for the protection of monuments in South Africa. The scope of this legislation was limited to the protection of monuments which included 'areas of land having distinctive or beautiful scenery, areas with a distinctive, beautiful or interesting content of flora and fauna, and objects, (whether natural or constructed by human agency) of aesthetic, historical or scientific value,...and also specifically includes...waterfalls, caves, Bushmen paintings, avenues of trees and old building' (NHMA 1923).

As a result of this legislation, the first statutory body responsible for heritage resources management – the Commission for the Preservation of the Natural and Historical Monuments of the Union, popularly known as the Historical Monuments Commission - was established. The Commission had the responsibility of compiling a register of the monuments of the Union of South Africa, and could pass by-laws to safeguard these monuments. It could also enter into agreements with any public body or private individual who owned a monument to ensure that it was preserved, and to prevent damage. The Commission was at liberty to accept donations and subscriptions, and depending on sufficient funding, it could purchase any monument. However critiques have noted that after seven years in operation the Commission could not report much progress in conserving sites as it relied heavily on the voluntary cooperation of private owners of sites or the Department of Public Works which owned numerous public buildings of historic significance (Viney 2004:01). Being a statutory body representing the Union of South Africa, the Commission also acted as a trustee of any monument which was given or bequeathed to the country. During this period the Commission initiated the practice of fixing their distinctive bronze badge on declared buildings.

Considering the fact that legislation on heritage resources management focused solely on the conservation of tangible heritage, the Commission became involved in the repair, restoration and conservation of many historical buildings and sites, including Groot

Constantia homestead (damaged by fire in 1925), the Hout Bay Battery, the first house built in Grahamstown and the Old Raadsaal in Bloemfontein (NHMA 1923).

Eleven year later, the Historical Monuments Commission was given increased powers to manage South Africa's heritage resources in terms of the Natural and Historical Monuments, Relics and Antiques Act of 1934. This piece of legislation replaced the previous Acts, both the Bushman Relics Protection Act of 1911 and the Natural and Historical Monuments Act of 1923. Under the new Act, the Historical Monuments Commission was entrusted with powers to make recommendations to the relevant Minister that a place or object be officially proclaimed a monument by notice in the government gazette and, in the case of a place, by endorsement of the title deeds (HMC 1923).

1934 is also the year of the founding of the Bureau of Archaeology which was directed by Peter Van Riet Lowe. The Bureau was charged with the responsibility not only for the archaeology of the Union, but also national monuments and heritage sites (Shepherd 1998:162). Van Riet Lowe served both as the director of the Bureau of Archaeology and secretary to the Commission for the Preservation of Natural and Historical Monuments, Relics and Antiquities (Historical Monuments Commission). After Van Riet Lowe retired in 1955 and B.D Malan succeeded him as director of the Bureau of Archaeology and secretary to the Historical Monuments Commission. A.J.B. Humphries was appointed to the later National Monuments Council (MNC) as an archaeologist in 1977 and when he left in 1979 he was replaced by Jalmar Rudner, who was an architect by training but with interest in archaeology. Critics have observed that "with the management of national heritage in the hands of professional archaeologists, a proportionately high number of archaeological sites from the pre-colonial period were selected for declaration as national monuments – 14% of the total declared national monuments in the years 1936 – 1948" (Deacon 1993 in Shepherd 1998:162). In this regard the field of archaeology provided a paradigm for contextualizing heritage resources management, thus setting lens through which the conservation of heritage resources could be perceived and understood.

The period post 1948, normally taken to mark the advent of formal apartheid, witnessed the gradual increase in the construction and naming of places commemorating white Afrikaner nationalist cultural heritage. Attitudes towards conservation did not change until the 1960s, 1970s and a major part of the 1980s. Much focus was geared towards the built environment or architectural heritage resources and this approach set precedents to the conservation of heritage resources. Critics note that “the emphasis on architecture ...has meant that the notion of national heritage, as well as the National Monuments Council (NMC) itself, has been inextricably bound with that icon of colonial privilege and oppression, the white Cape Dutch gable” (Shepherd 1998:166).

Over the next 35 years the Historical Monuments Commission proclaimed about 300 monuments. Among the newly proclaimed monuments were the Castle, Table Mountain, Dinganes’s Kraal, Cetshwayo’s Kraal and Mpande’s Kraal in Natal, the Ganesha Temple, the Makapan Caves, the Valley of Desolation near Graaff-Reinet, rock paintings, rock engravings and archaeological deposits. Also included were glaciated rocks and cretaceous deposits, palaeontological remains, several trees of scientific or historical interest, the Dias Cross at Kwaaihoek, forts and battlefields, historical houses, the Verdun ruins in the Zoutpansberg district, the first locomotive of the NZASM, and the first gold crushing and gold power plants in the northern region. In the publicity material of the National Monuments Council (1969), the abovementioned monuments were considered a reflection of the diversity of the cultural and natural heritage of South Africa.

The destruction, alteration, removal or export of a proclaimed monument was deemed illegal unless the Commission approved such distortion of the physical fabric. The Act considered any person who illegally exported an antique, proclaimed a monument, to be fined up to 75% of the market value, while the maximum fine for other offences was 100 pounds. Any person owning a potential monument who objected to the proposed proclamation could appeal to the Minister (HMC 1923).

For the most part, the core functions of the Commission involved the identification, research and recording of heritage resources being carried out by tiny teams of both

administrative and professional staff. From then onwards the question of understaffing in the heritage sector has been a challenge that has not been adequately addressed. Most importantly the notion of public participation and the involvement of ordinary members of the public in heritage management still remained largely ignored by the Commission.

However the 1960's marks a phase of emerging public interest in cultural heritage (Pistorius 1997; 04), but only a few privileged and well resourced individual and organization could influence the management of heritage resources. The public interest in heritage management, at this phase, is partly inspired by an increased pace and scale of modern developments (Viney 2004:03). During this period it is noted that several influential conservation organizations were established. These organizations include the Simon van der Stel Foundation, the Vernacular Architecture Society of South Africa and Historical Homes of South Africa Limited. Due to the efforts of these organizations and the Historical Monuments Commission, new legislation – the National Monuments Act – was promulgated and adopted in 1969.

Under this Act, the previous Historical Monuments Commission was replaced by a statutory body, the National Monuments Council (NMC), which was under the Minister of National Education. The NMC was given additional powers to protect monuments, now known as declared national monuments, and other aspects of South Africa's heritage. The introduction of provisional declaration of national monuments marks a significant development in the 1969 legislation, as it enabled the NMC to protect immovable property for a maximum of five years while it investigates the desirability of permanent declaration. The first provisional declaration provided protection to 24 houses in Church Street, Tulbagh, which were severely affected by a powerful earthquake in September 1969. These houses were subsequently repaired and restored to their mid-nineteenth century appearance, and permanently declared.

In the same year of its inception the NMC, for the first time, received additional funding from the state to be used to purchase monuments or for grants to owners of monuments. The funding is in addition to the budget allocated to the NMC for administrative

expenses. Despite the building costs, the financial support also enabled the NMC to contribute to the repair and restoration of national monuments. As early as the 1960s and even before this period the state has been allocating financial resources towards safeguarding heritage resources in South Africa. However both financial and legal instruments for conservation purposes have not been sufficiently allocated to address the challenges associated with the sustainable management of heritage resources.

The National Monuments Act has been amended several times since its promulgation in 1969. This was done to expand the powers of the National Monuments Council to cover the conservation of cultural heritage. However Janet Deacon notes that “ the architectural focus of the staff was emphasized anew with the amendment to the [Monuments] Act in 1996 which required that plans for alterations to any buildings older than 50 years had to be approved by the NMC. This amendment substantially altered the work load of NMC staff members and effectively pushed archaeology even further from the list of priorities” (Deacon in Shepherd 1998: 163 – 164).

Much of the conservation approach of the NMC focused on the built environment and architecture that celebrated both colonial and apartheid heritage with little regard to the cultural heritage resources of black South Africans. In reference to the work of the historian Farieda Khan, Annie Coombes assert that “ many of the buildings or other structures that have been proclaimed national monuments by the NMC have more negative than positive connotations for the majority culture...what does it mean, for example, to preserve the Cape Dutch architecture and slave quarters of Groot Constantia, built on slave labour and thriving as a profitable vineyard to this day” (Coombes 2003:34).

In 1979, the NMC was entrusted with powers to protect historical shipwrecks and control of underwater salvage. Furthermore, the identification, repair and maintenance of historical war graves fell under the jurisdiction of the NMC portfolio. These developments in heritage resources management inspired new categories in the conservation and management of heritage resources.

Seventy five years after the proclamation of the first legislation for heritage conservation in 1911, significant amendments were made to the National Monuments Act, starting in 1986. At that point the NMC had the responsibility to compile a register of all conservation worthy properties throughout South Africa. The register was compiled after conservation worthy aspects of the environment had been identified through a process of survey of local areas, and was published in the government gazette (NMC 1969).

Since the tangible aspects of heritage resources tend to set precedents in the management of heritage, the NMC could also designate any area of land of historical, aesthetic or scientific interest to be a conservation area. The new categories of heritage protection also made provision for consultation and cooperation between the NMC and local authorities in compiling the register and management of conservation areas. However consultation and cooperation in heritage management was limited to experts and there is no indication of the inclusion of the broad participation of members of the public in the conservation of heritage resources.

The declaration of moveable cultural treasures and the protection of historical sites – including buildings older than 50 years – were also introduced in 1986. More than 70 years after the Natural and Historical Monuments Act of 1923 first made provision for the identification of monuments, and 25 years after the establishment of the NMC, there are about 4000 national monuments in South Africa. According to Janette Deacon, these national monuments include: public buildings, vernacular houses and traditional villages, farms, mission stations, places of spiritual importance like churches, synagogues, mosques and temples, as well as structures associated with gold and diamond mining, railway stations and steam engines, wind and water mills, trees, avenues and gardens, mountains and waterfalls, kraals and hunting traps, roads and bridges, painted caves and rock engravings even some dinosaur footprints (Deacon et al 1997).

Clearly much of the focus on heritage policy and management, since the first 1911 Bushmen Relics Act to the 1969 National Monuments Act, has been centered on the

conservation of the tangible heritage, particularly heritage resources that served the interest of the dominant minority white South Africans. At the same time the intangible heritage or living heritage was barely protected or not even mentioned within the legal framework of the heritage policies throughout the colonial and apartheid periods. It is only in the period of transition to democracy that serious political interventions made way for the integration of intangible heritage or living heritage into the broader national policy framework on heritage resources management.

2.2 Transformation Imperatives (Transition to Democracy)

On April 27, 1994, South Africa accomplished the most fundamental political, social and cultural change in its modern history. It marked the end of apartheid and the inauguration of democracy. Change from the National Party government to the African National Congress government led to a huge policy review process which saw the redrafting of policies and legislation to suit the new democratic South Africa. According to the report by the Arts and Culture Task Group's (ACTAG) the purpose for reviewing and redrafting of policy is concerned:

“ not only with broadening the base to include a range of heritage resources that were largely ignored during apartheid era, but to reflect on past mistakes, identify what is needed and confront the problems. It is an opportunity to develop a transformation strategy to position our national heritage for the next millennium. One of the fields that will receive special support is what the draft White Paper refers to as ‘living heritage’. The Ministry of Arts, Culture, Science and Technology intends to establish a national initiative to facilitate the development of a structure and environment in which living heritage projects can be initiated by communities themselves” (ACTAG 1995).

The transition period has not been a smooth process due to contestations around the representation of the past in the present and for future use. In particular the question associated with the future of colonial and apartheid forms of cultural heritage in the present democratic state, has sparked heated debates and it is often revisited from time to

time without absolute closure. Annie Coombes asserts “while some recommend keeping the monument[s] as reminder[s] of the oppression of the apartheid era – to learn from the lessons of the past...some critics favoured abandoning the monument[s] altogether and demolishing the site[s]...the ANC (African National Congress) spokespeople involved in outlining cultural policy for the new democratic government were adamant that most of the Afrikaner monuments should remain, including the Voortrekker Monument” (Coombes 2003: 20).

The 12 years since the first democratic elections in 1994, also epitomize drastic changes which relate to the negotiation and formation of a new national identity under the prominent banners of ‘nation building’, ‘peace’, ‘unity’, ‘reconciliation’, ‘reconstruction’ and ‘development’, and most recently ‘African Renaissance’. In a speech marking the celebration of Heritage Day (newly created annual public holiday -24 September) in 1996, the former President Nelson Mandela stated:

“When our first democratically-elected government decided to make Heritage Day one of our national days, we did so because we knew that our rich and varied cultural heritage has a profound power to help build our new nation. We did so knowing that the struggles against the injustices and inequities of the past are part of our national identity; they are part of our culture. We knew that, if indeed our nation has to rise like the proverbial phoenix from the ashes of division and conflict, we had to acknowledge those whose selfless efforts and talents were dedicated to this goal of non-racial democracy”(DAC 1996).

In particular the Department of Art, Culture and Heritage (DAC) has been instrumental, alongside other government departments, in carving a new national identity and heritage for South Africa. Amongst the major events, under the DAC, that have occurred over this period has been the listings of heritage sites both of national and universal significance, namely the Greater St Lucia Wetland Park, the Cape Floral Regional Protected Area’s, the Cradle of Humankind, Mapungubwe Cultural Landscape, Robben Island,

Ukhahlamba/Drakensburg and Vredefort Dome, on the world heritage list under the World Heritage Convention.

Other major initiatives relate to the introduction of the Legacy Projects which is a system of commemoration by acknowledging and honouring a largely neglected part of South Africa's heritage (Arts and Culture Report 2003-2004:112). The Legacy Projects proposed are: the Women Monument, the Chief Albert Luthuli Legacy Project, the Battle of Blood River/Ncome Project, the Samora Machel Project, the Nelson Mandela Museum, the Constitutional Hill Project, the Khoisan Project, the Freedom Park Project.

These new developments coincide with the ongoing re-naming of geographic places with the most recent name change of the Johannesburg International Airport to O.R Tambo International Airport – a symbol of commemoration to the ANC stalwart Oliver Tambo. Most importantly these post-apartheid South African monuments and memorials represent the country's redefined national heritage, propagate new value systems and contribute to defining new national and community identities (Marschall 2003: 01).

In all these major developments the 'heritage debate' has become central in discussions on social formations of a national identity and the representation of heritage resources in the post-apartheid state. In particular there is a growing perception of the need to democratize the approach to conservation and management of heritage resources, starting with the approach of identification, protection and promotion of South Africa's diverse resources for all South Africans (SAHRA 2006).

Even state-funded museums have been called upon by the Ministry of Arts, Culture, Science and Technology (current Arts, Culture and Heritage Ministry) to redress past inequities as part of the national reconstruction and development programme. Funding is a powerful agent of change, and it has been made clear that financial support will be awarded to those heritage projects that contribute to transforming national consciousness (Davison 1998:148).

In broad terms the approach to heritage resources management, in the post-apartheid state, tends to be informed by several dominant factors. Some of these factors are premised on the following set of guiding ideas: counter narrative or oppositional discourse; re-interpretation; and the production and invention of new heritage resources.

The 'oppositional discourse' or 'counter narrative' involves a process of re-examining key persons and events in the divided history of the country with the intention of 'completing the record' by countering older ideologically biased historical accounts propagated during the apartheid period (Marschall 2003:01). In the case of the juxtaposition of both the Voortrekker Monument and the Freedom Park Project, the oppositional discourse or counter narrative could be experienced immediately in the most literal and metaphorical sense. The Voortrekker Monument celebrates an apartheid history associated with the achievements of white Afrikaner Nationalists while the Freedom Park Project serves as a memorial to the anti-apartheid struggle, mainly, of the former oppressed South Africans. Besides the fact that both heritage sites share the same geographical space (Salvokop in Pretoria), each one represents a narrative that stand in stark contrast to the other. This marks an emerging trend in heritage resources management where several projects, even those sharing the same exhibition space, have adopted the concept of 'oppositional discourse' or 'counter narrative' not only to denote the intrinsic nature of heritage being a contested terrain but also to express the evolutionary patterns of change occurring in the South African heritage sector.

