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# CULTURAL POLICY AND THE LANDSCAPE OF THE LAW IN SOUTH AFRICA

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## 1 Introduction

Profound diversity is a persistent characteristic of the international community.<sup>1</sup> Similarly, South Africa is a multi-cultured state and cultural diversity underlies the South African legal system.<sup>2</sup> Where different cultures exist in a society, each with its own social and legal norms, a dominant culture often emerges. Cultures other than the dominant one may then desire protection of the group against unequal treatment on account of their culture.<sup>3</sup> Diversity also implies recognition of identity.<sup>4</sup> International recognition of cultural diversity is accompanied by a search for more effective mechanisms of protection for linguistic, cultural and religious communities.<sup>5</sup> How the issues of recognition and protection are managed at the national level depends on cultural planning, cultural policy formulation and the adequacy of laws (in many areas other than arts and culture).<sup>6</sup> "Cultural policy" could be described as authoritative documents formulated by state departments of arts and culture, local authorities or any other public institution that works in the cultural sector with a view to addressing behaviour that poses problems for cultural communities. Legislative detail on the relevance, effectiveness and efficiency of the current legislative framework on arts, culture and heritage are linked to the broad issues. The documents concerned may take the form of laws, green and white papers or budgets.

How mutual appreciation or a true "meeting of cultures" is promoted, relies on a theory that comprehends the role of the state and the law. Where planning and

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1 Donoho "Autonomy, self-governance, and the margin of appreciation: Developing a jurisprudence of diversity within universal human rights" 2001 *Emory International Law Review* 391.

2 Baxter "Pure comparative law and legal science in a mixed legal system" 1993 *CILSA* 84.

3 Devenish "Minority rights and cultural pluralism – the protection of language and cultural identity in the 1996 Constitution" 1999 *THRHR* 201.

4 Taylor "The politics of recognition" in Gutmann (ed) *Multiculturalism: Examining the Politics of Recognition* (1994) 38; in general, Strydom "The international and public law debate on cultural relativism and cultural identity: Origin and implications" 1996 *SAYIL* 1 22.

5 Roodt "Culture and law: Research report for Fort Hare University" (unpublished) (2002); Malherbe "'n Universiteit se taalbeleid as 'n uitdrukking van grondwetlik-beskermede diversiteit" 2005 *TSAR* 708 709.

6 Henrard *Minority Protection in Post-Apartheid South Africa* (2002) 223; implicit also in Venter "The protection of cultural, linguistic and religious rights: The framework provided by the Constitution of the Republic of South Africa, 1996" 1998 *SA Publikereg/Public Law* 438.

insight are absent, ethnocentric tendencies may assert themselves with greater intensity.<sup>7</sup>

The legal landscape of the developing world is littered with laws that testify to the poverty of theory relating law to development.<sup>8</sup> To understand more fully the attributes of state level cultural policy, the full range of cultural programmes and policies must be considered and reflected upon as a unified whole.<sup>9</sup> While it may be uncommon to think of the agencies, institutions, actions and policies involved as an aggregate or in a highly integrated manner, such an approach may indeed prove indispensable to effective cultural mapping. Even if much state cultural policy is the result of actions and decisions taken without expressed policy intention, the idea of an overarching policy or master plan may be helpful in a number of ways.<sup>10</sup>

The working definition of the concept “cultural policy” cannot masque the many difficulties in defining and determining the amplitude of meaning of the concept of culture. Culture<sup>11</sup> is a particularly ambiguous concept in southern Africa, on the one hand having a clear role in most searches for an authentic identity and assisting in differentiating between different communities, but on the other hand being amenable to be used to institutionalise fragmentation<sup>12</sup> and the actual distribution of power<sup>13</sup> in the region. The dimensions of culture in its manifold and daily manifestations are bound – powerfully and in highly complex ways – with familial or personal life, with economic and social life, and with the environment.<sup>14</sup> In fact, societal transformation, freedom, justice, peace and development cannot avoid an encounter with “culture”.

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7 Nkosi “Culture and diversity”: paper presented to the National Reference Group, Pretoria, on 24 February 2005 (unpublished) 1.

8 Seidman & Seidman *State and Law in the Development Process: Problem-solving and Institutional Change in the Third World* (1994) 352.

9 Fortunately, the Department of Arts and Culture embarked on a policy review in February 2005. Results are expected in May 2006.

10 See Dunbar “Fostering the arts by disestablishment” in Greyser (ed) *Cultural Policy and Arts Administration* (1973).

11 A definition of the term “culture” is not easily accomplished due to its fluidity and over-expanded use. See Hartman *The Fateful Question of Culture* (1997) 29ff; in general also Roodt *Legal Aspects of the Protection of Cultural Heritage* (LLD thesis UFS 2000) 3-15; Roodt (n 5) 3; Sirayi & Anyumba “Local cultural policy: A tool for grassroots development” (version supplied to author on 18 January 2006) (unpublished) 7ff. Because few of the uses of the term “culture” converge, a common understanding is prevented and the term becomes susceptible to distortion and corruption. Furthermore, its meaning is contextually bound. See Beukes “Culture and cultural rights” in Joubert (founding editor) *LAWSA Vol 5 Part 3* (2004) §§ 386-387.

12 Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 77ff 285.

13 Chanock “Culture and human rights: Orientalising, occidentalising and authenticity” in Mamdani (ed) *Beyond Rights Talk and Culture Talk* (2000) 15.

14 Mercer *Towards Cultural Citizenship: Tools for Cultural Policy and Development* (2002) 18; Sirayi & Anyumba (n 11) 1.

In a society plagued by poverty, corruption and a struggling economy where many policy imperatives like, among others, education, health and housing compete, the urgency of getting cultural planning into focus requires explanation. In order to face the difficulties of realising the promise of development, and for development plans to have any impact on dysfunctional economic and social behaviour, culture and the role of the state, its institutions and law need to be reckoned with. Cultural policies are not confined to conservation sites, but underlie every viable project or development strategy in tourism, transportation, education, economic development and social services. Indeed, it is not so much about the “planning of culture” or creating a climate conducive to cultural expression and the protection and development of heritage,<sup>15</sup> as it is about allowing cultural considerations their say in planning and development.

