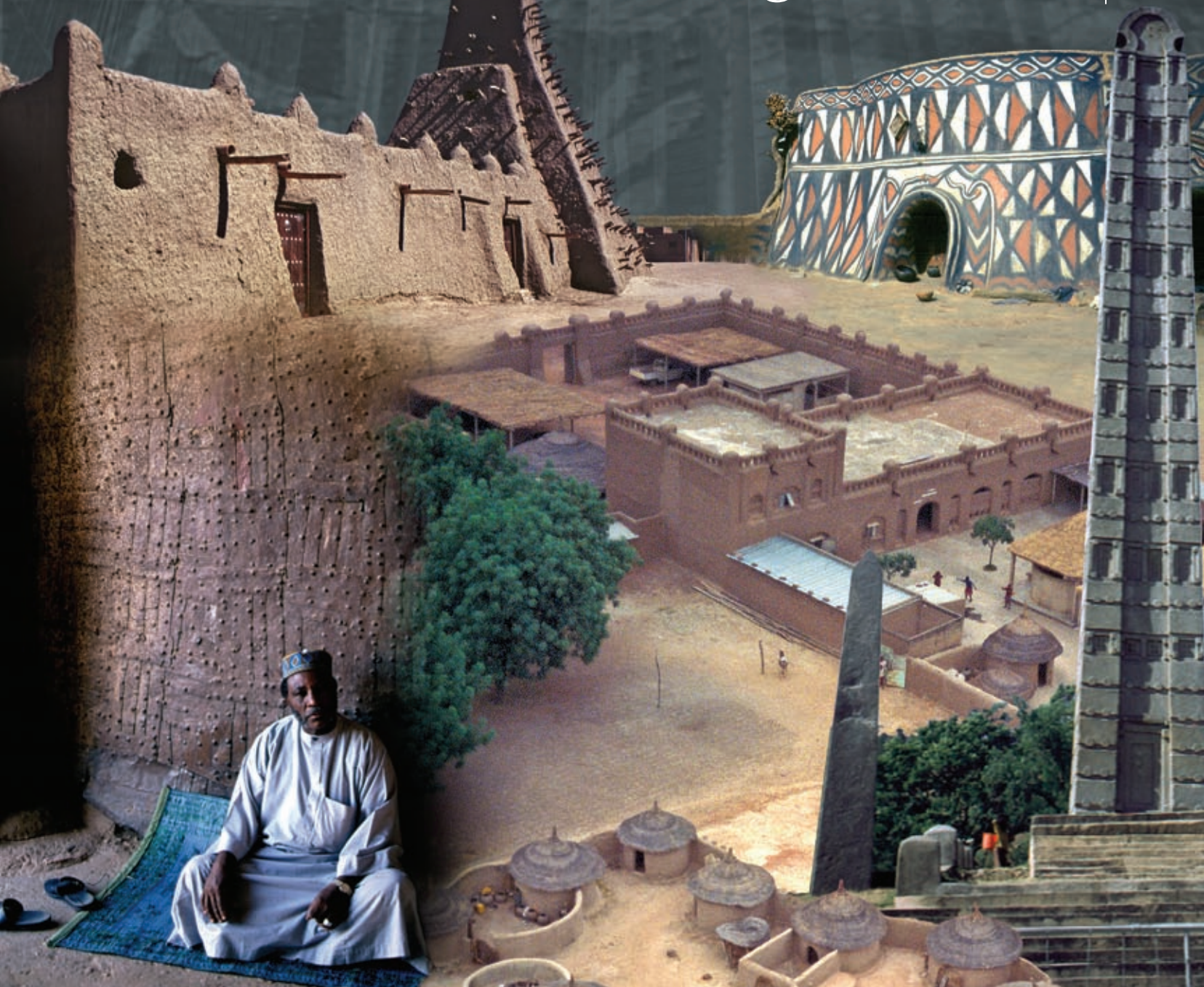


Legal Frameworks FOR THE Protection OF Immovable Cultural Heritage IN Africa



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

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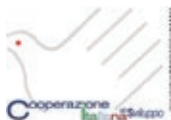
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Preface

THE 3rd REGIONAL THEMATIC SEMINAR FOR AFRICA 2009 on Legal Frameworks for the Protection of Immovable Cultural Heritage was organized by the National Museums and Monuments of Zimbabwe and AFRICA 2009. The seminar was held in Mutare, Zimbabwe from 21-25 October 2002, bringing together 22 professionals from Anglophone sub-Saharan Africa to discuss this important topic. The countries represented were Botswana, Gabon, Ghana, Nigeria, Mauritius, Kenya, Tanzania, South Africa, Namibia, Uganda, Zambia and Zimbabwe.

The theme of Legal Frameworks is that promoting and protecting cultural heritage is a very crucial issue in most of Africa since most of the legislations in current use on the continent were promulgated during the colonial times. These antiquated legal instruments are often inadequate to meet the new concepts, definitions and needs of heritage in contemporary African societies. Many countries have therefore begun to reverse their legal instruments with a view to making them more relevant to present day situations. The 3rd Regional Thematic Seminar of Africa 2009 was planned to discuss issues related to exploring the implications of the current legal frameworks for the protection and management of immovable heritage in sub-Saharan Africa. The workshop also shared ideas and explored ways of improving the way the immovable heritage is protected.

The seminar focused on:

- evaluating the current state of legal frameworks for immovable heritage conservation;
- identifying the key issues related to heritage legislation and possible strategies for dealing with them;
- identifying key issues related to the link between formal and informal legislation;
- developing linkages to support the development of best practice in legal frameworks related to the protection of the immovable heritage legislation.

This compilation brings together the papers presented at this seminar. The presentation of formal papers was then followed by group discussions, which were then crystallised as the seminar recommendations.

It is our sincere hope that this compilation can give an insight into some of the issues related to legal frameworks in sub-Saharan Africa. AFRICA 2009 is proud to have been associated with this seminar.

This paper will provide a brief background on the once symbiotic relationship between legislation and immovable heritage, which dates as far back as the reign of Justinian I in 527–65 AD. In essence there was an equality of three principles: values, society and legislation. Now, however, in the African context, most legislation dates from the period of colonialism resulting in heritage laws that do not capture this equality. The drafting of legislation is made difficult due to conflicting cultural values and its often too personal definitions that neglect the general public. This paper concludes with the recommendation for a complete revision of legislation to embrace common values in protecting heritage.

DAWSON MUNJERI

Legislation and practices: implications and the way forward

THE CHURCH OF HOLY WISDOM, Hagia Sophia, built in AD 532 appears in Seventy Architectural Wonders of the World by Neil Parkyn. Delving elsewhere into the literature on ecclesial architecture, it was found that its precursor is the Monastery of Saints Sergius and Bacchus, ‘the little Hagia Sophia’, as it is popularly known, which was a landmark in Byzantine architecture. More importantly, it was the architectural expression of the Roman Emperor, Justinian I (527–65 AD), who was famous for the Codex Justinianus, a great monument in legal heritage. During his period as Emperor in the 6th century AD, Justinian established an architectural tradition that saw churches, new cities and palaces springing up throughout the entire Roman Empire. Even as far back as this period, it is significant to note that a symbiotic relationship existed between immovable heritage and legislation, established as the Justinian Code, which also related to architecture.

By extension in an African context, could it have been possible to have a 13-15th century Great Zimbabwe founded on any other principle than that established by Justinian I? The rules of court, the rules of spiritual protocol in the Great Zimbabwe architecture and in the same measure, the regulation of space

are all ample evidence of this harmonic relationship between legislation and immovable heritage. The rock-hewn churches of Ethiopia and the Pyramids of Giza, Egypt reinforce the notion of a heritage steeped in the observance of some form of jurisprudence. *Ipso facto*, this is a point of departure that recognizes a harmonious relationship between legislation and practice as the *sine qua non* for the existence and continued survival of immovable cultural heritage.

The second point to underscore is that there is a fundamental principle that binds this relationship, which resembles the ‘geometric principles of the equilateral triangle where all the angles are 60 degrees and all three sides are of the same length’. In essence, there is equality among three principles: values, society and legislation.

Values

Immovable heritage can only be preserved through conservation, but the decision as to what to conserve depends on values attached to that heritage. It follows, therefore, that every conservation decision is based on values.

A problem presents itself, however, due to the nature of these values. Cultural heritage is valued in a number of ways and driven by different motives,

principally economic, political, cultural, social, spiritual and aesthetic. Each of these values has varied ideals, ethics and epistemologies. As a result, different ways of valuing have led to different approaches to preserving heritage. This dimension should be captured in legislation if it aims to preserve this heritage. Unfortunately, most if not all legislation in Africa is silent when it comes to defining the values it seeks to protect. The definition columns of the legislation texts have no room for values. Familiar definitions of a monument are ‘a monument means any ancient monument’, ‘any area of land which has distinct or beautiful scenery or a distinctive geological formulation’, and ‘any cave building... of aesthetic, historical or scientific values or interest’.

How are all these qualities defined? As Phillipe la Hausse deLalouvière of the National Heritage Trust of Mauritius notes, with respect to the heritage laws in Mauritius, the Board of Trustees can designate any structure as a national monument, but there is no selection criteria set out and no justification for the selection.

On one occasion I was on a visit to a cave site in Malawi that has distinctive rock engravings. Not far from the cave was a homestead and the locals were watching as I took photographs of one the engravings. A young boy came up to tell me that it was taboo for me to take photographs or to touch the engravings. On further enquiry, I was informed that the object of my interest was a rock engraving of the secret cult of *gule wankulu*. In essence, values lay not in the art *per se* but in its given meaning. The heritage laws do not capture this dimension. This also illustrates that within the boardrooms and within national heritage institutions in much of Africa, this issue of values is not being addressed. When attempts are made to do so, they are undertaken through a personal perspective rather than an all-embracing view. As a result, irrelevant definitions are provided in our legislation. Because these definitions have meaning to individuals only, they are not comprehended by society at large because society does not always respect the attributes of heritage that individuals may ascribe to it. The way forward is to involve all stakeholders, particularly local communities, to define the values. Currently, the existing legislation does not have the effect of protecting the heritage. This brings us to the second component of our equilateral triangle, namely society.

Society

As correctly noted in a Getty Conservation Institute research report in 2000, cultural heritage is a politicized and contested social construction. As seen in cases such as Great Zimbabwe and the rock-hewn churches of Ethiopia, immovable heritage is a

medium through which identity, power and society are produced and reproduced. As a result, it involves a variety of stakeholders – the individual, the family, the local community, ethnic and religious groups, the nation-state and the world at large – hence, creating the concept of a world heritage. Relations among stakeholders at various levels are both intimate and tense. Motivations for valorising the material heritage vary. Continuity and change, participation, power and ownership are all linked to how cultures are created and developed. The question as to who is valorising heritage and why, again, is an issue of values; however, it is also critical to understand the long-term strategic management of the heritage resources. Legislation should be able to help bring about a sense of order and equity among the various stakeholders. The current practice is to have a group typically referred to as the Board of Governors or Board of Trustees appointed by the relevant minister according to the relevant Act. The functions of the Boards are then stipulated as well as the terms for holding office. The Acts are noticeably silent on the qualifications of the Board Members. As a result, in many cases, the Boards are made up of members who have little or no interest, much less knowledge, in issues of heritage. It is critically important that such Boards include relevant stakeholders, including representatives of local communities, and that this be clearly spelt out in the legislation.

Legislation

Legislation is a critical third component of the equilateral triangle. It should not dominate the partnership but provide direction on an equal basis to the other two components. In this sense, the Law for the Protection of Cultural Properties of Japan represents the best example of heritage legislation. Its Article 3 states that ‘the purpose of the law is to make government and local bodies recognize that cultural properties of the country belong to all and are indispensable to the correct understanding of the country's history and culture and that they form the foundation for the country's cultural development for the future.’ The National Heritage Resources Act No. 25 of 1999 of South Africa follows in the same vein, and is currently the only one in Africa to do so. The purpose of the legislation is ‘to promote good management of the national estate and to enable and encourage communities to nurture and conserve their legacy... as part of their well-being.’ Explicit here is fact that the legislation attempts, as in the case of the Japanese legislation, to put people at the centre and not at the periphery. Most existing legislation starts with the object, namely, concern for the physical condition of the immovable heritage. The

characteristic *raison d'être* of such legislation reads as follows, 'An Act to establish a Board of Trustees to administer monuments and to provide for the preservation of ancient, historical and natural monuments.' The focus is clearly on the physical condition of the heritage. This is shown in practice by emphasis on the do's and don'ts; people are viewed as a threat to heritage and a number of rules and regulations are prescribed to distance them from the monuments and sites. Many traditional practices such as rituals and ceremonies are not allowed, and strict controls are set up to regulate activities and use of the sites. Only tourists and educational groups have free access. Legislation in this case becomes an instrument of oppression and not protection. It becomes the dominant partner in the equilateral triangle, which therefore becomes at best isosceles and at worst obtuse. While legislation seeks to provide for better preservation and protection, in practice the effect is the opposite.

The above-cited report of the Getty Conservation Institute aptly describes such a scenario: 'As a field we have come to recognise that conservation cannot unify or advance with any real innovation or vision if we continue to concentrate the bulk of our conservation discourse on issues of physical condition. Conservation risks losing ground within the social agenda unless the non technical complexities of cultural heritage preservation, the role it plays in modern society and social, economic and cultural mechanisms through conservation works are better understood'.

I am reminded at this point of an experience I had in Nigeria. At the time, museums and monuments were governed under the *National Commission for Museums and Monuments Decree No. 77 of 1979*. We all know what Military Decrees mean and the possible consequences of violating them. On that occasion, the Director of Monuments in Nigeria and I had an audience with the Military Governor of Benin. He stressed to us that the Benin earthworks, a declared monument, would be preserved at all costs and had given orders to that effect. Right in front of his offices, however, were buildings under construction on top of the earthworks and ironically, a photograph that I took on that occasion clearly shows a National Museums and Monuments red plaque boldly stating: 'This is a national monument; violators will be prosecuted.' No matter how powerful, legislation will remain ineffective unless accepted and understood by the people. It is implicit here that such legislation should be formulated in a participatory way. In particular, and especially at the design stage, the process should involve those it concerns most and not those to whom it may concern. As aptly observed

by the Secretary General of UNESCO Commission for South Africa, 'until such time as lions have their historians, the story of hunting will always glorify the exploits of the hunter'. The principle of the equilateral triangle entails a different approach for preparing and implementing legislation.

Finally, it is evident from the above that much needs to be done to revise our legislation to render it effective. Most of our legislation dates from the period of colonialism and does not therefore address society's existential questions with respect to immovable heritage. In a few cases where legislation has been revised, 'new wine is put into old skins'. What is required is a surgical operation of the patient and not mere physiotherapy treatment. This, I believe, is the way forward.

This paper examines and compares the creation and adoption of laws on protecting cultural heritage in twelve English-speaking African countries immediately or soon after their independence. The aim of these laws was either to institutionalise the protection of cultural heritage due to deficiencies in the former colonial system, or to reject this legacy and build the protection of cultural heritage on a new cultural identity. African independence has not always resulted in the breaking off with the cultural heritage protection system installed by the former colonial power. In addition, the laws relating to cultural heritage most often ignore customary rights and traditional rules. The paper will provide examples of the laws that develop a global approach to natural and cultural heritage.

[VINCENT NÈGRI]

An overview of formal legislation on immovable cultural heritage in Africa

THIS BRIEF OVERVIEW of the legislation concerning cultural heritage in twelve English-speaking African countries does not claim to provide an exhaustive view of their laws and institutions. (Botswana recently adopted a new legislation which is not presented here.) The basis for observation include the following legislations:

- Ghana (National Museum Regulations, 1973);
- Kenya (The Antiquities and Monuments Act, 1983, which repealed the Preservation of Objects of Archaeological and Palaeontological Interest Act, 1934, rev. 1962);
- Lesotho (The Historical Monuments, Relics, Fauna and Flora Act, 1967);
- Malawi (Monuments Act, 1965);
- Nigeria (National Commission for Museums and Monuments, 1979);
- Uganda (Historical Monuments Act, 1967);
- Seychelles (National Monuments Act, 1980);
- South Africa (National Heritage Resources Act, 1999);

- Swaziland (The National Trust Commission Act, 1972);
- Tanzania (Antiquities Act No. 10 of 1964 and Antiquities [Amendment] Act, 1979);
- Zambia (National Heritage Conservation Commission Act, 1989, which has repealed the Natural and Historical Monuments and Relics Act, 1948, amended 1953);
- Zimbabwe (National Museums and Monuments of Zimbabwe Act, 1972).

Most of these states belong to the eastern and southern parts of Africa; the western African states are under-represented here. A regional approach based on geographical homogeneity might have been preferred, but it would have meant neglecting the legislation of states represented at this seminar. This study will therefore have no other ambition than to compare African legislations for which the only common feature is language. But this common feature is far from being anecdotal: it is the expression of a legal culture common to all these States as well as the

enforcement of legal concepts unknown in French-speaking Africa.

Finally, law does not always mirror reality; at best, it may reflect it. The way that institutions operate is often another very useful source of information.

Through a comparative approach, this paper focuses on three main aspects, bearing in mind that the aim is to stimulate discussion by putting in perspective the legislation concerning immovable cultural heritage in English-speaking African countries.

African legislation concerning cultural heritage has affected the continent throughout its history. The colonial period has marked the development of legal systems, but to an even greater extent, the concepts of protection and identification of cultural heritage.

The institutional framework

Independence has not always resulted in the breaking off with the cultural heritage protection system installed by the former colonial power. Globally speaking, two situations can be identified:

1. The creation and adoption of laws protecting cultural heritage occur immediately or not long after independence. This corresponds to a will to institutionalize the protection of cultural heritage due to deficiencies in the former colonial system, or to reject this legacy and build the protection of cultural heritage on a new cultural identity. But there can be a gap between the proclaimed concepts and their juridical translation: a persistence of colonial criteria and protection methods may be manifest (Lesotho, Malawi, Seychelles). From this point of view, a similar situation prevails in many French-speaking and Portuguese-speaking African states due to the conflicts caused by independence.
2. A specific law to protect cultural heritage adopted by the colonial power has been repealed or replaced by a new law many years after independence (Kenya, Zambia), or is still in force (Zimbabwe). The persistency of colonial laws and their enforcement (for 20 years in Kenya and 25 years in Zambia) after independence have never been witnessed in any French-speaking African country; the persistence of the updated colonial law is characteristic of English-speaking Africa. This occurred even in Zimbabwe despite its long and painful war of liberation.

In opposition to observations of French-speaking Africa, independence in English-speaking countries has less frequently led to an open questioning of the legal system passed on by the colonial power. This situation likely results from the colonial doctrines

applied in English-speaking Africa, which were more decentralising and less interventionist (indirect rules) than those applied in French-speaking countries.

The influence of the colonial period may at times be particularly pronounced in the criteria defining cultural heritage.

The criteria defining immovable cultural heritage

There is no unity in the definition of immovable cultural heritage. National legislations give either relatively precise definitions, sometimes even very precise by using an enumerative list (Malawi), or general definitions based on identification criteria. These criteria correspond to the value, i.e. the historical, scientific or artistic interest of the heritage, and are occasionally completed by restricted dates or periods. In Kenya, for example, only immovable structures built before 1895 are qualified as monuments. This date corresponds to the establishment of the English protectorate in Kenya. By an express decision, the minister can, however, include, an immovable structure in the category of monuments no matter its age. But an express and particular declaration must be made, knowing the minister's decision does not correspond to the general criteria of identifying monuments. Similarly, in Zambia the definition of relics applies only to some goods manufactured before 1924, the year when the British took over the administration of the territory by abolishing the British Africa Company, which had administered this territory since the Berlin Conference in 1885. The Tanzanian legislation fixes the limit in 1863 – the year of European penetration, and the Ghanaian law uses 1900 – four years after the establishment of the English protectorate. More importantly, in Ghana, 1900 is the date of the rebellion provoked by the British announcement of the discovery of the gold stool – the symbol of Asantehene's power – hidden by the King's loyal servants since 1896. In Zimbabwe, the upper limit for the application of the law is fixed to 1 January 1890. This is the day following the reinforced establishment of the English protectorate, through the Charter granted to the British South Africa Company (B.S.A. Co.). This day also marks the beginning of the confrontation with the Ndebele people, who risked being dispossessed from their realm.

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

This observation must not be generalized. In other cases, immovable cultural heritage is identified

by values only or by a combination of criteria. Such an approach exists in Lesotho, in Malawi and in Uganda. In Uganda, ‘historical monument’ means any object, site, place, building or erection related to historical events. This definition echoes Objective 25 of Uganda’s Constitution of 1995, which claims that ‘the State and citizens shall endeavour to preserve and protect and generally promote, the culture of preservation of public property and Uganda’s heritage.’

Such all embracing criteria can be narrowed down, for example, by a minimum age to legally qualify sites and archaeological relics as immovable cultural heritage, as in the case of South Africa whose recent legislation requires a minimum age of 100 years. This limit is reduced to 75 years for the sites associated with military history. This approach seems more appropriate than determining a fixed date, because the requirement of a minimum age – as a sort of probationary period for the cultural qualification of heritage and of the estimated time delay necessary for this – fixes an evolutive date that moves forward every year.

The enumerative technique is also used. The most representative case is Malawi, where a ‘monument’ is defined as follows:

- any area of land that has distinctive or beautiful scenery, or which contains rare, distinctive or beautiful vegetation;
- any area of land, structure, building, erection, ruin, stone circle, monolith, altar, pillar, statue, memorial, grave, tumulus, cairn, place of interment, pit dwelling, trench, fortification, excavation, working, kiln, rock, rock shelter, midden, mound, cave, grotto, rock sculpture, rock painting, wall painting or inscription;
- any other site or article of a similar kind or associated therewith that is of archaeological, geological, anthropological, ethnological, pre-historical, historical, artistic or scientific value or interest, or any remains thereof;
- the site on which any monument or group of monuments is discovered or exists and such portion of land adjoining such site as may be required for the maintenance or preservation of such monument or group of monuments.

This technique may seem to offer advantages through a precise identification of the structures, but it can also generate confusion and more importantly, lack certain categories of cultural heritage.

Protection measures for sites and monuments

Protection measures from one country to another are more similar than the principles defining cultural

goods. Through a fairly strong control from public authority, these measures ensure the protection of the monuments according to the given definitions seen above.

The field of application of these measures is often limited to buildings, sometimes extended to sites and exceptionally to an urban unity or old districts. In some cases, the law develops a global approach to the heritage, comprising natural and cultural heritage. This trend is quite obvious in Lesotho, for example.

Concerning the protection of old districts, the case of Zanzibar can be cited, where a remarkable framework for the management of immovable cultural heritage has been installed through the Stone Town Conservation and Development Authority Act of 1994. Such a legal structure remains marginal; it was made for an identified site and cannot be reproduced in general. The application of specific rules to protect and manage immovable cultural heritage must naturally be realized in accordance with an analysis of the architectural character of this kind of heritage, and requires regulations adapted to each case. The legislation in the other states neither gives nor plans a general framework within which such particular rules could take place.

Concerning the relation with customary rights, the laws relating to cultural heritage most often ignore these types of traditional rules. Consideration for the rights of communities is still marginal.

In addition to these objectives, which remain far too ignored by the legislation studied here, it must be noted that in some of these countries, the protection and management of cultural heritage no longer comes under the law applicable to cultural heritage only. The latest generation of laws concerning the protection of environment occasionally include articles directly concerning the conservation of immovable cultural heritage, as is the case of the regulation of environmental impact assessment. For example, in Mauritius, the Environment Protection Act 1991 provides for an Environmental Impact Assessment that contains a true statement and description of the social, economic, and cultural effects that the undertaking is likely to have on people and society. More precisely, in Seychelles, the Environment Protection Act, 1994 provides for an Environment Impact Assessment Study that contains a true statement and description of the direct effects that the activity is likely to have on the population, flora and fauna, soil, air, water, landscape and other physical assets such as history, art and archaeology.

Taking into account cultural heritage through the protection of the environment can be done at a larger scale through the identification process of

protected areas. In Malawi, therefore, the Environment Management Act, 1996 provides that the minister may, on the recommendation of the Council, declare any area of Malawi to be an environmental protection area (forest reserve, game reserve, national park or monument under any written law other than an area declared to be a wild reserve). In determining whether or not to declare any area an environmental protection area, the minister must consider the unique or special geological, physiographical, ecological or historical and cultural features of the area.