With good intentions oppositional discourses or counter narratives provide an opportunity for the discursive formations of a balanced narrative (if there is anything such as a balanced narrative in the world) that seeks to be an equal representation of the diverse history and heritage of the country. Inevitably the contrasts or dichotomies created by oppositional discourses or counter narratives sometimes pose a challenge to the popular democratic efforts of uniting a fragmented people of a country such as South Africa under the popular banner of a national identity.

Another interesting concept that has gained momentum in the post-apartheid South Africa, is the idea of re-interpretation of heritage resources to articulate a contemporary narrative that is often aligned to the ideals of the new political order. In reference to the integration of local knowledge (indigenous knowledge) into the mainstream of heritage resources, the Minister of Arts, Culture and Heritage strongly contends that local knowledge can also be used to reinterpret heritage resources that are still subject to the dominant colonial interpretations (Jordaan 2005:05).

Similarly the artist/ curator Pippa Skotnes, attempted to 'return the gaze' or 'reverse the gaze', through the re-interpretation of Khoisan material culture of the colonial era, in the exhibition "Miscast: Negotiating Khoisan History and Material Culture", when she explains:

"This exhibition looks at the various relationships that were established when European strangers arrived in southern Africa. That those relationships were severely imbalanced in terms of power is witnessed by the extreme objectification of individuals in, for example, the anthropometric photographs of the late nineteenth century. That these relationships resulted in loss of life, in multiple language death and cultural genocide is evidenced in the images of trophy heads, hangings, prison victims and starvation" (Skotnes 1996).

In particular she uses the original colonial apparatus and artifacts in the form of scientific measuring tools and plaster moulds used in casting life-size Bushmen people, re-assembles them in a different manner that seeks to expose and confront the colonial scientific projects responsible for the discursive formation of the popularized negative Bushmen identity. Her use of the visual power in such a rhetorical and controversial manner has not only stirred public debate but also provides a new interpretation of the material culture used in the construction of a Bushmen identity.

Perhaps the most intriguing form of reinterpretation of the past into the present is the case of Robben Island, once the site of inferno serving as a maximum security prison, but now

a paradise for tourist travel. According to Harriet Deacon “ for the past three-and-a-half-centuries Robben Island has been the hell-hole of Table Bay, South Africa’s Alcatraz, an impregnable place of banishment for those who have opposed the status...the now dominant representation of the island as a place symbolizing triumph over apartheid is linked to a reformulation of national identity based on a particular view of modernity represented by the discourse of human rights” (Deacon 1998:162).The model of Robben Island has, thus far, been replicated in several national and international projects involving sites of political resistance and liberation struggle.

The idea of re-interpretation of the past in the present clearly underpins a significant shift in heritage resources management, in South Africa. The dominant colonial and apartheid narratives of the history and heritage of the country could not be contested or challenged in the past, but in the present post-apartheid era there has been a steady increase in the inscription of alternative narratives – along side the dominant narrative – that continues to cast light to different perspectives to the history and heritage of South Africa. This popular trend has had tremendous influence in the way in which heritage is defined and articulated for the present generation. This brings me to my next point which concerns the production and invention of heritage resources.

I want to consider the concepts of the production and invention of new heritage resources, in the post-apartheid South Africa, against the backdrop of the discursive meaning or definition of heritage provided by Ashworth and Turnbridge in ‘Heritage Dissonance’. Both authors contend that heritage is a product of the present, purposefully designed to respond to contemporary needs and demands (Ashworth et al 1996:47). Using this as a point of departure, the case of the Legacy Project is of particular relevance in this context. The Legacy Project is premised on the principles that take into consideration the need for redress, consultation with affected parties, environmental sensitivity and linking heritage with economic development (Arts and Culture Report 2003-2004:113). The contemporary purpose and invention of the Legacy Project epitomize the notion of ‘intentional monuments’ that Alois Riegl once described as structures deliberately erected for the purpose of commemoration – as opposed to

historical or unintentional monuments such as buildings and natural sites, upon which later generations have bestowed the status of 'monument' (Reigl in Marschall 2003: 02).

Clearly the idea of the production and invention of 'intentional monuments' in the post-apartheid South Africa has had far reaching connotations to the development of new strategies in the management of heritage resources. The increased public interest in the erection of new monuments that commemorate 'struggle heroes' and the emphasis on previously marginalized or neglected heritage resources of the majority of the former oppressed South Africans, also represents the increased public influence in the conservation and management of heritage resources.

In summary the drastic shifts occurring in the heritage sector could not have transpired in the way they are occurring now without the political will and government commitment to formulate a new policy and legislation for the safeguarding of heritage resources.

2.3 Towards a Democratic Arts, Culture and Heritage

In post 1994 the process of policy review is symbolized by the appointment of a special task team to drive transformation in the arts and culture sector by conducting research for the development of a new arts, culture and heritage policy. On 4 November 1994 the then Minister of Arts, Culture, Science and Technology, Ben Ngubane recognized the need for a democratic arts and culture policy and appointed the Arts and Culture Task Group (ACTAG). The appointments were made from a list of over 300 nominations received from the public and the arts community. To maintain diversity the task group represented various fields of the arts and culture, race, gender and religion. A list of 23 persons were appointed by the Minister. Amongst the numerous experts, Wandile Kuse was appointed to lead in the area of amasiko/(living culture) and Janette Deacon was responsible for monuments. Both experts were in charge of the heritage subcommittee which developed minimal standards as the basis for a new heritage policy.

The ACTAG report considered that legislation is in need of revision both because of changes in government structure and changes in policy and ethos, as much of the national heritage legislation was rooted in the apartheid structures and ideology and was now inappropriate for integrated planning (ACTAG 1995: 67). The Draft White Paper proposed the retention of a national body that would continue to co-ordinate the work done by the National Monuments Council (NMC), but which would also reassess the needs of the country to provide a cultural heritage management strategy that is widely negotiated (Deacon et al 1996:02).

As a way to integrate the arts, culture and heritage activities with the national objectives of the new dispensation, the ACTAG had a clear mandate based on the guiding principles set out in the Reconstruction and Development Programme (RDP White Paper 1994). Some of these principles were as follows:

- To affirm and promote the rich and diverse expression of South African culture so that all South Africans are guaranteed the right to practice their culture, language, beliefs and customs as well as enjoy freedom of expression and creativity, free from interference;
- To ensure that resources and facilities for both the production and the appreciation of arts and culture are made available and accessible to all (priority must be given to those people and communities previously denied access to these resources);
and
- To conserve, promote and revitalize our national cultural heritage so that it is accessible to all communities. Historical and cultural collections, resources and sites must fully reflect the many components of our cultural heritage and, in particular, neglected and suppressed aspects of our people's culture must be conserved (ACTAG 1995: 53).

For the first time in history these ideals places emphasis on a reformist culture of a new-standard setting instrument for an inclusive and diverse representation of the cultural heritage resources that make up South Africa. However this approach has presented

several challenges concerning the question, how does one use heritage to unite and reconcile a fragmented society such as South Africa that has just emerged from a segregated apartheid past? At the same time one cannot miss the question, how can diverse representations be achieved equally, without necessarily privileging one form of cultural heritage over the other? These pertinent questions still continue to stir heated debates.

It is crucial to note the set of guiding ideas behind the formation of ACTAG. Upon its inception ACTAG identified several problems with the previous art, culture and heritage legislation. The following striking points represent the rationale behind the work of ACTAG:

- there has never been a co-ordinated negotiated policy for South African heritage that was developed through a process of consultation and participation – democratically accepted principles and norms have not been made known or applied.
- the appointment of councils and boards to heritage institutions is perceived as undemocratic and lacking transparency and accountability; a better system must be implemented.
- the biases of the past must be recognized and redressed: African cultural heritage has been recorded systematically in some areas and ethnographic collections in museums are a valuable resource, but more needs to be done in the field of amasiko (living heritage). In general, written documents rather than oral histories have received priority, the heritage that has been promoted is mainly focused on that of European origin, there is bias towards the middle and upper classes, city rather than rural biases predominate, and there is a gender bias that largely ignores the hidden abode of the domestic sphere (ACTAG 1995: 52).

Drawing from the report produced by ACTAG there are several recommendations made, mainly pertaining to redress and the development of a new framework policy on arts, culture and heritage. On the one hand the recommendations suggest support for increased

access, tolerance, respect for heritage resources, as well as the promotion and conservation of the diverse cultural heritage of the South African people. On the other hand the report does not explicitly and substantially address the question of a 'shared heritage' in the context of democracy in which heritage could be a shared resource in order to stimulate a shared responsibility for optimal protection and sustainable management. Most importantly the report state that heritage disciplines remain very much the concern of specialists and serve, in the main, the interests of urban groups, the middle classes and whites and that the general public has, by and large, remained cut off from these resources (ACTAG 1995:53)

In the end the recommendation by ACTAG formed the basis on which a national strategy and policy on arts, culture and heritage could be developed. This led to the inception of a broad strategy for the formulation of the White Paper on Arts, Culture and Heritage. In turn the White Paper formed the basis for the drafting of the National Heritage Resources Act of 1999 and National Heritage Councils Act of 1999 amongst several other policies passed as acts of Parliament in collaboration with the Ministry of Arts, Culture and Heritage.

2.4 White Paper on Arts, Culture and Heritage

In broad terms the White Paper is premised on the notion of democracy and its underlining principles which constitute the new vision of the arts, culture and heritage in the New South Africa. This policy document is based on values such as, "access to, participate in , and enjoyment of the arts, cultural expression, and the preservation of one's heritage are basic human rights, they are not luxuries, nor are they privileges as we have generally been led to believe" (White Paper Arts, Culture and Herita 1996). This view also concurs with Article 27 of the Universal Declaration of Human Rights adopted by the United Nations states: "Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and it benefits" (UN 1998). This right is also guaranteed in the interim Constitution of the Republic of South Africa. Section 31 of the Fundamental Rights in Chapter 3 of the

Constitution states: “ every person shall have the right to use the language and participate in the cultural life of his or her choice” (South African Constitution 1996:15).

In view of redressing the past imbalances, the White Paper on Arts, Culture and Heritage specifically make provision for attention to living heritage as being of paramount importance for the reconstruction and development process in South Africa. Means must be found to enable song, dance, story-telling and oral history to be permanently recorded and conserved in the formal heritage structures (White Paper Arts and Culture 1996).

The White Paper represents a broad strategy for protection and the need to set up formal structures specifically for the conservation and management of intangible aspects of heritage resources. More specifically the ACTAG report recommends that a body named the National Living Cultures Commission should be established (ACTAG 1995:86), for the coordination of activities and projects. This body has not yet been established but currently the Department of Arts, Culture and Heritage, along with statutory bodies such as the South African Heritage Resources Agency and the National Heritage Council, carry out the task of safeguarding living heritage.

2.5 The National Heritage Resources Act of 1999 (NHRA) and South African Heritage Resources Act (SAHRA)

In the preamble the Act 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 (NHRA 1999:01). Unequivocally the National Heritage Resources Act of 1999 also advocates for the establishment of the South African Heritage Resources Agency (SAHRA) to be a statutory body and the lead authority for the implementation of the Act. In the year 2000 SAHRA officially replaced the former National Monuments Council (NMC) which organization was charged with the responsibility of heritage resources management under the previous National Monuments Act of 1969.

Throughout the history of heritage resources management in South Africa, the NHRA is the first diverse and inclusive cultural policy which attempts to address the imbalances and inequalities of the past, in the heritage sector. One of the highlights of the NHRA is its emphasis on public participation and the involvement of the local communities in heritage resources management. This is one of the aspects that make the NHRA distinct from the previous heritage policies. Similarly the draft White Paper on Arts, Culture and Heritage also makes provision for “a consultative forum enabling the public to participate in the re-writing of the National Monuments Act ...and to give new vigour and vision to cultural conservation” (Deacon at el 1996; 02). As an extension and a reflection of democracy in the new South Africa the NHRA prescribes, amongst others, the following guiding principles for heritage resources management:

- heritage resources form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management.
- heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity;
- every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans;
- heritage resources management must guard against the use of heritage for sectarian purposes or political gain (NHRA 1999).

For the first time the NHRA also advocates for heritage conservation to be part of the broad strategy of socio-economic development by promoting the integration of heritage resources management in urban and rural planning and social and economic development (NHRA1999). This suggests heritage conservation should not prevail inseparable from the development issues that are taking place in South Africa. However there is a serious challenge in finding a mutual balance between heritage conservation and development issues where, for instance, a housing project which is a national priority for the homeless and poor tends to take precedence over the conservation of heritage resources. These

represents some of the major challenges that the SAHRA has to address in the implementation of the NHRA.

In terms of the National Heritage Resources Act (NHRA) of 1999, the South African Heritage Resources Agency (SAHRA) has a mandate to conserve and manage both intangible and tangible heritage resources for the present and future generations. However the core functions of SAHRA in heritage resources management, drawing from the previous heritage authorities to the present, have largely concentrated on the conservation of tangible heritage resources. This demonstrates that the scope of living heritage remains fairly limited within the NHRA. For example under definitions, in Section 2 of the NHRA, living heritage only includes intangible aspects of inherited culture, such as: cultural tradition; oral history; performance; ritual; popular memory; skills and techniques; Indigenous knowledge systems; and the holistic approach to nature, society and social relationships (NHRA 1999 Section 2:08). Language being a signifier of people's identity and a significant aspect of cultural heritage of humanity is not covered in the definition provided by the NHRA. Other policies such as the 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage, include the conservation of intangibles such as language within the domain of oral traditions (UNESCO 2003).

In Section 2 of the NHRA the definition of cultural significance also represents, most implicitly, intangibles such as social, spiritual, linguistic or technological value or significance. Inevitably the scope of living heritage, in terms of definition and management guidelines, remains fairly limited.

Still within the framework of NHRA, living heritage in its intangible form is defined in relation to the tangible heritage. In terms of Section 3 of the Act, the South African Heritage Resources Agency (SAHRA) has a mandate to manage heritage resources (both objects and sites) to which oral tradition or living heritage is attached. In this context it is possible to resolve that intangible heritage is perceived through disciplinary-based tangible constructs such as sites, monuments, objects or things and so on (Galla 1994).

Critics have observed that the NHRA does not specifically provide for the protection of living heritage not associated with objects or places, or rather intangible heritage *per se* (Deacon et al 2003). The Act also does not explicitly assign specific and sufficient instruments to guide or inform the management of living heritage. This includes questions of how the management of living heritage should be carried out or what conservation measures or standards are applicable for management of living heritage (Dondolo 2004:03). Irrespective of the protection of intangible heritage associated with tangible heritage or intangible heritage *per se*.

At the same time the NHRA provides an understanding of the interconnectedness of intangible and tangible heritage, which other policies such as the 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage tend to miss by placing emphasis on intangible heritage *per se* without much regard of the inextricable link between intangible and tangible heritage resources.

It is a noticeable fact that a major facet of the management guidelines within the NHRA are allocated to the conservation of material heritage such as objects and sites. For example the sections of the Act on the 'Formal Protection'; 'General Protections'; and 'Management' stipulate operational directives mainly for the management of heritage sites and objects such as archaeological resources and objects or artefacts. As such the instruments provided by the NHRA are more applicable to the protection of material heritage than intangible heritage. In this regard the Act does not explicitly ascribe specific and sufficient instruments for the conservation and management of living heritage. These include questions of how the management of living heritage should be carried out, or what conservation measures or standards are applicable for management of living heritage.