At a conference that looks at society in transformation, it may be helpful to consider the place of cultural policy formulation among competing government priorities and the place of law in relationship to culture and development. In what follows, I consider the following aspects: the question of priority; the Cultural Policy Project; the link between culture and the state; the scope for governmental action in the constitutional and legislative framework impacting on culture; whether this is a provincial, national or shared responsibility; perceptions that frustrate the progress of the Cultural Policy Project; aspects of constitutional interpretation; and recommendations for a transition committed to a common democratic culture.

## **2 A question of priority**

Ever since the transition to a new democratic constitutional dispensation in 1994,<sup>16</sup> the South African government has put cultural policy formulation on the proverbial back burner and little attention has been given to cultural policy as a tool in social, economic and physical development. Neither the Departments of Arts and Culture and of Provincial and Local Government, nor the South African Local Government Association, have assigned to culture any specific strategic role that might put cultural resources to strategic use in community development.<sup>17</sup> Moreover, apart from a number of discipline-based policies, there has been no conscious, methodical and deliberate effort to draw a broad

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15 Cf *White Paper on Arts, Culture and Heritage, 1996* § 18 14 and § 1 16. Published on 4 June 1996.

16 The Constitution of the Republic of South Africa, 1993 (the interim Constitution) came into force on 27 April 1994.

map to guide planners in addressing problem behaviour in the cultural sector. The ANC conceded that this important area remains to be explored ten years after democracy. Indeed, it has been suggested that a National Municipal Cultural Policy needs to be devised in which culture is put to use "as a vehicle for reconstruction and development".<sup>18</sup> But for the better part of the last ten years, no serious effort has been made to acknowledge or explore the value hidden in local cultural policy for other spheres of government. In fact, the slow pace at which legislation in various crucial cultural matters has been adopted confirms that culture is not being permitted to link reform to broader agendas for development. Culture is being treated as a mere afterthought<sup>19</sup> and thus it remains adrift in a no-man's land.

Two initiatives harbour some hope that this may change: the South African-Flemish Local Network Cultural Policy Project<sup>20</sup> of the Department of Arts and Culture (2003-2006) and the Policy Review that the Department of Arts and Culture is undertaking further to a 2005 decision of MINMEC. This article explores the Cultural Policy Project.

### 3 The Cultural Policy Project

A first attempt at developing an instrument tailored to the development and formulation of local cultural policy in post-apartheid South Africa, the Cultural Policy Project is the result of discussions that took place between the South African government and the Flemish government in terms of a bilateral cultural agreement in existence. Whereas the Flemish government passed legislation and developed a policy for arts and culture at local government level in 2001, in

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17 Sirayi & Anyumba (n 11) 3 7. On the "transversal approach" which makes strategic use of cultural resources in community development, see Bianchini *Cultural Policy and Urban Regeneration: The Western European Experience* (1993); Mercer (n 14).

18 <http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo21/patriotic.html> (19 January 2006). Dr Wally Serote, the former head of the ANC's Department of Arts and Culture, once proposed this much when he argued that "legislation will have to be put in place that ensures that all South Africans have access to cultural expression and activity".

19 <http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo21/patriotic.html> (19 January 2006). The *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act* 19 of 2002 suffered many delays. With regard to the *South African National Languages Bill*, the Portfolio Committee on Arts, Culture, Science and Technology reported back in 2003 that the expected tabling had not materialised and that the Department of Arts and Culture would ensure "that the promotion of multilingualism in our country, a requirement of the Constitution, is not compromised by further delays". However, no progress seems to have been made since.

20 The Project is being launched in six areas based in the Free State, KwaZulu-Natal and Limpopo Provinces. In the Free State, Mangaung Municipality and Metsimaholo District Council are involved; in KwaZulu-Natal, aThekwini Metropolitan Municipality and Zululand District Council are involved; and in Limpopo, Polokwane Municipality and Thulamela Municipality are involved. Details are available on <http://www.unisa.ac.za> and <http://www.dac.gov.za> (6 February 2006).

South Africa there is a serious dearth of co-ordinated policy development in this sphere.<sup>21</sup>

The Cultural Policy Project brings culture to the centre of integrated development since it looks at space regeneration or physical development, economic development, social development and improved co-operation for purposes of culture-led development at the local level. This experiment envisages that local cultural policies that are developed within a common framework of policy guidelines will bring more insight into the existing “cultural fissure” in South Africa.

Among the objectives of the Cultural Policy Project is the stimulation of social responsibility and active citizenship. Indeed, the Project has not ignored the imperatives of participation and has gone some way to identify leaders. Practical instruments to support policy development have been generated and accountability fostered while the symbiotic relationship between state and law has been recognised. However, rendering structures adequate to translate policy into practice will require institutional reform. In this regard, the Policy Review assumes importance.

#### **4 Culture and the state**

Culture is autonomous, because the human mind or spirit is autonomous. That is why cultural formation cannot be possessed and controlled and why the state should keep in check its own interference in the cultural practices of communities, institutions and individual practitioners.<sup>22</sup> Paradoxically, however, the state is also there to serve (ie protect, promote, care for and transmit) culture. On the basis of such service, the state becomes identical therewith and “master” thereof in the sense of functioning as a cultural entity with competence in matters cultural.<sup>23</sup> From the model of the cultural state (“Kulturstaat”<sup>24</sup>) this statement, being dialectical, remains true in reverse order. Being competent in matters cultural, culture becomes master of and provides substance and content to the state.<sup>25</sup>

Patent instrumentalisation of culture by the state implies that culture is “objectified”. A perspective that allows culture to be treated as a mere tool in

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21 Sirayi “Local cultural policy framework: A tool for integrated cultural development for South Africa” (unpublished) 2 refers to a number of international models that were considered.