This contribution of environmental law to the protection of cultural heritage may be an asset, since it offers new instruments and a more global approach of spaces that takes into account cultural and natural factors. But environmental legislation will have to be controlled to avoid its complete takeover of the protection of cultural heritage, as it has occasionally occurred in French-speaking Africa. In fact, the legislation relating to cultural heritage is also aimed at promoting cultural rights, an aim ignored by environmental law. Furthermore, legislation on cultural heritage should aim at taking into account the cultural rights of all the communities within the nation.

Within the Republic of Nigeria there are kingdoms, states, cities and local communities whose customs and traditions still order some aspects of their lives and environment together with the corpus of the national legal system, which is derived from the Western legal tradition associated with Nigeria's colonial heritage. This paper will discuss the Kingdom of Benin in Edo State, Nigeria as example of traditional order. This Kingdom presents two contrasting examples of heritage protection and conservation systems. On the one hand, there is the state-based formal system whose problems are exemplified by the poor condition and state of conservation of the city walls. On the other, there is the traditional system based on the customs and traditions of the people for the protection of the immovable heritage whose effectiveness is demonstrated by the good state of preservation and integrity of the Ekho village earthworks. In this paper, it is recommended that African traditional laws and customs be incorporated into the formal state-based legislation to produce a plural legal system that takes cognizance of the values and sensitivities of local communities in the post-colonial nation state.

[JOSEPH EBOREIME]

Nigeria's customary laws and practices in the protection of cultural heritage with special reference to the Benin Kingdom

NIGERIA IS A PLURAL SOCIETY consisting of over 350 ethno-linguistic groups, 36 states, 774 local government administrative units, and a total population of over 150 million people. A Western-derived municipal legal system co-exists with Islamic law in most parts of the North, while African customary law and practices sanctioned by traditional rites and rituals operate together with canonical codes and the Western legal system in most parts of South. This state of affairs has not been without its attendant tensions and conflicts.

The Benin City Walls

Benin City is the capital of Edo State, the remaining core of the ancient Benin Kingdom, famous for its ivory and bronze artworks that were looted by the British in 1897. The British were fascinated by the Benin walls and earthworks, consisting of a 6,000 sq km complex network of constructions from the outlying villages to the capital of the Kingdom, Benin City. The city itself was surrounded by three monumental mud walls whose construction involved considerable engineering skills. The walls were the culmination of a 1,000-year

long process of state formation (Darling 1984). Oral traditions attribute the construction of the walls to two Benin monarchs, Oba Oguola (c.13th century AD) and Oba Ewuare (c. 1440–1473 AD). They are said to have been constructed for defensive purposes and to curb the massive population exodus from the city as a result of the high-handedness of the latter Oba. In preparation for the annual royal rituals, the city walls were polished with red mud mixed with red oil to minimize the effect of torrential rains.

The Benin City walls were and still are perceived by their owners and adherents of traditional religion as a boundary between the spiritual and the earthly worlds. They represented a world of restless spirits where the corpses of the deceased who lack male children to perform their mortuary rites were dumped by the local community. The walls were perceived as impregnable until 1897, when the invading British army's firepower defied the gods, forcing the *Oba* out of the palace ruins to take refuge in one of the outlying villages. Subsequently, the walls lost their invincible appearance and sense of impenetrability. Similarly, they lost their aura and mystery in the eyes of the people. Decades later, however, in 1961, their importance to Benin and Nigeria was recognized when the Federal Antiquities Department declared the city walls a national monument. (At this point, the declaration did not apply to the village earthworks and moats, which lay in the outlying provinces of Benin.) Thereafter, the city walls began to be perceived by most Binis as government property; as a result, they were no longer protected by customary practices. Due to a combination of urban pressure and land hunger, the City Walls became a place of limbo for waste disposal, which increasingly intensified. Further, the Benin water scheme initiated by the military government in the 1970s was channelled through the city walls and associated moats. This inadvertently increased erosion and the deterioration of the walls, a process ascribed to the anger of the gods. Nonetheless, sections of the walls have survived and are still visible in those portions associated with the principal shrines and deities of the Bini people and the King. The walls thus still retain some elements of their traditional cultural significance for the people. In 1979, for example, the King's coronation routes were mapped out and ordered according to their historical ties to the extant walls, shrines and groves (Eboreime 1985). To this day, the city walls help the Binis to define the Royal Section (*Ogbe*) within the walls as distinct from the town section, which lies outside the innermost walls (*Ore*). The surviving parts of the walls have therefore been kept intact because of their contemporary relevance to the continuity of tradition and customary practices.

The village earthworks

Ekhon village, which is around 18 km from Benin along the Benin–Asaba–Onitsha Highway, is a typical example of the endurance of Bini laws and customs in the preservation of biodiversity and heritage. Ekhon village and its *Onogie* (the chief appointed by the *Oba*) are the custodians of the Ovia shrine, which plays a key role in the coronation of all Benin monarchs (Bradbury 1973) where the Ekhon earthworks are found. The earthworks are not as massive as the Benin City walls, but they predate those of Benin City, having been dated to around the 9th century AD (Darling 1984). They consist of linear banks and ditches, which range from 2 to 6m high from the ditch bottom to the bank top, and enclose small primary enclosures. In addition to their symbolic significance, as represented by their sheer size and variety of patterns, the earthworks have a utilitarian function of defining space in terms of ownership and usage. Within the boundaries of the enclosures, ownership was vested in the paramount chief (*Onogie*). Belief in the sacredness and symbolic power of the earthworks gave the inhabitants not only physical but also psychological force. Those living within Ekho's main primary enclosure believed that it protected them from harm. For example, the belief was that those sons who fought and survived World War I or II or the Nigeria–Biafra War were protected by the magical powers bestowed on the earthworks by the founding father of the village. Thus, the Ekhon village earthworks, unlike the Benin City walls, are still intact owing to their historical, psychological, religious and contemporary relevance as well as the existence of an enduring system of age grades. Young men and boys form the labour force and vigilante groups in every Bini village. They provide the labour required for the maintenance of the earthworks. Benin City, on the other hand, no longer has age grades, but rather a system of elaborate elite chieftaincies based on providing service to the king through the three major palace societies.

The age grades also have their equivalents in the male association of worshipers. A system of cults at various levels of society link the whole network with their associated taboos and sanctions that protect the thick forests where the Ovia shrine and other deities reside. Indeed, most of the Ekhon village earthworks lie within the Secret Ovia forest. Men are not allowed to hunt, pick snails or collect firewood, much less till the land. The continued survival of *Ovia* and other Benin village sanctuaries and forests elsewhere are clear testimony to the fact that traditional practices and customs underwritten by African cosmological systems should be encouraged in the preservation of biodiversity, including cultural heritage. This also

underlines the interconnection between culture and nature in Africa. In Ekho as in other Benin villages, the age-grade system, which is underpinned by a strong religious and cosmological system, has been the basis for the survival and the authenticity of the cultural landscape. The management of heritage sites can thus safely and profitably be entrusted to these types of indigenous systems such as age grades, which have their female counterparts.

Discussion

The Benin City walls illustrate the limitations of Western-derived legislation in the preservation of Africa's heritage, while the Ekhor Village earthworks are a clear indication of the role and importance of customary practices and traditional laws. Against this background, it is ironic to note that as recently as 2001, Nigeria's post-colonial legislators have been largely influenced by the Western models in passing laws to protect the cultural heritage, even though there appears to have been a shift in policy and practice. In conformity with the UNESCO *Operational Guidelines* (2002), the Nigeria National Commission for Museums and Monuments had to go through the Edo State House Committee on Culture and Tourism to sponsor a bill for the protection of the Ekho-Udo (Benin Kingdom) earthworks as part of the requirements for nominating sites to be added to the World Heritage List. The Nigerian World Heritage Committee drafted the bill so that it would recognize the customary practices and traditions of the two communities.

It is unfortunate, however, that the final version of the Bill almost totally alienates the communities from the management and ownership of their immovable heritage. The result was that if the provisions of the law were to be adhered to as laid down, the people would be alienated from their heritage. This would contradict the standard UNESCO requirement for a state party to involve local communities in management planning and implementation strategies. Paragraph 1 of the Bill states, *inter alia*: 'Where an antiquity has been declared to be a monument as provided in this law, the owner thereof shall be entitled to the value, at the date of such declaration, as determined by the State Government, and thereafter any estate right, title and interest in and to such antiquity shall be extinguished'.

The situation is aggravated by Nigeria's Land Use Act of 1990 promulgated under the Military Government, which created grounds for alienating local communities from their heritage. It states that: 'It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by

assignment, mortgage, transfer of possession, sub-lease or otherwise, (a) Without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the Civil Process Law; or (b) In other cases without the approval of the appropriate Local Government'.

Many Nigerians have advocated the abrogation of the Land Use Act of 1990, which 'vests all land in the territory of each state (except land vested in the Federal Government) on the State who holds such land in trust for the people which similar power with respect to non-urban areas are conferred on Local Governments'.

It must be pointed out, however, that in practice, the consent and assent of the *Oba* must customarily be sought in the acquisition and use of any land lying within the Benin Kingdom. This involves payment of traditional fees to the *Oba*, the chiefs and the youth. To act otherwise renders any Government Certificate of Occupancy (C of O) ineffective. The elders and the youth act as an effective barrier, despite what the formal law says. To take them to court would invoke the *Oba*'s curse, which is dreaded by all.

Conclusion

Heritage Managers and policy-makers need to sensitise lawmakers and politicians at all levels on the need to design legal systems that accommodate traditional and customary forms of protective mechanisms within the ambit of modern state systems (see Mumma 2000). The incorporation of such mechanisms should be preceded by a systematic and comparative ethnographic documentation of customary practices, traditions and customs of all Nigerian communities. Relevant university departments such as Anthropology and Law, working in partnership with the National Commission for Museums and Monuments, should make use of the copious colonial ethnographies of the 1930s, which could form the baseline data for reformulating the heritage protection legislation. There is an urgent need to constitute a committee of experts to map out strategies for the identification and documentation of indigenous legal knowledge and the framework for heritage conservation in various African communities.

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The Antiquities Act of Tanzania was enacted by the independent government in 1964 to replace the Colonial Monuments Preservation Ordinance and the Monuments (Preservation) Ordinance promulgated in 1937. The 1964 Act itself was subsequently amended in 1979. Under this law, the following categories of the cultural property are recognized and protected: relics, monuments, protected objects, conservation areas and ethnographic objects. Under the Act, the minister responsible for cultural heritage is empowered to declare any object, structure or area which is of archaeological, historical, cultural or scientific significance a protected object or monument.

[DONATIUS KAMAMBA]

Cultural heritage legislation in Tanzania

Introduction: the legal framework in Tanzania

The Antiquities Act of Tanzania, enacted by the independent government in 1964 and amended in 1979 to replace the Colonial Monuments Preservation Ordinance and the Monuments (Preservation) Ordinance promulgated in 1937, is the basic legislation for the protection and preservation of the country's cultural heritage. Under the law, the following categories of cultural property are recognized and protected: relics, monuments and protected objects, defined as follows.

Relic

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

Monument

A monument is defined as any building, fortification, internment, midden, dam or structure erected, formed or built by human agency before the year 1863, or the ruins or remains thereof; or any rock painting

or carving or any natural object painted, incised, modified or erected in Tanzania by human agency before the year 1863, or any earthwork, trench, well, road, or other modification of the soil or rock, dug, excavated or otherwise engineered by human agency before the year 1863.

Object

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

Under the Act, the minister responsible for cultural heritage is also empowered to declare any object or structure of archaeological, historical, cultural or scientific significance a protected object or monument. The Act vests the ownership of all relics, protected objects and monuments in the government and prohibits the sale or exchange of such objects and the export of such objects outside of the country. The probe and search for relics, protected objects and monuments are also regulated under the Act and must be licensed by the authorized body of the government in accordance with conditions laid down therein. Before such a licence is granted, persons applying for the licence must prove that:

- a) they have sufficient scientific training or experience to enable them to conduct the proposed probe or search satisfactorily;
- b) they have sufficient staff and other resources at their disposal to enable them to undertake the proposed probe or search satisfactorily;
- c) they are capable of conducting the scientific study and publication of the results of such probe or search or that they can make appropriate arrangements for such study and publication.

All activities concerned with the protection and preservation of the cultural heritage are vested in the appropriate government department and can only be undertaken by the employees of the department or those authorized by it. The Act forbids a number of activities that may in any way disfigure or destroy the historicity of a relic, protected object or monument, and imposes sanctions and penalties for offenders in the form of fines or imprisonment, or both.

The Act also makes it a duty and an obligation for anyone who discovers a relic, protected object or monument to report such discovery to the appropriate authorities.

Categories of relics, protected objects and monuments

The relics and protected objects defined in the country's legislation are what UNESCO has termed *movable cultural property*; monuments are termed *immovable property*. In Tanzania there are many types and categories of both kinds of movable and immovable cultural property.

Movable cultural property includes:

- a) archaeological objects of stone, bone, wood, metal and or other materials that have survived and depict the historical and cultural development of man from the earliest period to what has been referred to as the historical era;
- b) human skeletal remains including the fossilized hominid remains which are of great scientific significance in the study of the phylogenetic development of man and the skeletal remains of the more recent populations that are important in the study of human evolution and development;
- c) the fossilized remains of animal bones and fossilized plants associated with early man's activities or skeletal remains of animal bones and remains of plants associated with human activities in more recent periods;
- d) the fossilized remains of animal bones and fossilized plants that are testimony to the evolutionary development of the various species of animals and plants;
- e) historical and ethnological objects made of different materials that are testimony to the

cultural and historical development of the more recent populations.

Immovable cultural property is made up of:

- a) sites that include open air, caves and rock shelters containing archaeological objects, fossilized animal bones and plants and historical and ethnological objects;
- b) human burial sites with evidence of burial activities of prehistoric and historic people;
- c) ruins of buildings and tombs either single or in groups manifesting the growth and development of villages and urban settlements;
- d) rock shelters or caves containing paintings;
- e) ethnologic structures that are still extant such as various defensive systems – ditches and banks, fortifications; ritual and worshiping sites;
- f) historic buildings and urban historic quarters that are of historical and architectural importance;
- g) monuments that commemorate important historical events.

Comparative analysis

Most of the cultural heritage laws in Africa south of the Sahara are similar because they were inherited from the colonial authorities. The legal means of protecting and conserving the cultural heritage is one among other means adopted to save the heritage from damage by human-related factors. This is achieved through gazetting restrictions on the use or development of cultural properties and their setting. The laws protect immovable and movable cultural heritage, which comprises monuments, groups of buildings, sites and objects. There are very few countries whose laws provide for the protection of living traditions, intangible heritage and cultural landscapes.

Almost every country in the sub-Saharan Africa region has legislation that protects its cultural heritage. However, by definition cultural heritage differs from one community to the other. In this region, *cultural heritage* defined by legislation is strongly related to age, durability and tangibility. This has tended to neglect beliefs, cultural traditions, customs, popular memory and indigenous knowledge systems. The only exception is the South African legislation, which accommodates intangible heritage. (see Hall, this volume). Tanzania's legislation protects human-made objects created before 1863; Kenya's legislation protects those created before 1895; and South Africa considers sites and objects made up to 50 years ago as significant.

These laws are also similar in that they give the responsible minister powers to declare any area, object or structure a monument or conservation area. However, the procedures for the minister to arrive at such a decision are not clearly defined in most of the laws. The other important issue to note in the laws

is the status of underwater cultural heritage. The Tanzanian laws specifically refer only to archaeological or historical findings above or below ground as heritage. No reference is made to objects of historical or scientific importance found under water. This is a serious oversight, particularly taking into consideration the recently adopted Convention on the Protection of Underwater Cultural Heritage (2001). Again, South Africa is an exception in this respect. Finally, the definitions in most of the laws are amorphous, ambiguous, and lacking in clarity, thus open to different interpretations.

Issues of concern

CONSERVATION, ENVIRONMENT AND NATURE

The protection and conservation of cultural property is a multifaceted endeavour and involves many professionals with different working ethics and expertise. Immovable cultural heritage, sites and monuments are important testimony to human efforts to exploit the environment and to nourish and sustain biological and spiritual needs throughout the ages. Indeed, they constitute an important and irreplaceable heritage that every country is under an obligation to protect, conserve and preserve, not only for the benefit of the present and future generations, but also for the benefit of humankind in general. Current cultural heritage legislation in Tanzania and most likely that of other parts of Africa does not cover the protection and conservation of the cultural heritage in relation to people, environment and nature.

RESEARCH AND DEVELOPMENT

Researching the cultural heritage entails probing and recovering the movable objects contained in the immovable properties, the study and analysis of the objects and other relevant data, and the study of the immovable property itself. In addition to taking action to offer legal protection to this heritage, every country has a duty to conserve, preserve and promote this heritage so that the human achievements as well as the history and development of the other living organisms found in these sites and monuments are made known and appreciated by the population and humankind in general. While this kind of research or study is well covered in the existing legislation, its contribution to the overall developmental of the community has been marginalized by the laws in force.

ESTABLISHMENT OF A NATIONAL INVENTORY

The first priority of any country in the protection and conservation of the cultural property is surveying, recording and mapping of all sites and monuments

to establish a National Inventory. This is particularly important in African countries where the heritage is diverse and fragile. With only a few exceptions, efforts made during the colonial period to protect, conserve and promote the cultural heritage did not amount to much in terms of the compilation of an inventory. The legislation therefore needs to be changed to acknowledge this need. Africa is poised for rapid economic and social development that will entail massive investment in the promotion of agricultural and industrial development projects and the development of the requisite economic and social infrastructure. All these development projects will not only transform the political, social and economic face of Africa and enhance the living standards of her people, but will also alter the landscape. These developments are therefore a potential threat to the cultural heritage in African countries. With the exception of Botswana (see Mmutle, this volume), most of the existing legislation does not explicitly respond to this threat through making pre-development archaeological impact assessment a requirement.

COMMUNITY PARTICIPATION

The laws in force have placed great emphasis on the technical aspects of protection and conservation. Community awareness and involvement have not been adopted as a strategy to motivate local populations to safeguard their heritage. In addition to the scientific value, which is usually the one recognized by the legislation, these sites and monuments have religious and social significance to the local communities, providing an important link between the past and the present. The communities should therefore be made an integral part of the protection and conservation process. For any conservation policy to be successful, it needs to involve all those responsible, from the policy formulators and the implementing agencies to the people. While legislation is usually the responsibility of the central government, policy control is the responsibility of the local authorities. A good piece of legislation will therefore not go far in the absence of community involvement. Most laws in force discourage the participation of the so-called unskilled and unspecialized. Our legislation should change from acting as a deterrent to become responsive and flexible for the purposes of participatory protection. Tanzania and other countries possess many sites and monuments but lack sufficient resources to effectively protect and conserve them. The approach has therefore been to select a few important sites and monuments to be protected and preserved. Such a phenomenon could be changed if more stakeholders such as NGOs, District Councils and the local com-

munities were involved. It is a regrettable fact that currently, not only do communities not participate in the process of protecting and preserving the cultural heritage, but they are also unaware of the existence and contents of the legislation.

PRIVATELY-OWNED OBJECTS AND MUSEUMS

Most movable objects of the cultural heritage are kept in museums or similar cultural institutions. In some countries, such objects are also held as private collections. In Tanzania, there are movable objects such as the protected carved doors and door frames still being used in houses along the coast. The houses themselves are not protected monuments. The protection and preservation of these objects, therefore, present a special problem. These carved doors and door frames belong to a rich and sophisticated artistic tradition that is slowly dying out. Many of the owners are very willing to part with them either because they do not appreciate their cultural value or because they are offered attractive prices for them, especially by tourists. The large number of doors involved is such that they cannot be moved to and preserved in museums. Unfortunately, the Tanzania legislation is not clear on how such objects that are part of a private dwelling should be handled legally, particularly in the event of an owner deciding to dispose of them for financial return.

To date, Tanzania has only one National Museum established under the National Museum Act of 1980 and located in the capital, Dar es Salaam. The Museum is the custodian of the movable objects of the country's cultural heritage. The museum is responsible for research, preservation and protection of the archaeological, historical and cultural heritage. It comprises departments of archaeology, history, ethnology, education services and a technical and conservation unit. The Ethnology Department has a sample of the traditional architectural heritage shown in a rural setting where appropriate activities and objects depict the traditional way of life in the villages.

While the existing National Museum serves an important and useful function in the different departments, the existing laws should be altered to make possible the establishment of district and village museums. Such museums would concentrate on the history, customs and traditions of the local people. As they develop, they might add other aspects depending on local specializations. For example, an area with a special natural history might develop this particular emphasis, while an area rich in archaeological findings might develop this bias.

FORMULATION OF AN ANTIQUITIES POLICY

While the antiquities in other African countries south of the Sahara are incorporated in the National Museums, the case is different in Tanzania. The Antiquities Department has been operating through the Antiquities Act. This is somewhat unusual. The normal procedure would be to have a policy in place from which an Act would be developed and passed. Rules and regulations based on the Act would then be put in place. Due to this situation in Tanzania, there is a feeling that a law not based on a shared policy will usually result in a lacking of cooperation between the law-enforcing authorities and the rest of the society.

INTERNATIONAL CONVENTIONS

The Government of Tanzania observes the various recommendations of UNESCO on the protection and preservation of cultural heritage and is a party to the three conventions relating thereto. These conventions are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. It is a matter of concern, however, that the country's legislation has not been harmonized with the international conventions. In some instances, it becomes therefore difficult to decide on a course of action, which is not a healthy situation.

CULTURAL RESOURCES ASSESSMENT

The Cultural Resources Assessment is usually understood to be part and parcel of Environmental Impact Assessment. Many laws in African countries do not recognize the importance of such an assessment. As already noted, the Botswana and South African legislation have accommodated this requirement. In other countries, such assessments are conducted but not necessarily because of the law. In Tanzania, the carrying out of Cultural Resource Impact Assessment with the Environmental Impact Assessment has many deficiencies. Usually the teams involved in such assessments do not include experts in cultural resources. As a result, nothing of significance is reported. In the event that a report does include cultural resources, it does not always reach the relevant authorities.

Conclusion

Tanzania is endowed with a rich and diversified cultural heritage that the government has committed

itself to protect, preserve and promote, notwithstanding the problems and concerns discussed in this paper. The legislation will need to be reviewed so that the necessary amendments are made. Indeed, it is expected to formulate an antiquities policy as the basis of the legislation review.

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The legal framework in Zimbabwe today is the product of colonial inheritance. When the European settlers arrived in 1890, they mistakenly thought that indigenous populations did not respect or value the cultural heritage. Accordingly, formal laws were passed to protect the country's heritage. The laws, however, alienated indigenous populations from the administration of their natural and cultural heritage. The situation today is that the protection of the cultural heritage is vested in the National Museums and Monuments of Zimbabwe, a statutory body that came into being under the National Museums and Monuments Act (CAP 313) of 1972. In this paper, discussion focuses on the relationship between formal legislation and traditional informal systems. Traditionally, the chiefs and kings who controlled different areas looked after both the intangible and tangible heritage on behalf of their people. The relationship between the National Museums and Monuments Act and other pieces of legislation that protect heritage in Zimbabwe will also be examined.

[HENRY CHIWAURA]

The development of formal legislation and the recognition of traditional customary law in Zimbabwe's heritage management

Introduction: formal and customary law in Zimbabwe

The colonization of Africa by Europeans had profound implications for the African legal systems and institutions. African systems were almost completely destroyed and replaced by European ones. African Customary Law was only recognized in very limited contexts within the realm of private law. In colonial Zimbabwe, for example, Bennett (1981) contends that

customary law was only recognized and permitted to function in the field of private law mainly because of the need to economize on administrative resources in the early days of occupation. This was a time when the governmental resources were stretched to their limit. The shortage of European manpower coupled with the policy of indirect rule meant that African laws and their courts were left largely untouched by the colonial government. There was no doubt a desire on

the part of the settlers to preserve tranquillity among a potentially hostile population and a conviction that European law was too complex to be administered to an unsophisticated people (Bennet 1981: 59).