In summary the Act only makes reference to living heritage or intangible elements of heritage in the beginning under definitions in section 2 and vaguely in section 3, while the rest of the contents of the Act address primarily the conservation and management of heritage sites and objects. The approach adopted by SAHRA towards the safeguarding of

living heritage is determined by the terms and conditions that normally govern the conservation of tangible forms of heritage such as site and objects. It is worth noting that intangible heritage is by its nature not fixed to a physical permanent format, like tangible heritage, and is subject to significant change. This makes it very vulnerable to loss, but also very difficult to safeguard using the same legal and financial mechanisms established for heritage places and objects (Deacon et al 2003).

As a result of several limitations or gaps that have been identified in the NHRA and other pieces of legislation, the Department of Arts and Culture has called for policy review and law reforms to improve the current arts, culture and heritage policies. While this process is still underway the current NHRA of 1999 continues to set policy and guidelines for heritage resources management in South Africa.

2.6 The National Heritage Council Act of 1999 (NHCA) and the National Heritage Council (NHC)

This Act makes provision for the establishment of a statutory body called the National Heritage Council. In terms of the National Heritage Council Act of 1999, the object of the Council is:

- to develop, promote and protect the national heritage for present and future generations;
- to co-ordinate heritage management;
- to protect, preserve and promote the content and heritage which reside in orature in order to make it accessible and dynamic;
- to integrate living heritage with the functions and activities of the Council and all other heritage authorities and institutions at national, provincial and local level;
- to promote and protect indigenous knowledge systems, including but not limited to enterprise and industry, social upliftment, institutional framework and liberator processes; and
- to intensify support for the promotion of the history and culture of all our peoples and particularly to support research and publication on enslavement in South Africa (NHC 1999).

Three of the aforementioned objectives place emphasis on aspects of intangible heritage such as orature, living heritage and indigenous knowledge. This epitomize the continues appeal for the protection of living heritage, especially since intangible forms of heritage have been subject to exclusion and marginalization in the past. The NHC seeks to integrate living heritage into the mainstream of heritage management. Unlike the SAHRA, the NHC is charged with the responsibility of co-coordinating and transforming the heritage sector in South Africa. The Chief Operations Officer of the NHC, Somadoda Fikeni argues that:

“ Colonial and Aparthied legacies compound the task as the South African heritage sector is highly fragmented, racialised and skewed. Rich diverse histories, cultures and experiences of the people of this country are not properly reflected or represented, as the formerly oppressed population is still marginal on the heritage landscape. A general survey of museums, monuments, heritage sites, archives, libraries, names of geographic places, symbols, and human resources or skills distribution, clearly demonstrate the need to transform the sector in a manner that will assist in fostering a true national identity that embraces diverse culture and experiences”
(Fikeni 2005).

Most recently the NHC has initiated the drafting of the ‘Heritage Practice Transformation Charter’ to effect change in the heritage sector. In this regard the NHC’s approach has been an appraisal of all heritage assets, institutions, practices and values through a broad consultative process. From this process, a transformation and re-integrating programme is intended to be developed and adopted in the form of a Heritage Practice Transformation Charter. However there seems to be ongoing criticism of the credibility pertaining to the lack of comprehensive details on the consultative process and deficiency in the depth of public involvement concerning the formulation of the Charter. This is regardless of the broad participation by members of the public which is highly encouraged by the NHC. The Charter is still being drafted and it is intended to be complete before the year end in 2006.

Despite a clear distinction in the separate mandates of SAHRA and the NHC, confusion is still prevalent amongst members of the public on the alleged similarities in the roles and core functions of both these organizations. There is an important distinct feature between SAHRA and the NHC, in that the former (SAHRA) is charged with the management of heritage resources which are considered part of the national estate, while the latter (NHC) coordinates all the heritage activities and institutions such as libraries, museums, archives and so forth, in the country (Sibayi 2005). More specifically, SAHRA is charged with the responsibility to manage living heritage associated with places and objects of cultural significance (NHRA 1999). The NHC on other hand is mandated to provide a broad strategy to safeguarding living heritage in totality, without necessarily confining or restricting the protection of living heritage to tangible or material heritage (NHCA 1999). The NHC is also responsible for funding heritage projects.

At present the Department of Arts and Culture (DAC) has embarked on a review process of all its policies, and as part of this process a gap has been identified in term of formulating a national policy on safeguarding intangible cultural heritage. The process of policy formulation is due to commence in 2006 and a panel of experts will be appointed for this task. Despite the sustained enthusiasm, this process has been slow due to several legal and bureaucratic processes.

In the past ten years the Department of Arts and Culture has embarked on a number of initiatives designed to transform and restructure government subsidized museums. In this regard a call was made to museums to reposition themselves so that they serve all South Africans (ACTAG 1995). This is due to a series of challenges that include accessibility to museum infrastructure, development of new audiences, development of human resources, devising transformation programmes to groom and appoint a new generation of curators and managers to enhance racial, gender and age representivity. According to the Minister of Arts and Culture, Pallo Jordan, "we [DAC] have challenged them [museums] to mount exciting community outreach programmes, to introduce acquisition policies that are friendly to indigenous artifacts, to integrating living heritage in the form of oral

traditions, oral history and indigenous knowledge systems into the museums” (Jordan 2005).

In an attempt to co-ordinate the museum sector, the DAC commissioned a feasibility study to investigate the possibility of clustering specific institutions in order to achieve economies of scale. The Simeka Report (1998) recommended that the overall approach to heritage services be transformed in line with the national agenda for change. This resulted in the amalgamation of heritage institutions which inspired the centralization of finance of heritage services and the formation of the Northern Flagship Institution and the Southern Flagship Institution, renamed the Iziko Museums of Cape Town (Simeka Report 1998).

Despite the urgent need to change museum exhibitions and public displays, the precarious notion of transformation appears to have been delayed and sometimes misconstrued to imply adding new exhibitions along side or juxtaposed old colonial displays which tend to reinforce the add-on effect, often problematic. In dismissing this approach critics argue for an integrated approach which takes into account the inclusion of previously marginalized forms of heritage resources being new exhibitions integrated into the mainstream of conservation, representation and display of cultural heritage (Prins-Solani 2006).

Across most sectors involved in heritage conservation and management the issue of transformation is still not yet resolved. It is a gradual process and continues still today.

3. Chapter Three: International Precedent Studies

3.1 International Trends in Heritage Legislation

The challenges associated with developing appropriate standards and adequate instruments for safeguarding intangible heritage are universal and not entirely unique or subject to national levels of government. On the other hand there are best practices in the world, also at national or regional levels that have been of particular attraction and use in South Africa. Most of South African heritage legislation, pertaining to material heritage, has been influenced by the Australian experience in heritage management. For instance key clauses in the National Heritage Resources Act of 1999 such as the definition of cultural significance, the function of heritage authorities and the general management of heritage resources in South Africa are a direct import from the Australian Burra Charter. Other national instruments like the Canadian Heritage Information Network (CHIN), and New Zealand heritage legislation have been of particular interest too.

3.2 The United Nations Educational Scientific Cultural Organisation - UNESCO

On a global scale the United Nations Educational, Scientific and Cultural Organisation (UNESCO) has developed and adopted a range of heritage legislation for the protection of cultural heritage resources. The Assistant Director General for Culture (UNESCO), Mounir Bouchenaki, recognises that “the safeguarding of intangible cultural heritage remained for a long time neglected...it is in 1973 when the permanent delegation of Bolivia proposed that a protocol be added to the Universal Copyright Convention in order to protect folklore” (Bouchenaki:2003:01). However the proposal was not successful but it raised awareness and generated discussion over the need to recognize the inclusion of intangible aspects within the definition of cultural heritage.

In 1982 UNESCO set up a committee of experts on the safeguarding of folklore and created a special section for the ‘non-tangible heritage’ (currently known as intangible cultural heritage), culminating in the adoption of the Recommendation on the Protection of Traditional Culture and Folklore in 1989. This recommendation promoted the protection of traditional culture and folklore. However after several regional assessments on the impact of the recommendation, change had to be effected and an expert meeting

was convened. This resulted in the Washington International Conference in 1999 organised by UNESCO and the Smithsonian Institution.

The resolutions from the expert meeting formed the basis of a new or revised legal instrument “to address questions of terminology and the breadth of the subject matter, protection of traditional culture and folklore, more adequately” (UNESCO 1999). In particular experts raised a common criticism of the inappropriate use of the term ‘folklore’, as it was used in the 1989 recommendation on the protection of traditional culture and folklore, to describe a range of cultural heritage for conservation purposes. It is said Indigenous people regard it as a term that demeans their traditional cultural heritage and does not accurately describes it (Taro 1999 in Blake 2001).

On a different level some critics contend that the terms ‘Indigenous’ and ‘traditional’ are problematic in the definition of intangible heritage because they imply that intangible heritage occupies the same discursive space as ‘primitive culture’ or its derivative, ‘folklore’ (Deacon et al 2003:24). Deacon et al conclude that such constructs tend to portray aspects of intangible heritage as old, pre-industrial, unchanging or relatively stable over time, related to an ethnic identity and regionally specific (Deacon et al 2003:24).

There has also been a significant shift in the concept of intangible heritage to include not only the ‘masterpieces’ but also the ‘masters’ (Kirshenblatt-Gimblett 2004:53). Citing the example of the Japanese concept of Living National Treasures which gained legal status in the early 1950’s, Kirshenblatt-Gimblett argues that the continuity of intangible heritage would require attention not just to artefacts, but above all to persons, as well as to their entire habitus and habitat (Kirshenblatt-Gimblett 2004:54). However terms such as ‘masterpieces’ and ‘master’ are contentious in the debate on intangible cultural heritage, mainly, because they imply external, generic criteria of value that may not be appropriate. The inclusion of Living National Treasures or Living Human Treasures as defined in the 2003 UNESCO Convention, marks the expansion of the scope of intangible heritage and

its protective measures which often include the know-how and skills residing within human beings.

The Washington International Conference (1999) also highlighted the need for much recognition to traditional-bearers rather than scholars. It also underlined the need to broaden the field of cultural heritage, encompassing not only artistic products such as song, tales and etc, but also knowledge and values enabling their production, the creative processes that bring the products into existence and the modes of interaction by which these products are received and acknowledged (Bouchenaki:2003:01).

In the quest for the inscription of adequate and appropriate instruments for safeguarding intangible heritage, UNESCO commissioned several studies in the 1990's on the advisability and feasibility of adopting a new normative instrument. This process resulted in a general conference which concluded that a new convention is required to ensure the most appropriate protection needs for intangible heritage. In the year 2000 UNESCO began drafting a new international Convention for the safeguarding of intangible cultural heritage, similar to the 1972 Convention for the Protection of World Cultural and Natural Heritage. The draft of the new Convention was submitted to the 32nd session of the general conference and adopted by a large majority in October 2003. Since the adoption of recommendations of the 'UNESCO 2003 Convention on Safeguarding Intangible Cultural Heritage', the legislation has been ratified by over 50 member states to date (UNESCO 2006).

Besides the significant steps and initiative that have been established to ensure protection of intangible elements of heritage, however there seem to be emerging criticism of UNESCO's instruments. The key criticism particularly concerning the recommendation on the safeguarding of traditional culture and folklore in 1989 is that it did not critically ensure sufficient regard to the interrelationship between intangible and tangible expressions (Thomas 1999:02). Also it could recommend but not oblige states to implement protective mechanisms, and failed to ensure control over intangible heritage management and benefits remained with the communities who owned that heritage

(Deacon et al 2003:13). However article 11 of the recent 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage, insists that each State Party shall: a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory; b) identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations (UNESCO 2003). This legal instrument further advises that to ensure identification with a view to conservation, each state party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory (UNESCO 2003).

Despite the political will to participate in UNESCO's activities, South Africa and many other countries, have not yet ratified the 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage as a state party or member state. The reason for the delay, on the part of South Africa, relates to a number of legal factors such as the need for South Africa to develop a position on the convention and adherence to bureaucratic processes involving relevant government departments (Malherbe 2006:17). In other words the Ministry of Art and Culture does not have the sole mandate to ratify international conventions without involving other Ministries, such as the Ministries of Foreign Affairs, Trade and Industry, Environmental Affairs and Tourism, amongst others that are potentially affected by the 2003 UNESCO Convention. It becomes difficult for those countries that have not ratified the Convention to bind or commit themselves to implementing the Convention, and also to be active participants expressing international cooperation in safeguarding intangible heritage.

Another interesting aspect in the developments leading to the recognition of intangible heritage concerns the redefinition of the notion of cultural heritage. The UNESCO Universal Declaration on Cultural Diversity of 2001, and the Istanbul Declaration of 2002 adopted by the third round table of Ministers of Culture, stressed that an all-encompassing approach to cultural heritage should prevail, taking into account the dynamic link between the tangible and intangible heritage and their close interaction (Istanbul Declaration:2002). One of the key issues discussed concern the expansion of the

concept of cultural heritage to include intangible heritage, since the previous instruments such as the Venice Charter of 1964 initially made reference only to monuments and sites, and architectural heritage. Whereas cultural heritage is not only subject to tangible forms of heritage resources as it has been the norm before but it also covers intangibles, including oral traditions and music, social practices, rituals and festivals, farming methods and indigenous intellectual property such as medical skills and medicinal compounds (Bauer et al 2004:01).

Also, cultural heritage conservation is not only about the preservation, continuation and management of cultural heritage resources but also the process of evolution and continuation of the community cultural contexts (Galla 1994:01). It has been noted that a working group on religion and spiritual heritage during the 1995 first global strategy meeting on 'African Cultural Heritage and the World Heritage Convention', also included aspects like trance, rituals, ceremonies, rights of passage and taboos as part of the intangible elements of cultural heritage (Munjeri et al 1995:106). Today an anthropological approach to "heritage" leads us to consider intangible heritage as a social ensemble of many different, complex and interdependent manifestations, reflecting the cultures of a human community (Luxen 2003:01).

The expanded concept of cultural heritage to include intangible heritage and the launch of the UNESCO 2003 convention has also made it possible for the listing of intangible cultural heritage on the register based on the intangible value used as criteria for listing. For example the listing of 'Masterpieces of the Oral and Intangible Heritage of Humanity' presents evidence of the success in the proclamation of cultural heritage based purely on its intangible value. The Director-General of UNESCO proclaimed a total of 75 'Masterpieces of the Oral and Intangible Heritage of Humanity' of universal significance in 2001 up to 2004. It is the very first time cultural heritage resources have been assigned universal or world heritage status based on the intangible values imbued in the heritage resources. According to the set criteria the proclamation rewards two types of expression of intangible cultural heritage: i) regularly occurring forms, such as musical or theatrical performances, ritual or various festivities; ii) cultural spaces where popular and

traditional cultural activities occur in a concentrated manner, or time frames for recurring manifestations of the intangible cultural heritage (UNESCO 2003).

Since the proclamation of 'Masterpieces of the Oral and Intangible Heritage of Humanity' is a relatively new field in heritage conservation, it has, however been a process of trial and error which requires refinement. Also, apart from the impressive array of protective measures stipulated in the 2003 UNESCO convention, a significance number of operational directives still have to be drafted to ensure the smooth implementation of the convention. In this regard UNESCO has set up a series of expert meetings not only for the purpose of information sharing or exchange of experiences amongst experts from different region, but also to engage experts in the process of developing a draft, to serve as recommendation to the intergovernmental committee, for implementation of the 2003 UNESCO convention which came into force in April 2006. In March 2006 UNESCO and Asia Pacific Centre for UNESCO (ACCU) organised an expert meeting where experts (including myself) from different regions converged in Tokyo to draft recommendations on operational directives with a specific focus on the theme, 'Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the UNESCO's 2003 Convention'. There are several meetings of this nature scheduled before the year ends in 2006 to ensure the smooth implementation of the convention.