22 Cf *White Paper on Arts, Culture and Heritage, 1996* § 9 18.

23 Huber “Zur Problematik des Kulturstaats” in Häberle *Kulturstaatlichkeit und Kulturverfassungsrecht* (1982) 138ff.

24 Huber (n 23) 122.

25 Van Wyk “Kultuur, staat, reg – kultuurstaatsreg?” 1991 *Stell LR* 180 187.

service of an authoritarian state, and the state as free to choose to push it towards the periphery, belittles culture and limits its autonomy. The idea of an “officially designated culture” appears greatly at odds with modern sensibilities. At times, the very idea of government involving itself in cultural life revisits the unwelcome image of censorship and official propaganda. Thus, a reductionist view of the importance of protection, care, promotion and transmission of culture and its development as a sector in its own right is problematical.<sup>26</sup> The inverse is also true. Over-estimating what culture can accomplish, or perceiving the state as a mere instrument (object) in the hands of the dominant political group or culture, is to ascribe to it too much power<sup>27</sup> and ruins the fine balance of state, culture and law in a living and mutually enriching relationship. Yet using cultural policy to enhance social integration and economic regeneration need not bring about a pitfall of the kind of either of the two extremes.

Undue delay of policy-making processes lessens the ability of the state to function as a cultural entity that protects culture against political manipulation, and the calamitous fostering of intergovernmental conflict over these processes paralyses culture’s ability to provide substance to the state. And, even if the process does produce sound policy backed by effective law, the quality of a rule cannot be judged merely on its substance, but also on the likelihood of how effectively it will be administered.<sup>28</sup> The symbiotic relationship between state and law featured in President Mbeki’s 2006 Opening Address when he highlighted the urgent need for closer co-operation among governmental spheres in order to reach developmental targets.<sup>29</sup>

## 5 The scope for governmental action in the existing constitutional and legislative framework impacting on culture

The Constitution of the Republic of South Africa, 1996<sup>30</sup> articulates the very ethical and jurisprudential foundations upon which the state is structured. At the same time, the Constitution is the primary empowering and mandating source of the regulation of matters cultural in South Africa.<sup>31</sup> The Constitution does not

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26 Van Wyk (n 25) 84-188; Kruger “Regstaat, kultuurstaat, welvaartstaat: Bestanddele van 'n nuwe staatsmodel?” 1994 *Stell LR* 22; Beukes *Kultuur: 'n Staatsregtelike Perspektief* (LLD-thesis Unisa 1991) 309ff; Beukes “Identiteit, (kulturele) pluralisme, reg- en kultuurstaat: 'n Verkenning” in Carpenter (ed) *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 161; Roodt (LLD n 11) 42ff; in general also Sirayi *et al* “Local Cultural Policy Framework for SA” (unpublished) (2005) 10.

27 Strydom (n 4) 16 25.

28 Seidman & Seidman (n 8) 351.

29 Delivered 3 February 2006. See *Naweek Beeld* 4 February 2006 4.

30 Entered into force on 4 February 1996.

31 LAWSA (n 11) §§ 386ff 419ff.

seek merely to identify problematic behaviour that requires legislative intervention.<sup>32</sup> Several provisions in the Bill of Rights<sup>33</sup> are designed to safeguard culture and give recognition to a right to culture.<sup>34</sup> To put the role and competency of government in matters cultural into proper focus, the constitutional definition of the powers and functions of local authorities in relation to provincial and national government, and more specifically how Schedules 4 and 5 are to be interpreted and read, need to be explained with reference to, at least, Chapter 3 of the Constitution. The leeway for initiative which the system allows for different spheres in this area must be considered. But there are limitations too. While aspects of law and culture are linked and integrated at several focal points in the Constitution,<sup>35</sup> constitutional law cannot provide detailed answers to every question related to culture and the diversity paradigm.<sup>36</sup> Moreover, since language is not a precise tool that carries a single meaning, the interpretation of a legal text will always imply some margin of appreciation.

A large number of Acts deal with a wide range of matters pertaining to culture.<sup>37</sup> Without purporting to assess all these laws in terms of public interest, one may safely assume that not all of them advance development and transition equally successfully.<sup>38</sup> Nonetheless, compared to the conservation laws of the old order, current conservation and planning legislation, ordinances and town-planning schemes are better integrated into a unified system of

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32 Mahomed "The impact of a bill of rights on law and practice in South Africa" June 1993 *De Rebus* 462; Mothupi "The value of minority judgments in the development of constitutional interpretation in South Africa" 2005 (2) *Codicillus* 15.

33 Ch 2.

34 The perspective of cultural communities that enjoy a right to culture may have been articulated more convincingly in the Preamble, which refers only to the need to free the potential of every citizen. Even so, recognition is significant despite cultural rights being affected by a number of the same difficulties as the contested concept of "culture". *LAWSA* (n 11) §§ 387-388; Beukes (LLD n 26) 76ff; Beukes "The international (law) dimension of culture and cultural rights: Relevance for and application in the 'new' South Africa" 1995 *SAYIL* 127 mentions the added difficulty of classification.

35 Direct and indirect reference to "culture" is made in ss 15, 30, 31, 143, 181, 185, 186, 235, ch 12 as well as Schedules 4 and 5 of the Constitution. In general Venter (n 6).

36 Roosevelt Thomas Jr *Redefining Diversity* (1996) 20 mentions the possibilities of inclusion/exclusion, denial, assimilation, suppression, isolation, toleration, building relationships and mutual adaptation; also Nkosi (n 7) 8-9.

37 *LAWSA* (n 11) § 386. Current laws pertinent to culture and local government include the *Pan South African Languages Board Act* 59 of 1995; *National Archives of South Africa Act* 43 of 1996; *Legal Deposit Act* 54 of 1997; *National Arts Council Act* 56 of 1997; *National House of Traditional Leaders Act* 10 of 1997; *National Film and Video Foundation Act* 73 of 1997; *South African Library for the Blind Act* 91 of 1998; *National Library of South Africa Act* 92 of 1998; *South African Geographical Names Council Act* 118 of 1998; *Cultural Institutions Act* 119 of 1998; *National Heritage Council Act* 11 of 1999; *National Heritage Resources Act* 25 of 1999; *Council for the Built Environment Act* 3 of 2000; *Local Government: Municipal Systems Act* 32 of 2000; *African Renaissance and International Co-operation Fund Act* 51 of 2000; *National Council for Library and Information Services Act* 6 of 2001; *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act* 19 of 2002.