The problems associated with the co-existence of two systems of law within the same nation cannot be fully understood without considering the historical context in which they arose and developed. The first enactment to refer to the application of African customary law in Zimbabwe was the Royal Charter of 1890. This empowered the British South Africa Company (B.S.A. Co) to govern Southern Rhodesia, now Zimbabwe, to appoint judicial officers and to establish such courts as were necessary. However, the Charter did not prescribe which law was to apply to the Africans. Section 14 of the Charter stated that: 'Careful regard shall always be paid in matters that had to do with the customs and laws of the class or tribe or nation to which the parties respectively belong.'

This, however, did not oblige the B.S.A. Co to apply or to recognize customary law, nor did it give them a free hand to ignore it; all that was needed was to pay it 'careful regard'. The 1961 Southern Rhodesian Constitution was also of importance, which proclaimed that '...subject to the provisions of any law for the time being in force in Southern Rhodesia relating to the application of customary law, the law to be administered by the High Court and by any courts on Southern Rhodesia... shall be the law in force in the colony of the Cape of Good Hope' (Section 56).

The point to note in all these pieces of legislation is that they made the Rhodesian Common Law the formal law of the country. The position of the customary law within the colonial legal system varied from statute to statute. This may have been an inevitable result of the colonial state's dilemma of not knowing what to do with the customary law of the Africans.

It can thus be seen that the extent and manner of the application of Customary Law during the colonial state was neither static nor uniform. The 1890 Charter required the courts to give 'careful regard' to customary law. The Proclamation of 1891 by the High Commissioner mandated the courts to 'follow the laws and customs of the natives concerned, in so far as they are applicable', whereas the 1898 Order in Council required the courts merely to be guided by the customary law without being bound to apply it.

Cultural heritage legislation

Colonial policy towards customary law clearly perceived it as an inferior system. This attitude is still evident in the legislation in force in independent Zimbabwe, at least until very recently (see Chipunza, this volume). The legislators hardly recognized customary law at

all. Soon after the occupation of Zimbabwe, many of the settlers started searching for the famous 'second Eldorado'. During this period, irreparable damage was done to the cultural heritage. Great Zimbabwe and related structures appear to have suffered the most, particularly at the hands of the Rhodesia Ancient Ruins Company Ltd., a company established under the B.S.A. Co expressly to hunt for treasure at these sites. It was soon realized, however, that a great deal of important heritage was being destroyed and accordingly, the Legislative Council belatedly passed the Ancient Monuments Protection Ordinance in 1902. According to Galarke (1973), the British High Commissioner advised that it should not become law because he considered the protected sites ill-defined and the penalties too severe. It nevertheless became the first formal law to govern heritage in colonial Zimbabwe. This was followed in 1912 by the Bushmen Relics Ordinance, which was passed in order to include protection of rock paintings. The 1902 and 1912 Ordinances were replaced by the 1936 Monuments and Relics Act, which established the Monuments Commission as the implementing body. However, the first statutory body to protect heritage sites interests in Zimbabwe was the Rhodesian Historical Monuments Commission established in 1958. Soon after its establishment, it sought to prohibit all further unlawful excavations, unfortunately many years after the occupation of Zimbabwe and the start of the destruction of its heritage.

The next major development in the history of heritage legislation in Zimbabwe was the passing of the 1972 National Museums and Monuments of Rhodesia Act Chapter 313 17/1972. Following independence in 1980, the Act was adopted almost verbatim as the National Museums and Monuments of Zimbabwe Act Chapter 313 and later Chapter 25.11.

Legislation and heritage management

The National Museums and Monuments of Zimbabwe Act Cap 313 is the major piece of legislation that governs the cultural heritage in Zimbabwe. The Act protects all areas and objects of archaeological, historical, architectural and palaeontological value. These areas or objects cannot be altered, excavated or damaged, and any material thereon cannot be removed without the written consent of the Executive Director of National Museums and Monuments of Zimbabwe (NMMZ). The law requires that any monument or relic discovered must be reported in writing to the Executive Director of the NMMZ by the discoverer and the owner of the land on which it is found. As stipulated in the Preamble, the NMMZ Act was

promulgated to ‘establish a Board of Trustees and administer museums and monuments in Zimbabwe, to provide for the establishment and administration of museums, to provide preservation for the ancient, historical and natural monuments, relics and other objects of historical or scientific value or interest.’

Many ancient monuments or relics are located in rural areas where in the normal course of events, the locals are governed by and adhere to customary law. Most if not all the people here are therefore unaware of the provisions of the NMMZ Act, which would clash with their beliefs and traditions. An example is the case of the Late Stone Age rock art site of Domboshava, near Harare. The locals regarded the site as sacred and occasionally carried out rain-making ceremonies within the rock shelter. In the process, NMMZ thought that they were damaging the rock art and prohibited them from using the site. The locals retaliated by defacing the rock art with black oil paint.

Apart from the NMMZ Act, there are other pieces of legislation that complement and in some way help in the conservation of heritage of Zimbabwe. One is the Natural Resources Act Chapter 20.13 enacted in 1941. This Act empowers the State President to acquire land for conservation or improvement of natural resources. Section 25 of this Act allows for compulsory acquisition of the land if deemed necessary, pursuant to the Land Acquisition Act Chapter 20.10 of 1992. This Act complements the NMMZ Act in that monuments on such land enjoy greater protection. In addition, conservation of natural resources is an important part of the management of cultural resources. Section 2(1) of the same Act empowers the State President to set aside land or declare a part of it a natural resource. This may include landscape or scenery that he considers should be preserved on account of its aesthetic appeal or value.

The 1992 Land Acquisition Act Chapter 20.10, Section 3 empowers the President to compulsorily acquire land in the interest of public health, safety and morality. Further, any rural land may be acquired where the acquisition is reasonably necessary for the utilization of that land for the purpose of land reorganization, environmental conservation or utilization of wildlife or other natural resources. This renders monuments and natural resources state property and once so declared, they are protected from damage, alteration and demolition. As such, both the Natural Resources Act and the NMMZ Act are complemented by the Land Acquisition Act. Section 23 of NMMZ Act stipulates that where the Board of Trustees wishes to acquire a national monument or relic on a given

piece of land on which the monument is situated, the Board shall reach a mutually agreed settlement with the landowner. If this fails, however, the Board shall apply to the President for the authority to compulsorily acquire the land for NMMZ.

In terms of the Regional Town and Country Planning Act, buildings that are not national monuments may be subject to a Building Preservation Order if they are of special architectural or historical interest. Such an order restricts the demolition, alteration or extension of a building. The Urban Councils Act Chapter 29.15 enacted in 1974 empowers the Council to acquire land for any purpose they deem fit. Although this Act does not relate to the NMMZ Act directly, such powers can be used in protecting land with monuments and other cultural resources. The gazetted boundaries of proclaimed national monuments are state land, protected from mining prospecting pursuant to the Mines and Minerals Act Chapter 21.05 Section 31.

Formal law only looks at heritage management in Zimbabwe through the narrow lens of the Western scientific eye. This is a result of the colonial inheritance in legal systems. Heritage management in Zimbabwe is greatly premised on the legislation; hence it is more academic than practical. It fails to accommodate or promote indigenous knowledge systems. This is evidenced by the appointment of NMMZ custodians and trustees of the heritage while traditionally, they had been chiefs and headmen (see also Oboreime, this volume). Further, heritage management totally excludes and ignores customary laws, hence there is no community participation in cultural heritage management (see Mmuma, this volume).

Customary law and cultural heritage management

Members of a community automatically practice and maintain the customs they deem necessary or desirable, which become part and parcel of their way of life. Their lives are continually affected by their beliefs, and their social and legal customs. As a source of law, however, traditional beliefs and customs have virtually ceased to play an active part in the modern world. This also applies to Zimbabwe’s cultural heritage, which is now in the hands of the State, governed by formal law, and controlled and managed by the relevant statutes.

Inasmuch as it may be desirable to recognize customary law in cultural heritage management in Zimbabwe, this creates some problems. Nevertheless, customary law is not usually recognized because it does not have a formalised structure (see Mmuma,

this volume). It is community-based and understood through day-to-day norms and restrictions, folklore and songs. All members of the community are expected to possess traditional community knowledge, which varies with age, gender, social and economic status. Because it is local community-based, it lacks universality. The enforcement or application of traditional cultural heritage law is through restrictions and taboos that can be negotiated and changed according to circumstances. Punishment and penalties for contravention are based on traditional procedures at the traditional courts.

In trying to recognize customary law in cultural heritage management in an ever-changing world, another potential problem is who will be entrusted with heritage protection. Traditional people governed by customary law believed strongly in communalism and that heritage belonged to them all. This philosophy was supported by well-understood and functional traditional structures, and checks and balances. Many such structures, however, have been eroded by colonialism and the accompanying modernisation, posing some challenges for the integration of customary law in cultural heritage management.

Conclusion

Customary law should be recognized in cultural heritage management as the formal law develops. In this regard it is important to recall Garlake's (1973) recommendation that traditional history and knowledge should be used to illuminate some of the more abstract problems associated with cultural material. For this reason, the interest and co-operation of a much wider public must be fostered and not discouraged by the NMMZ Act. Customary law has the advantage of being embracive rather than compartmentalist in its approach. It is the product of the accumulation of indigenous knowledge systems over long periods of time and involves people at the grassroots level where most of the heritage is found. It is notable that because of the existence of traditional myths and legends as well as taboos, some heritage resources in Zimbabwe have managed to withstand destruction for a long time, only to be destroyed when modernization came in (Ndoro 2002). The NMMZ Act is currently being reviewed. As this takes place, it is hoped that the resulting amendments will include elements of the customary law relating to the management of cultural heritage. While it is acknowledged that problems exist, and that some elements of this law have been eroded by colonialism and are therefore no longer viable, it would benefit everyone if all possible avenues were explored to merge customary with formal law.

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Formal legal systems acquire legitimacy from the nation-state system and are enforced through formal legal processes (i.e. the state judicial system), but they are unsympathetic to local communities in orientation. Community-based 'traditional' systems, which originate from the local community, have unravelled with the decline of social cohesion because of the hegemony of the state-based systems and global changes. This paper describes these systems and discusses how the legitimacy of community-based systems must be reinstated.

[ALBERT MUMMA]

The link between traditional and formal legal systems

MOST DISCUSSIONS of systems of cultural heritage management have focused on the so-called 'modern' systems and the difference between these and so-called 'traditional' systems. Often, the traditional systems have been seen as backward-looking, while the modern systems have been seen as forward-looking and therefore progressive. However, this distinction between traditional systems as 'old' and formal systems as 'modern' is simplistic, if not outright inaccurate; the differences between the two systems are far subtler. Indeed, a much closer and more objective inquiry shows that there are many similarities between the two, which must not be overlooked in any analysis. An outline of some distinguishing characteristics between the two systems is given below.

In this paper, rather than think in terms of modern and traditional systems, it is considered more accurate to refer to 'state-based' as opposed to 'community-based' systems.

Characteristics of the formal legal system

- written in formal legal texts;
- typically prescribed through a formal hierarchical process (legislature, decree, statute);
- in the case of Africa, introduced as part of the colonization process (alien to local systems);
- acquires legitimacy from the nation-state system;
- recent in origin (dates back to the advent of colonization at the turn of the century);
- is based on nationally applicable standards and systems;
- tends to be hegemonic in orientation;
- enforced through formal legal processes (i.e. the state judicial system);
- is premised on a philosophical orientation informed by science, technology and 'experts' with regard to the management of immovable cultural heritage;
- separates 'nature' from 'culture';
- protects nature through the device of 'protected areas' in which nature is 'protected' from communities;
- not sympathetic to local communities in orientation;
- vests in the state historical rights of use and ownership, thus depriving local communities;
- singles out particular 'unique' areas for special protection and tends to ignore the rest of the countryside;
- divorces heritage protection from economic, social and other phenomena.

Characteristics of the community-based traditional system:

- typically not written in formal legal texts but may be derived from written texts (e.g. the Koran);
- typically derived from day-to-day usage and practices rather than formal prescription (traditional in nature);
- originates from the local community;
- acquires legitimacy from historical rights of use and ownership, etc;
- tends to be 'traditional' and therefore typically, but not necessarily, old in origin;
- specific to the local community and therefore diverse in nature;
- tends to be inward-looking and marginalized by the nation-state, therefore capable of being hegemonic in present times;
- enforced through cultural, social, religious and ethical belief systems and behaviour patterns, as well as community leaders;
- regarding the management of immovable cultural heritage, is premised on a philosophical orientation informed by the day-to-day survival needs of the community;
- integrates nature and culture;
- protects nature through economic sustainable practices;
- pro-community in orientation, though not necessarily equitable intra-communally;
- reinforces the historic rights of local communities, favouring them over non-members of the community;
- tends not to be based on a 'unique areas' philosophy, and with the exception of sacred sites, all landscapes tend to be managed through similar systems;
- integrates heritage with economic, social and other phenomena.

The decline of community-based systems

Community-based systems have declined in effectiveness to the point where their survival is in question in many countries due to the hegemony of the state-based systems and global changes.

Traditionally, the relationship between the two systems has been antagonistic because they essentially compete for legitimacy and influence. In Africa, given the colonial experience and the ability of the colonial and post-colonial nation-state to assert their influence, the state-based systems have predominated and have succeeded in completely marginalizing the community-based systems.

The hegemony of state-based systems is manifested in a number of ways: historic rights derived from community-based systems have been

revoked, nationalized and at best, reduced to permit-based rights; community historical uses have been criminalized; community rights have been open to exploitation and use by persons typically considered outsiders by the community; community-based traditional leaders and authority systems have been invalidated and replaced by state-appointed leaders; and community enforcement systems have been invalidated and derided. The effect has been to alienate the community from its heritage.

The hegemony of state-based systems has either driven community-based systems to extinction or reduced them to a peripheral management system, often ineffective and secondary in status.

Community-based systems have also declined as a consequence of changes in the wider economic, social and cultural circumstances in which they operate. Resource use has typically become commercial in orientation and the pressures of state-sanctioned commercialization have proved to be more than the community-based systems (developed during a time of limited resource demands) can sustain. These changes have combined with a decline in internal social and cultural cohesion in communities arising from the introduction of Western-style formal education, less youth depending on the local economy and local natural resources, and changing religious and cultural beliefs and practices to undermine the authority of traditional systems. This has resulted in the unraveling of community-based enforcement systems.

The inability of community-based systems to adjust to these changes has further undermined their effectiveness and relegated them to secondary status even in the eyes of community members.

Recapturing the lost glory of community-based systems

Despite the decline in community-based systems, it is now widely realized that state-based systems on their own are incapable of providing a holistic and sustainable management of local immovable heritage. One of the key reasons is resource limitations that make it impossible for a highly resource-dependent system such as a state-based system to function effectively in Africa. This is particularly so because in Africa, unlike in Western countries with a longer history of reliance on state-based systems, the state-based systems have not been internalized widely and depend almost exclusively on state organs for their enforcement. It is therefore necessary to integrate communities into management systems and structures to improve effectiveness.

To be able to reinstate community-based systems, a number of measures involving fundamental change are necessary. First, the legitimacy of community-

based systems must be reinstated. This would require a reorientation in the relationship between the state and local communities. Fundamentally, it involves reinstating historic ownership and/or use rights, particularly with respect to land. In South Africa, this has begun under a land restitution programme to reinstate land to original historic owners. Restitution of historic rights reinstates the confidence of communities, enabling them to take charge of managing local resources.

Second, arising from restitution of historic rights, in many situations it will be necessary to reinstate community leaders and authority structures (see Kamuhangire, this volume). This involves a fundamental shift in power relations between the central state and local communities. In many countries, states have attempted to decentralise power to local levels. However, decentralisation typically does not devolve power to local communities; rather, it hands over power to lower levels of state-legitimated and appointed officials, such as local authorities and local government officials. Community leaders and authority structures have continued to be marginalized. Decentralisation is unlikely to be able to fully utilize community-based resource management systems because they do not rely on local authority systems for enforcement. To achieve this, community-based leadership and authority structures need to be revived.

Third, community-based leadership and authority systems must change and adapt to continue to be relevant and accepted by the present generations. Often, traditional leadership and authority systems have been undemocratic (i.e. excluding marginalized groups within the community), allocating local resources inequitably to those close to power. They have tended to be backward-looking, seeking legitimacy and justification for their demands through past practices rather than current relevance. These features undermine the continued relevance of traditional management systems. To be able to function effectively in today's world, community-based systems must adapt and adopt principles of democracy and accountability in the selection and decision-making of leaders, equity in resources distribution and knowledge-based rationalisations, adopting science and technology.

Fourth, the adoption of a forward-looking approach to resources management would require that community resources management consciously integrate a conservation ethic, rather than take it for granted that it will necessarily be embedded in the community management systems, as has been the practice in the past.

Conclusions

State-based laws on the management of immovable heritage need to be changed to re-orient the relationship between state- and community-based legal systems. The two systems must be brought into a relationship of complementarity and symbiosis, rather than antagonism and competition. In effect, legal pluralism must be formally adopted as the way forward.

The change in the relationship between the two legal systems will require amendment or rewriting of laws in many countries. Whereas the laws of many countries are in fact being changed presently, many countries have not yet changed their philosophical and policy stance with respect to the role of community-based systems in heritage management. Often the legal reform is designed simply to improve the effectiveness of the state-based system itself. It is recommended that countries clarify their policy position with regard to community-based systems prior to implementing legal reforms in their state-based systems.

Second, the proposed legal reform will need to go beyond merely amending heritage legislation only. In order to make community-based management systems effective, it will almost always be necessary to reform laws relating to land ownership and use, local systems and structures of government, forestry and wildlife legislation, planning and environmental management legislation, agriculture and land use legislation, and in many countries, even laws relating to the countries languages. Community-based heritage management must be seen as holistic and integrated in nature.

This paper discusses how the traditional customary system of heritage conservation and sustainable resource utilization in Western Province (Barotseland), Zambia has proved effective for centuries. Responsibilities and authority in ensuring sustainable utilization of finite resources is delegated to specific village heads known as *indunas*. Following a description of the hierarchy of governance, examples are given of cultural heritage protection (the Summer Palace at the village of Limulunga and the Winter Palace at the village of Lealui) and of natural heritage protection (the use of canals to manage the flooding of the plains stretching along the mighty Zambezi River). A brief description is also provided on an effective method of enforcement to punish offenders.

[SIMON MUSONDA]

Customary systems of heritage conservation: the Barotseland experience, Zambia

MANY OF THE REGIONS in Zambia have well-developed traditional systems of governance. Under such systems, responsibilities and authority are delegated to specific village heads known as *indunas* who ensure sustainable utilization of finite resources, which include both natural and cultural heritage.

The traditional systems of governance have seriously taken on board the question of heritage conservation to the extent that they effectively contribute to sustainable utilization of non-renewable heritage resources. Consequently, valuable resources are preserved and handed down to successive generations by way of traditional methods of preservation and protection.

TRADITIONAL METHODS OF CONSERVATION IN WESTERN PROVINCE

Western Province, Zambia, historically known as Barotseland, is mainly covered by the Zambezi plain,

which extends nearly 160 km and stretches from the confluence of the Lungwebungu and Kabompo Rivers with the Zambezi River in the north to the confluence of Lui River with the Zambezi River in the south. The plain varies in width from 16 km at its narrowest to about 40 km at its widest.

GOVERNANCE SYSTEM

The Lozi people are the dominant tribe of the Western Province of Zambia. Traditionally, the king, known as *Litunga*, is the supreme traditional authority in the region. Below him is the *Ngambela*, the chief spokesman of the royal establishment. Third in the hierarchy is the *Natamoyo*, who handles appeal cases of a serious nature in the traditional court called *Kuta*.

Below the *Natamoyo* is a long list of other *indunas*, each with specific duties to perform. These duties include, *inter alia*, protection and conservation of:

- forests;
- fisheries;
- wild animals;
- historic canals for transportation in the plain;
- the winter and summer palaces;
- the Royal Barge for the *Kuomboka* ceremony, one of the major intangible aspects of the Barotse cultural landscape;
- birds and other heritage resources.

In this paper, the protection and conservation of the two palaces and the historic canals will be discussed only.

The Winter and Summer Palaces

Due to seasonal flooding of the Zambezi River from January to approximately May, two palaces for the king have been constructed and are occupied at different times of the year. The Summer Palace at the village of Limulunga is used during the flood months in summer and the Winter Palace at the village of Lealui, in the plain, is occupied during the winter months when the floodwaters recede.

An *induna* is assigned specific duties to ensure that these palaces are conserved and protected, and oversees a collection of villages responsible for the conservation and maintenance of the two palaces. Craftsmen from these villages report to the *induna* for any conservation work to be carried out. Such tasks are assigned only to specialists and distinguished craftsmen.

Conservation philosophy

The basic philosophy in traditional methods of conservation entails:

- **Replacement** in the case of badly deteriorated organic as well as inorganic materials. Highly skilled thatchers re-thatch the palace at regular intervals to ensure the roof is leak-proof all year round;
- **Preventive conservation** employed through traditional methods of treatment with organic chemicals;
- **Careful selection of material:** timber columns and beams normally made of timber sawn from aged trees and predominantly heartwood, which is naturally resistant to termite attack.

Historic canals

As noted above, the province is predominantly covered by a vast, rich alluvial flood plain stretching along the mighty Zambezi, which flows through Western Province from north to south. The plain is traditionally known as *Ngulu* or *Bulozi* and gets flooded seasonally.

Due to seasonal flooding, canals were constructed in the 19th century to facilitate travel and communication across the plain. Also, inhabitants of the plain built their villages on termite mounds called *mazulu* and at times on artificially built mounds called *liuba*. The same canals were and are still being used for an annual cultural ceremony known as *Kuomboka*. This annual procession culminates in the moving of the retinue of the King of the *Malozi* from the village of Lealui in the floodplain to the village of Limulunga on high land where floods do not reach.

As in the case of the palaces, a number of *indunas* are assigned to take care of different sections of the canals due to the sheer vastness of the flood plain. A question may arise as to how these *indunas* manage to maintain the canals. The same system outlined above in the conservation and repair of the palaces is used.

Different villages are assigned specific sections of canals to clean by removing weeds and deposits washed down the river during previous flooding. The *indunas* provide leadership in this regard and ensure cooperation from all villages in this work since everyone knows that this is their only means of travel from one place to another during the floods. Also, the success of the *Kuomboka* ceremony depends to a great extent on the condition of the canals.

Enforcement of customary law for heritage protection

In the event of certain individuals disregarding the traditional directives or indeed violating any of the customary laws in connection with conserving and maintaining infrastructure and use of natural heritage resources, an effective method of enforcement to punish offenders is in place. The offender is summoned to the local court, referred above, called *Kuta*, where if proved guilty, would be sentenced to flogging or to performing community service.

Conclusion

This customary system is used to protect and conserve all heritage resources available in the province. As noted earlier, other regions in the country have similar systems in place. The result is that a wealth of heritage resources are well preserved and handed down to successive generations. Further, the system has ensured sustainable utilization of finite heritage resources for centuries, thus demonstrating that traditional customary methods can be used to conserve our heritage. These principles have governed the traditional methods of conservation for centuries. Today, we have priceless cultural heritage preserved for our enjoyment and education.

The legislation for the protection of immovable cultural heritage in Uganda is the Historical Monuments Act No. 22 of 1967 and Statutes Nos. 7 and 8 of 1993. Using Kasubi tombs as a case study, this paper discusses the extent to which formal legislation was used to promote the site for international recognition. Statutes Nos. 7 and 8 of 1993 concerned the restoration of traditional rulers and the return of their assets and properties including royal tombs and palaces. During the nomination process of Kasubi tombs for inscription on the UNESCO World Heritage List, the Kingdom of Buganda used the Historical Monuments Act to acquire formal legal backing by the Central Government, the latter being a State Party and signatory to the 1972 UNESCO Convention. This reciprocity illustrates the level of interdependence between the central government and the Buganda Kingdom in the protection of immovable cultural heritage.