3.3 Other International Instruments and Bodies

Other pieces of legislation, instruments and organisations such as the International Council of Monuments and Sites (ICOMOS), International Centre for the Preservation and Restoration of Cultural Property (ICCROM), International Council of Museums (ICOM), World Heritage Convention (WHC), African Council of Museums (AFRICOM) make provision for the conservation of intangible heritage associated with material heritage (both objects and places). Despite the ambition expressed by these bodies to provide a holistic conservation approach to safeguarding both intangible and tangible heritage resources, however the preservation of material heritage tends to take precedence

over the conservation of intangible heritage. In the case of ICOMOS, critics argue that as long as ICOMOS is about monuments and sites, the physical remnants of the past will continue dominating the discourse and practice of preservation and conservation of cultural heritage, in that intangible values are best protected not only at monuments and sites, but also within the social processes that generated them (Katsamudanga 2003:01).

Gradually over a number of years, gained through experience in conservation, ICOMOS has shown a serious interest in the safeguarding of intangible heritage that is attached to monuments and sites. This is evident in the formation of International Committee for Intangible Cultural Heritage (ICICH) in 2005.

In October 2005, the executive committee of ICOMOS at its meeting in Xi'an (China) established the ICOMOS International Committee on Intangible Cultural Heritage (ICICH). The committee was established in accordance to article 14 of the statutes of ICOMOS (adopted by the 5th General Assembly) and the Eger Principles for International Scientific Committees (adopted by the 10th General Assembly). One of the key objectives of the committee is to promote international cooperation in the identification, study and solution of issues related to the ethical identification, protection, interpretation, and management of intangible cultural associations attributed to monuments and sites (ICOMOS 2005).

The International Centre for the Preservation and Restoration of Cultural Property (ICCROM) is also engaged in the preservation of material heritage associated with intangible heritage. It is an inter-governmental organisation with 100 Member States, founded by UNESCO in 1959. Most of the ICCROM projects focus on place and collections management, but although recent meetings have addressed the issue of intangible heritage, it is not an explicit focus. The 'living heritage' sites programme includes two subprogrammes; a regional pilot project based in southeast Asia (Mekong River region subprogramme) and the ICCROM Forum on living religious heritage that took place in 2003 (Deacon et al 2004:17).

The World Heritage Convention (WHC) for the protection of heritage places of international significance has not fully recognised the intangible value associated with material heritage. The intangible values like social and aesthetic values have been on the WHC's operational guidelines for some time, however, these values have not traditionally been used to identify places for inscription on the world heritage list (Deacon at el 2004:03). Clearly the physical fabric is still regarded as being of paramount importance over the non-physical aspects of heritage.

The 1972 World Heritage Convention makes specific reference to criterion (vi) of the operational guidelines for the implementation of the Convention. According to criterion (vi), sites, which are directly or tangibly associated with beliefs, or with artistic and literary works of outstanding universal significance can be inscribed on the World Heritage List (WHC1972). In recent years, however, a heated debate has occurred concerning whether this criterion should be used in conjunction with others or is it sufficient to justify an inscription on its own (Bouchenaki 2003:02). Despite the ongoing debates on the amendment of the criterion for inscription and declaration of sites of universal significance, sites such as the terraced rice fields of the Ifugao (Philippines), Kasubi (Uganda), Ambohimanga (Madagascar), Robbin Island (South Africa) and several others have been declared world heritage sites based on the outstanding intangible value attached to these sites (Munjeri 2003:01)

The 2003 UNESCO Convention for Safeguarding of Intangible Cultural Heritage can be considered to be similar to the 1972 Convention for the Protection of the World Cultural and Natural Heritage. For instance the similarities in both pieces of legislation can be spotted in the following provisions: the international cooperation and assistance mechanisms, and the cultural heritage fund, the representative list of the intangible cultural heritage of humanity and the list of the intangible cultural heritage in need of urgent safeguarding, have been modelled along the lines of the 1972 Convention. In several ways the 2003 UNESCO Convention for Safeguarding of Intangible Cultural Heritage complement the World Heritage Convention by emphasising the inclusion of

intangible cultural heritage into the ambit of heritage resource management, especially the domain of heritage sites.

There are also fundamental differences between the 1972 World Heritage Convention and the 2003 Convention on the Safeguarding of Intangible Cultural Heritage. While the World Heritage Convention places much emphasis on 'universal significance' for listing of cultural heritage, the Convention on Intangible Cultural Heritage is not convinced by the debate for 'universal significance' associated with aspects of intangible heritage.

With specific focus on museums, the Shanghai Charter, adopted at the 7th Asia Pacific Regional Assembly of the International Council of Museums (ICOM) in Shanghai (October 2002), recommends that museums establish interdisciplinary and cross-sectoral approaches that bring together movable and immovable, tangible and intangible, natural and cultural heritage and develop documentation tools and standards in establishing holistic museum and heritage practices (Shanghai Charter 2002). The Charter recognises that these provide the framework in which the voices, values, traditions, languages, oral history and folk life are acknowledged and promoted in all museological and heritage practices (Shanghai Charter 2002). Similarly, the National Conservation and Preservation Policy for Movable Cultural Heritage of Australia make reference to movable cultural heritage as an important element in the lives of all Australians. This policy also includes intangibles - what is felt, known and experienced and it prevails as evidence of the cultural richness and diversity of Australian people's past and presents (AU 1995).

Apart from the establishment of special structures and instruments to deal with the protection of intangible value associated with material heritage, there seems to be an exceeding interest in ongoing debates and formal discussions on formulating best practices and appropriate measures for safeguarding intangible elements of heritage within museum contexts. Recently in 2006, organisations such as the African Council of Museums (AFRICOM) and the South African Museum Association (SAMA) have been organising important discussion forums under the themes; "Intangible Heritage: African Museums and Living Cultures" and "Making Intangible Heritage Tangible". While the

latter conference has proved to be a success the former is yet to take place, in October 2006.

The struggle to safeguard intangible heritage in accordance with its conservation requirement still remains a challenge, even in the museum context.

3.4 National Trends in Safeguarding Intangible Forms of Heritage

On a national level some countries have several years experience in the development of legal instruments and legislative frameworks to safeguard intangible heritage in their territories. Experts have identified a recurring trend for developing instruments and database systems for safeguarding intangible forms of heritage. By the 1970s, governments like Japan (1950), Korea (1964), Thailand (1985), and the Philippines (1973) had already adopted legal systems within their own countries for safeguarding intangible cultural resources, specifically in the performing and applied arts (UNESCO 2003a in Deacon et al 2003). Japan presents an integrated approach to tangible and intangible heritage, and for over fifty years, has recognised the importance of the intangible heritage in Japanese building techniques, crafts and performance arts (Deacon et al 2003:01). However heritage policy such as the Law for the Protection of Cultural Properties in Japan is not entirely specific to safeguarding intangible heritage, rather it encompasses all kinds of cultural heritages, with intangible cultural heritage divided into two categories (Ito 2003:01). The main categories are: 1) Intangible Cultural Property which is sub-divided into performing art and craft skill; 2) Intangible Folk Cultural Property which is defined as customs and manners (Ito 2003:01).

Japan is also considered to have a well defined system of Living Human Treasures. The first Living Human Treasures system was created in Japan in 1950. The Republic of Korea established its system of Living Human Treasures in 1964. Six other countries - Philippines, Thailand, Romania, Korea, China and Bulgaria – have all set up their systems, and these vary quite substantially from one to another (UNESCO 2003).

However in some of the aforementioned countries and many others, there seem to be no national policy or legal instrument that specifically focuses on the conservation of intangible forms of heritage or render sufficient protection to such heritage resources. Most often aspects of intangible cultural heritage, such as language, traditional and religious practices, traditional music, folklore, performance art and others, receive some measure of protection and are promoted under the constitution and intellectual property laws exist at national government level. For instance in Bulgaria the regulations of the Copyright and Neighbouring Rights Act (1994), in particular article 3 of the Act provides for protection of any literary, artistic and scientific work resulting from a creative endeavour and expression by any mode and in any objective form (Santova 2004:02). While in other countries, the only form of protection afforded intangible heritage is through the constitution which recognises the value of Indigenous culture (Deacon et al 2003:18). For example the South African Constitution (Bill of Rights) section 31(1) states that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language (South African Constitution 1996:15).

In Canada the Deschambault Charter defines the special nature of Quebec's heritage and outlines principles for the preservation of Quebec's material culture, geographic and human environments. With regards to the sustainable conservation of intangible heritage related to the preservation of Quebec cultural heritage, the charter promotes continuous use of the heritage integrated into the social and economic life of the nation, with preference given to traditional use (ICOMOS Canada 1982). Since 1994, the Quebec government has provided tools for making inventories of intangible heritage, focusing on ethnological knowledge and practices (Campean 2001 in Deacon et al 2003).

In the Netherlands cultural policy is a matter of the central government at national level, the provinces at regional level and the municipalities at local level. Similarly the Canadian authorities recognise the importance of centralising the administration of intangible heritage, focusing on sustainability and working with local communities (Lopez 2002 in Deacon et al 2003:17). In other countries there has been a need to

decentralise the administration of heritage management and systems of protection simply because of maximising accessibility. For instance, in reference to a centralized system of intellectual property rights in Australia, Thomas strongly argues that “such a centralised system may not be appropriate...to provide for decentralised community decision making based on local group autonomy” (Thomas 1989:04).

In Russia there are multiple pieces of legislation that protect the various aspects of intangible heritage. These range from the Cultural Legislation (1992), the Federal Law on National- Cultural Autonomy (1996) to the Federal Law on Folk Art Crafts (1999). These laws have made it possible for the setting up of the All-Russia databank and inventories for recordings of various forms of oral expression (Gur’yanov 2004; 01). A committee was set up to champion activities around the conservation of elements of intangible heritage, particularly the implementation of the UNESCO programme of the proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity. The basic outcome of the initiatives, by the Russian committee, was the promotion of a nominee – cultural space and oral culture of Semeiskye Old-Believers from Transbaikalia – for the first proclamation and the preparation of a file on Yakut Heroic Epos Olonkho as the next nominee for the third proclamation. However there are problems concerning the absence of legislative acts in the field of copyright for bearers (carriers) and custodians of the intangible cultural heritage, works of folk arts, collectors and keepers of folklore, owners of folklore funds and collections (Gur’yanov 2004: 01).

A number of critics have argued that intangible cultural heritage as a form of ‘living culture’ has to be practiced, used and transmitted from one generation to the next for continuity to ensure conservation. For instance Regenvanu has observed that because the culture of the great majority of people in Vanuatu continues to demonstrate a strong continuity with the cultures of their ancestors, the most effective way to safeguard and maintain the intangible cultural heritage is to encourage communities to continue to maintain the many aspects of traditional culture in their day to day lives (Regenvanu 2004:01). Similarly in the case of Croatia the national policy on cultural property states that intangible cultural property, being a variety of forms and phenomena of spiritual

creativity, is transferred by passage from one generation to another, or through other methods, and which in particular relate to: 1) Languages, dialects, idioms and toponyms, as well as oral literature of all types; 2) Folklore creativity in the areas of music, dance, traditions, games, ceremonies, customs as well as other traditional popular values; 3) Traditional skills and crafts (Percinic-Kavur 2004:02).

While it has been a generally accepted norm for safeguarding of intangible cultural heritage to be transmitted from generation to generation, however several critics have contended that the recurring pattern of transmission of aspects of intangible heritage from generation to generation, 'is not a figure of speech indicating a certain antiquity: the knowledge and skills required for enacting or performing elements of the intangible cultural heritage are located in the brains and bodies of human beings and in order for the intangible cultural heritage to continue to be enacted, this knowledge and skills has to be passed on to others, whereby the usual process is from older to younger generations' (UNESCO 2005:04).

In New Zealand the Charter for the Conservation of Places of Cultural Heritage Value (1992) stipulates principles to guide owners, authorities, tradespersons and professionals in conserving places of cultural heritage value, where the Treaty of Waitangi recognizes the indigenous Maori and Moriori as exercising responsibility beyond current legal ownership for their treasures, monuments and sacred places. The charter sets forth general principles and calls for conservation methods that show the greatest respect for, and involve the least possible loss of, material of cultural heritage value (ICOMOS New Zealand 1992).

Often the emphasis on the participation and involvement of indigenous people in the conservation of intangible heritage is not peculiar but eminent in most instruments. For instance the Declaration of Oaxaca (1993), under the Mexican National Commission for UNESCO, adopted at the seminar on education, work, and cultural pluralism, emphasizes the importance of recognition and inclusion of indigenous peoples in solving the principal problems facing human society. However the declaration does not relate directly to the

conservation of material culture, rather it is concerned with cultural pluralism, environmental management, and protection of the natural resources of the Ibero-American (Declaration of Oaxaca 1993).

Australia, Canada, Philippines, Brazil, Korea and New Zealand are particularly rigorous in developing the relationship between government and indigenous communities both in assessing significance and making decisions about the management of heritage such as cultural landscapes with spiritual significance. One of the key objectives of the Pacific region, in terms of its position in the international debate on the protection of intangible element of heritage, has been to encourage institutions, governments and the industrial sector to work with indigenous people to develop voluntary mechanisms to protect traditional knowledge and cultural expressions of indigenous people of the Pacific, inter alia, memorandum of understanding, code of ethics and research protocols (UNESCO 1999) In Canada, as well, the key issue has been the use of indigenous frameworks to assess landscape significance in national parks (Deacon et al 2003:17).

Many African countries, especially the former colonies, have adopted wide-ranging Africanisation policies after independence from the colonial powers, and in South Africa the government has promoted an “African Renaissance” strategy during the last few years (Seleti 2003 in Deacon et al 2003). However, not much of the intangible heritage policies have been developed by countries in Africa. But given the political will and consciousness to promote local cultures and indigenous heritage various governments have designed basic instruments, such as the national heritage legislations of Botswana, Kenya, Senegal, Ghana, Egypt and others. In specific cases some African states present highly specialised and unique systems of indigenous knowledge, such as the policy for Indigenous Knowledge System (IKS) in South Africa (IKS 2004).

However most of the heritage legislation developed in former colonies use as a model a European or Western framework (as opposed to a system originating in Africa and South Africa in particular) , which tends to place much emphasis on tangible forms of heritage such as monuments, architecture and statues over the intangible heritage (for example the

National Monuments Council Act of 1969 in South Africa). Deacon et al contend because of the legacy of colonialism, many African countries have followed European trends and not much of the heritage-related legislation specifically includes intangible heritage (Deacon et al 2003:18). Similarly Sinamai argues that in the colonial and postcolonial periods the Western models of heritage management is often imposed on a traditional model (Sinamai 2003:02).

Recently most national governments are engaged in the process of policy review and development of new cultural heritage policy. Between 2004 and 2005, a proposal was drafted to carry out research on a 'Comparative Legal Analysis of the Legislation in the area of Cultural Heritage in Southeast Europe' (Petkova 2004:01). The proposed research considers a comparative analysis of the legislations of Bulgaria, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia, Montenegro and Greece in the area of cultural heritage, with particular focus on both tangible and intangible heritage. In reference to the research proposal, Petkova states that intangible cultural heritage will be viewed as including all forms of traditional and popular or folk culture, i.e. collective works originating in a given community and based on tradition (Petkova 2004:01).