38 In general on this method of assessment see "Foreword" in Seidman, Seidman & Abyeekere *Assessing Legislation - A Manual for Legislators* (2003).

conservation-related control of development.<sup>39</sup> A number of these laws impact on local government in one way or another and acknowledge the importance of fiscal arrangements, co-operation and development.<sup>40</sup>

According to section 104 of the Constitution, provincial legislatures have the power to pass legislation on any matter within a functional area listed in Schedule 4 and Schedule 5 and for which a provision of the Constitution envisages the enactment of provincial legislation.<sup>41</sup> Provinces may proceed with legislation regarding these matters in the absence of national legislation. Provinces may also pass legislation on any matter outside their functional areas if the matter is expressly assigned by national legislation.<sup>42</sup> Indeed, provinces have adopted their own legislation to set up councils and for many other matters that have a bearing on culture.<sup>43</sup>

Local authorities or municipalities exercise legislative and executive authority within predetermined areas. "Legislative authority" refers to the competency of municipalities to develop and adopt policies, plans, strategies and programmes; to promote and undertake development; to prepare, approve and implement budgets; to adopt by-laws and regulations (that tally with provincial and national legislation); and so forth.<sup>44</sup> Such by-laws and regulations may promote culture and heritage, provided there is no conflict with or encroachment upon provincial or national legislation. The concurrent and exclusive competencies of provincial government in cultural matters may be assigned to the local sphere, and local authorities are obviously competent to fulfil functions assigned to them.<sup>45</sup> Provision is made for the assignment of functions to local government by agreement<sup>46</sup> if the local authority concerned has the necessary capacity and can be regarded as the most effective site from which these powers may be exercised.<sup>47</sup> Exercise of such powers and functions will be subject to national and provincial oversight.

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39 In general Kotze & Jansen van Rensburg *Legislative Protection of Cultural Heritage Resources: A South African Perspective* available on <http://www.criticalmethods.org/p108.mv> (6 February 2006).

40 Eg *Development Facilitation Act* 67 of 1995; *Organised Local Government Act* 52 of 1997; *Intergovernmental Fiscal Relations Act* 97 of 1997.

41 S 104(1)(b)(i), (ii) and (iv).

42 S 104(1)(b)(iii).

43 Eg the *Western Cape Provincial Languages Act* 13 of 1998; *Northern Province Languages Act* 7 of 2000; *Gauteng Arts and Culture Council Act* 11 of 1998; *North West Arts Council Act* 37 of 1988.

44 S 11 *Local Government: Municipal Systems Act* 32 of 2000.

45 A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a Provincial Executive Council or to a Municipal Council; Provincial legislatures have the power to assign any of their legislative powers to a Municipal Council in that province (s 104(1)(c) Constitution).

46 Any function or a power contained in an Act of Parliament or a provincial act may be assigned to a specific municipality in terms of an agreement between the relevant Cabinet



In certain Western European legal systems, the principle of subsidiarity creates a presumption that the governmental sphere which is closest to the people has the competence to perform a function. The principle is typically found in a classical federation where competencies are clearly demarcated and allocated to the federal, provincial and local spheres.<sup>48</sup> Making use of this principle in the context of the relationship between different spheres of government in South Africa (where there is evidently some influence of German constitutional law), it may affect one's interpretation of the structure, granting of competency and exercise of competency. The South African Constitution raises the status of local government. The constitutional assignment of competencies to the federal and provincial spheres is not the only assignment, but concurrent competencies (where both federal and provincial spheres may exercise the same competency) also exist. The thinking underlying the idea of subsidiarity seems to play more than a mere structural role in highlighting the original intention that prevailed when the allocation was originally made. Scope seems to exist to allow it a more prominent or substantive role.<sup>49</sup>

Offering key role-players some inspiration to become more willing to prompt and sustain cultural policy formulation initiatives, the Cultural Policy Project hopes to make a significant contribution. However, there are both incorrect and contested perceptions that stand in the way of its success.

## **6 Provincial, national or shared responsibility? Perceptions that frustrate the progress of the Cultural Policy Project**

One of the misconceptions causing conflict that obstructs progress with the Cultural Policy Project is that Schedules 4 and 5 prevent local authorities from making by-laws and regulations dealing with cultural issues that will affect their jurisdictions. As a result of this particular misunderstanding of constitutional imperatives, many local authorities have sidelined culture as an issue of and for development.

It becomes easier to explain regulation of matters cultural to a target audience comprised of civil society and government officials if the basic tenets and foundational values of the new constitutional order are well-understood.

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member or MEC and Municipal Council (s 99 and s 126 Constitution; s 10 *Local Government: Municipal Systems Act* 32 of 2000).

47 S 156(4).

48 Van Wyk "Subsidiariteit as waarde wat 'n oop en demokratiese Suid-Afrikaanse gemeenskap ten grondslag lê" in Carpenter (n 26) 256 263.

49 Van Wyk (n 48) 263.

However, interpretative difficulties also need to be tackled and untangled. In this regard, the Cultural Policy Project must promote an understanding of how choice and justification fit into different approaches to constitutional interpretation. If the roles of different spheres of government are clarified and the public cultural network in the state comes to a better understanding of its role and structure, a more common understanding of issues may follow. Contested meanings and ostensibly diverging views about what “local government matters” entail, will dissipate and the confidence that is gained will translate into effective advocacy. Cultural policy formulation requires focused intervention and guidance in order to create the conditions in which it may start providing substance and content to the state so that transition may proceed with cultural sensitivity and commitment to a common democratic culture.