EPHRAIM KAMUHANGIRE

Formal legislation and traditional heritage management systems: a case of interdependence in Uganda

THE CURRENT FORMAL legislation for the preservation and protection of the immovable cultural heritage in Uganda is the Historical Monuments Act No. 22 of 1967. It was supplemented by Statutes Nos. 7 and 8 of 1993. A recent attempt to replace the Historical Monuments Act with a new legislation that would address new concepts, issues and needs in the protection of immovable cultural heritage and within acceptable international standards, has been overtaken by other developments which aim at streamlining the divestiture process of government departments. The Uganda Government will promulgate an Umbrella Act for the formation of executive agencies. The Department of Antiquities and Museums will become the Uganda Museums and Monuments Agency (UMMA). UMMA will be a

semi-autonomous body with an Advisory Board and not a Board of Directors, and will depend heavily on the parent ministry. The Chief Executive Officer of the Agency will be appointed by the minister on the recommendation of the Advisory Board working with the Ministry of Public Service. A legal framework will be formulated to streamline the legal status of the agency and will incorporate various aspects of the Draft Bill.

The central, southern and western parts of Uganda were dominated by centralised political systems commonly referred to as kingdoms. They lasted from the pre-colonial period, through the colonial and post-colonial periods up to 1967, when these kingdoms, namely Buganda, Ankole, Toro and Bunyoro, were abolished. These kingdoms had palaces and royal tombs that were well maintained on a communal

voluntary basis. Their respective chiefs mobilised their subjects to contribute materials for the works. In the case of Buganda, there were and still are clans that traditionally carry out the thatching of the tomb houses, wrap barkcloth on support poles and do other odd jobs in the site. When the kingdoms were abolished in 1967, the palaces and royal tombs were neglected. However when Idi Amin came to power in 1971, he took on the responsibility of maintaining and preserving some of the royal tombs. Statutory instruments were prepared and signed by the minister responsible for cultural heritage using the provisions of the Historical Monuments Act to declare them preserved and protected places.

When the kingdoms were restored in 1993, the assets and properties of the traditional rulers, which included land, palaces and royal tombs, were returned to them through the enactment of Statute Nos. 7 and 8 of 1993. The statutory instruments that had rendered them government-protected sites were repealed. However, the legal provisions of the Historical Monuments Act were evoked during the nomination process of Kasubi tombs on the UNESCO World Heritage List. The Historical Monuments Act provided the legal framework that was necessary for the preparation of the Nomination File and the minister responsible for cultural heritage countersigned it for formalization.

This paper will show how formal legislation has been used in Uganda to protect traditional heritage sites without excluding traditional practices. It will also show that when the sites were returned to their owners, the state did not abrogate its responsibility for providing legal backing when it became necessary. The case of the Kasubi tombs will be used to illustrate the point. Taking a historical approach, other pertinent issues will be discussed, including the contexts in which cultural heritage is found, research levies, pre-development cultural impact assessment, and penalties for contravening the laws protecting cultural heritage.

Historical background

As noted above, Uganda had centralised kingdoms from the pre-colonial period and for a few years after independence in 1966. At the time of independence, an understanding was reached between the King of Buganda, Sir Edward Mutesa II, and the leader of the Uganda Peoples Congress (UPC), Apolo Milton Obote, to unite forces through a merger of UPC and a Baganda Party known as Kabaka Yekka (KY) to defeat a predominantly Roman Catholic Party known as the Democratic Party (DP). The UPC/KY Alliance formed the first independence government, and under a federal arrangement, Mutesa II became

the ceremonial President while Obote became the Executive Prime Minister. However, this marriage of convenience between the UPC and KY did not last long as the two leaders soon began to clash over roles and responsibilities. A number of sanguinary incidents took place and military build-ups were constructed until the political crisis culminated in the 1966 Mengo War. Obote used government troops led by Idi Amin to storm Mutesa's palace at Mengo. Mutesa was defeated and fled into exile in London. In 1967, all the Uganda Kingdoms of Buganda, Bunyoro, Ankole and Toro were abolished and the 1962 Constitution was abrogated. The army occupied the former palaces and those who had royal regalia gave it over to the government to be kept in the Uganda Museum.

Before the kingdoms were abolished, their affairs were administered through customary laws and practices. The coronation ceremonies for the kings were conducted on the basis of traditional ceremonies and rituals, and palaces were very important points of reference. The subjects maintained the palaces and royal tombs on a communal voluntary basis. The chiefs would mobilise the people to take building and other materials to the palaces for maintenance works. In Buganda, there were and still are clans that are specifically responsible for thatching the royal houses. Other clans are also traditionally given specific duties and these duties are hereditary.

Mutesa II died in exile in London in 1969. In 1971 Idi Amin took over power from Obote following a military coup. In order to marshal support from the Baganda, the most populous ethnic community in Uganda, Idi Amin brought back the remains of Mutesa II from London to Uganda, which were reburied at Kasubi tombs. While Christian church services were conducted during the burial proceedings and the body lay in state for public viewing at Namirembe Cathedral (the main Anglican Church of Uganda), when it came to the actual burial itself, Mutesa II was buried in the traditional manner. It should be pointed out here that in Buganda, and indeed in other kingdoms such as Bunyoro and Tooro, whenever a king died, his lower jawbone was removed. The body would be buried or, the case of Ankole, left in the wild. The jawbone was never buried, but would be covered with barkcloth and decorated with beads and cowry shells. A shrine would be built for it with its own attendants, servants and guards. Rituals would be held at the shrine to supplicate to the king's spirit.

Kasubi tombs

The case study of Kasubi tombs is used here to show that through mutual interdependence, formal legisla-

tion and traditional or community-based systems have been used to protect the cultural heritage in Uganda. As a first step, Idi Amin won popular support from the Baganda by bringing back Mutesa II's remains from London to Uganda. During the burial ceremonies, Mutesa II's heir, Prince Ronald Mutebi, now the King, was allowed to conduct the necessary succession rituals. However, this did not automatically lead to the restoration of kingdoms in Uganda. The army continued to occupy the former palaces. Surprisingly, however, Amin's government took on the responsibility of maintaining and protecting some of the traditional sites such as the royal tombs. These included Kasubi and Wamala tombs for Buganda, Nkokonjeru tombs for Ankole, Karambi tombs for Tooro and Mparo tombs for Bunyoro. Statutory instruments in accordance with the Historical Monuments Act 1967 were prepared and the minister responsible for cultural heritage signed them, thus declaring the sites government preserved and protected places, now national monuments. The workers at the sites became government employees and were paid monthly wages while the traditional custodians were paid honoraria. Limited traditional practices were allowed to take place. However, permission had to be sought from the responsible minister since there was the suspicion that some of these activities were politically motivated. The central government also provided funds for the maintenance of the sites, even though the funds usually proved to be inadequate given that the communal voluntary services of the former royal subjects were no longer available.

Kasubi tombs were inscribed on the UNESCO World Heritage List in December 2001. In total, the site measures 26.8 hectares. It is divided into two parts, the outer and inner fences or courtyards. The inner courtyard is the most important part, which accommodates the tomb houses, the widows' houses, the twins' house, the drum house and the gatehouse. In the outer courtyard, there are the houses of the widows, the house of Lubuga, the house of the guardian of properties, the house of the Katikiro (the Prime Minister), the house of the site administrator and the houses of other ritual custodians. This is also the area where the princes and princesses who are the immediate descendants of the kings buried at Kasubi are also interred. Adjacent to the main site but now separated by a mosque and a primary school is Nalinya's palace. Nalinya is the ceremonial sister to the king and the overall guardian of the site. Together with Lubuga, they are installed in ceremony and wield a great deal of power at the site.

Mutesa I built Kasubi Palace in 1882. Perhaps due to Christian influence, although never baptized,

or his being impressed with the style in which his mother, Muganzilwaza, was buried in 1882, Mutesa willed to be buried whole and inside his courthouse – known as Muzibu Azaala Mpanga – at his death. The Church Missionary Society representatives had arrived in Buganda in 1877 and the White Fathers representing the Roman Catholic Church had arrived in 1879. Islam had already been introduced in Buganda as a result of the long-distance trade between the Arab/Swahili traders from the East African coast and the interior since 1844. By 1880, religious competition between the three sects for influence at the palace had set in. Mutesa was not happy with this development and expelled them all from his palace. The White Fathers relocated to Bukoba but the Church Missionaries led by Alexander Mackay decided to stay on. When Mutesa's mother died in 1882, Mackay made a magnificent coffin for her, constructed in metal and lined with wood and cloth. Indeed, when he died in 1884, his will was done. He was buried intact, without his lower jaw bone removed, as tradition would have demanded. His successors, Mwanga II (1910), Cwa II (1939) and Mutesa II (1971), were also buried intact and inside the same tomb house. The site has thus become a very important burial ground of the Buganda Royal Family. It is also the burial place of the immediate descendants of the four kings. The site is regarded as the main spiritual centre of the Baganda as they strive to maintain very strong links with their traditions.

Kasubi tombs are outstanding examples of the traditional Ganda architecture and palace design. The spatial organization of the two courtyards, the sequence of entry from the two-doored gate house (*Bujja bukula*), the drums house next to it, the widows' houses and the twins' houses in a circle inside the inner courtyard down the alley to the main tomb house (*Muzibu Azaala Mpanga*) represent a powerful experience for visitors to the site. The main tomb house is itself a magnificent and gigantic conical, grass-thatched house representing the unique Ganda architectural style, which has survived through the centuries. This represents one of the most remarkable structures using only grass and wood materials in the entire region of sub-Saharan Africa. The thatch has smooth after-finish, glittering on sunny days.

Inside the tomb house, magnificent and unique detail in design can be observed. The ring work inside the house from the floor to the apex represents the 52 clans of the Baganda Kingdom. The sense of grandeur is reinforced by the straight poles wrapped in barkcloths supporting the structure of the house and the long sewn barkcloths dividing the inside of the tomb house into two parts. The main burial place known as *Kibira* (forest) and in front of this

are the platforms representing the positioning of the graves of the respective kings. The symbolic regalia for each of the kings as well as their photographs are placed in front of the platforms. The floor is lined with lemon grass and covered with well-knit traditional mats on which visitors sit. Some relics of the Arab and European material culture in the form of sandals, lamps and chairs, representing the four widows of the kings who take monthly turns to stay inside the tomb house at night and during the day, all represent a unique and fascinating experience of the spiritual harmony and strength of the Baganda cultural heritage.

The other most important attribute of Kasubi tombs is that it is a traditional site, which has been preserved as a large green forest area surrounded by a fast-growing urban development. The site is only 4.5 km from the city centre of Kampala. In spite of the mushrooming skyscrapers and other modern structures, the site has remained intact from encroachment. Such is the importance attached to its preservation that recently, when a rumour circulated that the Buganda Kingdom Government had sold an acre of the site land to Shell Petrol Company, there were loud protests by the public and the Katikkiro. The Prime Minister of the Kingdom had to make an announcement through the popular media and in writing to both the National Commission for UNESCO and the central government that the rumour was false. Therefore, the degree of interdependence is manifested in this general concern over the protection of the site not only between the central government and the kingdom, but also between the central government and the general public. Many local developers have attempted to buy plots of the land within the site from the guardians, but the attempts have failed because they cannot obtain land titles from the Central Government Land Commission.

Another illustration of interdependence between the Central Government and the Buganda Kingdom Government was during the nomination process of the Kasubi tombs for inscription on the UNESCO World Heritage List. The Uganda Government is a State Party to UNESCO and a signatory to the 1972 UNESCO Convention Concerning the Preservation and Protection of Cultural and Natural Heritage. In order for the Nomination File of the Kasubi tombs to be presented to the UNESCO World Heritage Centre, the Uganda Government, through the minister responsible for cultural heritage, signed the File to provide its legal support based on the Historical Monuments Act 1967. During the preparation of the Nomination File, as a representative of government, the author chaired the stakeholder meetings and supervised

the utilization of the funds for the exercise. The author is also on the Site Management Committee and the Buganda Heritage Sites Commission as an ex-officio member whose role is to provide guidance for the proper protection of cultural heritage in the Kingdom.

The restoration of Uganda's kingdoms and traditional heritage management systems: Statutes Nos. 7 and 8 of 1993

The National Resistance Movement (NRM) of Yoweri Kaguta Museveni started its liberation struggle in central western Buganda in a region with thick forests and hard terrain, popularly known as the Luwero Triangle. It was difficult for Obote's forces to flush Museveni's guerrilla fighters out of 'Luwero Triangle' not only because of the difficult terrain, but also because the guerrillas had popular support and backing from the people. This support was essentially based on two premises. The first was that the Baganda wanted to avenge the humiliating defeat of their King Mutesa II in 1966, which forced him into exile and final death under dubious circumstances in London in 1969. The second was that the National Resistance Movement had promised the Baganda the restoration of their kingdom and the cultural properties that had been confiscated by the Obote Government in 1967. This promise was also made to the Banyoro, Batooro and Banyankore, whose kingdoms had also been abolished in 1967.

It is important to note that when President Museveni and the NRM took over power in Uganda, all the monarchists who had been in exile returned to the country, including Prince Mutebi and the King of Tooro, Patrick Kaboya II. Despite the prevailing optimism, however, the new government was not able to fulfill all its promises. It was not until 1993 that the National Resistance Movement Government of President Museveni finally fulfilled its promises by passing Statutes Nos. 7 and 8.

STATUTES NOS. 7 AND 8 OF 1993

As pieces of formal legislation, the two Statutes are important in that they provide the legal framework for the restoration of important traditional institutions and practices. These have harmonized traditional heritage management systems and formal legislation for the preservation and protection of cultural heritage in Uganda. They are cited here in full to underline this important development.

Statute No. 7 was promulgated 'to amend the Constitution in order to cancel the abolition of Traditional Rulers, to guarantee the freedom of a person

to adhere to his culture and cultural institutions, to make possible the return to Traditional Rulers of assets and properties previously confiscated from them or in respect of or in relation to their offices or incidental to the foregoing. It is to be cited as the Constitution (Amendment) Statute, 1993.’

Statute No. 8 was promulgated to ‘give effect to Article 118A of the Constitution and to restore to the Traditional Rulers assets and properties previously owned by them or connected with or attached to their effects but which were confiscated by the State and to make other provisions relating or incidental to, or consequential upon, the foregoing. It is to be cited as the Traditional Rulers (Restitution of Assets and Properties) Statute 1993.’

Under Statute No. 7, Prince Ronald Mutebi was crowned Kabaka Muwenda Mutebi II with pomp and ceremony on 31 July 1993. Both church and traditional ceremonies were performed during the coronation. The King of Tooro, Patrick Kaboyo II, was confirmed on the throne, having been crowned in December 1966. The Kingdom of Bunyoro had to crown their king at a later date because the throne was being contested in courts of law. King Kaboyo II died soon after and was succeeded by his three-year old son, King Oyo Nyimba Kabamba Iguru Rukidi IV. The fate of Prince John Barigye who was to be crowned King of Ankole is still undecided.

It is important to note that while Statute No. 8, with an attached schedule, specifically targeted the return of assets and properties to the Kingdom of Buganda, the other kingdoms were also accorded their assets and properties. Although Prince Barigye did not get back the Old Palace at Kamukuzi in Mbarara, he is in charge of the royal tombs of Nkokonjeru, which had been under government control since 1972. Mparo and Karambi tombs in Bunyoro and Tooro, respectively, are under the control of those kingdoms.

Kasubi and Wamala tombs and two other sites that were under government control were returned to the Buganda Kingdom Government. For this to occur, a Statutory Instrument to repeal the 1972 legislation was prepared and signed by the minister responsible for cultural heritage in the central government. The handover of these places to the traditional authorities by the central government did not, however, imply the withdrawal of support and the end of the mutual relationship between them. As shown above, through the Historical Monuments Act, the central government provided the legal backing required for the nomination and subsequent inscription of Kasubi tombs on the UNESCO World Heritage List. The department responsible for cultural heritage in the

Central Government has maintained a supervisory and advisory role in the management of the site.

The state department responsible for cultural heritage continues to be an active partner of the traditional authorities, and in the Buganda case, was actively involved in the initiation and development of the project known as the ‘Kabaka Heritage Trail’, which was inaugurated by the Kabaka himself in November 2001. This is a pilot project involving six cultural heritage sites in the Buganda Kingdom related to the monarchy. However, for reasons that remain unclear, Kasubi tombs were not included in the Trail. The project is intended to raise awareness among the communities who live near the sites so that they become responsible for managing and protecting them. They are meant to benefit from the project by making products such as crafts that they can sell to visitors to the sites. They have formed dance and drama groups and perform for visitors for a fee. In this way they have also managed to revive their intangible cultural heritage.

The success of the pilot project in Buganda has led to its transformation into the Uganda Heritage Trails. This will be an NGO which, in addition to consolidating its activities with the Kabaka Heritage Trail, will work with the Uganda Museums and Monuments Agency to develop another heritage trail in Tooro Kingdom. It will also collaborate with UMMA to establish an inventory of the cultural heritage sites in Uganda and to generate a database. Further, it will also help in developing 20 cultural sites into tourist attractions. In all these endeavours, community involvement in the establishment and management of the cultural heritage will be paramount. This is part of a five-year project funded by the World Bank under the Protected Areas Management for Sustainable Use (PAMSU) Project of the Ministry of Tourism, Trade and Industry, under which UMMA falls.

Conclusion

The cases of Uganda in general and the Kasubi tombs in particular demonstrate that community-based/traditional systems of heritage protection and formal state-based systems complement each other and can therefore work hand in hand successfully. Although problems and occasional contradictions may arise due to the different philosophical and ideological origins of the two systems, it is clear that for most of sub-Saharan Africa, any successful management of the cultural heritage will need to integrate them. In addition, the Uganda case demonstrates that the local communities are and should be an integral part of heritage management.

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The Republic of Mauritius has a very diverse cultural heritage that has been the product of the interaction of various populations who came to settle on the island from the 15th century. In this context, this paper discusses the legal instruments that have been put in place over the years to protect the cultural heritage of the country. The discussion focuses on the history of the protective legislation, the types of heritage that have been protected and the problems that have been encountered. Finally, the paper looks at the provisions of the Draft Bill of 2002 and how the proposed amendments to previous legislation and the proposed new additions are expected to render heritage protection more effective.

[DAWSON MUNJERI]

The National Heritage Trust Draft Amendment Bill 2002 of the Republic of Mauritius

MAURITIUS WAS FIRST made known to the outside world by the Arabs and the Portuguese in the 15th century. It was later occupied by the Dutch between 1598 and 1710 and then colonized by the French from 1715 to 1810. The British took over from the French in 1810 and the island was to remain under British rule until independence in 1968. It became a republic in 1992.

This brief history shows that the Mauritian nation is the product of a worldwide diaspora with permanent human settlement made up of people who originated from Europe, Africa, India and China having taken place only within the last four centuries. This reality offers Mauritius the unique advantage of being at the crossroads of civilizations where different customs, traditions, religions, languages and heritage coexist. The society's pluralism manifests itself in all aspects of Mauritian life. Mauritian culture is democratic, based on understanding and acceptance of other cultures. This background is very important and must be considered a frame of reference when discussing the legal framework for the protection of cultural heritage.

All Mauritians are expected to enhance their potential of expression and preserve their cultural identity in the varied context of a plural society. Culture and heritage in Mauritius is concerned with our roots and identity as a people of different origins and as a nation that has emerged through years of living together and interacting. Cultural pluralism has become entrenched in our social fabric.

Throughout history, the evolution of Mauritian society has been characterized by militancy in each cultural component that makes up the Mauritian mosaic. The militant element has helped to cultivate specificity and self-awareness of each culture. We cannot belong to the world unless we belong to our own culture and our nation. It is within this social reality and social parameters that the legal frame is set so that no one feels excluded. Every Mauritian should find himself within this frame.

The recognition of the past of each community has consolidated our nationhood. This nationhood is the result of the protection of the heritage of each ethnic group. Accordingly, in a democratic setting, it is the wish of the people that constitutes the law. The preservation of holy shrines and places of pilgrimages,

the setting up of memorial museums and the establishment of national museums greatly facilitate and consolidate peaceful coexistence. Mauritius cannot afford to lose the rich legacy of cultural stability to create a situation that erodes the very basis of our cultural being. The lawmakers are fully conscious of this predisposition.

If the colonial experience has repressed our heritage, we cannot in turn afford to become oppressors ourselves. Each heritage site is a centre of memories. The tangible heritage is the invaluable creation of the people's historic tales embodying values and deeds that stimulate the imagination.

Ours is a society where every citizen participates fully in cultural development. The multiplicity of religions and the plurality of races are our assets, not our liabilities. We live a democratic life within a secular society. All Mauritians are encouraged to identify themselves with their heritage. This identification develops a sense of belonging to the history of the country and ultimately to the country itself.

The guiding philosophy is that the immovable cultural heritage is the tangible product of human values from the point of history, art and science. Each heritage structure is an expression of its era. It is the duty of any nation to preserve and consolidate the vestiges of its past.

History of the cultural heritage legislation

Acts of Parliament are the highest form of law in Mauritius. All other sources derive their validity from or are subordinate to such Acts.

THE 1938 ANCIENT MONUMENTS ACT

The first cultural heritage law in Mauritius was passed under British rule in the form of the Ancient Monuments Act in 1938. The Act also set up the Ancient Monuments Advisory Board. In 1944, a new Ancient Monuments and Nature Reserves Board was set up. The primary responsibility of this Board was to protect and preserve the ancient monuments of Mauritius.

This law also decreed that a list of monuments must be published each year in the Government Gazette. As a result, a number of monuments were listed from the 1940s.

THE 1985 NATIONAL MONUMENTS ACT

The National Monuments Act of 1985 replaced the 1938 Act and provided for the protection of listed monuments with national historical value. It also set up a Board whose responsibilities, *inter alia*, was to designate and maintain national monuments.

Evaluation of the legislation and practice of cultural heritage protection

Despite what appears to be a commitment to protect the cultural heritage through the promulgation of the relevant laws, the reality of the situation in Mauritius is not very encouraging. The laws have not been very effective and implementation has been fairly haphazard. Although in the past century many buildings and other places have been declared national monuments, they have been provided with very little protection or maintenance. Many of them lie almost abandoned and in a state of disrepair. Moreover, the process of proclamation itself has been neither systematic nor scientifically objective. The selection criteria has been rather dubious and biased. For example, in a country like Mauritius, with a short but rich history, the fact that 50 percent of its declared monuments are graves or statues is indicative of biased selection criteria.

Most of our significant heritage sites and structures have remained ignored and many historical events have been deprived of commemorative monuments. As far as cultural heritage is concerned, therefore, there is a large gap between the policy that recognizes cultural diversity and the reality on the ground. The historical contribution of different sectors of the society has not been acknowledged. Their contributions have either been belittled or simply ignored as negligible.

The National Monuments Act of 1985 allows for protection but provides very limited maintenance of the monuments. The only successful cases of heritage preservation are those structures with a clear economic benefit.

By the end of the 1990s, it was clear that if most of the heritage sites and structures were not integrated into the economic fabric of the country, there would be little chance that such heritage would be sustainably maintained, much less developed and well managed. If a clear purpose or role could be found for heritage sites and structures, then many such edifices could be developed and managed. They could then reflect the contributions, interactions and the richness of the many cultures from which they arose and contribute to the construction of a fully Mauritian heritage.

The National Heritage Trust Fund Act of 1997

As noted above, by the 1990s it had become clear that there was no comprehensive strategy for the protection, restoration, development or management of national heritage sites or structures. It was within

this context that the Government of Mauritius passed the National Heritage Trust Fund Act of 1997. The aim was to create a framework that would allow for better management of the national heritage. For the first time the concept of ‘heritage’ was legislated with the intention that tangible cultural heritage be fully protected, conserved and managed. The functions of the National Heritage Trust are, *inter alia*, to dispose of, acquire, preserve, restore, survey and research heritage; give advice and publish material on heritage; raise funds; and allow public display of heritage. The fundamental aim is to promote civic pride in Mauritius through the preservation and development of heritage sites and structures.

Draft Bill of 2002

The 1997 Act has since shown weaknesses, particularly with regard to terms of reference and authority as well as powers of enforcement. The Mauritian authorities have therefore decided to amend the cultural heritage laws in order to correct these weaknesses.

The Bill proposes to merge the National Monuments Act and the National Heritage Trust Fund Act. This measure is expected to improve protection and efficiency within the heritage management sector.