In South Africa the Department of Arts and Culture is undergoing a major policy review process. Also in addition to this important process, the department has put out a tender - a call for expression of interests - for the development of a national intangible cultural heritage policy. In the advertisement by the Mail and Guardian Newspaper (24/03/2006) the Department of Arts and Culture called for the expressions of interest from suitably qualified and experienced individuals to sit on a panel of experts to assist the department in the development of a national intangible cultural heritage policy. The department explicitly states that all research papers should be able to examine specific areas of focus against the 2003 UNESCO Convention on Intangible Cultural Heritage, the South African Constitution and other international conventions and protocols including the Universal Declaration on Human Rights (Mail and Guardian 2006).

In many countries most of the work which relates to the recording of aspects of intangible heritage occurs in an uncoordinated manner and sometimes ad hoc fashion. In South Africa such activities are carried out by NGO's, universities, museums, government departments and etc , with each focusing on particular aspects of intangible heritage. For instance the Centre for Popular Memory at the University of Cape Town functions as an oral history archive with a specific focus on research, recording and dissemination of oral narratives and interviews. Cooperation with these institutions is vital for establishing partnerships and good working relations. In this regard, the Declaration of Valencia (1996) outlines the objectives of UNESCO and makes provision for cooperative governance and coordination of heritage activities, through a network of universities concerned with the protection of cultural heritage and the role of universities in supporting efforts to conserve cultural heritage.

Apart from the general coordination of heritage activities done by the National Heritage Council in South Africa, there seem to be no specific structures for coordinating intangible heritage activities, carried out by the different organisations and departments. There have also been several suggestions that the government should commit itself to helping local communities to setup structures, at grassroots level for the conservation and management of intangible heritage. In other regions in the world, especially in south east Asia, the Asia/Pacific Cultural Centre for UNESCO (ACCU) is active in the coordination of intangible heritage activities in the Asia/ Pacific region.

3.5 Intellectual Property Rights

Other instruments for safeguarding aspects of intangible heritage involve intellectual property laws associated with the protection of intangible heritage, and with community rights over their heritage including benefit sharing arising from the use or exploitation of the cultural heritage resource. Communities, in particular Indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity (UNESCO 2003).

The United Nations High Commissioner for Human Rights has put forward a policy, the Draft United Nations Declaration on the Rights of Indigenous People, which recognises the urgent need to respect and promote the inherent rights and characteristics of Indigenous people, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies (UNHCHR 1994). Article 12 of the United Nations Declaration stipulates that Indigenous people have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs (UNHCHR 1994).

Some organisations and legislation do not deal specifically with intellectual property rights related to the protection of all aspects of intangible heritage. However others express a keen effort to include intellectual property rights within their ambit. For instance the World Health Organisation (WHO) has been active in the regulation, recording and intellectual property-related aspects of traditional medicine and botanical knowledge (Deacon et al 2003:16). In the article entitled "Indigenous Knowledge, Alternative Medicine and Intellectual Property Rights Concerns in Kenya", Kibet Ng'etich argues that the developments in interest in traditional medicine and intellectual property rights concerns is generated by the quest for ownership and control of not only the knowledge but also the benefits that may accrue from Indigenous health resources (Ng'etich 2005:02).

Being conscious of the existing intellectual property laws, the Food and Agriculture Organisation (FAO) has carried out work on farmer's and breeder's rights, many whom are Indigenous farmers (Deacon et al 2003:16). At the international workshop on 'Traditional Knowledge - Food Sovereignty and Traditional Knowledge - in Panama'

(September 2005), Diaz contends that “for Indigenous people food sovereignty and traditional knowledge are profoundly linked with mother earth...Indigenous peoples consider these two concepts as critical to the relationship between indigenous peoples and their lands, territories and resources and, their cultural and spiritual survival” (Diaz 2005:02). The United Nations Conference on Trade and Development (UNCTAD) held an expert meeting on ‘Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices’ (in October 2000) to identify issues with potential benefits to developing countries and to study ways of protecting traditional knowledge, innovations and practices (UNESCO 2001a).

The United Nations Convention on Biological Diversity 1992 (CBD) is one of the major international conventions which appears to assign ownership of biodiversity to Indigenous communities and individuals, and asserts their right to protect this knowledge. The CBD presents two important provisions in this context. State Parties to the convention are required:

- to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote the wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices (CBD 1992 Article 8 (j));
- to encourage and develop models of cooperation for the development and use of technologies, including traditional and Indigenous technologies (CBD 1992 Article 18.4).

Similarly, the United Nations Environmental Programme (UNEP) is working on the preservation of traditional knowledge, with particular focus on Indigenous knowledge that can assist in preserving the natural environment subsistence resources and biological diversity (Deacon et al 2003:17). However the interactions between biodiversity, access

and benefit sharing, intellectual property rights, traditional use and indigenous knowledge continue to grow more complex (Duthie 2002: 01).

Amongst the aforementioned organisations, the World Intellectual Property Organization (WIPO) could be considered a key organisation that has contributed enormously to the development of legal instruments for the protection of aspects of traditional cultural expression and knowledge. The work of WIPO is built on earlier interventions, as far as 1967, a revision of the Berne Convention provided some intellectual property protection for expressions of folklore in article 15(4) (WIPO 2001b). Subsequent to this Convention a number of interventions and expert - meetings were convened to amend and improve the previous instruments. During a meeting in 1976 which was facilitated by UNESCO and WIPO, a committee of governmental experts adopted the Tunis Model Law, referring to the protection of folklore (Blake 2001:18).

In view of developing effective mechanism for the protection of intangible cultural heritage, UNESCO has commission a number of research projects, including the study which led to the proposition to develop a New Standard – Setting Instrument for the Safeguarding of Intangible Cultural Heritage. In the proposition Blake argues that UNESCO should concentrate its efforts on providing general protective measures that promote access to existing moral and economic rights for traditional-holders (Blake 2002:09). She further contends that UNESCO should leave the development of sui generis protection of intangible heritage based on intellectual property rights to specialist agencies such as WIPO that have a specific mandate in this area. Amongst the aims and objectives of the proposed instrument the focus is centered on the revitalisation of the living creative process of traditional culture, protection of the means of transmission (including the traditional holders themselves), adoption of customary rules and approaches for safeguarding were appropriate, prevention of unauthorised use and distortion of expressions of intangible heritage, and recording of oral cultural traditions that are in danger of dying out (Blake 2002:09).

In the previous years and also at present, the major debates and discussions concerning intellectual property have focused on the application or use of intellectual property laws to protect elements of intangible heritage, and also the problematic in the use of a narrow term such as 'folklore' to describe intangible cultural heritage in totality .

With regards to folklore, critics have argued that this particular term derives from a European context and has also been adopted by some anthropologists who have applied it to developing nations such as those in Africa (Thomas 1989:02). Thomas further asserts that the term as used in the UNESCO and WIPO discussions gives primacy " to 'artistic' expressions based in oral traditions and performances...whereas the use of this term is not appropriate to describe the living heritage of indigenous peoples, as it trivializes the significance that indigenous peoples place on their intangible heritage as an integral part of their cosmology" (Thomas 1989:02).

Speaking on behalf of the Pacific region, Tora also contends that " the term folklore is not acceptable...our culture is not folklore but the sacred norms intertwined with our traditional way of life – the norms that set the legal, moral, and cultural values of our traditional societies...they are our cultural identity" (Tora 1999:01). In reference to the 1985 WIPO and UNESCO Expert Meeting on the "Protection of Expressions of Folklore by Intellectual Property", Blakeney has observed that the representatives of the Spanish-speaking countries took the position that 'folklore' was an archaism, with the negative connotation of being associated with the creation of lower or superseded civilizations (Blakeney 1999:01).

As compared to the discussions on terminology, the debate on the application of intellectual property laws for protection of intangible heritage has been a heated one. It has been a general assumption that the safeguarding of intangible heritage must include consideration of the use of intellectual property laws on intangible aspects of heritage. However there are far reaching implications in the application of intellectual property laws on intangible heritage. In most instances intellectual property rights are considered to offer limited protection to community knowledge and innovations, in general they are

inappropriate because they seek to privatize ownership, they are designed to be held by individuals and corporations rather than communities, they are expensive to apply for and maintain, and they give a restrictive interpretation of invention (Tora 1999:02). A common criticism that has been noted by experts considers intellectual property laws to be largely Eurocentric or Western, therefore sometimes tend to be irrelevant and inconsistent with the customary rules for the protection of local and traditional or indigenous heritage (Blake 2002).

On the other hand certain aspects of intellectual property laws are deemed to be relevant when applied to traditional or Indigenous cultural heritage. The seminar entitled "Arts for Money's Sake", organised by the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Australian Centre in September 2000, provides insightful considerations to the relevance in the application of moral rights to protect cultural rights of Indigenous artists. For Indigenous people, "art expresses all aspects of life and identity... art is a major way of passing on culture to future indigenous generations...certain images, techniques and styles have developed over time, originating from, and identifying, particular indigenous groups...indigenous law and custom may control use of these" (Janke et al 2000:01). However Janke et al contend strongly that this will only occur if the proposed legislation extends moral rights protection to Indigenous clans over works that contain traditional ritual knowledge (Janke et al 2000:01). They further assert that moral rights are the inalienable personal right of a creator of a work or maker of a film to: i) claim authorship of the work or film (Right of Attribution); and ii) object to any distortion, mutilation or other modification of the work which would be prejudicial to the creator's honour or reputation (Right of Integrity) (Janke et al 2000:01).

Other organisations such as Trade Related Aspects of Intellectual Property Rights (TRIPS), the African Regional Intellectual Property Organisation (ARIPO) and the African Intellectual Property Organisation (OAPI), are striving to develop well defined intellectual property instruments for the conservation of intangible forms of heritage.

The history of ARIPO goes back to the early seventies when a regional seminar on patents and copyrights for English-speaking African countries was held in Nairobi (www.aripo.org). Both the United Nations Economic Commission for Africa (UNECA) and the World Intellectual Property Organisation (WIPO) are key sponsors for the establishment of a regional organisation such as ARIPO.

The OAPI was created in Libreville, the capital of Gabon, in the 1962 by a number of French-speaking African states to administer shared intellectual property matters. The Libreville Agreement has since been replaced by the 1977 Bangui Agreement, revised in 1999. The Bangui Agreement of 1999 contains a special annex dealing with folklore and indigenous knowledge. However it does not appear that any countries party to the OAPI have yet to harmonize their domestic law with the Bangui Agreement's Annex on folklore (Blavin 2003:05).

On the other hand TRIPS affiliates to the World Trade Organisation (WTO) and it covers four types of intellectual property rights – patents, geographical indications, undisclosed information (trade secrets) and trademarks. However critics have observed that “it [TRIPS] does not acknowledge or distinguish between indigenous, community-based knowledge and that of industry...furthermore, it makes no reference to the protection of traditional knowledge” (Ng’etich 2005:03).

Throughout the discussion the best practices for safeguarding intangible heritage demonstrate strong efforts to include considerations of intellectual property laws. However the South African National Heritage Resources Act of 1999 makes no provision or reference to intellectual property rights pertaining to safeguarding of intangible heritage resources. But the Department of Trade and Industry (DTI), in South Africa, presents a well defined system of intellectual property laws that can be useful for referencing and application. Such laws include: cultural property rights, patent law, copyright and related rights, moral rights, trademarks, industrial design, indications of geographical origin and customary law.

In summary there are several issues that have emerged prominently in this chapter. The main debates regarding UNESCO's legal instruments concern issues of refinement and amendment of instruments to be inclusive and considerate of strategic measures for implementation. In particular there have been attempts, through debates, to expand the definition of intangible cultural heritage to include a diverse representation and cater for multiple interpretations. Most importantly there have been serious challenges of implementing UNESCO's instruments, especially at national government levels. In this regard UNESCO has set up a series of expert-meetings to provide advice on operational directives for the implementation of its instruments.

Other international instruments and bodies, such as the International Council of Monuments and Sites (ICOMOS), International Centre for the Preservation and Restoration of Cultural Property (ICCROM), International Council of Museums (ICOM), World Heritage Convention (WHC), African Council of Museums (AFRICOM), amongst many others, provide evidence of the current thinking around the formulation of applicable policy and standards on the protection of particular aspects of intangible heritage. However most of these organisations are at the beginning stage in formulating policy for the safeguarding of intangible heritage.

It is also worth noting that at national levels of government there is keen interest in cultural heritage, even though there are vast similarities and dissimilarities in policy and conservation approaches, in each country, for the protection of intangible aspects of heritage. In particular the dissimilarities in conservation approaches epitomise the uniqueness of national policies of each country which tend to pose a potential challenge to the implementation of the generic policy provided by UNESCO internationally.

The administrative frameworks for safeguarding elements of intangible heritage vary and this is evident in the application of intellectual property laws. For example intellectual property laws are generally considered to be narrow, insufficient and sometimes incompatible or inconsistent with the customary laws governing traditional or Indigenous cultural heritage. This highlights the technical problems of applying instruments which

tend to be in dissonance with existing systems protecting intangible heritage. This is, with exception to sui generis legislation (intellectual property rule) which could be modified to suit the protection of various elements of heritage resources. In total the process of assigning appropriate and adequate legal measures to protect intangible cultural heritage still remains a challenge, even at an international level.

4. Chapter Four: Key Management Issues

Managing specific fields of intangible heritage sometimes can be a complex task. The process of safeguarding intangible heritage continues to present new fields for specialized management that need to be taken into account. For the purpose of this research project there are several issues pertaining to the management of intangible heritage that have been identified which require serious attention. These will be discussed as follows.

4.1 Making Intangible Forms of Heritage Tangible

Making intangible heritage tangible often involves documentation. Modes of recording or documentation may include a number of the following media: video, audio, transcription and illustration (Deacon et al 2003:50). Perhaps the most common means of documenting intangible heritage is through the recording of oral testimonies by use of a tape recorder. The end product of this process is a tangible record of the oral testimonies in the form of an audio tape (analogue) and hard copies of transcripts. The rationale behind this process concurs with what critics have suggested that perhaps intangible heritage has to be presented in a tangible way or rather translated into a visible format for it to be safeguarded in an effective manner (Deacon et al 2003, Luxen 2003 and Blake 2001).

In the case of the listing of intangible forms of heritage on the register or inventorying of aspects of intangible heritage, eventually such approaches entail a process of making

intangible heritage tangible. However the process of making intangibles tangible by means of documentation, invites a host of critical questions such as : How does documentation make allowance for continuity of dynamism which underpins the notion of 'living culture' inherent in intangible heritage? How adequately or accurately does documentation cover all aspects of intangible heritage including the abrupt frequent changes or ephemeral qualities that often signify perpetuity of intangible heritage? In asking these pertinent questions I want to consider the limitations related to documentation, especially since this process is often concerned with 'fixation', or 'freezing' of thing, and also selective amnesia concerning what is scrupulously selected for recording. In particular, selective amnesia is best described when footage of a ritual or interview is selective in terms of when the camera starts and stops, what is deemed appropriate to say or do in front of the recording device, and the framing of the shots (Deacon et al 2003:51). Heritage is always in the making and is, therefore, often a matter of practice and performance that exist in its own right (CHAMP 2005).

At the same time documentation cannot simply be dismissed as effectively an invalid means of safeguarding intangible heritage, as there are benefits that can be realized in this form of preservation. One of the benefits relates to the making of a repository or inventory which could serve as a tangible record and a back-up system of information associated with intangible heritage. An inventory is an instrument used for making known the intangible heritage of the country, and for safeguarding it through registration and safeguarding plans (Santova 2005:13)

However it is also important to consider alternative forms of conserving such as renewal, reproduction or recreation of intangible heritage. When people act in the world, they are not simply reproducing culture or structure, they are creating it anew (Deacon et al 2003:52). Renewal is also not a simple process as it requires consideration of restriction, permission and respect of the cultural protocols governing the use of intangible heritage resources. The enactment of certain traditional practices requires permission to be obtained before pursuing the practice.