## 7 Constitutional interpretation

### 7.1 Different approaches

Constitutional interpretation is essentially a flexible process during which different approaches, which may overlap, are combined.<sup>50</sup> Various broad categories of approaches that range from the traditional to the critical<sup>51</sup> may be distinguished, for instance the so-called foundationalist, antifoundationalist and non-foundationalist approaches.<sup>52</sup> Foundationalist theories seek to provide a neutral and apolitical basis or ground for interpretation. They include, for instance, the textualist theory<sup>53</sup> and purposive interpretation.<sup>54</sup> An antifoundationalist approach promotes the idea that meaning is impossible and therefore all interpretations flowing from the free play of the judicial mind are considered to be equally legitimate.<sup>55</sup>

Foundationalist approaches may not go far enough to make it possible to apprehend all the constitutional implications involved in a particular

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50 S 39(1) & (2) of the Constitution imply a purposive, contextual and value-based approach. See Botha *Waarde-aktiverende Grondwetuitleg: Vergestaltung van die Materiele Regstaat* (LLD thesis Unisa 1996).

51 Kroeze “Power play: A playful theory of interpretation” (unpublished research article).

52 Kroeze (n 51) groups the textualist, intentionalist, communalist and purposive approaches under “foundationalism”.

53 This theory holds that meaning may be found in the text because meaning is internal thereto. Thus the meaning is believed to lodge in the linguistics, the grammar and the syntax of the Constitution as text: *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) and *United Democratic Movement v President of the RSA* [2002] 11 BCLR 1179 (CC). See Van Marle “Revisiting the politics of post-apartheid constitutional interpretation” 2003 *TSAR* 549 553; in general Kroeze (n 51).

54 Purposive interpretation moves beyond the black letter of the legal rule to establish why it was enacted: *Jaga v Dönges*; *Bhana v Dönges* 1950 4 SA 653 (A) at 662G-H; *United Democratic Movement v President of the RSA (1)* [2002] 11 BCLR 1179 (CC); in general Kroeze (n 51).

55 Kroeze (n 51).

interpretation. Systematic interpretation cannot qualify as a foundationalist approach in my view, as it is concerned with the clarification of the meaning of a provision with reference to both the text it forms a part of and extra-textual factors such as the social and political environment.<sup>56</sup> Historical interpretation,<sup>57</sup> comparative interpretation<sup>58</sup> or using international Human Rights Law as an aid to interpretation<sup>59</sup> would not necessarily be foundationalist in character either. If the Constitutional Court is to follow the approach recommended in the Constitution itself, it may well prefer a purposive, contextual and value-based (value-coherent<sup>60</sup>) approach.<sup>61</sup> The art of adjudication implies making and unmaking meaning and thus the need arises for an approach that takes account of how moral and political factors may affect interpretation.<sup>62</sup> It may not suffice to merely accept the rules of interpretation as much as to engage them in a game of politics that questions the status and stability of meaning.<sup>63</sup>

The Constitution has an inherent coherence or unity. Thus, each part should be read and understood in relation to all its other parts.<sup>64</sup>

## 7 2 Significance of Chapter 3 to interpretation of powers and functions

Chapter 3 of the Constitution treats the three spheres of government as distinctive, but interdependent and interrelated, and envisages a partnership among all the spheres in the national interest.<sup>65</sup> This Chapter requires the three spheres to interact on the basis of co-operation rather than competition (ie

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56 In *The Government of the Republic of South Africa v Grootboom* [2000] 11 BCLR 1169 (CC); 2001 1 SA 62 (CC) § [22], § [34] Yacoob J stated: "Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chap 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context."

57 This approach refers to the historical context surrounding the Constitution and includes factors like the circumstances that gave rise to its adoption, preceding discussions and negotiations and the original intent of the drafters and those who ratified it.

58 In terms of s 39(1) of the Constitution, the courts must consider international law in the interpretation of the Bill of Rights. Comparative interpretation makes use of comparable law and foreign case law. A comparative reading of a text may change its meaning beyond what its language discloses because it may "shrink" or "stretch" concepts or categories, generate alternatives and offer ways of improvisation. Ultimately, comparison may promote the protection of cultural communities.

59 See *The Government of the Republic of South Africa v Grootboom* [2000] 11 BCLR 1169 (CC) § [26]-[33]. A common-law presumption also requires a court to interpret legislation in a way that is consistent with international law; cf s 233 of the Constitution and *Azanian Peoples Organization (AZAPO) and Others v The President of the Republic of South Africa* 1996 4 SA 671 (CC) 688B-C.

60 Which is used to ascertain what a particular provision is supposed to accomplish in the legal order. This basic question serves to integrate the purpose of a provision with other factors such as higher values and norms.

61 Mangu "Who really governs in South Africa's constitutional democracy: Parties or 'we, the people?'" 2003 (2) *Codicillus* 2 15; also *Certification of the Constitution of the Republic of South Africa* [1996] 10 BCLR 1253 (CC) 34-39.

62 Mothupi (n 32) 16.

63 Kroeze (n 51) refers to the non-foundationalist approach; Mothupi (n 32) 18.

64 Kruger "Is interpretation a question of common sense? Some reflections on value judgments and section 35" 1995 *CILSA* 1.

65 S 40(1) & (2).

avoid conflict),<sup>66</sup> and to co-ordinate (ie align and integrate) legislation and government activities (and policies).<sup>67</sup> The structuring, functioning, planning, decision-making and interpretation of the duties of the national and provincial spheres of government in the cultural sector are to be guided by the principles of co-operative government and intergovernmental relations.<sup>68</sup> Consequently, this Chapter is highly significant for the interpretation of any power or function pertaining to culture and not only for purposes of constitutional interpretation.

Chapter 3 instructs Parliament to create legislation establishing structures that promote and facilitate intergovernmental relations and to provide mechanisms and procedures to settle disputes between the spheres of government.<sup>69</sup> Two attempts are pertinent in this regard: First, the *Intergovernmental Fiscal Relations Act* 97 of 1997 promotes co-operation between the spheres of government on fiscal, budgetary and financial matters and makes equitable sharing of revenue possible. Secondly, the new *Intergovernmental Relations Framework Act* 13 of 2005 sets up intergovernmental forums<sup>70</sup> on every level of government. This Act is likely to improve coherent government, effective provision of services, monitoring of the implementation of policy and legislation as well as the realisation of national priorities<sup>71</sup> because it formalises previously informal co-operative relationships and provides fora for contractual forms of co-operation. However, before the Act was promulgated, the Department of Provincial and Local Government adhered to the narrow driving goal of improving the performance of the state in the area of service delivery. Certain provisions give rise to questions concerning the scope, content and quality of co-operative relationships.<sup>72</sup> In principle there is no reason why this Act should fail to render it easier to anticipate the actions and decisions of other spheres, but the question of prioritisation of key policy areas may cause it to fail to achieve its objectives in matters cultural.