The purpose of the proposed legislation is to protect archaeological and architectural monuments and sites as well as the cultural environments in all their variety and detail in the overall context of environmental and heritage resource management. It is a national responsibility to safeguard these resources as scientific source material and as an enduring base for present and future generations, for their self-awareness and enjoyment.

The proposed law also proposes to redress marginalisation in the treatment of the cultural heritage of the different cultures making up Mauritian society. This refers in particular to the heritage of the descendants of slaves and indentured labourers who have in many ways been denied cultural recognition and identity, notwithstanding their contribution to Mauritius, just like the rest of the population. It is now time for these cultural injustices to be corrected.

In addition, it is now felt that that our heritage should be re-appropriated. Embedded in every item of tangible heritage is a strong component of intangible heritage consisting of values, philosophies and maxims, which need to be recorded, revitalized and promoted. The proposed legislation will thus incorporate recognition and protection of intangible heritage.

The proposed law seeks to harmonize Mauritian law with international conventions relating to the protection of cultural properties. In this way, Mauritius will fully join the rest of the world in safeguarding its heritage for the benefit of all and for future generations.

Finally, it is the wish of all concerned that the new law reflect and implement these concepts. Lawmakers should be fully aware that unless and until those concerned accept and identify themselves with proposed legislation, it cannot be implemented by any authority fully and effectively.

On 1 April 2000 the South African Heritage Resources Agency (SAHRA) replaced the antiquated National Monuments Council, and after almost six years since national debate commenced, the heritage sector in South Africa finally became transformed. This paper sets out the framework of heritage conservation in the 'New' South Africa. In the past, developed countries applied a system of impact assessment rather than a permit system to heritage conservation. In many African countries, impact assessment has now become standard practice for management of the natural environment and mining resources, but is still rarely applicable to heritage resources. This need should be addressed by a holistic approach that takes into account the relationship between heritage and natural resources as well as knowledge of the heritage conservation traditions of the country and research into practices elsewhere.

[ANDREW HALL]

Initiating a review of national heritage legislation in the South African experience

SOUTH AFRICA has a history of heritage conservation that goes back to 1911, one year after the creation of the country, when a basic law to protect their 'Bushman Relics' was promulgated. This led to the creation of a predecessor to the current national agency two decades later, and from that point on, South African heritage conservation developed along similar lines to those of other Anglo-African countries. Laws for the protection of heritage remained conservative, lagging twenty to thirty years behind innovation in Britain and elsewhere in the developed world, and focused primarily on monumentalism. The focus was on the grander buildings that reflected the dominance of the colonial powers and, in the case of South Africa, their successor settler governments. While there were basic control systems for archaeology, and hence a means of protecting some aspects of African heritage – albeit only that of the fairly distant past – little was done to

create appropriate mechanisms for the unique heritage that cultural practice in Africa creates. It is for this reason that up until 1999, the system for heritage conservation as set out in the National Monuments Act of 1969, although much amended, remained firmly rooted in European and specifically pre-war World War II British traditional practices.

Background

Revision of the national heritage conservation framework was required following liberation from apartheid in 1994 and specifically to implement a constitution which devolved more powers to provincial governments, including on cultural matters. Powers for heritage conservation had to be devolved to the nine provinces, and due to limitations in its scope, the National Monuments Act was not able to adequately address the demands of a recently liberated society with a strong desire for the State to recognize its

African heritage. This situation was not limited to heritage conservation. Hence in late 1994, the minister responsible for arts and culture set up a team of experts, known as the Arts and Culture Task Group (ACTAG). The Task Group's mandate was to report to him on the state of field conditions and ideas for change in areas for which his ministry had responsibility. In 1995 ACTAG produced a Green Paper, outlining problems and setting out its vision of the ideal future situation for arts and culture in the country. This was followed in the same year by the production of an Arts, Culture and Heritage White Paper, which extracted from the ACTAG Report elements within the realm of possibility in terms of available resources, matters of conformity to broad policies of government and the restrictions imposed by the Constitution.

The White Paper was published in 1996, and like the ACTAG Report, contained a section on heritage. This very carefully set out the framework under which heritage conservation in the 'New' South Africa should take place and committed the government to the promulgation of a new heritage conservation law.

While the above processes were taking place, several provinces were also looking at its heritage conservation framework. Most notable was KwaZulu-Natal, which had inherited a fully functional monuments authority from the KwaZulu homeland administration, and had drafted a bill that was ready to be submitted to its legislature by the end of 1995. Namibia, a former South African territory that functioned under the same 1969 National Monuments Act, also drafted new legislation in 1995 with UNESCO assistance. These two processes and provisions became critical reference points for what followed at the national level in South Africa in the second part of 1996 and early 1997. Namibia had used a wide process of consultation on its new legislation, bringing together heritage practitioners and other interested parties from around the country in two week-long sessions to hammer out the provisions of its heritage bill under the guidance of two UNESCO-sponsored specialists. In South Africa, a similar *forum* process was followed and several hundred individuals from the heritage sector and its stakeholders were brought together at three meetings over a period of several months to determine the provisions of a draft bill for submission to the minister.

At the first session of the Forum, basic frameworks were discussed and a six-person drafting committee was appointed. This committee then began work on a draft bill first by doing research, which involved collecting and consulting copies of legislation from

all over the English-speaking world, focusing on examples from other emerging countries. These documents were acquired by writing to embassies and heritage authorities in other countries; recently the Internet has served as a useful source of such information. Advertisements were also placed calling for submissions from the public, resulting in close to 1,000 submissions received from members of the Forum and other stakeholders. At the second Forum meeting, the ideas to be incorporated into the bill were discussed in addition to its basic form and structure, and alternative responses to problems raised by submissions to the drafting committee were debated and resolved. Responses were based on the research conducted by the drafting committee, their own original ideas or concepts that emerged during the discussions of the Forum.

Following this meeting, the Drafting Committee worked for several weeks on a first draft of what became the Heritage Resources Bill and then circulated it to Forum members for responses. During the drafting process it was assisted for a week by a UNESCO-sponsored expert from Britain who understood the tradition from which much of the South African heritage experience is drawn and who was already familiar with the National Monuments Act through his work on the Namibian Heritage Bill. This specialist, Richard Crewdson, proved to be indispensable for his expertise in determining the most appropriate way to handle movable heritage.

Many responses to the initial draft were received, and where possible, the Drafting Committee incorporated or addressed them. However, certain responses, particularly those coming from the country's strong mining industry and corporate property owner's lobby, could not be addressed without compromising essential elements of the draft bill. One-on-one meetings were hence arranged with the Chamber of Mines and the South African Property Owners Association where issues of potential conflict were discussed. In most instances such meetings created the opportunity to elucidate the intentions of contested provisions of the bill, which in most cases allayed the fears of these two influential organizations. In other instances, compromises and alterations were agreed upon and changes made. An example is the provision protecting historic mine dumps as elements of industrial heritage, which mining houses felt would limit their ability to reprocess such resources. It was agreed here that instead of creating a blanket protection of such heritage resources, a survey and assessment of all dumps over a certain age would take place and that agreement would then be reached regarding precisely what was to be protected. At the final meeting of the Forum, a draft bill was approved

with only one mining house still voicing major concerns.

A period of limbo then followed in which for almost two years the draft bill shuttled between the Ministry and the bureaucracy in the then Department of Arts, Culture, Science and Technology, and several ill-advised changes were made from a professional perspective. By the end of 1998, the term of office of the first post-liberation government of South Africa was coming to an end and the Department and Ministry came under pressure from the Portfolio Committee in Parliament to submit the Bill for debate. It was then submitted to Parliament late in the 1998 session with insufficient time for discussion that year. In January of the following year, it was first discussed by a sub-committee of the Portfolio Committee for Arts, Culture, Science and Technology. At that time, two of the members of the original drafting committee were called in to advise the committee and most of the post-Forum changes were removed. A complication at this stage was the fact that the bill had to be passed before the last session of the Parliament concluded in March, and the legal advisory service of Parliament was hard-pressed with other legislation that the outgoing parliamentarians wished to see concluded before their term ended. The legal advisor working on the National Heritage Resources Bill therefore had little time to delve into a highly specialized area of legislation and could not give the Bill the attention it required due to other pressures. The result is that while the National Heritage Resources Act contains all the elements approved by the Forum process, there are many minor errors that still bedevil implementation.

Once approved by the National Portfolio Committee, the Bill had to be put before the legislatures of each province due to the complex procedures required for legislation approval in the provinces. In several of the legislatures its provisions were challenged by DeBeers Consolidated Mines, but ultimately this campaign proved futile. In the last days of March 1999, just before Parliament adjourned to prepare for elections, the Bill became law and was gazetted on 28 April 1999 as the 'National Heritage Resources Act', or 'NHRA'.

The South African Public Service financial year is from 1 April to 31 March, and the Act was passed too late for implementation in 1999/2000. As a result, it was only on 1 April 2000 that the South African Heritage Resources Agency (SAHRA) replaced the antiquated National Monuments Council. The heritage sector in South Africa was finally transformed almost six years after the initial national debate had started.

The National Heritage Resources Act (1999)

As discussed, the provisions of the National Heritage Resources Act (NHRA) of 1999 are a conglomeration of several factors, which include: the almost 90-year tradition that preceded it; the ideas gleaned from research into the legislation of many countries that share a similar tradition; and the product of original thought and the collective professional experience of the large group of professionals and clients involved in the drafting process. While specialists in their field who wrote the Act, including the writer of this paper, would like to believe that in some areas there is more original material in the Act than that drawn from the past or from the experience of other countries, this is not so. While most provisions of the NHRA have some precedent, areas of originality primarily relate to how these precedents have been adapted to suit changing needs and local conditions. Knowledge of the heritage conservation traditions of the country and research into practices elsewhere were thus critical to the process.

In accordance with the provisions of the ACTAG Report and the White Paper on Arts, Culture and Heritage, as well as tradition dating back to the 1930s, SAHRA and the nine Provincial Heritage Resources Authorities are governed by statutory bodies. These bodies are funded by the government but with independent powers to implement the terms of the Act. Governance is carried out via a council whose members are selected by the Minister of Arts and Culture after a process of public nomination and in accordance with strict requirements for demographic equity. Beyond this power, ministers at both the national and provincial level have only limited policy-making and advisory rights in relation to the management of what the Act terms 'heritage resources'.

Drawing on the Australian precedent, the NHRA establishes a concept known as the 'national estate', but takes this somewhat further in that the national estate is more all-encompassing. Simply put, it is that aspect of any property, movable or otherwise, which by virtue of its importance to the heritage of the country remains the property of the people held in trust by heritage authorities and controlled by them. In effect, the NHRA seeks to establish a system for the control of heritage resources that resembles that used by many countries to allocate and manage mineral rights and the mining industry. It sets up a system whereby heritage is not a commodity with a value to be traded, altered or even destroyed by one who has rights to use the land on which that heritage is located.

The drafters of the NHRA were particularly concerned in ensuring that in addition to continuing conservation of the built environment, it would address the needs of population whose heritage did not predominantly lie in structures. It also sought to strengthen areas of previous legislation where African cultures place more emphasis than does European society, on which previous conservation practice was based, as exemplified in the section dealing with burial places.

It is hoped that some of these mechanisms would allow for innovation in heritage conservation practice in South Africa, as examined briefly below.

Comments on some specific provisions of the 1999 Act

STATE ORGANS AND ADHERENCE TO HERITAGE CONSERVATION PRACTICE

A small, but important factor concerning these provisions requires the State to set an example in standards of heritage conservation practice. Section 9 of the Act removes many of the exemptions that previously applied to State undertakings and instead imposes a system whereby State organs such as Public Works are required to conform to a minimum standard in their treatment of heritage resources. This applies to both conservation work and general maintenance. It was inserted in the hope of removing the constant embarrassment caused to heritage authorities when private applicants complained that they were required to adhere to standards that the State imposed but did not itself apply in its own jurisdiction. The provision turns the tables, in fact, requiring the State to set the example for sound heritage conservation practice.

CONSERVATION AREAS

In trying to move away from the concept of monumentalism, which many feel is not appropriate in an African context, the NHRA contains a mechanism that is not new, but is rarely found on the African continent. Known in many countries as ‘Conservation Areas’, but termed ‘Heritage Areas’ in the NHRA in order to differentiate it from provisions of environmental legislation, Section 31 allows a heritage authority to create protection for an area by means of regulation rather than direct provisions of the Act. The advantage of this is that provisions that are very specific to the heritage resource in question can be created by imposing only those conservation mechanisms that are most appropriate. This is far better than relying on catch-all measures – in Africa usually monument declaration – and a strenuous permit application system that often

imposes draconian requirements that go far beyond the needs for conservation of the resource in question. It allows for a softer option that is less likely to cause resistance from an owner or community and as effective in protecting a heritage resource. Such an option would use provisions created through a consultation process.

BURIAL GROUNDS AND GRAVES

Section 36 of the NHRA deals with ‘burial grounds and graves’. With its history of colonial wars, South African heritage legislation has protected the graves of military casualties for many years and has had to extend provisions to recognize the graves of the victims of the Liberation Struggle. However, the new legislation goes further in recognizing the strong attachment of most African cultures to ancestral burial places by providing a general protection for all graves over 60 years old. Recognizing that monumentalization of graves, i.e. the prevention of interference of any sort, would pose a major restraint on development, the Act rather creates a system where consultation and agreement with descendants is required on how graves are to be treated in the course of a development. In this process the heritage authority can in effect act as the arbitrator, since it is required to issue a permit on the basis of the agreement reached. Agreement could, *inter alia*, require a developer to move an aspect of a development away from a burial site, if that is possible, or to exhumate and re-inter remains at its own cost.

HERITAGE RESOURCES IMPACT ASSESSMENT

Many developed countries have for many years applied a system of impact assessment rather than a permit system to heritage conservation. In many African countries, impact assessment is current standard practice for natural environment management, but is still rarely applied to heritage resources. South Africa is a case in point where there are fairly sophisticated systems for environmental impact assessment and a separate system for mining activity impact assessment, neither of which include provisions for heritage resources. Given the very close connection between natural phenomena and heritage in Africa, particularly when dealing with the link between sites and intangible heritage, a system of impact assessment for heritage resources was regarded as essential in providing a holistic approach by establishing a clear connection between heritage and natural resources. Rather than setting up a new system for assessing heritage resources, the NHRA therefore makes a formal connection

between the two existing systems of Environmental Impact Assessment and requires that they take heritage resources into consideration. Finding that the existing systems did not function on a sufficiently micro-level to provide for all heritage resources that could be impacted upon, however, the NHRA also establishes an independent system of assessment for use only in situations where a proposed development is not covered by the provisions dealing with environmental and mining legislation.

MANAGEMENT SYSTEMS AND PRACTICE

Some of the most important innovations in the Act are in the management systems that it institutes rather than the forms of protection. Section 40 provides for a system of grants for the upkeep of protected sites and loans. The latter provision is intended to overcome the difficulty many poorer owners have in raising funds from financial institutions. In recognition that it is most likely that heritage authorities will not have sufficient resources to adequately fund a grant or loan system for heritage conservation, Section 43 provides for 'incentives', whereby reductions in property or other taxation may be provided to those who adequately care for heritage resources.

Section 42 creates a system for heritage agreements. These allow a heritage authority and an owner or community to enter into a contract regarding how a heritage resource will be managed. Based on the 'covenant' system often used elsewhere, it is felt to be particularly relevant in an African context. Generally, covenants have been used to bind communities or owners to a process of upkeeping historic buildings in return for the injection of capital and expertise required to raise the state of conservation to an acceptable level. In an African context, the system can also be used to recognize traditional practices that are not codified in law, but which nevertheless ensure the conservation of a heritage resource. While codification of the practice might be the outcome of the Heritage Agreement, this is not necessarily so, and such a contract can simply provide for recognition of the rights of a traditional authority to continue administering the conservation of a site in a traditional manner, thus allowing the dynamism of tradition to continue. In practice it is hoped that it will prove to be a useful tool for bridging the gap between traditional practice and the State legal system, and that recognition of traditional conservation practices under the terms of the NHRA will create a form of protection from outside disturbance that is not possible at present. This provision in close combination with provisions for heritage areas

resolves many of the problems involving recognition of traditional heritage conservation practices.

Wilful neglect of a heritage resource is likely a more serious problem in South Africa than in other African States. This is the practice of allowing a resource to fall into a state of such disrepair that it can no longer be conserved or simply disappears. It most often occurs when an unscrupulous owner wishes to utilise the land on which a heritage resource is located for an incompatible purpose. In such circumstances, Sections 45 and 46 of the NHRA grant a heritage authority powers to issue a 'compulsory repair order' requiring the owner to stabilise the damage. If the owner refuses to comply, the authority may undertake the stabilization itself and recover the costs from the owner. Under Section 46 an authority may in extreme circumstances expropriate a property that is not properly cared for.

One of the greatest problems of conservation on the African continent is the imposition of sanctions against those who fail to adhere to the provisions of heritage conservation law. Most legislation prescribes the option of a fine or jail sentence, the latter usually dismissed by courts for what they generally regard as a less significant area of criminal activity. In the high inflation conditions of the continent, fines prescribed in legislation within a few short years become insignificant, and those who do not respect national heritage continue to act with impunity. South Africa has suffered from this problem, such as in cases where developers and other perpetrators simply offer to pay the fine and continue to do as they wish. Fortunately, South Africa now has legislation that links the amount of a fine to the length of the prescribed jail sentence and requires the Minister of Justice to regularly update the amount prescribed as equivalent to a certain term in prison. Section 51 of the Act thus provides a schedule of set prison terms for contravention of each relevant section of the Act, setting only the option of a fine rather than the amount thereof. However, the penalties go further than this, drawing on a precedent of a provision in anti-poaching laws that permits confiscation of all equipment used in the commission of an offence. This provision is proving particularly effective in preventing the construction industry from indulging in illegal practices and is equally as effective in dealing with illegal salvage of maritime heritage. The Act also imposes a penalty for each day in which a transgressor remains in contravention of the Act, another good management tool for dealing with the construction industry and forcing it to negotiate and obtain a permit as soon as a contravention is discovered.

Conclusion

While the authors of the NHRA tried to anticipate the many problems and issues that may arise in the implementation of a heritage conservation programme in post-apartheid South Africa, it is unlikely that they have foreseen every eventuality and every challenge that lies ahead. The experience of the past two and a half years has shown that implementation is not easy and the problems regarding devolution of powers to provincial governments have proven to be a nightmare that has to date sapped much of the energy put into implementing the new Act. Many of the new provisions thus remain largely untested and will remain so until the resources and expertise necessary for their implementation are available at the level of government where they are best implemented. Nevertheless, it is felt that the National Heritage Resources Act provides a system in which the State's heritage conservation agencies can grow and develop in the coming years.

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This paper provides a brief history of the development of laws and institutes protecting immovable cultural heritage in Zimbabwe. The newly amalgamated body, the National Museums and Monuments of Zimbabwe (NMMZ), has not completely succeeded in effectively managing of the immovable cultural heritage of the country, primarily due to its colonial character and philosophy that sites are to be 'preserved rather than used', as discussed below.

[KUNDISHORA CHIPUNZA]

Protection of immovable cultural heritage in Zimbabwe: an evaluation

THE NATIONAL MUSEUMS and Monuments of Zimbabwe Act (Chapter 25:11) provides for the establishment and administration of museums whose mandate among others is to ensure the preservation of immovable cultural heritage (ancient, historical and natural monuments), relics and other objects of historical and scientific value or interest.

According to the Act, monuments include 'any area of land, which is of historical, archaeological, palaeontological or other scientific value or interest'.

The Act protects monuments in two general ways. At the general level all archaeological and historical sites as well as associated artefacts and relics dating back farther than 1890, including rock paintings, are protected under the law. A permit is required before one can destroy, damage, alter, excavate, remove or export any site or artefacts from it. At a more specific level, the minister responsible may declare a site a national monument. Essentially, the land on which such a site as demarcated stands and the monument itself transfers ownership to the National Museums and Monuments of Zimbabwe (NMMZ), who own it on behalf of the people of Zimbabwe. However, because of the Mines and Minerals Act, sites are not protected against mining activities, although it is mandatory to carry out impact assessment before

engaging in earth-moving activities, according to the NMMZ Act Sections 26 and 27.

Immovable cultural heritage protection in Zimbabwe dates back as early as 1902 when the Ancient Monuments Protection Ordinance was passed into law. The Ordinance defined anything pre-dating 1800 as an ancient monument or relic. The ordinance did not cover rock paintings as part of ancient monuments, however. These were later included by the 1912 Bushmen Relics Ordinance. The two Ordinances were replaced in 1936 by the Monuments and Relics Act. This 1936 Act was probably the most profound of developments in the protection of monuments in the country for the following reasons: it brought into existence the Commission for the Preservation of Natural and Historic Monuments and Relics, better known as the Monuments Commission; it brought with it the concept of *National Monuments* as an effective way to protect monuments; and it established a system of regular site inspection.

In addition, the Commission undertook to maintain, excavate, document and keep a register of all sites through a system of active surveys for new sites. From this register some sites would be recommended to the Minister for proclamation as national monuments. By 1954, 79 sites had been declared national monuments.

The 1936 Act was replaced in 1972 by the National Museums and Monuments Act, Chapter 313 17/1972. Under this Act, the National Museums and the Monuments Commission were merged into one body, the National Museums and Monuments of Zimbabwe (NMMZ). According to some, this was not a positive development, because it has largely been responsible for slowing down progress in the effective protection of monuments. The Act endowed NMMZ with sweeping powers that it applies fully as it seeks to maintain monuments in their original state as much as possible, while at the same time allowing for rescue, restoration and preservation.

Despite the wide-ranging powers given by the Act (Cap 25:11), NMMZ has not really succeeded in effectively managing the immovable cultural heritage of the country. This has been the result of an interplay of factors examined and discussed below.

The colonial character and philosophy of the Act

The greatest problem of the NMMZ Act in effectively managing cultural heritage has been its colonial character and philosophy. The Act, which has not been amended except for the country name change from Rhodesia to Zimbabwe, has become both outdated and reactionary in view of the democratisation process. This process has seen tremendous changes, especially in the Arts and Culture legislation. The Act is deeply rooted in a colonial philosophy that believes that sites and monuments must be 'preserved rather than used'. The process of listing monuments on the National Register effectively barricaded local communities from the heritage. This was compounded by the passing of the 1931 Land Apportionment and 1969 Land Tenure Acts, which saw mass movement of indigenous people from the agriculturally more productive highveld to the dry, hitherto thinly populated parts of the country. This effectively alienated the local populations from their heritage (Pwiti and Ndoro 1999; Ndoro and Pwiti 2001). Many places of cultural significance such as Chinhoyi Caves, Great Zimbabwe, Matopo Hills, Natabazikamambo, Khami, Danamombe, and Tsindi were placed under National Parks and/or National Museums whose protective legislation meant that Africans no longer had official and free access to these places. The Land Apportionment Act meant that more than 80 percent of the heritage places fell under land designated as European, resulting in physical and spiritual alienation of Africans from their heritage. The transfer of ownership of cultural property to government departments such as National Parks and National Museums, and the displacement of people in these areas to 'foreign' areas

therefore meant that the local communities no longer had legal access to the sites (Ndoro 2001).

To date, the legislation has been applied without due regard for the very ethno-systems involved in the production of heritage that the Act aims to protect. Pwiti (1996) also alluded to this fact, that cultural heritage management has been the by-product of colonialism and was carried out without the involvement of the indigenous populations. Open conflict has occasionally resulted, for example, in an early post-independence case when Sophia Muchini, a respected spirit medium of Mbuya Nehanda, attempted to set up her home at Great Zimbabwe. Her action was deemed illegal and she was forcibly removed by the security forces (Garlake 1981; Pwiti 1996). The case illustrated very clearly the idea that monuments could not be used for traditional/religious purposes, but rather, for neo-colonial, bourgeoisie middle-class based pursuits such as scientific research, tourism, filming and photography. For NMMZ, the establishment of a permanent home within Great Zimbabwe by the spirit medium was in conflict with the obligations of the Act, i.e. to protect and preserve the monument (Pwiti 1996). The law thus puts to the fore the 'object', 'artefact', 'monuments' and never the people who created them (Munjeri 1999).