Intangible heritage is not static but it is dynamic, it is a living entity of heritage which is characterized by significant change as it evolves over time, so as culture. The Cultural Heritage and Museum Practices (CHAMP) also suggests that 'for a performative heritage to have and keep its effect, it must not only admit change but reinvent itself through constant iteration...thus, there are problems of preservation and documentation as well as questions regarding interpretation and the degree to which a performative act in a community today represents the values of a larger cultural identity, past or present' (CHAMP 2005).

Sometimes change is desirable and it is often an inevitable phenomenon in the transmission or reproduction of intangible heritage. Nonetheless, change has to be engaged critically. Traditions and practices continuously change, in fact no two enactments of an intangible cultural heritage element are exactly identical and over a period of time considerable change can take place in the form and/or in the function (including values) of an element of intangible cultural heritage. The changes of and around an element of the intangible cultural heritage can indeed be so considerable that at times the question can come up whether we have still to do with the same element of intangible cultural heritage as it was in the beginning or before change occurred (UNESCO 2005:05).

The very notion of change underpins the process of making intangibles tangible which in this context change tends to have far reaching implications to questions of retaining authenticity of elements of intangible heritage and also to the legitimacy of permanent formats of recording intangible forms of heritage.

4.2 Inventorying Intangible Forms of Heritage

The state parties to the 2003 UNESCO Convention on Safeguarding of Intangible Cultural Heritage are required to draw up one or more inventories of the intangible cultural heritage present on their territory; they may do so in a manner geared to their own situation (UNESCO 2003:06). For the purposes of the consolidation and co-

ordination of information on heritage resources, the South African Heritage Resources Agency is required to compile and maintain an inventory of the national estate, which must be in the form of a data base of information on heritage resources (NHRA 1999). However, the scope of inventorying specific aspects of intangible heritage remains limited within the legislative framework of the National Heritage Resources Act (NHRA) in South Africa. The Act makes no provision for the management of intangible heritage *per se*, but only provides for the protection of heritage resources, both places and objects, associated with oral traditions and living heritage (NHRA 1999). It is worth noting that intangible heritage is by its nature not fixed to a physical permanent format, like tangible heritage, as it is subject to significant change always. This makes it very vulnerable to loss, but also very difficult to safeguard using the same legal and financial mechanism established for heritage places and objects (Deacon et al 2003).

Most recently, in March 2005, UNESCO organised an expert-meeting on inventorying intangible cultural heritage where experts from different countries met to discuss their experiences concerning inventory-making. Inventory-making is central to the safeguarding of intangible heritage, and various countries apply different methods or approaches to inventorying intangible cultural heritage in their respective countries. For example in Brazil, inventory-making methodology comprises three phases: 1) preliminary collection, 2) identification and documentation, and 3) interpretation. This methodological approach is said to take into account the cultural references of Indigenous people, Afro-Brazilian citizens and groups inhabiting protected urban nuclei, as well as people living in multicultural urban contexts, with specific focus on cultural property at risk (UNESCO 2005). According to Sant'Ann, Director of the Intangible Heritage Department of the Brazilian Institute of Historical and Artistic Heritage (IPHAN), an important goal of inventorying intangible cultural heritage is to maintain the country's cultural diversity in a context of homogenizing tendencies and to contribute through the implementation of safeguarding mechanisms to social inclusion and improvement of living conditions of the traditional bearers (UNESCO 2005).

In reference to Article 1,12,16, 17 and 31 of the 2003 UNESCO Convention, Khaznadar has identified three fundamental tasks involved in inventory-making which include; raising awareness, fostering respect for all forms of intangible cultural heritage without hierarchy, and honouring the living/evolving nature of the intangible cultural heritage (Khaznadar 2005:03). On the question of hierarchy he further stresses that by insisting on respect for all intangible cultural heritage, the convention discourages value-judgments of the establishment of hierarchies among its various forms. Also noting that the planned discontinuation of the proclamation of Masterpieces is in line with this approach, given that in order to be proclaimed a 'Masterpiece', an intangible cultural heritage element has to be considered of 'outstanding value', thus encouraging hierarchy. Khaznadar noted that the Representative List would present forms that are included because they are emblematic enough to cover other forms, not because they are considered of higher value to humanity than others (Khaznadar 2005:16). Finally, he explains that the living and constantly evolving nature of intangible cultural heritage implies that inventories will need to be regularly revised and updated (Khaznadar 2005:16).

In the Netherlands the concept of inventories as an instrument for safeguarding cultural heritage has shown its limitations. Pors contends that inventories which just have been made out of concern for threats of loss could in fact endanger the manageability of the cultural heritage (Pors 2004:02). As such it is important to take this into account right from the start of the inventory process in order to keep a controllable state (Pors 2004:02).

The question of intellectual property rights regarding inventory-making is hard to ignore. It is in this regard that Wendland, a legal expert at the World Intellectual Property Organization, has raised a host of critical questions concerning the relationship between the systems of inventorying intangible cultural heritage and intellectual property (IP) protection. He argues that the answers to these pertinent questions depend to a large extent on i) what "inventory-making" means in practice; ii) what is being inventoried, and iii) how and by whom inventory-making is undertaken (Wendland 2005:02). The

implication of responses to these questions suggests that IP questions arise at every stage of inventory-making: research, collection, recording, cataloguing, classification, publishing, disclosure, updating and etc (UNESCO 2005:29).

The process of assigning appropriate and adequate legal measures to protect intangible cultural heritage within the context of inventory-making remains a challenge, even at international level. In particular the role of community participation and involvement in the process of inventory-making still remains a subject of further discussion and clarity is required on the responsibility of stakeholders in the process of inventorying intangible elements of heritage.

4.3 Managing the Intangible Value Embedded in Intangible Cultural Heritage

There are many elements of intangible heritage consisting of intangible value or symbolic meaning, such as oral tradition, music, indigenous knowledge system (IKS), language, ritual and customs, and so forth. For instance language in the form of the spoken word often serves as a means by which symbols of culture and knowledge are conveyed or transmitted. According to Mgijima, Chief Director of Language Services: Department of Arts and Culture, language constitutes the heritage of countless generations of South Africans, we need to highlight the plight of our indigenous languages much more strongly and emphasize that the loss of indigenous languages disconnects African from African traditions (Mgijima 2005:03) .

This demonstrates that language as a component of intangible heritage is imbued with intangible value such as culture and knowledge. However in the context where language, being a primary conveyer of the intangible value, is under threat of disappearance, this has the potential to pose a serious challenge to the transmission and perpetuity of cultural heritage and knowledge. For example, in the case of the Khomani San of the Kalahari desert, the vernacular N/u language is under threat of disappearing as there are about 11 elderly people who can still speak the language (Smith 1999 in Crawhall 2001). This has serious ramifications on the continuation of the cultural heritage and traditional knowledge that is embedded in the dying language. According to Rieks Smeets, Director

of the Intangible Heritage Unit of UNESCO, in order for language to be sustained or continued there should more than enough people to speak the language frequently on a daily bases, if not the language will cease to prevail (Smeets 2005).

Still on the case of the Khomani San, it is also through the use of the N/u language that the indigenous skill and know-how of animal tracking could be sustained and conveyed to the younger members of the Khomani San. The Art of animal tracking could be counted amongst a few cultural traits of intangible value that have been retained and passed on to the current generation. It may well be imagined that in the absence of the use of the appropriate language certain cultural forms of heritage which depend on the spoken language may easily cease to prevail.

In summary the conservation and management of intangible heritage should not only focus on the intangible heritage as it is presented, but it is equally important to prioritise the protection of the underlying intangible value/s embedded within the intangible heritage resources. In this regard a holistic approach to conservation and management of the cultural heritage could be achieved and sustained.

4.4 Managing Skill and Know-how Embodied in Human Beings

Intangible cultural heritage is deep-rooted in human creativity; intangible cultural heritage provides a vast number of communities, groups and individuals with a sense of identity and continuity. It is expressed through living traditions and social and cultural practices (UNESCO 2003).

Most often the knowledge and skill of safeguarding intangible heritage resides within particular individuals who are considered Living Human Treasures under the current 2003 UNESCO Convention. According to the UNESCO Convention Living Human Treasures are individuals who possess to a very high degree the knowledge and skills required for performing or creating specific elements of the intangible cultural heritage that Member States (who are party/signatory to the 2003 UNESCO Convention) have

selected as a testimony to their living cultural traditions and to creative genius of groups, communities and individuals present in their territory (UNESCO 2003).

Often the knowledge and skill residing in Living Human Treasures represents an important dimension of intangible heritage which could be the method for the conservation of both intangible and tangible forms of heritage. Therefore the methodology or know-how cannot simply be ignored in the sustainable management of intangible heritage. However there are ethical and moral issues, of great sensitivity, that require serious considerations in the management of knowledge and skill residing within certain individuals. This presents numerous challenges in the management of intangible heritage. These challenges relate to issues of access, transmission (use) and ownership rights of information.

Access to information embodied within Living Human Treasures can only happen once those individuals, who are bearers or holders of intangible heritage, are willing and agree to express such information (heritage) by means of practice, use and orally to others. To a certain measure the bearers or holders of intangible heritage have the autonomy to decide unilaterally on the future prospects of intangible heritage, as they are at liberty to apply their own discretion regarding the transmission of intangible elements of heritage to others. This is an important issue because in South Africa and elsewhere there is no policy or some form of incentive to encourage the holders of information on intangible heritage to share their invaluable knowledge and skills with others. This is apart from being mindful or sensitive of ethical issues pertaining to the confidentiality and secrecy against public disclosure or public use of certain elements of intangible heritage. However when intangible heritage in the form of traditional knowledge and techniques ceases to be practiced this could impact negatively on the perpetuation and persistence of intangible heritage, thus affecting the sustainable transmission, conservation and management of intangible heritage.

The question of ownership rights regarding information which resides within certain individuals is a point of serious concern. In this context ownership rights operate on two

different levels. On the one level ownership rights, under the existing intellectual property rights, provide for the protection of individual rights over their cultural property (knowledge or information). On the other level, ownership rights of cultural property especially intangible heritage, as will be demonstrated later, belong to a collective as opposed to an individual. Hence the intellectual property laws, in particular copy rights, are ineffective when applied to the protection of ownership rights of a collective (Blake 2001:08).

Administering intangible heritage that reside within certain individuals continues to pose a serious challenge to a holistic management approach of intangible heritage by heritage officials or authorities.

4.5 Rethinking Indigenous Knowledge Systems in the Management of Living Heritage

Indigenous Knowledge System (IKS) constitute an integral part of living heritage but it is not the only important component of intangible heritage worthy of protection and promotion. Other components are included in the expanded definition of living heritage in the section under definition of terms (in the beginning).

Without any doubt IKS has attained a significant measure of prominence and tends to be prioritized and extensively promoted in the new South Africa. This is important considering that IKS was once subject to silence, neglect and exclusion from the mainstream of heritage resources management by the previous heritage legislation (eg National Monuments Council) under both the colonial and apartheid eras.

However what appears to be of serious concern with the current trends related to the exceeding recognition of IKS, is the unprecedented and uncritical obsession with the promotion of traditional or indigenous forms of heritage, a situation which tends to pose the threat of overlooking contemporary aspects of cultural heritage such as 'popular memory' associated with modern history. In summing up the debates at the Eastern Cape Heritage Indaba (2005), Minkley warns that such emphasis on the indigenous heritage of

the past leads to a tendency of forgetting about African modernity in the present that is equally important (Minkley 2005). Heritage should be engaged and celebrated critically. This leads to the question of 'The Renewal of African Moral Values', as Pityana argues "African moral values must also be viewed and understood critically...African moral values cannot be absolute...we can no longer be confronted with inflexible moral dogmatism that fails to reflect the dynamic and progressive character of our society...moral values, if they are to have any value for modern South Africa, must be transformative" (Pityana 2002:148)

Similarly the African Cultural Heritage Trust has observed that the conservation of cultural heritage is not merely a return to the customs of the past. It embodies the attitude of people to the future of their traditional values faced with the demands of modern technology. Its objective is not to ossify or to mystify, but to ensure harmony with contemporary realities and the demands of change and development and to prevent a mindless sweeping away of our cultural heritage, a situation which can only result in disorderly change and societal instability and the eventual creation of a people completely cut off from its cultural roots (ACTAG 1995).

There is a potential danger associated with privileging a particular form of heritage resource over others, especially regarding the listing of intangible heritage onto the national register or inventory. This also poses a challenge to the popular efforts of reconciliation and the promotion of unity in the celebration of democracy by recognizing the diverse cultures and heritage making up South Africa. Most importantly Deacon at el caution us that if intangible heritage is defined relating only to indigenous or traditional forms, this could be dangerous in that it encourages a tendency "to acknowledge resources relating to certain ethnic identities and not to others...minority groups not identified by national government as 'indigenous' will not receive priority" (Deacon at el 2003:09).

Taking this debate further I also want to consider Galla's argument entitled the 'Tyranny of Binary Opposition'. Galla makes extensive reference to Lowenthal's argument

referring to dichotomies of true and false, real and fake, sacred and profane, and also noting further examples like primitive and civilized, literate and illiterate, traditional and contemporary, dynamic occidental and static oriental which have dominated archaeological and heritage conservation discourse until recently (Lowenthal in Galla 1994:02). In this regard Galla critically confronts the tyranny of dichotomies when she argues “the deconstruction of such binary oppositions like traditional and contemporary is essential if we are to recognize the dynamic essence of emerging cultural heritage values...for example, Nara and Japan could be considered for such an exercise...after all, where does one delineate traditional and contemporary heritage value systems and their manifestations in such complex societies?”(Galla 1994:02).

At the face of transforming the heritage sector the challenge at present is centered on the issue of promoting equal representation of the diverse cultures and heritage resources of South Africa. Most importantly how can a balance be achieved and maintained in representing both the past and present, or traditional and contemporary cultural forms of heritage resources? Or how can an integrated representation of traditional and contemporary cultural forms be promoted, without necessarily privileging one aspect of cultural heritage over the other?

4.6 The Application of Intellectual Property Laws to Intangible Heritage

It has been a common practice to consider intellectual property (IP) laws and their application in the protection of intangible heritage. However it is crucial to apply scrupulous thought and critical observation to the implications associated with the application of intellectual property laws to the protection of intangible heritage.

In practice, the application of intellectual property laws to aspects of intangible heritage presents several challenges and opportunities. The opportunities associated with such practice concern the ongoing developments and interventions at national and international level, to improve the quality of standards or instruments applicable to the protection of intangible heritage especially to traditional or Indigenous forms of heritage resources.

The development of a 'New Standard-Setting Instrument for the Safeguarding of Intangible Cultural Heritage' provides the opportunity not only for rigorous debate but also robust interventions in the application of certain IP laws, particularly copy right laws to intangible heritage (UNESCO).

The deficiency in intellectual property rights (IPR) for the protection of intangible heritage has also provided the opportunity for ongoing research and the production of new knowledge. Between June 1998 and November 1999, WIPO embarked on fact-finding missions designed to identify, as far as possible, the IP needs and expectations of traditional knowledge holders. The study or mission was conducted in 28 countries including the following regions: South Pacific; Southern Africa; Eastern Africa; Western Africa; South Asia; North America; South America; Arab States and the Caribbean. Despite the success of the mission the following issues, however, raised serious concerns: i) IP laws are considered ineffective to protect Traditional Knowledge; ii) IP laws are regarded unsuitable as a means to protect Traditional Knowledge; iii) IP laws cannot be the only means used to protect Traditional Knowledge.