Whereas national legislation provides an overall framework for the other governmental spheres, provincial government has an important intergovern-

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66 S 41(1)(h).

67 S 41(1)(h)(iv).

68 In general De Villiers "Intergovernmental relations in South Africa" 1997 *SA Publiekreg/Public Law* 197ff.

69 S 41(2).

70 For the meaning of "intergovernmental forums", see the interpretation section of the Act. For an overview of institutions of co-operative government that preceded the Act, see <http://www.dplg.gov.za/documents/publications/idpmanual/audit7.pdf> (20 February 2006).

71 See s 4 *Intergovernmental Relations Framework Act* 13 of 2005.

72 Eg s 7 (re the role of the President's Co-ordinating Council); s 11 (re the role of the National Intergovernmental Forum); s 21 (re the power of the Premier to determine the role of a Provincial Intergovernmental Forum) and s 35(2) (re implementation protocols).

mental role that entails promoting horizontal co-operation and co-ordination between local authorities and the province concerned. Levels of co-operation among the spheres of government are unsatisfactory, but provincial-local intergovernmental relations are the worst. The crisis in provincial-local intergovernmental relations became evident in 1997,<sup>73</sup> yet it persists to this day. The Cultural Policy Project revealed that, as far as culture is concerned, little or no intergovernmental co-operation is forthcoming in places such as Zululand (eThekweni) and Mangaung. It is to be hoped that “development” for purposes of the *Intergovernmental Relations Framework Act* 13 of 2005 will not be restricted to basic services only and that the provisions regarding the declaration of a formal intergovernmental dispute will prove helpful to get a clearer sense of competencies. Moreover, intergovernmental co-operation is more likely to be analysed and scrutinised by government.<sup>74</sup> However, the unhealthy discretion conferred on Premiers to determine the role of a provincial intergovernmental forum in section 21 is a fundamental mistake and the absence of criteria and procedures in respect of the exercise of discretionary powers does not serve the public interest.<sup>75</sup>

Local authorities are able to co-operate with other local authorities within the same geographical area. In their capacity as legal persons, local authorities may also conclude contracts under private law to procure services; make use of contracting out;<sup>76</sup> and make use of contractual forms of co-operation with either other spheres or with other local authorities within the same geographical area.<sup>77</sup> For instance, they may conclude agreements with provincial authorities or the South African Heritage Resources Agency that provide for the conservation, improvement or presentation of a clearly-defined heritage source under the *National Heritage Resources Act* 25 of 1999.<sup>78</sup> This Act makes co-operation (and co-ordination) across all fields of heritage conservation possible, but seems to rely on the general duty of provincial heritage authorities to co-operate and co-ordinate with and assist local authorities. Local authorities

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73 De Villiers (n 68) 213.

74 De Villiers (n 68) 212 highlighted this urgent need back in 1997, but little seems to have changed since.

75 Seidman & Seidman (n 8); Seidman, Seidman & Abeysekere (n 38); Seidman, Seidman & Abeysekere *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (2001).

76 Ss 81-84 *Local Government: Municipal Systems Act* 32 of 2000.

77 For instance, s 42 *National Heritage Resources Act* 25 of 1999 utilises the built-in flexibility of contracts, so-called “heritage agreements”. The South African Heritage Resources Agency or a provincial heritage resources authority may enter into an agreement with a provincial authority, local authority, conservation body, person or community. The owner of the heritage resource must give his or her consent and may add or delete provisions. The agreement may regulate aspects such as maintenance, management, custody, occupation or use, restriction of rights, access, presentation, notice, financial assistance and payment of expenses. In principle, this mechanism ought to strengthen the capacity of local authorities to manage their affairs.

78 See s 42 *National Heritage Resources Act* 25 of 1999.

seem to be unaware of section 54 of the *National Heritage Resources Act 25 of 1999*, which enables them to make by-laws with the approval of provincial heritage authorities. This leads to confusion concerning the question where the initiative rests and which criteria and procedures apply. Indeed, it has been predicted that confusion with regard to the governmental resource authorities' jurisdiction and competence is likely.<sup>79</sup> To build and strengthen provincial-local co-operative relationships in this regard, it is necessary for criteria and procedures to be set in place for the conclusion of contracts as well as for contract management.

Local authorities are supposed to manage their own affairs and perform their functions effectively. National and provincial government must offer support and strengthen their hand in this respect.<sup>80</sup> Presently, however, there are very few indications that local authorities realise fully the importance that the principles enunciated in Chapter 3, and the principle of subsidiarity, may have in interpretation and issues relating to effectiveness.

### **7 3 Schedules: Interpretational difficulties**

Most governmental powers and functions have several components. It is not necessarily true that the same governmental sphere can best perform all of these components.<sup>81</sup> The Constitution draws some distinctions between components, but grey areas remain.

Chapter 3 prohibits all spheres of government from assuming any power or function except those conferred on them by the Constitution.<sup>82</sup> Because express references to arts and culture are absent from Schedules 4B and 5B, certain local authorities are not easily convinced that the matters with regard to which local government enjoys competence, include arts and culture.<sup>83</sup> The very framework that is designed to ensure that the state fulfils its mandate with regard to culture is considered to be ambiguous.

To those working in provincial and national government, the Schedules do not provide a clear sense of the competency and role of local authorities either. Listed as a concurrent competence between national and provincial governments in Schedule 4 Part A,<sup>84</sup> "cultural matters" are interpreted as being

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79 Kotze & Jansen van Rensburg (n 39) 10.

80 Ss 154 & 155(6) & (7).

81 *White Paper on Local Government 1998* 10.