Monumental heritage economy

Management of monuments heritage has always taken an uneconomic approach, since NMMZ is viewed as non-profit-making organization. Any form of consumerism of monuments and indeed economic consumption has been limited to the middle classes. Eighty percent of the class 1 monuments are located on what were until recently private, white-owned commercial farms. Most the people have therefore not been able to enjoy their own heritage. Recent developments in the country, however, show that NMMZ is falling behind in its philosophy and practice.

In Zimbabwe, natural heritage management has recognized that communities need to derive economic benefits from their natural resources. This has seen the launching of the Communal Areas Management Programme (CAMPFIRE). The programme entrusts local communities with the management of the wildlife resources in their localities. Successful management of these resources means that they are able to sell off some of the wildlife and its by-products and derive a direct income. This approach resulted in wildlife conservation because it has reduced the problem of poaching. Local communities feel a sense of ownership and responsibility over the wildlife under their custody. This move away from animal 'welfarism' to people 'welfarism' has yielded positive

results (Munjeri 1999). The NMMZ Act is still entrenched in the colonial 'site welfarism'. The fairly limited vision of the NMMZ with regard to the need for the economic management of the monumental heritage results in plundering, irrational and irresponsible exploitation, destruction and, finally, decay. Due to this uneconomic approach to monumental heritage, income is not directly registered in the accounts of the national wealth nor are the values linked to it directly and fully recognized. The non-economic management of the heritage has resulted in what is perceived today as a lack of appreciation and care for the cultural heritage such as archaeological sites especially in the communal areas. This should be relevant now that there is reversed land ownership in Zimbabwe, which will in part ensure the reunification of the African populations with their heritage that had been ex-appropriated through the Land Apportionment Act 1931 and the Land Tenure Act of 1969. Monumental heritage economics will help convince the resettled families of their responsibilities in creating favourable conditions for the discovery and expansion of monuments, including activities such as their preservation, maintenance and development.

Monuments inspection

By any standards, Zimbabwe leads in the field of heritage management in Southern Africa despite the limiting legislative framework. The Monuments Commission made huge strides in registering monuments and creating a workable National Monuments Register. Most of the achievements were recorded in the 1950s. By 1980 when Zimbabwe gained its independence, there were 169 declared monuments on the National Register. A professional archaeological survey was in place and the general register had more than 3,000 sites. An effective monuments inspection and protection programme had worked very well until the museums and monuments were put under the same administration. The amalgamation unfortunately limited the activities of the Commission. There were no monuments inspectors in the museological regions until recently. Up to now the merged national museums and monuments administrative framework does not recognize monuments inspection as a profession. There is, however, a post of chief monuments inspector whose incumbent is charged with the responsibility of coordinating the national monuments conservation programme.

The National Monuments Conservation Programme

Between 2000 and 2002, this programme managed

to carry out its responsibilities fairly effectively in the following areas.

Ranking of monuments

Based on the criteria below, the programme has ranked sites on the National Monuments register into three classes for effective administration and monuments inspection.

Class 1 (36 sites):

- are public sites with significant visitorship;
- have custodians in place;
- have site museums;
- are accessible through all weather roads;
- are provided with brochures, pamphlets, comprehensive research publications;
- include World Heritage sites.

Examples include Great Zimbabwe, Khami, Domboshava, Ziwa, National and Provincial Heroes Acres, Matopos Rock Art Sites, Tsindi, Harleigh Farm, Diana's Vow.

Class 2 (28 sites):

- are semi-public sites;
- are partially accessible;
- lack significant visitorship;
- literature available at some sites;
- lack custodians;
- lack museums.

Examples are Chamavara, Zinjanja, some historic buildings, Majiri, Alter site, Kagumbudzi, Matendera, Jumbo Mine.

Class 3 (78 sites):

- are non-public sites;
- lack custodians;
- are not easily accessible;
- have very few specialist visitors;
- lack amenities on sites.

Examples are Dambarare, Fort Makaha, Tohwechipi's grave.

Establishing a monuments inspection programme

Under this programme, Class 1 sites are inspected quarterly, Class 2 sites, twice in a year and Class 3 sites, once a year.

Carrying out condition surveys

In the two years between 2000 and 2002, condition surveys have been carried out for more than half of the Class 1 National Monuments. The aim is to have condition surveys carried out for all National Monuments and Management plans produced for all Class 1 monuments.

Producing multimedia CDs

A multimedia CD for all the national monuments was produced. The CD combines narration, video, still photos and written texts for all the sites on the list.

Elaborating annual action plans

The programme has managed to design directed and focused year-by-year action plans. These were produced with the participation of all Monuments Inspectors from the different regions.

Problems experienced

Unfortunately the post of Chief Monuments Inspector responsible for the programme fell vacant and most of the initiatives have been shelved. Without this coordinating function, it has been difficult to maintain the momentum gained. As far as the monuments themselves are concerned, the country has developed the capacity to diagnose and monitor the deterioration mechanisms, especially on dry-stone wall monuments. Relevant and effective remedial measures can also be taken in the event of threats to the integrity of this type of cultural heritage. There is, however, the perennial problem of manpower to implement programmes. The programme also lacks the expertise capacity to deal with conservation problems relating to *dhaka* (adobe) monuments. Similarly, there is limited capacity to handle the rock art heritage.

LACK OF A TRADITIONAL PROTECTIVE REGIME FOR CULTURAL HERITAGE

Modern heritage practices encourage involvement of local communities in the management of immovable cultural heritage. Communities living with the cultural heritage in Zimbabwe, especially during this period of heritage re-possession through the agrarian land reforms, want to be involved in the management of their heritage. In most cases, however, the nature of their involvement is incompatible with the promulgation of the NMMZ Act (Chapter 25:11). Communities and cultural heritage fall under the purview of the Traditional Leaders Act, which also gives traditional roles and responsibilities to chiefs and headmen, protection of sacred/cultural heritage included. It is my view that NMMZ should recognize the powers of this Act. This takes into account the fact that legal protection of cultural heritage is best provided by a protective system that incorporates the various normative systems that operate in the African communities concerned, i.e. the State Law concerned (NMMZ Act) and the customary/traditional law regime (see Mumma, this volume). Currently, through its Act, the NMMZ

views itself as the sole agency for the protection of cultural heritage. The Act (Cap 25:11) has to some extent ignored the existing traditional and other normative systems. Acceptance of the inherent powers of chiefs and headmen with regard to their responsibilities as custodians of culture will foster the traditional management systems in the protection of cultural heritage.

Conclusion

In Zimbabwe, most of the cultural heritage is recognized traditionally and is accorded religious significance. Most of the immovable cultural heritage sites, especially the stone built monuments, are regarded as shrines and traditional centres of worship. This places the care and upkeep of this heritage under the purview of the traditional leaders through the Traditional Leaders Act. The National Museums and Monuments Act does not formally acknowledge this Act nor is there is formal dialogue at the policy level between the two competing Acts. While this should serve as a classic case of legal pluralism, the adjudications of the different administrative frameworks are likely to be thrown into open conflict now that the Traditional Leaders Act is poised to give traditional leaders court powers to deal with cases that fall under their Act.

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The National Heritage Council Bill has been on the drafting table for more than a decade in Namibia, during which the Namibia heritage authorities have used the South African National Monuments Act 29 of 1969 and a multitude of policies from other Namibia government agencies. This paper identifies and discusses the legislative policies that have been adopted by the National Monuments Council of Namibia and the National Museum of Namibia in managing immovable cultural resources in the first 11 years of independence. Of special interest is the policy on conservancies that was appropriated by the Directorate of Environmental Affairs and applied at immovable cultural heritage sites. The paper also discusses the pros and cons of this approach, which was originally developed for wildlife management.

[GOODMAN GWASIRA]

Managing with borrowed laws: cultural heritage management in Namibia

THE GENESIS OF NAMIBIAN heritage legislation is inextricably connected to South African legislation (Tötemeyer 1999: 73). The first promulgation of heritage legislation in South Africa was in 1911 when the Bushmen Relics Promotion Act was passed, aiming at preserving rock art (Tötemeyer 1999). The Bushmen Relics Promotion Act was replaced, however, by the Natural and Historical Monuments Act of 1923, which led to the birth of the Historical Monuments Commission. Despite it being named the Historical Monuments Commission, its definition of ‘monuments’ included both ‘natural and cultural heritage, which had aesthetic, historical or scientific value’ (Tötemeyer 1999: 73). Due to lack of financial assistance from the State, however, it could not declare monuments (Vogt 1995; Tötemeyer 1999). The Monuments, Relics and Antiquities Act (Act 4 of 1934) that replaced the Natural and Historical Monuments Act of 1923 made it possible for the commission to identify and recommend national monuments to the relevant minister for subsequent declaration.

All these Acts were and still are not applicable to Namibia, but in 1948, a Historical Monuments Commission was set up by the then South West Africa Scientific Society. Despite the fact that it was not set up by an Act of Parliament, the Commission managed to preserve ‘significant’ cultural and natural heritage sites and relics. The Commission was dissolved in 1969 when the National Monuments Act (Act 21 of 1969) was passed in South Africa and a Regional Committee for South West Africa (Namibia) was established. It is interesting to note that despite being amended in 1979, the amendments did not apply to Namibia.

Current legislation and practice

In order to understand the complexity of heritage law and its enforcement in Namibia, it is important to recall that the current legislation was introduced in 1969, the period in Namibian history when the notorious Odendaal Commission dealing with separate development was being implemented, which led to the creation of Bantustands (homelands). There appears to have been selectivity in identify-

ing and declaring National Monuments. Of the 117 National Monuments declared between 1950 and 1990, close to 80 percent represent the settler culture, reflecting the political agenda of the period. Hence from the onset, heritage management and protection in Namibia was inextricably connected to the 'bias in the South African National Monuments Commission towards conservation of buildings and sites associated with European colonists' (Tötemeyer 1999: 78). Cultural heritage was therefore used to advance and support the differences between the settlers and the indigenous people, emphasizing the alleged superiority of the former and hence the need to protect and promote their culture at the expense of the latter.

It is clear from the outset that the definition of what could be protected by the 1969 Act was restricted. The definition did not take into account the totality of cultural practices and expressions and their continuous evolution. While this status quo has not yet generated debate at the community level in Namibia, the Australian experience is a portent of this emerging debate. In Australia, the Aboriginal and Torres Strait Islands Commission rejected a proposed legislation on the grounds that it did not protect 'a broad range of community interests, especially indigenous heritage' (*The Guardian*, 14 March, 2001). This shows that a non-consultative approach to legislation formulation will lead to non-cooperation in implementation and respect for the laws.

Many laws have had to be repealed or amended since the attainment of Namibia's independence in 1990. However, the government cannot change all inappropriate laws at once. Some pieces of legislation, such as the National Monuments Act 29 of 1969, have been retained to protect immovable cultural heritage while others are being addressed.

The fact that a draft bill, the Namibian National Heritage Council Bill, was compiled indicates that Namibian authorities acknowledge the shortcomings of the South African National Monuments Act 29 of 1969 as an instrument that can be used to fully manage National Heritage Resources in Namibia. Also, since South Africa had already changed its own legislation when the National Heritage Resources Act of 1999 was passed (see both www.geocities.com/mariejoubert/han/policies.htm and Hall, this volume), this is further indication of the failure of this National Monuments Act of 1969 to address some serious issues. The question then arises as to how Namibia has managed its heritage resources since independence.

Legislative policies developed and adopted for other forms of heritage, especially conservation of

wildlife, have been appropriated. The major policy appropriated by the National Monuments Council is that of the Ministry of Environment and Tourism (MET) on wildlife management, utilization and tourism in communal areas, as well as that on the establishment of conservancies. The policy has a threefold aim, as expressed in Circular 19 of 1995:

- (1) To remove discriminating provisions of the Nature Conservation Ordinance (Ordinance no.4 of 1975) by giving conditional and limited rights over wildlife to communal area farmers that were previously enjoyed by commercial farmers. (According to the Nature Conservation Amendment Act of 1996, 'commercial land' means any geographic area of land habitually inhabited by traditional communities.)
- (2) To link with rural development by enabling communal area farmers to derive direct income from the sustainable use of wildlife from tourism.
- (3) To provide an incentive to rural people to conserve wildlife and other natural resources, through shared decision-making and financial benefit. The MET Policy document on the concept of conservancies has its roots in the realization of the advantages of pooling land and resources by commercial farmers to 'make available a larger unit on which integrated management practices can be carried out'.

At the communal level, however, a conservancy is 'a community or group of communities with a defined geographical area who jointly manage, conserve and utilise the wildlife and other natural resources within the defined area' (MET Policy Document: 6). In both cases the conservancy is managed with minimal interference or input from the state. The establishment of Communal Area Conservancies has been described by Sullivan (1999: 2) as reflecting a 'post-independence agenda to re-instate African rights to land and resources in the wake of the alienating policies of this century's imposed colonial and apartheid administration.'

As mentioned above, the communal areas conservancies policy was developed on the assumption that natural heritage resources can be 'harvested... and utilised non-destructively only if their benefits are harnessed effectively by the users themselves' (Sullivan 1999:1). This entails the devolvement of power to manage the heritage at the community level. The community then views the heritage product as its own and thus assumes responsibility for its continuity. This is similar to Zimbabwe's Communal Areas Management Programme (CAMPFIRE) (see Chipunza, this volume).

Brandberg Mountain: an example of management under multiple laws

Immovable cultural heritage sites are almost always linked to natural heritage, of which Brandberg Mountain is a good example. The mountain is famous for the natural scenic mountains as well as the spectacular Late Stone Age rock art. In terms of values, the natural aspects are therefore just as important as the cultural values. Thus, the Ministry of Environment and Tourism is a major stakeholder. The mountain is, however, under the jurisdiction of the National Monuments Council (NMC). The legislation applicable for the protection of the mountain is therefore the National Monuments Act of 1969. The National Monuments Council experienced problems in the past in implementing the Act, however, mainly due to NMC's understaffing (a situation currently being rectified). The issue, however, is how the management of the mountain was carried out in the past. The natural environment was looked after by the environmental laws and policies drawn by the MET, while a host of other prohibitive laws, such as the mineral prospection policy, were implemented by the relevant ministry. The NMC then found itself in the role of coordinator rather than policy-implementing agency. This appeared to be the best option given the status quo at that time. Currently, the NMC is undergoing a restructuring process, which should lead to appropriate staffing levels so that the National Monuments Act can be effectively implemented.

Although laws and policies appropriated from other government agencies have chiefly dealt with the protection of the Brandberg Mountain's natural heritage, its rich cultural heritage in the form of the prehistoric rock art needs to be addressed. The routine maintenance of the site has remained the responsibility of the NMC. The distance of the site from the capital city where the NMC has its headquarters is too vast for the Council to effectively manage the site regularly. Activities critical to site management such as regular inspection or routine monitoring could not be accomplished without recourse to the Communal Areas Conservancies policy. This policy becomes an effective way of addressing the issue of local people's alienation from proclaimed parks. The Dâures Mountain guides and the Tsiseb Conservancy, for example, all but live off the tourism generated by the mountain and its rock art. It is in their interest, therefore, to maintain and sustain the source of their income. The guides consequently monitor the cultural heritage and report to the National Monuments Council. This automatically means that there is daily monitoring of the art and the natural heritage, which

translates into a chain of communication between the conservancy and the NMC. However this state of affairs should not be allowed to replace the ideal situation: legally the presence of the NMC should still be required. Under the circumstances, the current arrangement seems to be working. In essence, the community that works for the conservancy observes and reports to the NMC on any violation of the Act, and the Council is responsible for law enforcement. This means that the community has to be conversant with the heritage laws of the country, but unfortunately, this is not always the case. They know parts of the Act only, and therefore resort to other agents such as the rangers from the Ministry of Environment and Tourism and mining inspectors.

Conclusion

This paper has attempted to piece together a history of immovable cultural heritage legislation in Namibia and to show that in the absence of a well-staffed heritage agency, immovable cultural heritage has been managed by a multiplicity of laws. The NMC has borrowed laws and policies of other bodies and used them for heritage management. The evolution of the NMC in Namibia as outlined here has played a significant role in creating the status quo. However, while these shortcomings are being addressed by the National Heritage Council Bill, conserving and protecting immovable cultural heritage need to continue, and for now, the feasible option appears to be to 'manage with borrowed laws'.

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This paper will discuss the evolution of the cultural heritage legislation in Botswana, from 1911 when the first Heritage Proclamation was enacted up to the current Act of 2001. The Bushman Relics and Ancient Ruins Protection Proclamation of 1911 mainly applied to materials deemed 'relics of Bushmen'. Although there were subsequent amendments to this legislation, they did not make much of a difference. The first major and more encompassing legislation was the Monuments and Relics Act of 1970. It was 'an Act to provide for the better preservation and protection of ancient monuments, ancient workings, relics and other objects of aesthetic, archaeological, historical or scientific value or interest.' The Act did not address the heritage in its totality, however, but rather focused on the archaeological components. More recently, important amendments were effected in 2001 in order to address the limitations of the 1970 Act and to take into account recent developments such as the need for Environmental Impact Assessment. The National Museum Monuments and Art Gallery (NMMAG), which is responsible for administering the Act, has also drafted regulations designed to facilitate the implementation of the Act.

[MATLHODI MMUTLE]

Protection of cultural heritage in Botswana

Introduction: The history of heritage legislation

A number of proclamations, as they were known during the colonial period, were enacted to protect the heritage of the then Bechuanaland Protectorate. In time, however, the proclamations proved to be inadequate, resulting in their amendment. The first was the Bushman Relics and Ancient Ruins Protection (Bechuanaland Protectorate) Proclamation of 1911.

THE 1911 BUSHMEN RELICS AND ANCIENT RUINS PROTECTION PROCLAMATION

The Proclamation made provision for the protection of Bushman relics and ancient ruins within the Bechuanaland Protectorate. It prohibited the removal of the protected relics and ancient ruins without the written permission of the Resident Commissioner. An application had to be made for permission to remove relics or ancient monuments from their original place.

The application was to be accompanied by drawings, photographs or tracings of the relics or the portion of the ancient ruin to be removed. The exact location was to be stated clearly. In addition, the reasons for such action were to be explained and justified. Penalties for contravention of the Proclamation were stipulated, including those for giving false information when making the application. The proclamation recommended that the High Commissioner should lay down regulations to enhance effective administration and ensure proper handling of objects.

THE 1934 NATURAL AND HISTORICAL MONUMENTS, RELICS AND ANTIQUES PROCLAMATION

This Proclamation included natural aspects such as geological formations and areas of scenic beauty as well as historical monuments. The relics were associated with peoples believed to be natives of the area. Antiques that had been in existence for over

100 years were also protected. In common with its predecessor, the Proclamation also protected monuments, relics or antiques from destruction or removal from their original place. There were also restrictions placed on the exportation of relics. Export of antiques required an application for a permit providing a full description of the object, photographs, location and the purpose for which export was desired. Antiques also could not be destroyed or damaged without the approval of the Resident Commissioner. The proclamation was silent on the issue of regulations, however.

THE 1935 BUSHMAN RELICS PROCLAMATION

The one important amendment contained in this Proclamation was that in addition to seeking the written permission of the Resident Commissioner to alter or destroy a monument or remove a relic, it was required to consult the chief and the tribe where it was situated. In the event of a disagreement between the chief and his subjects on the one hand, and the Resident Commissioner on the other, the matter was to be referred to the High Commissioner for a decision. It was ruled that ‘provided that in that case of any monument or relic situate in a Native Reserve, such consent shall not be given without previous submission to the chief and the tribe occupying such reserves: provided further that in the event of a disagreement on the matter submitted between the chief and the tribe on the one part and the Resident Commissioner on the other, the matter in dispute shall be referred to the High Commissioner for the decision.’

THE 1951 BECHUANALAND PROTECTORATE BUSHMAN RELICS AMENDMENT PROCLAMATION

The amendment laid down that permission to excavate monuments had to be in writing. The Resident Commissioner had to consult with the chief and tribe in cases where the monuments were situated in native reserves.

THE 1970 MONUMENTS AND RELICS ACT

In 1967, an Act was passed to establish a National Museum and Art Gallery as a government department. The Museum was established in 1968 and two years later, the 1970 Monuments and Relics Act (Cap 59:03) was passed. The National Museum and Art Gallery, operating under a Board of Trustees, was given the responsibility of administering the Act.

The 1970 Act focused on relics, ancient monument in addition to *national monuments* in existence before

1902. It clearly distinguished the responsibilities of the different categories of personnel working within the Department. The Act sought to consolidate and improve on the ways in which heritage should be protected and preserved. For example, for those monuments located on private property, written agreements were to be entered into with regard to custodianship and maintenance.

The Act allowed for wider consultation when national monuments were to be declared. The Commissioner had to consult the affected parties on the intention to declare an area a national monument. Prior to declaration, the government minister responsible had to be informed, and once a decision had been reached, it had to be published in the Government Gazette for public commentary. The Commissioner had to be notified about the discovery of any monuments without delay. This enabled the Museum to compile a National Register of sites. There were also restrictions on access to certain areas of sites where one was required to be given permission before one could visit the area. This was to control movement of people in sensitive sites and to restrict activities that could be done at certain sites.

An important provision was the restrictions placed on excavations at sites, monuments and ancient workings. A written permit from the museum was required before conducting any excavations.

The 1970 Act also established the Monuments and Relics Fund to hold funds allocated by government for the acquisition and administration of monuments as well as for excavations and research. Funds donated by individuals for research would also be deposited in this fund. The Commissioner was responsible for the management and administration of the funds. A report was to be sent to the minister on 31 December of each year or immediately after on all matters pertaining to national monuments, monuments, ancient workings or relics considered important.

Regulations were extended to cover fees payable for access to monuments. Fines for contravention of the regulations under the Act were also introduced.

One of the important sections in this Act is Section 22 states that ‘any object declared to be a natural and historical monument or relic or monument under the provisions of the section 7 of the Bushman and Relics Proclamation shall, unless, the declaration is cancelled under section 10(2) of this Act be deemed to be a national monument for the purposes of this Act.’

This is important because all proclaimed monuments were not national monuments prior to this Act declaring them so.

Heritage protection after the 1970 Act

Initially, there was a shortage of skilled personnel until the late 1980s; the government only began then to recruit staff to manage the heritage. This was in the overall context of the spectacular economic development taking place in the country. Mining replaced cattle ranching as the major branch of production in the economy. This economic growth has had a negative impact on the heritage, however, with numerous archaeological sites and monuments destroyed during mining, road construction, urban building construction and other related development initiatives.

The Ministry of Labour and Home Affairs became increasingly concerned over the loss of Botswana's heritage. This led to the introduction of a set of procedures requiring developers to carry out and finance archaeological impact assessment studies. Although at this time the requirement was not a clear part of the law, it worked relatively well; many sites were documented before they were destroyed and some were saved for posterity. This largely depended on the good will of developers and there were no serious instances of non-compliance. In some cases, however, the NMMAG had to pay compensation to developers in instances where there were delays in carrying out archaeological impact assessment or mitigation work due to its own shortcomings.

Public awareness is another issue that concerned the 1970 Act. To this end, NMMAG has been trying to make sites accessible and raise awareness through the country's education system and general educational campaigns. In recent years, the Department of Tourism has been aggressively trying to diversify the tourism industry by marketing heritage in the general context of cultural tourism growth. As a result, some sites and monuments have received publicity and public awareness has been raised. However, this has not been without its problems. Sites are now being exposed to new risks from uncontrolled public use and vandalism has increased due to lack of relevant regulations.

On the whole, inadequacies and shortcomings have come to the fore as NMMAG has been actively trying to enforce the 1970 Monuments and Relics Act.

Limitations of the 1970 Act are:

1. The cut-off date of 1902 excluded a great wealth of cultural heritage that needs to be protected by the law;
2. The Act did not make provision for compulsory pre-development impact assessment. Although procedures were subsequently put in place, they were difficult to enforce or to follow up and compliance was largely dependent on the good

will of developers. Some developers thus ignored the appeals by the NMMAG and a number of places of archaeological significance were destroyed during construction work.