The application of IP laws especially to traditional and Indigenous forms of heritage, continue to present numerous challenges. Intellectual property laws are essentially individualistic and express a set of values that place a high premium on the concepts of authorship and innovation, viewed as Eurocentric and alien to the value-systems of many Indigenous and local societies (Bellagio Conference Blake 2001). The notion of a collective or share heritage, as opposed to an individual's heritage, is a theme which often underpins the complications of applying IP laws to protect traditional or Indigenous heritage belonging to a particular group of people. Abungu argues that traditionally in Africa, heritage was managed either communally or through a group of elders or kingship who were charged with the custodianship, the advent of colonialism drastically altered this management (Abungu 1996: 01). He argues further that the colonial period in Africa saw the rise of museums to assume the custodianship of African heritage (Abungu 1996:02).

Subsequently, the advent of democracy in South Africa presents a drastic move towards community participation in heritage management in order to enhance and stimulate a sense of community ownership of heritage. In the government gazette published in 1996, the then Ministry of Arts, Culture, Science and Technology considered the significance of including local communities in the management of heritage by acknowledging that it is the communities fundamental right, that is access to participate in and benefit from the cultural life of the country (Klopper 1996:03).

Similarly the Resource Management Act (1992) of the New Zealand Government uses indigenous terms to affirm the ownership rights of indigenous people of their cultural heritage resources. For example 'Kaitiakitanga' means the exercise of guardianship, and, in relation to the resources, includes the ethic of stewardship based on the nature of the resources itself. While 'Iwi Authority' means the authority which represents an Iwi society and is recognised by the Iwi society as having authority to do so. 'Marawhenwa' means customary authority exercised by an Iwi or Hapu society in an identified area.

Another interesting aspect of intellectual property laws concerns the application of copyright laws and their implication in the protection of resources such as artistic and literary works, originality, individual author, fixation, duration of protection, exclusivity of rights granted, ownership, fair use exception, and so forth. Under the concept of duration of protection, Blake argues as follows:

“Copyright protection usually extends for a period between twenty-five and seventy years after the death of the author, after which period the protection form is then part of the public domain. Given the great religious, social and cultural significance for the cultural community of much folklore and traditional culture, it is essential that whatever protection is extended to such heritage is granted in perpetuity in order to prevent it from lapsing into the public domain after a period of time. Since this heritage may be of ancient origins and passed down through generation, no fixed period of protection will be sufficient (Blake 2001:15)”.

Within the South African context, the feasibility of applying IP laws to the protection of 'Amasiko' or 'Ditso' or 'Living Culture' proves to be difficult, especially considering the existing disparities between the European instruments and traditional African customary laws of protection. For example the concept of exclusivity of rights over traditional cultural heritage is one that is frequently incompatible with the customs of the community within which it originates (Blake 2001: 15). Similarly Mashelkar argues that the intellectual property rights are often at odds with indigenous cultures, which emphasize collective creation and ownership of knowledge (Mashelkar 2002:190)

On the other hand, IKS has received a substantial measure of protection in South Africa especially under the existing instrument such as the IKS draft policy. The Policy makes specific reference to categories of IP laws such as Trade Marks, Patents, Copyrights, Designs and Integrated Circuits, Geographical Indications and Plant Breeders Rights. At the same time the draft policy stipulates, where it is deemed necessary, that protection of IKS is possible within a sui generic legislation in respect of the rights of Indigenous knowledge IK holders (IKS 2004:28). However the policy does not explicitly elucidate how IP laws can be applied in practice to protect IKS.

There has also been a serious concern that intellectual property rights systems encourage the appropriation of Indigenous knowledge for commercial use, without the fair sharing of benefits with the holders of this knowledge (Mosimege 2005:15). The recent discovery in the deficiency of control over the commercial exploitation of the *hoodia gordania* plant, by big pharmaceutical co-operations, has set in motion a heated debate on intellectual property rights over the ownership of knowledge and use of this appetite suppressant plant. In this particular case, critics have argued that ethical codes and public policy seldom address Indigenous needs such as control by Indigenous people over their cultural and intellectual property (Ouzmen et al 2003:195). It was in November 2000 that the decision by Pfizer Pharmaceuticals to financially and intellectually acknowledge southern Africa's Bushmen or San for their knowledge of the *hoodia gordania* plant's slimming properties. Recently the Council for Scientific and Industrial Research (CSIR)

in South Africa and the San Community of the Kalahari concluded a Trust Agreement (the San Hoodia Benefit Sharing Trust) to share the benefits accrued from the potential commercialisation related to patents that follow research and development of a new technology related to the medicinal plant.

In such a context, the knowledge and expertise related to the use of the plant is treated as an asset of the relevant community, which is transferred to an institution and developed further. According to Mshana the current intellectual property rights regimes and especially patents threaten to worsen the piracy of biological resources and traditional knowledge associated with the resources. He continues to say that biopiracy of indigenous knowledge is a double theft, it steals creativity and innovation and patents on stolen knowledge, and robs owners of economic development (Mshana 2002:204).

A report on the Australian Indigenous Law indicates that Indigenous people are concerned about various uses of their heritage, including the appropriation of Indigenous arts and cultural expression, unauthorized use of secret/sacred material and the appropriation of Indigenous biodiversity knowledge, often without their informed consent or knowledge (Austlii 1999:03).

As illustrated above the system of IP laws does not adequately address the issue of protection of traditional knowledge and Indigenous heritage in particular, and often these systems are incompatible with the protection of various aspects of intangible heritage. This has serious ramifications for the sustainable management of intangible forms of heritage according to their conservation needs, as the National Heritage Resources Act of 1999 demands.

4.7 Intangible Heritage and Human Rights

An integral part of safeguarding intangible heritage occurs through cultural practices involving the enactment of tradition and cultural practices, and the transmission of these from one generation to the next to ensure perpetuity and persistence of cultural heritage. While some cultural practices enhance or improve the quality of life of people, however

others sometimes pose a threat or danger to human lives and infringe basic human rights under the current laws. At same time aspects of intangible heritage, whether benign or malign, can be use to discriminate against others. Many cultural practices differentiate between people on the basis of gender, ethnicity, age, religion, physical ability and so on. Those who wish to protect their power base in society often appeal to 'tradition' as a way of legitimizing continued discriminatory practice (Swanson in Deacon et al 2003:33). However culture should not be used as a mechanism of exclusion, to discriminate, a barrier between people, nor should cultural practices be reduced to ethnic or religious chauvinism (White Paper Arts, Culture and Heritage 1996).

At this juncture I want to cite a case study that could best elucidate the latter point. In June 2005, a meeting was scheduled between representatives of traditional leaders from the National House of Traditional Leaders (NHTL) and myself (the SAHRA delegate). Initially the purpose of the meeting was to establish partnerships and working relations between the National House of Traditional Leaders and the South African Heritage Resources Agency's Living Heritage Unit, since both organizations are among the key stakeholder groups for the sustainable management and conservation of cultural heritage resources, particularly intangible heritage. However the purpose of the meeting was soon deviated by the dominant discussions over concerns on the tentative parliamentary approved banning of a prominent traditional custom of virginity testing for young women. The *Sunday Times* newspaper describes the "banning of the virginity testing, under the Children's Rights Bill, to infringe on basic human rights by invading the privacy of children, without prior informed consent of the affected individual/s, thus violating their dignity and rights" (September 2005:25). The general motion by the representatives of the NHTL revealed disgust at the responsible government authorities for passing such a discriminatory law which would prevent those who derive pride from the old tradition of virginity testing from practicing it in future. At the same time, they acknowledge that such a respectful practice has been misused by some for the abuse of women and children. A resolution reached in this regard, considers that while it is important to uphold the existing human right laws, however the banning of virginity testing is in fact not a solution to the continuous abuse or violation of children's rights,

but a discrimination of the rights of those whose existence is centred on this particular cultural practice. The South African Constitution, chapter 2 of the Bill of Rights, stipulate that everyone has the right to freedom of conscience, religion, thought, belief and opinion (SA Constitution 1996:08).

Drawing from this case study and others as well, it appears that there is a serious lack of compatibility and consistency regarding the existing legislations which promote both human rights and the conservation of cultural heritage resources. The case study also provides an excellent opportunity to interrogate the notion of international human rights laws and their application in the context of Africa in general and South Africa in particular, especially being mindful of the inevitable disparities between the general human rights laws of international significance (origin) and the customary rules relevant to local communities. At the same time it is of paramount importance to consider questions posed by the Comaroffs in their publication, 'Modernity and Its Malcontents: Ritual and Power in Postcolonial Africa', that: i) What role does ritual play in everyday lives of modern Africans? ii) How are so-called 'traditional' cultural forms deployed by people seeking empowerment in a world where 'modernity' has failed to deliver on its promises?

In contextualizing this discussion within the paradigm of human rights laws and their application to aspects of intangible heritage, perhaps it is also important to ask the following questions: i) How best can human rights laws be applied to enhance the conservation of intangible heritage without necessarily compromising the integrity and sustainability of such heritage resources? ii) How can the conservation of aspects of intangible heritage ensure adherence and observation of protocols governing basic human rights?

5. Chapter Five : Findings and Discussion

Drawing from the ongoing discussion in the previous chapters there are several themes that emerge, and these will be discussed under the following headings below.

5.1 Definition of Intangible Heritage or Living Heritage

Although in the definition of terms section at the beginning, a definition of intangible heritage or living heritage is already provided. However this definition is largely determined by existing definitions provided by the NHRA and 2003 UNESCO Convention. As such it does not entirely satisfy the ongoing debate or criticism on terminology. For instance when 'living heritage' is documented or recorded can it still be considered a living entity of culture or intangible heritage even if it is translated into a permanent physical format or tangible record? In other words to what extent does the phenomenon of making intangibles tangible still satisfy the definition of living heritage or intangible heritage? If the inextricable link between the intangible and tangible heritage has any bearing on or could be used as a justification for the definition of living heritage or intangible heritage, then it is only fair to question the validity in the meaning of intangible as it applies to intangible heritage. Galla has also observed that intangible heritage is often perceived through disciplinary-based tangible constructs such as sites, monuments, objects or things and so on (Galla 1995). Therefore the link between intangible and tangible heritage cannot simply be dismissed as invalid in the justification of the definition of intangible heritage. At the same it is difficult to accept such reasoning or rationale to be absolute when intangibles, strictly speaking, represent the non-physical properties of heritage and could be classified as intangible heritage per se based only on

intangibles such as language, music and etc – i.e. intangible heritage independent of tangible heritage.

Another twist in the definition of intangible heritage relates to the term ‘intangible cultural heritage’ used in the 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage. In particular the word ‘cultural’ in the phrase intangible cultural heritage raises a host of questions. The term ‘cultural’ is often perceived to exclude the notion of natural elements of heritage associated with intangible heritage, even if it is not the intention here to exclude other forms of heritage resources within the definition of intangible cultural heritage. At the International Council on Museums (ICOM) general conference (2004), entitled ‘Museums and Intangible Heritage’, the term ‘cultural’ between intangible and heritage was omitted, due to the fact that intangible heritage concerns both natural and cultural resources (Galla 2004:12). Galla further explains that documentation of traditional knowledge about bio-diversity is an invaluable intangible element of natural heritage (Galla 2004:12).

Within the context of the South African National Heritage Resources Act of 1999, it also interesting to note the overtly narrow definition (Section 2) of heritage resources which only covers material forms of heritage such as places and sites and does not include any aspects of intangible heritage (NHRA 1999:08). The definition of heritage resources, under the Act, is limited to sites and objects being part of the national estate.

As time unfolds and culture evolves to assume new meanings, it becomes more evident that the definition of living heritage or intangible heritage is in itself not static or fixed in time and space but continues to expand and change consistent with the changing perceptions of what is declared a heritage resource at any given time.

5.2 Legislative Imperatives and Considerations

Internationally, heritage legislation especially the formulation of legal instruments for the conservation and protection of intangible heritage has had a far reaching impact on the general approach adopted by experts developing policy in their respective countries.

Despite the visible similarities in heritage policies across different regions and countries, however there are also vast dissimilarities which are unavoidable. Most countries which are in the process of developing policy and appropriate standards to safeguard intangible heritage within their borders rely on best practices or models developed by other nations, including making extensive reference to the current 2003 UNESCO Convention on Safeguarding Intangible Cultural Heritage.

In particular the 2003 UNESCO Convention is a useful piece of legislation, and is often used as a point of reference for developing policy at national levels of government. However on the flip side the tremendous influence by the UNESCO Convention on member states could pose a potential danger of a culture of dependency solely on the Convention. This absolute dependency on the UNESCO Convention may negate the prospects of national governments being creative enough to produce policy that uniquely defines and represents requirements of heritage resources within the context of national territories.

Also drawing from the review of heritage legislation in the literature review, there seem to be both inconsistency and compatibility in the use of foreign standards imported from other countries and international organisations, and the application of these standards in the local context particularly in South Africa. For instance the application of most intellectual property laws, produced by WIPO amongst others, often appears to be in dissonance or inconsistent with the cultural protocols and customary rules governing the protection of Indigenous heritage at grass root levels.

At the same time due to contemporary demands of modernity and advancing technology IP laws cannot entirely be dismissed as invalid means of protection but they could to be modified to be suitable and effective to protect Indigenous heritage and other aspects of intangible heritage.

An interesting facet of the 2003 UNESCO Convention worth noting is that the Convention focuses more on the intangibles and does not sufficiently consider the link

between intangible and tangible heritage. The strict distinction or dichotomy between intangible and tangible heritage could be considered a potential threat to the physical expression of intangible elements which often entails a process of translating intangibles into a tangible record. When unpacking the process of making intangibles tangible, it becomes clear that both intangibles and tangible heritage are inextricably linked, hence it is irrelevant sometimes to consider intangible forms of heritage indivisible from the tangible heritage resources.

In as much as UNESCO advocates for a universal standard, to be adopted by national governments towards the safeguarding intangible heritage, it remains problematic to present a generic model of protection to be used by member states who are party to the UNESCO Convention, especially considering the vast disparities in the nature of heritage issues and cultural practices present in each country. On the contrary the UNESCO convention recognises the need for national governments to formulate national policies that are relevant to their own territories, particularly when identifying and listing intangible heritage or inventorying aspects of intangible heritage.

Another interesting facet about the 2003 UNESCO Convention that has not been thoroughly investigated in this dissertation due to its necessarily restricted scope, concerns a set of guiding ideas, by influential and most powerful nations, behind the inception of the Convention. The drafting of the UNESCO Convention and its activities and programmes are mainly funded by developed countries such as France, Japan, Italy, Norway and the Republic of Korea amongst many others (UNESCO 2003). The extent of the influence of these powerful countries over the Convention remains a matter of curiosity and a question yet unanswered. However it would be no surprise to find that these countries exerted a substantial measure of pressure and influence on the drafting of the Convention, over and against the developing countries who could not even finance the development of the convention. Yet it is ironic that out of 52 countries that have ratified the UNESCO Convention about 33 are developing countries. But at the same time if countries do not like the convention they are at liberty not to ratify it.

5.3 Institutionalisation of Intangible Heritage

In general the notion of institutionalization refers to a number of things. In this context the idea of 'institutionalising intangible heritage' is used to refer to the removal of aspects of intangible heritage from their site of production or origin to a carefully demarcated and mediated official space (institution or repository), such as an archive, museum or even an inventory, for conservation purposes. Similarly the idea of formulating policy or standards for conservation and management of intangible heritage could be perceived to be reinforcing the stereotypes of institutionalising heritage resources if it is not properly articulated and engaged critically.