82 S 41(1)(f).

83 For instance eThekweni and Mangaung.

84 In terms of Part A Schedule 4, "cultural matters", "tourism" and "urban and rural development" count among the areas in respect of which Parliament and provincial legislatures have concurrent legislative competence. Grammatically speaking, "concurrent legislative

outside of the ambit of local government, which is considered to have been “completely marginalised” in this regard.<sup>85</sup> Listed as a functional area of exclusive legislative competence in Schedule 5 Part A, “provincial cultural matters” are regarded as falling outside of the jurisdiction of local authorities altogether.<sup>86</sup>

It has been predicted that the difficulties associated with the distinction between “provincial cultural matters” and cultural matters in general is likely to lead to conflict.<sup>87</sup> A direct consequence of these misconceptions is that the interpretation of the powers and functions of local authorities in the area of culture become contested. The Cultural Policy Project also exposed a notion even more problematic than the idea that local authorities lack competency for culture under the Constitution, namely that cultural policy initiatives constitute “unfunded mandates”.<sup>88</sup> The *Draft White Paper on Arts, Culture and Heritage, 1996* may have contributed to this idea.<sup>89</sup> Whereas the *White Paper* makes oblique reference to social cohesion, urban and rural development, education,

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competence” means simply that Schedule 4 allows legislation concerning the functional area of cultural matters to be enacted in both national and provincial spheres. Clearly, provincial government bears some responsibility to promote and develop arts and culture in their defined areas. What is perhaps not so clear is that local government also has some responsibility to promote and develop arts and culture in their defined areas. Part B Schedule 4 includes “local government matters” such as local tourism and municipal planning, but makes no express reference to arts and culture. Systematic interpretation requires the text of the Constitution to be read as a whole, giving consideration to the social and political environment. Both “development” (Part 4A) and “municipal planning” (Part 4B) have many cultural components. Neither foundationalist approaches (such as purposive and value-coherent constitutional interpretation) nor non-foundationalist approaches (that question the stability of meaning) can discount culture in development and planning initiatives. Even if culture could be discounted on the basis of some strange constitutional interpretation theory, Schedule 4 does not set out to deal with the boundaries of local government powers and functions. Thus, Part 4B cannot be taken to constitute a definitive delimitation of local government powers and functions in the functional area of culture. It goes without saying that the Schedules have implications for the boundaries of local government powers and functions, but none of these implications are that the meaning of terms such as “development” and “planning” – as they are used in Part 4A and Part 4B – exist where culture cannot reach. In fact, transformation requires culture to serve as a point of orientation in both development and planning, for development cannot take place without it and plans will remain unimplemented if it is negated. Social, economic and environmental values are more effectively transmitted by means of culture if it is in close proximity to people and involves them at the local level. Sirayi & Anjumba (n 11) 3; *Green Paper on the Cultural Policies of Local and Regional Authorities in Europe* (2004).

- 85 <http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo21/patriotic.html> (19 January 2006).
- 86 Schedule 5 sets out the functional areas of exclusive provincial legislative competence. The ordinary grammatical meaning of “exclusive competency” is capacity reserved for the provincial sphere with the implication that the national sphere of government does not enjoy legislative competence in relation to the functional area of cultural matters. Part 5A includes “provincial cultural matters”, “provincial planning”, “libraries and museums other than national” and “provincial recreation and amenities”. These terms have undeniable cultural components, even if Part 5B does not make express reference to arts and culture. “Exclusive competence” in this context cannot mean that local authorities lack competency for cultural matters altogether, because even a foundationalist (eg purposive) interpretation indicates that the purpose of the Schedule is not to set out the competencies of local government.
- 87 Venter “The protection of cultural, linguistic and religious rights: The framework provided by the Constitution of the Republic of South Africa, 1996” 1998 *SA Publikereg/Public Law* 458.
- 88 Hagg “Challenges to local public service delivery in constitutionally unmandated areas: The case of community arts centers in South Africa” (unpublished research document); also discussion during the workshop phase of the Project, namely eThekweni (28 & 31 October 2005) and Mangaung (15 November 2005).
- 89 *White Paper on Arts, Culture and Heritage, 1996* §§ 2 3 & 4 at 16.

trade, health, the environment, tourism and the need for intergovernmental co-operation,<sup>90</sup> its approach is in fact compartmentalised. The chapter dealing with new policies and institutional frameworks (Ch 2) fails to take numerous other government programmes into account and does not assign any strategic role to local cultural policy.<sup>91</sup> Chapter 3 mentions the integration of arts and culture into all aspects of socio-economic development as a principal area to be addressed,<sup>92</sup> but proceeds to provide a closed list of organs government will interact with in the context of arts and culture.<sup>93</sup> Nonetheless, this document will continue to serve as the national blueprint and definitive guide to policy formulation and implementation until it is replaced.<sup>94</sup> Most lamentable is the incompleteness of its perspective on the institutional framework and on the role and competency of all spheres of government in matters cultural, for arguably, this may constitute the greatest obstacle to reform in this sector.

The “unfunded-mandates” argument continues to prevent the many positive aspects of the cultural life of the people of South Africa from having a constructive effect in the newly established democratic society.<sup>95</sup> However, considering the structures and processes of intergovernmental co-operation supported by the *Intergovernmental Fiscal Relations Act 97 of 1997* and the new *Intergovernmental Relations Framework Act 13 of 2005*, “unfunded mandates” seem to indicate lack of planning, agreements and budgeting rather than lack of competency. Local authorities need to plan for co-operation and budget adequately, as “unfunded mandates” will not exist if plans have been approved.

#### **7 4 Factors that exacerbate interpretational difficulties**

From the perspective of municipal administrators and provincial government officials, the powers and functions of local authorities in relation to provincial and national government in the area of culture are not self-evident. Several factors contribute to the difficulties of the situation.

- a) Constitutional interpretation is an art. Posing a relevant and necessary question out of context may prove as futile as posing an irrelevant one.

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90 *White Paper on Arts, Culture and Heritage, 1996* §§ 4 & 6 at 12-13.

91 *White Paper on Arts, Culture and Heritage, 1996* §§ 1-9 at 16-17.

92 *White Paper on Arts, Culture and Heritage, 1996* § 12 at 19.

93 *White Paper on Arts, Culture and Heritage, 1996* § 14 at 19.