3. The Act largely pertained to archaeological and historical monuments. No protection was provided for outstanding cultural or natural heritage places not defined as archaeological or historical.
 4. Landowners had undisputed ownership rights over cultural properties on their lands, which in many cases, did not belong to their ancestors. The Act needs to be harmonized with others, such as the Tribal Land Act.
 5. There were loopholes that allowed offenders to plead ignorance in contravening the Act.
 6. The Act did not provide for stricter and closer control and monitoring of research activities. The application procedures for research permits also need to be decentralised.
 7. The rationale and purpose of proclamation of monuments and places were not clearly defined.
 8. The Act did not specify or name the National Museum, Monuments and Art Gallery as the final place of repository of cultural material.
 9. There was no provision for a revaluation of proclaimed monuments.
 10. The Act did not provide a definition of treasure troves nor of the procedures to be followed concerning them.
 11. The Act made reference to a Board of Trustees, a staff structure and a Monuments and Relics Fund. These do not apply to government departments. The status of NMMAG in relation to the state structures needed to be clarified.
 12. The penalties for contravention of the law were set far too low to act as an effective deterrent.
- The 1970 Act was reviewed once account was taken of the above problems, shortcomings and oversights. This review then saw the passing of the Monuments and Relics Act, 2001.

The Monuments and Relics Act, 2001

The 2001 Act addressed a number of important issues:

1. Sites dating after 1902, including recent monuments, are now also protected. The Act also caters to heritage areas, recent artefacts and recent historic monuments that were not previously afforded any protection. Definitions covered wider aspects of heritage, i.e. monuments now included waterfalls and relics were extended to include meteorite and treasure troves.

2. A Pre-Development Archaeological/Environmental Impact Assessment is now compulsory.
3. The new Act encourages local communities to develop monuments as tourist attractions. This is designed to bring them economic benefits as well as to engender a sense of ownership and participation in heritage management. In a situation where both the local community and an individual want to develop a site, priority will be given to the community. In a case where an individual has land rights, the government will compensate the individual and the community will use the cultural resource.
4. Penalties for contravention of the Act have been revised. The fine has been increased from P1 000 to P10 000. This is to ensure that people do not destroy the heritage and simply pay a small fine.
5. No development of land within 1 km of any national monument shall take place without the Minister's prior written approval. Such approval shall not be granted unless the minister is satisfied that: a) such development will not be incompatible with the preservation of the national monument; or b) it is in the country's national interest.

ADMINISTRATION OF THE ACT

Introduction of regulations

The 2001 Act gives the Minister the power to pass regulations for the better management of sites open to public. This includes the right to charge entrance fees, regulate opening hours, collect data from visitors, and control access and visitors' behaviour including in camping locations.

The regulations will need to be gazetted for better enforcement. The range of activities permitted will necessarily vary according to the type of site since each has a unique location and context. Regulations will also include provisions for research and monuments development.

Information dissemination

Information brochures and pamphlets providing guidelines for contractors and developers as well as posters for distribution to the public have been developed. In addition, workshops for different stakeholders are also planned, for example, for Community Trust Boards, police officers and regional planners.

Inter-departmental and ministerial collaboration

The National Conservation Strategy, which coordinates the Environmental Impact Assessment, is expected to work closely with the NMMAG in

formulating the guidelines. The Community-Based Natural Resource Board is also working hand in hand with the NMMAG in the development of monuments. The Department of Tourism is assisting with the marketing of cultural and natural resources through the eco-tourism strategy. Living heritage is covered by a different Act, which is administered by the Department of Culture.

Leasing and development of sites

The NMMAG is now leasing sites to communities so that they will develop them for their own benefit. In such cases, the National Museum will provide specialist expertise and monitor developments.

EVALUATION OF THE 2001 ACT

Despite important changes introduced by the 2001 Act, there remain some areas that still need to be looked into. The Act does not address the status of antiques, which remains a somewhat grey area. Similarly, the section of the Act dealing with the penalties for contravention gives the impression that ignorance of the provisions of the Act can be used as a basis for evading or escaping prosecution.

The Act does not cover intangible aspects of the cultural heritage, especially spiritual values and practices like taboos and myths that play a vital role in the protection of the cultural heritage. Another important concern is that the Town and Regional Planning Act overrides all other acts in the country. This poses a threat to cultural heritage in the event of conflict between two acts over a piece of land that may contain cultural property. In addition, the Act cannot be effectively implemented or enforced because there is a shortage of trained personnel and funds. Finally, the law enforcement officers are not fully conversant with the heritage laws.

Finally, the Act does not make any reference to a code of ethics or to monitoring the standards for Archaeological Impact Assessment. There is also a need for a code of conduct to be adhered to by all practising archaeologists. This can be achieved by establishing a committee of archaeologists, NMMAG and government representatives to ensure that proper standards and professional ethics are adhered to.

Conclusion

The 2001 Act appears to have addressed the main concerns of heritage protection and management. It is noted, however, that during its drafting, legal professionals did not always include provisions that heritage management professionals felt should be included.

The regulations provided for under the Act have been drafted in order to be administratively effective.

It is now up to the Museum to ensure that the regulations are gazetted and implemented. There is clear need for the NMMAG to recruit more professional staff to ensure that areas such as Archaeological Impact Assessments are carried out in a timely and professional manner. Overall, the heritage of Botswana has finally been given the serious consideration it deserves.

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This paper examines the efficiency and effectiveness of the new National Heritage Resources Act (NHRA), which came into force on April 2000. Through democratic and holistic principles, it aims at decentralization of heritage resources management, effective participation and community empowerment for effective conservation, and the protection, promotion and management of tangible and intangible, movable and immovable heritage. However, there are many challenges: African heritage resources are complex and difficult to understand and many communities and regions do not have heritage organizations to assist institutions in managing heritage resources. This paper concludes with recommendations for ways forward to meet these challenges.

PUMLA MADIBA

The new Heritage Protection Act for South Africa

THE NATIONAL POLICY for arts, culture and heritage entitled, *All Our Legacies, Our Common Future*, developed in 1996, created a framework for building a nation through redress to foster equality in diversity of cultures. The principles of democracy form an anchor of the policy for heritage resources management.

Six years after the democratic elections in South Africa, the National Heritage Resources Act, No. 25 of 1999 took effect on 1 April 2000. During the six years of transition to democracy, a new, democratic heritage legislative framework was developed to ensure that heritage would be conserved for the public good. By the time the Act became law, the National Monuments Council had laid a basic policy and regulatory infrastructure to facilitate the implementation of the Act. Although the Act sought to democratise heritage management and turn it into a public resource, it has occasionally defeated its own objectives, i.e. decentralization of heritage resources management, effective participation and community empowerment as the prerequisites for effective conservation, protection, promotion and management of heritage.

The National Heritage Resources Act (NHRA)

The National Heritage Resources Act provides for a holistic system of heritage resources management, protecting both tangible and intangible, movable and immovable cultural heritage resources. The Act defines a heritage resource by its cultural significance to an individual, a group of people, a community, a region/province and the nation, hence applying the system of grading to local, provincial and national status for ease of distribution of management responsibilities among the different spheres of interested parties and the two tiers of government.

The concept of cultural significance and the decentralized management system accommodates cultural diversity and democracy, espousing the principle of human rights, identity and right to cultural heritage.

The Act recognizes the power of heritage as it celebrates our achievements and contributes to addressing past inequities. It educates and deepens our understanding of our society and encourages us to empathize with the experiences of others. It facilitates healing and material and symbolic restitution. It

promotes new and previously neglected research *into our rich oral traditions and customs*.

The Act therefore calls for the identification of all culturally significant resources, their conservation, protection and promotion for this and future generations. This is the vision of the South African Heritage Resources Agency (SAHRA). Specifically, SAHRA must coordinate the management of the national estate through the formulation of norms, standards, policies and management of Grade I heritage resources and sites.

Challenges

ENTRENCHED PRACTICES

Throughout the history of cultural heritage management in South Africa, there has been a bias towards the conservation of colonial and apartheid heritage and history, particularly the conservation of monumental architectural buildings and other structures (see Hall, this volume). There are approximately 4,000 physical and man-made structures declared before 1994. There is limited or no record of cultural significance of the resources and sites other than the general information on location and design. Heritage was used as a tool for control and domination of the native by foreign cultures.

CULTURAL HERITAGE AND AWARENESS OF THE ACT

Very few people are aware of the provisions of the Act. In addition, it is too detailed and inconsistent. It provides the legal framework, policy and procedures, thus providing too much detail that makes implementation difficult. The general ignorance of the Act and its provisions mean that it is often violated and SAHRA frequently finds itself in the position of gatekeeper rather than managing authority.

TRANSFORMATION IMPERATIVES

The institutions that manage heritage resources must improve accessibility of all heritage resources by involving the people and communities in identifying and protecting their own heritage resources. The cornerstones of transformation in the management of heritage resources in South Africa are:

- inclusiveness and affirmative action to promote awareness and achieve unity in diversity;
- equitable distribution of resources to achieve equality;
- affirmation of oral history and living heritage to achieve a holistic sense of place;
- community participation to promote ownership and effective protection.

Conclusion

South Africa has good legislation with the potential to redevelop the heritage resources to present all the diverse cultures. This can be achieved through affirming the cultures that were not recognized prior to 1994 when democracy emerged in South Africa. It is acknowledged that democratisation is a complex process full of challenges. First, public participation is a concept usually referred to rather than practiced. Second, old practices are hard to eradicate. Third, there is always competition between heritage protection and economic development; often the former is sacrificed in favour of the latter. Fourth and in many senses directly linked to the third challenge, when it comes to funding, heritage is not always regarded as a priority and is therefore often under-funded. Finally, African heritage resources are complex and not always easy to understand. In South Africa, very few people understand the traditional indigenous African heritage management systems because they have been suppressed in almost every respect for a long time. There are limited, if any, records that can enable research into how they worked. Therefore, there is a pressing need to develop new approaches to rediscovering the lost heritage and how to manage it effectively.

THE WAY FORWARD

The challenges articulated above can be addressed by developing a firm foundation for effective implementation. There is need for a public awareness programme to empower ordinary people to participate meaningfully in the implementation of this new National Heritage Resources Act. A programme for identifying and interpreting heritage resources must be implemented as a matter of urgency. This programme must involve the people whose heritage is being protected. A system of formal protection must be designed to ensure that all concerned adhere to it. Further, many communities and regions do not have heritage organizations that can assist institutions in managing heritage resources. Moreover, since all these activities and institutions need resource capacity, more funding must be raised to ensure effective management. Some of the funding must be spent on education and training to improve human resource capacity in heritage resources management.

The legal frameworks for the protection of immovable cultural heritage in Africa are so old that they are out of tune with present day realities, partly because they were inherited from the colonial administrations. Even where the legislation is the product of the post-colonial state, it has been influenced by the colonial antecedents. A glance at the legal frameworks presented by the 18 participants from the different African countries at the 3rd AFRICA 2009 Regional Course in Mombasa 2001 reveals very close similarities in their formats. What also emerges is that some of the stakeholders of immovable cultural heritage did not have much of an input in the formulation of the legal frameworks. As such, inadequacies, omissions and weaknesses in the legislation are bound to occur. These are to be found in the areas of legislative policy issues, formal legislation, traditional and customary law, the role of local communities, penalties, and implementation and enforcement of legislation, among others. In this paper, these issues will be examined in relation to the country's legal framework for the protection of immovable cultural heritage. These issues are vital because they directly affect the extent to which the formal administrative mechanisms for the enforcement of the legislation can successfully operate.

[VICTORIA OSUAGWU]

Implementation and enforcement of immovable cultural heritage legislation in Nigeria

Introduction: a short history of cultural heritage legislation in Nigeria

Under Nigerian law, immovable cultural heritage includes: fossil remains (human or animal), ruins, ancient habitations, caves, natural shelter, inscriptions on rocks, paintings and engravings, statues, historical buildings, walls and moats, monoliths, shrines, bridges, human settlements, ancient graves and burial sites, as well as cultural landscapes.

Although a draft Bill to protect antiquities was initiated as far back as 1939, legislation to preserve the cultural heritage in Nigeria dates back to the

1950s. The initiative to protect the past came about following the realization that many old buildings were being demolished and replaced with modern structures. In March 1953, the Prime Minister of Nigeria, Sir Abubakar Tafawa Balewa, then Minister of Works, accordingly introduced the Bill in the House of Representatives. In his introduction of the Bill, he articulated the need to protect and preserve the history, artistic relics and traditions of the country. He further emphasized the importance of the cultural heritage as a source of pride and inspiration to Nigeria, both in the present and the future.

This Bill gave birth to the 1953 Antiquities Ordinance, otherwise referred to as Ordinance 17.

This Ordinance created the National Department of Antiquities and the Antiquities Commission. The Antiquities Department was to be responsible for establishing the museums, supervising archaeological excavations, declaring and protecting monuments and controlling the movement of antiquities. Following the passage of the Ordinance, a total of 55 national monuments were declared between 1959 and 1964.

In addition to Ordinance 17, the Antiquities (Export Permits) Regulations were passed in 1957 to regulate the movement of antiquities out of Nigeria. This was followed by the promulgation of Decree 9, otherwise known as the Antiquities (Prohibited Transfer) Decree of 1974. This legislation banned the buying or selling of antiquities except through an accredited agent. It gave the police and customs powers to search without warrant and power of seizure. It also provided for the registration of antiquities and their compulsory purchase, and imposed 'stiffer' penalties for offenders. The promulgation of this Decree stemmed from the fact that Nigeria had lost much of its cultural heritage through official and unofficial transfers during the period before independence, and through illegal transfers in the post-independence period.

The above legislations did not provide adequate protection for immovable cultural heritage. This was subsequently accommodated by Decree 77 of 1979, which dissolved both the Antiquities Commission and the Federal Department of Antiquities. These merged to form the National Commission for Museums and Monuments (NCMM). The Decree made new provisions for the declaration of National Monuments and also provided more protection for the said monuments. For example, Part II, Section 13 (1) of this Decree states that 'the Commission may, if it considers that any antiquity is in need of protection or preservation and ought in the national interest to be protected or preserved, publish notices to that effect in the Federal Gazette and in the appropriate State Gazette and cause a copy of the notice to be served on the owner of the antiquity'.

Furthermore, Part II, Section 15 states that 'the Commission may with the consent of the owner of a monument, or if it appears to the Commission that the monument is in danger of decay, destruction or removal or damage from neglect or injudicious treatment, maintain such monument and may: a) have access at all reasonable times to the monument for the purpose of inspecting it and doing such acts as may be required for maintenance thereof; and b) where practicable remove the monument or any part of it for the purpose of repair or protection for such period as may be agreed between the owner thereof and the Commission.'

The Decree also provided for public access to monuments and payment of such entrance fees as may be determined in the rules made by the Commission with the consent of the Commissioner.

With the promulgation of Decree 77 of 1979, more National Monuments have been declared, bringing the total to 66, including the World Heritage Site of Sukur Cultural Landscape in the Madagali Local Government Area of Adamawa State.

Monitoring of National Monuments

Decree 77 of 1979 listed one of the functions of the NCMM, 'to administer National Museums, Antiquities and Monuments.' For effective management of immovable cultural heritage, the Commission has recently created a Department of Monuments, Heritage and Sites (DMHS) headed by a Director. Hitherto, the management of immovable cultural heritage was under the Directorate of Museums and Monuments headed by a director and supervised by museum curators in their respective jurisdictions. In addition, from time to time curators identify the monuments in their museum states and follow the procedure in the NCMM Decree to declare them state monuments. Within its limited resources, the Commission has been able to maintain these monuments. This formal administrative mechanism has aided the protection of the country's monuments. The curators carry out regular inspection of the monuments, then send reports to headquarters; where necessary, action will be taken. The curators are assisted by monuments superintendents. Currently, for example, in Abia State each of the four monuments have a local guard who reports regularly on the condition of the monuments to the curator at Umuahia. Using this approach, the Commission has been able to successfully carry out comprehensive restoration work on the four monuments. Other monuments where similar comprehensive work has been carried out are the Benin City Wall and Moat. This monument has also benefited from preservation work jointly carried out by the NGO, Committee on Vital Environmental Resources (COVER), and the NCMM. In addition, an Environmental Forum was held to draw attention of the public to the problems of conservation, sanitation and erosion of the City Wall and Moat. There has also been a media awareness campaign in addition to workshops organized for experts, schools, environment clubs, community and ward leaders in Benin City.

Other examples are the Old Residency, Calabar, a national monument converted into a museum and which is now a major tourist attraction, as well as the Gidan Makama, Kano. Both these monuments

have enjoyed constant maintenance work by the Commission.

Other monuments such as the rock art sites of Dutsen Damisa (near Gumuel), Dutsen Zane Geji and Shadawonka, all in Bauchi State, have been protected by the Commission through the erection of fences to deter defacement. In addition, the Commission has also mounted signboards to direct and educate visitors. At the Ikom Monoliths in Cross Rivers State, the Commission has erected a protective fence and cleared the bush to protect the monument from the incessant bush fires.

Traditional protection and enforcement systems

Decree 77 of 1979 did not provide for traditional management and enforcement systems in the maintenance and protection of immovable cultural heritage. This was a result of the lack of involvement on the part of local communities in the formulation of the legislation. This weakness is tied to the fact that most African countries including Nigeria inherited the colonial systems of heritage management. Such systems did not take into account how local communities perceived and valued their heritage. The outcome is that formal administrative mechanisms for enforcement were adopted with no regard or consideration for traditional protection and enforcement systems. It is not surprising, therefore, that communities felt alienated from their cultural heritage and were seemingly no longer interested in its maintenance.

Before the introduction of the formal state-based systems concerning heritage, most places of cultural significance (now monuments) were under the custody of traditional religious leaders who guarded them jealously (see Mmuma, this volume). Because of their sacredness, they were protected from looting and vandalism, unlike what occurs at most sites today. Despite this, however, there are places that enjoyed traditional community-based protective control measures as well as formal legislation. A good example is the Osun-Osogbo Cultural Landscape in Osun State, which is a World Heritage Site nominee. Here, conservation activities are jointly carried out by the Commission, a cultural organization known as Osogbo Cultural Heritage Council, Osun Groves Support Group (an NGO) and the Adunni Olorisa Trust.

Problems with the legislation

Although the NCMM has been maintaining the monuments scattered across the country through the activities of its officers, many problems have been experienced, particularly with regard to some aspects of the legislation and its enforcement. Decree 77 of

1979 in Part 11, Section B, sub-Section 3 states that 'it is an offence to destroy, alter, remove or excavate or transfer the possession of the antiquity to which the Commission has put out a notice to be declared as a National Monument except with the permission in writing of the Commission'.

The penalty for the above offences is a fine of 200 Nigerian pounds, imprisonment for six months, or both.

Furthermore, Section 18, sub-Section 1 states that 'any person who, save as it is provided in this Decree, willfully destroys, defaces, alters, removes or excavates any monument, shall be guilty of an offence and shall be liable on conviction to a fine of 1,000 Nigerian pounds or twice the value of such monument (whichever is higher) or to imprisonment for 12 months or to both such fine and imprisonment.

However, sub-Section 3 of the above section states that 'nothing in the foregoing provisions of this section shall be construed as prohibiting the doing by the holder of a mining title of any act in relation to a monument or a thing erected or provided for the maintenance of a monument which is within the area to which a mining title relates if:

- a. Such act is authorized by the mining title, and
- b. The mining title was granted or became effective before the date on which the monument was so declared; and
- c. The holder has given the Commission at least three months' notice in writing of his intention to do such act.'

The major problem with this provision is that monuments could be destroyed under the guise of possessing a mining title. Another problem with the legislation relates to the protection of immovable cultural heritage with regard to the provisions of the excavation and discovery sections of the Decree (Sections 19-20). For example, Section 20 stipulates that 'any person who discovers an object of archaeological interest in the course of operations permitted under section 19 of this Decree shall not later than 7 days thereafter, give notice thereof to the Commission.'

Although a penalty of 500 Nigerian pounds, imprisonment of six months, or both is provided for failure to comply, no one has ever been convicted for such an offence. This is because excavations are usually not supervised by museum professionals and few people are in a position to positively identify an object as having archaeological value or interest. In addition, the penalties are not an effective deterrent. Violations of the law take place frequently. The rock paintings of Dutsen Zane near Geji, for example, have been partly defaced by people striking the rock in the belief that they will acquire magical powers by doing so. Also, the wire fence erected to protect

the paintings from vandalism was cut in two places and pushed back in order to facilitate easy access to the enclosed paintings. Further, some monuments are located in remote and bushy areas ‘away from watchful eyes’. As a result, vandals may freely access them since they are difficult to police.

In addition to the task of maintaining over 66 monuments, the Commission is also mandated under Section 15 of the Decree to maintain private monuments. This section states that *inter alia*: ‘the Commission may, with the consent of the owner of a monument, or if it appears to the Commission that the monument is in danger of decay, destruction or removal or damage from neglect or injudicious treatment, maintain such monument and may:

- a. have access at all reasonable times to the purpose of inspecting it and doing such acts as may be required for maintenance thereof and
- b. where applicable remove the monument or any part of it for the purpose of repair or protection for such period as may be agreed between the owner thereof and commission’.

The above injunction has been unsatisfactorily implemented because there are limited human and material resources to cope with this arduous task.

Problems associated with enforcing legislation

The legislation under the different sections of Decree 77 granted the Commission monopoly in the protection of immovable cultural heritage. However, problems have been experienced when it comes to enforcement. The first problem is that the Commission does not have a standardized inventory of privately-owned monuments and their state of preservation. This is compounded in some cases by individuals being so attached to their heritage that they do not allow heritage officers free access to their properties. This makes monitoring and maintenance very difficult for the Commission. In addition, the Commission cannot deal with offenders but must take them to court. This process is usually cumbersome; so far no one has been actually convicted. Furthermore, the authorized state agents, the police and customs officers, are usually handicapped because they do not understand their roles in the protection of cultural property and are not adamant about prosecuting offenders.

Another problem is the failure to adhere to the provisions of international conventions, such as the International Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954). A case in point occurred during the Nigerian–Biafran Civil War of 1967–1970 when many cultural properties were looted, vandalized and destroyed in different parts of the country.

The observance of new religious faiths in the region such as Christianity has also led to the destruction of cultural property. This has occurred where cultural heritage places have been seen as pagan. Adherents of the new faith may not always allow the Commission access to the monuments for inspection and monitoring.

The way forward: some suggestions for effective protection of cultural heritage

The popular saying that ‘laws are made for man and not man for laws’ appears to apply in the Nigerian context and probably many other parts of Africa with regard to heritage legislation. More often than not, when a law is out of tune with prevailing realities, people try to evade it. This is the situation that confronts Nigeria’s cultural heritage law today, where it is extremely difficult for NCMM to carry out its role in maintaining and protecting the cultural heritage. Below are some suggestions for the way forward if Nigeria’s cultural heritage is to receive the protection that it requires.

REVIEW OF THE EXISTING LEGISLATION

It is encouraging that Decree 77 of 1979 has undergone review and the proposed amendments are being considered by Parliament (National Assembly). In the proposed review, the penalties for violating the cultural heritage legislation in Sections 13–20 have been raised upwards to a fine of 100 000 Nigerian pounds five years’ imprisonment, or both. This is a very positive development compared to the previous penalties of 200 to 1,000 pounds or six months imprisonment. Looters, vandals and other violators of the laws of immovable cultural heritage will now be arraigned before Federal High Courts as opposed to magistrate courts, which are generally looked down upon. It is expected that these measures will act as an effective deterrent.

In addition to these issues, it is expected that a review of the legislation will include specific requirements for archaeological/cultural pre-development impact assessments. Clearly, a great deal of immovable cultural heritage has been lost as a result of development projects such as road and dam construction in recent years. One way of avoiding this would be to encourage construction companies to employ heritage officers qualified to carry out such work.

INCREASED FUNDING FOR THE CULTURAL SECTOR AND PUBLIC AWARENESS

The government needs to be sensitised on the importance of a nation’s immovable cultural property,

since at present, investment in the cultural sector is seen as a waste of scarce national resources. If greater awareness were created, however, the government might increase the funding of the cultural sector.

Awareness of the importance of cultural heritage also needs to be extended to the public. Quite often, destruction of the heritage is a result of ignorance. This problem should be addressed by the launching of major awareness campaigns through radio and television public lectures, seminars and workshops so that people develop a sense of ownership, respect and pride in their patrimony.