By its intrinsic nature intangible heritage resources reside in the public domain, generally amongst the local communities and in particular, as Wulf asserts, that elements and dimensions of intangible cultural heritage have as medium the human body (Wulf 2004:01). In this regard intangible elements of heritage are not necessarily confined to the private domain of a specific institution of heritage (e.g. as archive or museum). Institutionalising intangible heritage under the good intension of preserving it for posterity, ironically could imply arresting the heritage resource within a confined and highly regulated space which might not be an ideal location for the conservation of intangible heritage according to its conservation needs or best management practice. In the article entitled 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property', Brown argues that efforts to preserve intangible heritage have tended to follow information society models by proposing that heritage be inventoried, then removed from the public domain and returned to the exclusive control of its putative creators (Brown 2005:01).

In this kind of institutionalisation it is not difficult to imagine the displacement of intangible heritage from its site of origin or context of production, and the unceremonious shifts in the meaning of the heritage resources as it moves between the registers or discourse of private and public domains. In such a situation one is induced to ask, what bearing or effect does institutionalising have on the meaning of the intangible heritage?

And how adequately and accurately does institutionalising ensure the proper conservation of the meaning that defines an aspect of intangible heritage?

These empirical questions inspire further discussion around the issues of legitimacy and ethics of institutionalising of intangible heritage resources. In particular the issue of legitimacy poses a serious challenge to the unprecedented validity of the intangible heritage when it is institutionalised in a context that is usually foreign to its site of origin or production. Even though the debate on the conservation of intangible heritage may transcend the question of time and space, however a trace of evidence of the site of origin or production of the heritage resource provides a perspective not only on the evolutionary pattern of change of the intangible heritage but also sheds light on the initial custodians of such heritage resources.

Institutionalisation often goes hand in glove with the notion of conformity to certain acceptable standards of management practices. In drawing up instruments towards safeguarding intangible heritage one is most likely to question the notion of ethics behind institutionalising intangible heritage, especially when unpacking the idea of institutionalisation in that it is not immune from the politics of conformity to certain ideological standards and perceptions. There are general prevailing perceptions that institutionalisation and its conformist or sanitary approach to conservation tend to mediate and impose the lens through which heritage resources can be understood and conserved in totality.

In view of conserving intangible heritage in relation to its conservation needs, as the South African National Heritage Resources Act suggests, institutionalising of intangible heritage resources might not be the most appropriate option for protection, when in effect there are other alternatives to safeguarding intangible heritage that relate to making provision of a conducive (enabling) space for the perpetuation of intangible heritage for transmission, use, resuscitation, production and reproduction of aspects of intangible heritage.

5.4 Politics of Transformation and Expectations of Heritage

Cultural policy reforms in post apartheid South Africa are an important political process for transformation. Since 1994 the heritage sector like any other government institution in South Africa has had to align itself with the transformation objectives of the new political dispensation. In several directions change in the political order, from apartheid to democracy, has had far reaching consequences in effecting change in heritage resources management. For the first time in the history of South Africa the cultural heritage of a diverse people (including the former oppressed black masses) is recognised, and now integrated into the mainstream of heritage resources management in order to promote a diverse representation.

As much as transformation is needed in the heritage sector in South Africa, however change has to be engaged critically because most often heritage serves as a political tool set up to carry out grand ideologies of democracy such as the framing and propagation of peace, unity, reconciliation, national identity, nationhood, healing and pride in the new South Africa. Despite the fact the NHRA warns against the use of heritage for sectarian purposes or political gains, on the contrary the Act, also assert that heritage resources have the capacity to promote reconciliation, understanding and respect, and contribution to the development of a unifying South African identity (NHRA1999:16). Similarly the White Paper on Art Culture and Heritage state that attention to living heritage is of paramount importance for the reconstruction and development process in South Africa (White Paper on Art Culture and Heritage 1996).

In many countries, heritage in its own merits is not immune from politics and it serves as a political resource upon which national identities are constructed and forms of power and privilege justified and celebrated (Lumley 1988:02). Ashworth and Turnbridge refer to this process as the 'Dominant Ideology Thesis', because heritage interpretation is endowed with messages which are deliberately framed by an existing or aspirant power elite to legitimize the existing dominant regime, or alternatively are developed by an opposition group with the objective of overthrowing a competitor (Ashworth and Turnbridge 1996:47). For example, in the case of Malawi under the dictatorship of

Kamuzu Banda's regime, the author Kalinga observed that, Banda himself, personally played a leading role in the production of history in the 1960's, in that "...his version of history (based on anti-colonial struggle and emancipation) became dominant and as such celebrated at national events, like Independence Day" (Kalinga 1998:542-543).

The historical use of heritage as a political weapon to promote white domination and black subjugation is not a new phenomenon in South Africa, as in the past both colonial and apartheid projects framed heritage to further white supremacy by privileging the dominant colonial and apartheid cultural heritage over the heritage of the oppressed black population. This segregationist approach has had far reaching consequences in undermining other forms of cultural heritage in South Africa and it is still prevalent in some contexts today.

Addressing delegates at the 'Heritage Consultative Conference', in Cape Town (May 2006), Premier Ebrahim Rassool warned that:

"heritage pose a risk of reinforcing the racial stereotypes entrenched by apartheid laws if it is not properly articulated...it [heritage] should reflect the transition this country has gone through and correct some of the misconceptions about certain communities created in order to justify apartheid. Heritage should not be used to denigrate certain communities by perpetuating stereotypes which have no relevance in today's world" (Rassool 2006:09).

Clearly heritage can be used in the service of both benign and malign purposes. In the post apartheid era, the uses of heritage to promote ideologies such as humanity, reconciliation and etc could be problematic if these issues are engaged with a measure of blind loyalty or unscrupulously. But when applying critical thought to this situation, these grand political ideas tend to pose a huge burden and overwhelming pressure on heritage to deliver on the expectations of democracy. The burdening of heritage to fulfil such grand democratic ideas begs a host of questions related to: what is actually expected of heritage to deliver? What purpose is heritage expected to fulfil? It the purpose of heritage

to carry out national objectives of transformation? I want to consider these pressing questions in relation to how realistic it is to expect heritage to effectively deliver on the expectations of democracy to solve problems of the past in the present or redress the imbalances of the past, when in fact the greatest challenge confronting heritage is the threat of disappearance if there are no adequate protective measures in place?

At the same time it is only fair to ask whether heritage can be protected and promoted effectively in isolation from the developmental issues that are imperative to building a stable democratic situation in South Africa. In particular I want to consider the management of heritage resources in relation to notions such as 'Ubuntu' (African humanity) and the promotion of the 'African Renaissance'. Both concepts, in one way or the other, epitomise the spirit of unity, reconciliation and the reconstruction of a nation that has been struck by the past injustices of colonisation and apartheid. Therefore it is not surprising that a wounded nation such as South Africa could be appealing to heritage, amongst others cultural entities, for restoration and redemption. Most importantly, heritage cannot be divorced from the politics of change in the democratic South Africa.

On the contrary, much of the revolutionary policies on cultural heritage tend to place more emphasis on conceptualising the transformation objectives and political imperatives of the new dispensation. Minimal attention is often allocated to the development of sufficient and applicable management tools or implementation guidelines for the protection of heritage resources. Hence the recurring deficiency in protective measures for conserving heritage resources in accordance with their conservation needs.

5.5 Managing Multiple Dimensions of Intangible Heritage

Despite the relatively limited and narrow scope of living heritage within the ambit of the National Heritage Resources Act (NHRA), the field of intangible heritage still remains vast to manage, especially considering the specific broad categories such as oral history, indigenous knowledge systems, rituals and etc, which constitute the prescribed definition of living heritage. Some South African government departments have even formulated policy and management guidelines, geared to their specific needs for protection of

aspects of intangible heritage. One instance of this is the Indigenous Knowledge System policy by the Department of Science and Technology. There is even a Language Policy and Performance Act under the Department of Arts and Culture. More recently, towards the end of 2002 the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities was established. One of the key objectives (Act 19) of the Commission is to promote the right of communities to develop their historically diminished heritage (CRL 2002).

In terms of the NHRA, it remains the responsibility of SAHRA to conserve and manage the various aspects of intangible heritage, as defined in the Act, in relation to heritage objects and places which are considered to be part of the national estate. However there are several challenges pertaining to formulating policy or instruments that are applicable and adequate to protect the various aspects of intangible heritage.

The challenges relate to the fact that each aspect of intangible heritage, to a large degree, present unique dimensions and qualities, and requires suitable measures for protection geared to their specific conservation requirements, as opposed to developing or applying generic instruments for protection. For example, it would not be fitting to conceive and assign the same instruments for the protection of oral history to protect performances such as rituals, because both oral history and performance do not have identical characteristics and qualities.

One other crucial issue concerns the allocation of sufficient protective measures to all aspects of intangible heritage, especially when applying a generic instrument for protection. In other words, in developing a generic system of protection it is advisable to provide adequate protection to all aspects of intangible heritage, despite the evident disparities and variations amongst the elements of intangible heritage.

In summary the implications of multiple dimensions of intangible heritage pose a serious challenge to the formulation of a generic instrument for the conservation and management of intangible heritage in its totality.

The management of the diverse aspects of intangible heritage also has far reaching implications for issues of capacity, funding, representation, management expertise and guidelines for management. However all of these are determined by the scope of policy and management guidelines.

6.Chapter Six: Conclusion and Recommendations

6.1 Conclusion

Clearly the task of formulating policy and appropriate instruments for safeguarding intangible heritage is complex and extensive, and it presents the possibility of numerous research initiatives and opportunities for further research. For the purposes of this research project, the focus is centred only on a comparative analysis and review of existing heritage legislation, legal instruments and best practices that may be useful in the South African context. In this regard I contend that the comparative analysis and review process have been useful in terms of providing in depth assessment of existing policies, conventions, protocols and instruments that affect the conservation and management of intangible elements of heritage resources. At the same time the comparative analysis and review process have made it possible to avoid unnecessary duplication or reproduction of instruments, including the reinvention of best practices already existing, but rather to consider the option of expanding or building on what already exists.

The literature review in chapter 2 begins by highlighting the importance of presenting a historical account based on the evolution of heritage legislation in South Africa, throughout the political regimes of colonialism, apartheid and democracy. A sharp contrast is noticeable in the transition from apartheid to democracy, where both these political regimes have made a huge impact in shaping heritage legislation in South Africa. It is intriguing to note the undisputable power and tremendous influence of politics on heritage management and policy formulation, especially the impact of grand political ideas on the definition of heritage and its meaning. In essence heritage is not immune from politics, and most often it serves as a political tool to express dominant ideologies of the government of the day.

The integration of living heritage into the ambit of heritage resource management has provided an opportunity for the formulation of legal instruments in the absence of a policy framework and regulatory measures to safeguard the various aspects of intangible

heritage. The integration of living heritage into the management of heritage resources also epitomises a significant measure of change in the approach of heritage conservation in post apartheid South Africa. In this regard transformation, amongst other things, underpins a process which seeks to present a diverse representation of the cultural heritage of the citizens of South Africa. This includes the heritage resources of the former oppressed black people which are now integrated into the mainstream of heritage management in South Africa. As I have indicated earlier, transformation in heritage resources management has to be engaged critically as it is not a neutral process isolated from the dominant discourse of politics.

While it has proved to be productive to draw a comparative analysis and review heritage legislation in chapter three, it remains equally significant that chapter four focuses on key management issues pertaining to the protection of intangible heritage. It is not an easy process to identify and define appropriate management areas for safeguarding living heritage without extensive background assessment and a nuanced understanding of existing policies and instruments. When developing management guidelines, it is worth noting that intangible heritage is by its nature not fixed to a physical permanent format, like tangible heritage, as is subject to significant change always. Therefore the management of living heritage should consider the conservation needs of various aspects of intangible heritage.

One thing this study aims to achieve is to generate discussion and stimulate dialogue amongst experts working in the field of safeguarding intangible heritage, particularly those who are developing policy and legal instruments for protection. Due to the limited scope and requirements of a mini dissertation this study is not conclusive in the sense that it marks the first step for further research towards the development of appropriate measures and instruments for the conservation and sustainable management of living heritage. In this regard there is still room for further research and development.

6.2 Recommendations

Drawing from the ongoing discussions in the previous chapters there are several recommendations suggested below. These recommendations suggest key aspects of policy framework and management issues, and do not entirely cover all areas of conservation and management pertaining to the protection of living heritage or intangible heritage. The proposed recommendations are:

- A holistic approach to safeguarding cultural heritage resources must take into cognizance the indivisible link between intangible and tangible heritage. Often intangible and tangible heritage coexists. Sometimes the one cannot be realized in its completeness or expressed fully in the absence of the other. In some communities the distinction between intangible and tangible heritage is not made. It is also possible to consider tangible heritage in its materiel form as a physical manifestation of intangible heritage, while the intangible heritage represent the non-physical properties of the tangible heritage. Both tangibles and intangibles are generally considered to be a unified cultural heritage;
- Safeguarding of living heritage or intangible heritage should not only be limited to the protection of the actual heritage resource in its tangible or intangible form. It is equally important to promote the documentation and recording of applicable knowledge and skills (intangibles) used in the conservation of the many facets of heritage resources including the intangibles as well;
- An integrated management strategy that includes a community-based conservation approach for protecting intangible heritage is highly recommended. Recognizing that living heritage resides mainly within communities at the local level, and also considering that local communities have, over many years of interaction, developed and adopted highly specialized skills and traditional forms of knowledge to safeguard their heritage resources;
- Acknowledging that there is often minimal information gathered and recorded on any community-oriented approach to safeguard heritage resources, such as the

local know-how and traditional techniques applied by communities to protect their heritage resources. In addressing these pertinent issues, the management of living heritage is not complete without including the necessary skills and knowledge applicable to conserve such heritage resources according to its conservation needs. In particular taking into account the protective measures that communities at grass roots level have developed and can identify with in order to enhance a collective responsibility for protection of intangible heritage;

- Heritage institution such as the South African Heritage Resources Agency have the responsibility to create a conducive (enabling) environment for the transmission, production and reproduction of intangible forms of heritage, to ensure the persistence or continuation of the heritage resource through generations. This approach could add tremendous value to the conservation and sustainable management of living heritage;
- Heritage institutions also have the responsibility to educate community members to realize the value and importance of their heritage so that they can learn to take it serious and conserve it for posterity. Most importantly, education is crucial in this regard to help local communities to realize the benefits that they can accrue in the conservation and management of their heritage resources;
- It is important to promote the transmission of intangible heritage by practitioners (Living Human Treasures) or holders of aspects of intangible heritage. Providing an incentive as a means to encourage practitioners to share their knowledge and information can be a viable option for the persistence of intangible heritage from generation to generation. This approach has proved its worth in countries such as Japan, Korea, Bulgaria and many other countries who have developed extensive experience in the system of Living Human Treasures;
- Some aspects of intangible heritage are highly sensitive and to a substantial measure they are also sacred and secretive. In this regard cultural protocols

(customary rules) pertaining to prior informed consent or authorisation and ethics on issues such as access, use and presentation of intangible heritage must be observed. In particular, access to intangible heritage resource must be negotiated with affected parties or communities and should consider respect of customary practices governing access to specific aspects of such heritage;

- The development of the capacity and skills of heritage practitioners is highly recommended, as there is a serious deficiency of competence in heritage resources management, particularly in the conservation and sustainable management of intangible heritage;

- There is a need for the allocation of adequate financial resources for research initiatives towards the development of policy and management guidelines, as well as the financing of infrastructure for the implementation of protective measures for safeguarding intangible heritage;

- Key areas for further research and development include:
 - Identification, Nomination and Listing of intangible heritage on the national register;
 - Application of intellectual property laws for protection of intangible heritage;
 - Establishment of a Living Human Treasure system;
 - Integration of intangible heritage in school curriculum and the formal education system.

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