94 Eg <http://www.capecapegateway.gov.za/Text/2005/3/> (20 January 2006).

95 DAC *Local Cultural Policy Framework for South Africa: A Discussion Document and Guidelines for Local Authorities* (2005) (unpublished policy paper) 2-3.



- b) Perceptions change slowly if at all. Explaining that it is not the true purpose of either Schedule 4 or 5 to draw boundaries around the powers and functions of local government, and giving assurances that no constitutional provision denies local government the competency for cultural matters may eventually make an impact, but change should not be expected soon.
- c) There is no comprehensive “map” of the distribution of powers among the spheres of government. The formal distribution of powers in the Schedules to the Constitution cannot provide a comprehensive picture of what governmental spheres are responsible for. Even a comprehensive formal account or “map” is unlikely to fully reflect the true relationship between the various levels of government on account of the possibility that assigned powers and agreements may be overlooked.
- d) Introducing an amendment to the Constitution may be considered too extreme and not strictly called-for.
- e) Systematic interpretation of relevant sections, such as section 104 of the Constitution for instance, is necessary to render evident the rich potential for considerable provincial initiative in the system. Provincial initiatives in the area of culture (which may differ from province to province) are highly significant as long as these tally with national legislation, but if no initiative is taken, there is little to be done.
- f) The process of recognising, accommodating, fostering and protecting diverse cultures is incomplete,<sup>96</sup> and very little constitutional jurisprudential development is evident in the functional area of cultural matters.<sup>97</sup> The number of jurisprudential interpretations available locally is limited and not focused on questions of competency.

## 7 5 Court action as remedy

While the political and moral implications associated with what looks like “grey areas” may render constitutional adjudication attractive, it is not to say that

96 LAWSA (n 11) § 386.

97 Case law includes cases on language rights of schools, such as *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC); *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 2 All SA 37 (K); *Western Cape Minister of Education v Mikro Primary School* case no 140/05 (HHA) (unreported); cases involving language rights of accused, such as *Mthethwa v De Bruin* [1998] 3 BCLR 336 (N); *S v Matomela* 1998 3 BCLR 339 (Ck); *S v Pienaar* [2000] 7 BCLR 800 (CC); cases concerning customary law of succession such as *Mthembu v Letsela* 2000 3 SA 867 (SCA); *BHE v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) § 163 § 182.

moral and policy-oriented reasoning will be permitted to play a role in interpretation. In constitutional adjudication, the interpretive method is likely to be tailored to the circumstances and merits of the particular case.

In terms of the *Intergovernmental Relations Framework Act 13 of 2005*, a reasonable effort is required to settle disputes without resorting to judicial proceedings.<sup>98</sup> The option of using the authority of the courts to properly interpret or enforce the state's constitutional obligations exists only when a formal intergovernmental dispute has been declared<sup>99</sup> and specific criteria and procedures have been met.<sup>100</sup> After all, litigation is not what the letter and spirit of Chapter 3 contemplates. The formal declaration of an intergovernmental dispute would be the only route if too restrictive a meaning is attached to development.

## 8 Conclusion

The lack of attention on the part of government to local cultural policy initiatives attests to the under-utilisation of the current model of harmonised co-operative governance. Even if the Cultural Policy Project does not provide policy makers, decision makers, and cultural actors with a direct opportunity for policy review and reflection, it may succeed in jump-starting cultural policy formulation at the local level. The inadequacy of the legislative framework cannot be blamed for the general failure to co-operate at inter-governmental level, since the last phase of the Cultural Policy Project co-incided with the promulgation of the *Intergovernmental Relations Framework Act 13 of 2005*. The formal structures where the Cultural Policy Project should be implemented and where adjustments should be discussed have been set in place. Consequently, the spheres of government are poised to undertake local cultural policy and planning together with cultural communities. The need to propose new legislation to promote cultural policy formulation by local government is no longer acute at this point.

Effective development and implementation of local cultural policies require consideration to be given to the following tentative suggestions:

- a) Just as state service in the area of culture (ie protection, caring for, promotion and transmission) leads to and anchors its competency in matters concerning culture, so any misgivings concerning its competency

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98 S 40 (b).

99 S 45.

100 Ss 42 & 43.

will weaken its ability to serve culture as it is ideally meant to do. Local authorities ought to make themselves available to serve culture to the point where they become established and confident in their own competency in this area.

- b) The Constitution has an inherent coherence or unity. Thus, each part should be read and understood in relation to all its other parts. Moreover, Schedules 4 and 5 are not to be interpreted and read narrowly or as definitive delineations of local government competencies.
- c) At a conceptual level, the aggregate of agencies, institutions, actions, and policies must be considered as a whole in order to get cultural policy formulation started at the local level.
- d) While the *Intergovernmental Relations Framework Act* 13 of 2005 addresses the format of co-operation, local government still needs to work towards clarifying its role and competence in matters cultural. Local authorities must participate in new structures to be established under the Act and also conclude agreements with other governmental authorities. Local authorities within the same geographical area must be encouraged to co-operate in cultural matters. Inter-municipal co-operation may include exchange of learning experiences, sharing of staff, technology and equipment, joint investment projects and collective purchasing agreements. Importantly, they need to be highly pro-active in existing budget committees.
- e) The spheres of government should not become overly careful about interfering with one another's powers. The instruction of the Constitution to the effect that spheres of government must not assume any power or function except those conferred on them by the Constitution, should not be understood to mean that passivity is the best option in the cultural arena. On the contrary, true service or "non-interference" in matters cultural may imply taking long-overdue action and engaging in manifold activities.
- f) Considering that the role of local government in cultural policy formulation is still unfolding, municipal and other government officials are to be encouraged to make more use of policy-oriented reasoning to give content to powers and functions. This implies a need to bring different local policies together in order to align them with the pertinent cultural considerations and key policy issues underlying all processes of planning and development.

If the substantive content of cultural policy has received a boost through the Cultural Policy Project, much work still lies ahead. In societies in transition, the interface between declared policy and law is often dangerously slippery. Hopefully this Project and the Policy Review will guide the wheels of development through the many blind corners, unexpected pitfalls and sharp curve roads in the South African legal landscape.