For immovable cultural heritage to be protected, continuous monitoring is needed so that signs of vandalism or deterioration are detected on time and preventive measures taken to avoid loss of heritage. This calls for greater investment of resources in this sector, as noted above. Heritage managers should be equipped with vehicles and other necessary equipment to perform effectively. They also need to periodically attend training workshops and specialist meetings to update their skills.

Training should not only be limited to heritage officers. The heritage protection framework should also facilitate the training of public servants such as the police and customs officers in protecting the cultural heritage.

PRIVATE MONUMENTS

Joint efforts should be made by the Commission and private individuals for the conservation and upkeep of private monuments. This could emulate examples such as the Mombasa Old Town Conservation in Kenya where parts of the Old Town are private dwellings legally considered immovable cultural heritage and are therefore being maintained by the owners and personnel from the Kenya National Museums. Another area of concern is the need to curb illegal excavations. Here, in addition to the legislation, education campaigns need to be increased.

COMMUNITY PARTICIPATION AND BENEFITS

Consultations with and advice from local traditional rulers on the use of traditional enforcement systems will assist the Commission in the management of the cultural heritage. As noted above, during the pre-colonial era, most places of cultural significance were sacred and protected by a series of taboos and restrictions. The traditional enforcement system could be merged with formal administrative mechanisms for enforcement. Still, at the community level, the Commission should consolidate its policy of employing locals as guides and custodians at the

different monuments. So far, this has had the very positive effect of making local communities associate more closely with their heritage. If this were to be carried out at all the monuments, those located in remote areas would no longer be far from watchful eyes since locals would be safeguarding them.

A critical variable in ensuring the support and interest of local communities is the benefits that they should derive from their monuments. There should be a policy implemented to allow local communities to share in the proceeds from their heritage as is practiced at Osun-Osogbo Cultural Landscape Site.

Finally, visitor registers should be maintained to have visitors' views on how monuments are being managed and presented. Where necessary, adjustments will be made as a result of this input.

STATE AND LOCAL GOVERNMENTS

The apathy shown to immovable cultural heritage by the central government has also affected the state and local government authorities. These latter should be required to contribute to the maintenance of immovable cultural heritage located in their areas, but at present, this is only being practised on a meaningful scale by the Opobo/Nkoro Local Government Council in Rivers State, and Osogbo and Olorunda in Osun State.

Conclusion

Nigeria is rich in immovable cultural heritage. Through the country's legislations, this heritage has enjoyed some measure of protection within the limits of the available resources. Nevertheless, there is a general outcry against the destruction and defacement of this heritage across the nation. This is tied to the fact that the traditional enforcement systems were not included in the legislation. However, a policy of involving local communities in the preservation of heritage sites in their locality, as practiced at Sukur Cultural Landscape and Osun-Osogbo Cultural Landscape, would make them proud of their heritage and thus strive to see it preserved.

Finally, the greatest means of protecting immovable cultural heritage is to have the public appreciate that 'a people without culture is dead' and be ready to guard their patrimony jealously. This may then enable central government to integrate heritage programmes with general development projects.

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This paper focuses on the need for an effective system of protection and management of immovable cultural heritage in Ghana. The tasks of the Ghana Museums and Monuments Board, its related legal and administrative framework and the ongoing programme in Elmina concerning the rejuvenation of the historic town are highlighted. This paper also discusses the relationship between the national legal framework and international conventions.

FREDERICK KOFI AMEKUDI

Legal instruments concerning immovable cultural heritage protection in Ghana

THE PRESERVATION of Ghana's heritage has always been a major objective of the government as outlined in its Vision 2020 long-term development plan report released in 1995. It is recognized and accepted that most of its heritage assets, both cultural and natural, are in danger. Many assets such as historic towns, buildings of historical, religious or aesthetic importance, sites of scientific interest and natural features of outstanding beauty are neither listed nor protected. Many have been damaged or destroyed rather than safeguarded for posterity.

The legal framework for the protection of Ghana's cultural heritage

Following Ghana's independence in March 1957, the Ghana Museums and Monuments Board (GMMB) was established to manage its cultural heritage under the National Museums Ordinance of 1957. This Ordinance was repealed and replaced by the National Liberation Council Decree (NLCD) 387, gazetted in August 1969. The NLCD established a board that created regulations to govern the protection of cultural heritage using a succession of instruments – Executive

Instrument 118 in 1969, Executive Instrument 42 in 1972 and Executive Instrument 29 of 1973.

The GMMB is a statutory organization that derives its powers from the NLCD and Executive Instruments. The GMMB defines the general policy for the management of the cultural heritage. The Board comprises two main divisions, the Museums Division and the Monuments and Sites Division. The latter is of main interest here because it is this division that is primarily responsible for the identification, listing, protection, conservation and management of the country's immovable cultural heritage. It has the responsibility for professionally interpreting and presenting historical monuments and sites in the country to both domestic and international tourists. Personnel of the division are made up of conservators of monuments, inspectors of monuments and other support staff.

Other functions of the GMMB falling under the Monuments and Sites Division are:

- setting up a comprehensive national register of cultural heritage and national inventory of immovable cultural property;
- implementing programmes on listed buildings;
- determining the state of deterioration and carrying

out restoration, preservation and rehabilitation programmes.

Ghana's cultural resources

Ghana has a rich and diverse cultural heritage that includes historic and traditional buildings. The need for an effective system of protection for the country's immovable cultural properties has been recognized for many years. In the early 1960s, a number of properties were therefore scheduled as national monuments and taken into the custody of the GMMB, thereby enjoying statutory protection. These included a few surviving Ashanti fetish houses, many of the surviving traditional mosques in the northern region, the palace of the Wa Naa (chief) at Wa and the surviving portions of the defence walls of the northern region.

The GMMB has defined six main categories on national monuments:

- forts and castles (34);
- Ashanti traditional buildings (10);
- ancient mosques (10);
- chiefs' palaces (1);
- town walls (2);
- individual private houses (8);
- royal graveyards (1).

Two of these monuments, a fort/castle and an Ashanti traditional building, were inscribed on the UNESCO World Heritage List in 1979 and 1980, respectively.

Other categories of immovable cultural heritage that are not listed as national monuments and thus not similarly protected, include:

- chiefs' palaces and compounds;
- churches and mission houses;
- mosques;
- traditional shrines;
- graveyards;
- historic quarters;
- traditional settlements and compounds in the rural areas;
- former merchant traders' houses;
- colonial buildings;
- old towns;
- old commercial and public buildings.

In 1970 the GMMB, in association with the Ghana chapter of the International Council of Monuments and Sites (ICOMOS), recognized the need for a national register of historic buildings and sites, and in June 1972, a preliminary compilation was circulated. The register contained 309 entries divided into the following categories:

- forts and castles (37);
- religious buildings (100);
- traditional houses (16);

- old settlements and sites (15);
- villages and towns (12);
- domestic, public, commercial and educational buildings (107);
- memorials (22).

Subsequent to the compilation of this register and its circulation, it was envisaged that legislation would be enacted to provide statutory protection for the registered places. However, the Executive Instrument that followed (the National Museums Regulation (E.I.29) of 1973) failed to do so. Subsequently, little progress was made as the economic recession in the country worsened in the 1980s. At the same time, however, there remained strong awareness of the need to provide some measure of protection of historic buildings and recognition that without this, their survival was in danger.

Early in 1991, under the aegis of the National Commission on Culture, the status and responsibilities of the GMMB were re-examined and legislation was proposed to broaden the provisions for cultural heritage protection. A final draft of the proposed legislation was submitted in 1991.

The draft legislation highlighted the recognition of the principle of private and/or commercial ownership of:

- dwellings and religious, institutional, educational, commercial and industrial buildings;
- shrines;
- memorials;
- cemeteries;
- gardens and parks;
- defined sites and open spaces.

In addition, the draft legislation defined the rights of private owners and the responsibilities of state agencies in the control of listed buildings and sites. Legislation also provided for statutory authority to implement a scheme for the protection of historic buildings and sites that would meet Ghana's present and future development needs.

The document also proposed the designation of 'conservation areas', defined as any group of buildings or sites of landscape or townscape value. Additional considerations were sites of historic or archaeological importance and those with valued cultural associations. The proposal also highlighted the need for an Executive Instrument under the Local Government Act to set out in detail the rights of property owners as well as the responsibilities of statutory authorities in the control of the development of listed buildings and sites within conservation areas.

Conservation of historic towns

Any effort to conserve a historic city must include the revival of the economic base, an increase in

investment and revitalization of the economic and financial structure to both fund and maintain conservation work.

To achieve this, adaptive reuse may be considered a flexible approach, combining area conservation with conservation of individual historic buildings, upgrading and some restoration. The author proposes a local government by-law to define the *historic area* and in the process create a ‘Historic Area Development Entity’, which would provide the framework for a new public-private partnership and generate revenue and return on investments. This law will have to be incorporated into the existing GMMB legal framework.

The rejuvenation of a historic city should be given the necessary attention and support because it protects our cultural heritage, attends to urban poverty and attracts private investment. It must be noted, however, that it is only the best-intentioned efforts and the most meticulous rejuvenation projects that are most likely to succeed if the underlying conditions that led to the historic city’s state of crisis are not tackled. At the same time, the physical aspects of architectural design and restoration of this culturally sensitive town must be attended to. The underlying causes of the crisis may be summed up as the inadequacies of the institutional infrastructure to facilitate modernization of the economic base while promoting social welfare and protecting the physical environment within a financially sound, sustainable and legal framework.

The Elmina Cultural Heritage and Management Programme (ECHMP)

BACKGROUND

A report was prepared by UNESCO (Ghana) in collaboration with GMMB and presented in 1999 to the Netherlands Government. The Netherlands Department for Conservation (RMDZ) was asked by The Netherlands Ministry of Foreign Affairs to undertake an identification mission. The objective was to identify heritage assets of Dutch/Ghanaian importance, also called ‘Mutual Heritage’, to explore the feasibility of the proposed UNESCO initiatives and to look into the prospects of future co-operation with the Ghanaian authorities in the field of heritage and integrated conservation.

In addition to the UNESCO initiatives, the mission was also requested to pay attention to St. George’s Castle, Fort St. Jago and the town of Elmina. The Elmina Cultural Heritage and Management Programme was initiated based on the findings and report from the identification mission presented in February 2000. This programme has a consortium

of the following institutions, namely: the Institute for Housing and Urban Development Studies (IHS), Rotterdam; the Institute of Local Government Studies (ILGS), Ghana; Ghana Museums and Monuments Board (GMMB); the Department of International Relations and International Organisations, University of Groningen (RUG), the Netherlands.

PROJECT AIMS

The main goal of ECHMP is to develop a strategy for an integrated urban cultural heritage conservation in the town of Elmina and to revitalize the identified mutual heritage. The development strategy and organizational structure will ensure the sustained safeguarding of the future of Elmina’s valuable urban cultural heritage through coordinated and coherent well-planned actions. Local economic development and improvement of related infrastructure will be the important components in ensuring the continued role of the Ghanaian built heritage as an important resource in economic and social development and the improvement of general living conditions.

The programme will pay special attention to the environmental conditions in Elmina and its impact on the health situation of the population, local economic activities and tourism. The programme is thus based on an integrated conservation approach.

PROJECT IMPLEMENTATION

The programme focuses on developing a strategy for the protection, conservation and management of the urban cultural heritage in a participatory manner. In addition to creating a transparent, efficient and clear organizational structure in order to improve heritage management in the town of Elmina, the programme also mobilizes funds for identified emergency conservation activities and other priority actions. In order to ensure the programme’s sustainability, emphasis is to be placed on institution-building, the targeting of organizations involved in integrated cultural heritage conservation, and capacity-building for strategic development. Technical assistance will be provided in order to implement the identified pilot projects.

To identify, review and expand on urban issues of priority that affect the safeguarding of cultural heritage and sustainable development in Elmina, a city heritage profile was drafted by the core team (IHS Resident Representative), together with ILGS, the Komenda–Edina–Eguafo–Abrem (KEEA) District Assembly, and other stakeholders. The profile is a compilation of existing information available and gives an overview of current developments in Elmina. The project organized a series of community consultations as part of the profile preparation, in order to brief the general public on the project and identify

the priority problems in Elmina. Based on these meetings, five priority areas were identified and included in the profile:

- drainage and waste management;
- tourism and local economic development;
- fishing and fishing harbour;
- education;
- health.

This was followed by a city consultation in April 2002, which was organized by the core team with assistance from the consortium representatives, the local government of Elmina (KEEA District Assembly) and identified stakeholders. The consultation brought together key actors in the public, private and popular sectors in order to commit them to develop improved integrated conservation of the cultural heritage of Elmina. It also mobilized social and political support to secure the required commitment.

The project prepared a profile for Elmina that was later presented at the Elmina's Town Consultation, which was opened by the Senior Minister of State in the presence of Their Royal Highnesses, The Prince of Orange and Princess Maxima of the Netherlands.

A selected 20-member group participated in a two-month training programme (May–July 2002) on 'Inner City Revitalization' at the Institute of Housing and Urban Development Studies in Rotterdam. The participants are key stakeholders in integrated conservation management in Elmina and other cities in Ghana. They are also the ones who are directly affected by problem issues and whose capital, expertise and information are crucial to their resolution. Further, they possess the relevant policy and implementation instruments. The group represents central, regional and local government agencies, departments, non-governmental organisations (NGOs), community-based organisations (CBOs) and the private sector. Upon return to Ghana, the group members have been actively collaborating as a core team with the expatriate experts in preparing in-depth profiles of the individual sectors for which strategies are being formulated and action plans prepared.

As part of the ECHMP, a survey and inventory of structures was carried out in the historic core of Elmina in September 2002 by a team of two experts from the Netherlands Department for Conservation, students from the Department of Architecture of the Kwame Nkrumah University of Science and Technology, and staff from the Ghana Museums and Monuments Board. The site survey was used as a means of obtaining information during the mapping exercise; maps were then used in the collection of data. The attributes recorded were

the historical identity and physical condition of the existing properties and their current use. A surveyor, three architectural draughtsmen of the GMMB, four student architects of the Kwame Nkrumah University of Science and Technology, and a Dutch photographer were engaged in the exercise. Two observers from the community also joined the team. In addition, two groups of four persons each were formed to identify and record structures in the area. This was followed by a presentation to homeowners and the general community. Following this presentation, a strengths, weaknesses, opportunities, and threats (SWOT) analysis was undertaken with the participation of community representatives.

The exercise was aimed at revitalizing the dilapidated built heritage and reusing the existing building stock and infrastructure in a social and economic way. This exercise is important because it provides easy access to information for the heritage managers, development planning officers of the District Assembly, the general public, researchers and other institutions.

As a member of the consortium for the programme, the role of the GMMB will offer expertise in the key areas connected with the more technical heritage and construction issues. It will collaborate with the identified key stakeholders in fulfilling its statutory mandate responsibilities for the identification, listing, protection, conservation and management of the cultural heritage resources within the Elmina Town. This is to ensure proper integration of these resources in the proposed town revitalisation programme.

ELMINA CULTURAL HERITAGE AND MANAGEMENT PROGRAMME: THE WAY FORWARD

In summary, the ECHMP initiative involves the following:

- re-evaluation of existing urban planning and development policies;
- recognition of historic buildings as valuable housing resources;
- the securing of areas containing buildings of historic and architectural significance as conservation zones;
- integration of conservation into sustainable community development plans;
- sustainable urban renewal to give priority to housing improvement by the preservation, renovation and rehabilitation of existing historic buildings.

The success of the programme depends on:

- the provision of adequate funding;
- the availability of trained and qualified staff to strengthen the relevant institutions;

- recognition of the conservation of cultural heritage as an integral element of sustainable development plans;
- the development of infrastructure and close collaboration among stakeholders;
- declaring historic towns as conservation zones;
- promulgation of the draft legislation to broaden cultural heritage protection.

Conclusion

The Ghana national legal framework acknowledges international charters and conventions. It also conforms to the principles guiding the preservation and restoration of ancient buildings as laid down in Articles 2, 3, 4, 5, 6, 7, 10, 13 and 14 of the Venice International Charter for the Conservation and Restoration of Monuments and Sites of 1964.

As far as GMMB is concerned, the issue of integrating cultural heritage, most importantly immovable cultural heritage, into a development programme should not be regarded merely concerning individual heritage resources, but in a much wider framework. From this perspective, GMMB believes that this heritage can be exploited to the maximum if the historic town of Elmina is declared a conservation area. This is the main reason that the legal framework of the institution is being reviewed – to espouse the concept of conservation areas instead of focusing on individual heritage resources.

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In 1990, the Government of Zanzibar created the Stone Town Conservation and Development Authority (STCDA) as the custodian of the Stone Town Conservation Area. This came in the wake of the derelict state of most of the buildings and their rapid rate of deterioration. The Stone Town Act No. 3 of 1994 was passed shortly after, giving STCDA all legal rights of conservation and development activities within the Stone Town Conservation Area. The Act granted STCDA exclusive legal powers, including the authority, independence, strength and means to operate effectively. Despite the merits and intrinsic values of the Act of 1994, however, several weaknesses have been identified with regard to the enforcement and implementation of the law. Several examples are discussed in this paper that clearly expose these weaknesses and other problems. Ultimately, what we learn from the Stone Town experience is that overcoming the problems of conservation of heritage sites will not be achieved by merely drafting and enacting laws to safeguard the heritage sites, but rather developing strategies and approaches that tackle the problem holistically.

SHINUNA KARUME

An evaluation of the strengths and limitations of the implementation and enforcement of the Stone Town Conservation Legislation: Zanzibar

Introduction: A brief history of Zanzibar Stone Town

Zanzibar, which is part of Tanzania, is an archipelago in the Indian Ocean. The town of Zanzibar developed on Unguja, the main island of the Zanzibar archipelago, whose tropical climate, fertile soils, plentiful waters and ready supply of building materials offered all that was needed for early urban development (Siravo and Bianca 1996). In addition to these resources, Zanzibar is strategically located geographically. The African

mainland is a mere 40 km away from the island and the monsoon winds facilitated commerce between merchants from the Northern Hemisphere – primarily India and the Arab peninsular – and the African populations from very early times.

Zanzibar was originally taken over by the Portuguese over three centuries ago in order to safeguard their interests in the Indian Ocean. In 1840, however, Zanzibar fell under Arab control when the Sultanate of Oman effortlessly took over control from

the Portuguese (Sheriff 1995). In the years to come, the Arabs constructed several houses in typical Arab style. They were simple in character but grand and extravagant in space and taste, with high ceilings, huge rooms overlooking the Indian Ocean and intricate doors. As the Arab architecture became the predominant feature of the town, it was then named 'Stone Town' to describe its character. In many ways, Stone Town was a rare and unique phenomenon in Africa, given that most houses were constructed with pole and mud.

As Stone Town developed, a segregated settlement pattern grew, with the Africans settled on one side of the town in the area known as Ng'ambo, permitted only to cross Creek Road that separated the two different worlds when they came to work for those in the Stone Town area, whether Arabs or rich Indian merchants. In the following years, coastal towns grew as a result of Stone Town's rapid prosperity, mainly from the slave trade and export of cloves. In fact, during the 19th century, several European countries established their consulates in Stone Town because of its strategic position, both geographical and more importantly, economical. Stone Town thus grew to become the political, economic and cultural capital of Zanzibar.

In 1890, Zanzibar became a British protectorate but was still governed by an Oman Sultanate. It was thus to remain essentially Arab until it gained independence from the British in 1964. In the same year, one month after the Arabs gained their full independence from the British, a revolution by the Africans took place to wrestle power from the Arabs. Shortly after the revolution, the Revolutionary Government of Zanzibar nationalized many buildings in the Stone Town. Very few buildings were returned to the original Arab families, most of whom had fled back to Oman. Most of the buildings were thus occupied by Africans.

Early in 1990, the influx of tourists, the evident deteriorating state of the buildings as well as the recognition of the importance of preserving the cultural heritage led to the creation of the Stone Town Conservation and Development Authority (STCDA). STCDA was created primarily to assume responsibility for the development and conservation of the Stone Town area with full authority as well as supporting laws to govern its activities.

General legislation for the protection of cultural property in Zanzibar before 1994

Zanzibar heritage legislation was mostly drawn from the colonial British system. The Ancient Monuments Preservation Act of 1948, which initially protected

cultural properties in Zanzibar, was primarily aimed at the protection of isolated monuments and sites (Sheriff 1995). Under this Act, all the gazetted monuments were regulated and administered by the Department of Archives, Monuments and Museums. The Act did not provide for the protection of cultural properties in the form of towns, such as Stone Town. Within this context, it is of interest to note that as a result, its status remained somewhat unclear and in 1982, the Stone Town conservation was partially made the responsibility of the Municipality Land Use Plan, which was gazetted in that year. It was noted in the Municipality Land Use Plan 1982 that Stone Town needed to be conserved but no clear guidelines were developed or given and there was no indication or determination of its custodianship. It was not until 1994, with the passage of the Stone Town Act No. 3, that the Stone Town area was officially declared a conservation area. The STCDA was then formally named the sole custodian.

New legal and institutional framework

STCDA's primary responsibility is to control and monitor the development of the conservation area, which is now a UNESCO World Heritage Site. It assumed this responsibility after the House of Representatives of Zanzibar passed the Stone Town Act No. 3 in June 1994. The passing of the Act was the final outcome of the recommendations made and submitted by the Aga Khan Trust for Culture for the future management, development and conservation of the Stone Town along with an extensive and comprehensive Master Plan, later published in 1996. In essence, it was emphasized that the Master Plan was not conceived as a complete and final scheme, but was to be viewed as part of an ongoing evolutionary process in which programmes and actions are woven together to achieve the specified objectives (Siravo and Bianca, 1996).

Ultimately, the principal changes in the legal and institutional framework regulating planning, development and conservation in the historic area are the formal approval of the Conservation Plan (Master Plan) and the establishment of the STCDA as a legal entity. However, as part of the Zanzibar Municipality, the general local authority and land tenure laws in some cases equally apply to the Stone Town. For example, according to the land tenure laws, the Commission for Lands and Environment is the Planning Authority for all municipal lands and townships, while the local authorities such as STCDA are the implementing agencies. As far as the land tenure laws are concerned, the Commission for Lands and Environment is the custodian of all

land in Zanzibar, making it responsible for holding, protecting, planning and issuing land. Thus, even though the STCDA has the power to declare conservation areas and to make recommendations, it is nonetheless the Commission of Lands and Environment that issues the land use titles in all cases, including the Stone Town Conservation Area.

STCDA's mission and tasks

The Act of 1994 defines the STCDA's mission and tasks as well as its organization and legal powers. STCDA's objectives as the single public institution in charge of the entire historic area are, among others, to ensure the continuity of effort and sustained commitment and to plan and manage the complex historic area over the long term by preparation and supervision of the Master Plan and Regulation of the Stone Town. The principal tasks of the STCDA include issuing building permits and restoration notices, monitoring of construction works and prosecution of illegal building activities. The STCDA also advises, coordinates and monitors other government agencies and departments and is responsible for coordination between the various government agencies and external aid organizations.

As clearly stated in the Act, the Authority's main function is to 'initiate, plan, prepare, co-ordinate and control all matters related to the conservation of the Stone Town' (Stone Town Act 1994, p. 4).

As an organization, the STCDA is a department of the Ministry of Water, Conservation, Energy and Lands under the direct authority of and directly answerable to the minister. This Authority is headed by a Director General assisted by an Advisory Board. The Act gives the Authority special legal powers intended to give it the independence, strength and the means to operate effectively.

ADVISORY BOARD

The Board is made up of between five and seven members whose chairman is appointed by the State President. It meets every quarter to allocate its responsibility of advising the STCDA on the following matters:

- the declaration of any area to be a conservation area, as well as on the provision of guidelines for its conservation;
- the declaration of reconstruction areas and the provision of guidelines for their redevelopment;
- the contents and procedures of conservation Master Plans, conservation plans and reconstruction plans for the Stone Town;
- the contents and procedures of building permits for the Stone Town;
- the appointment of the sub-committees and give

- guidelines for their functions and operations;
- any other matters relating to the Stone Town.

Problems of the implementation and enforcement of the Stone Town Act of 1994

INTER-INSTITUTIONAL CONFLICTS

Three main institutions are in some way directly involved in the Stone Town Conservation area: the Commission of Lands and Environment, the Zanzibar Municipal Council and the STCDA. Although efforts have been made to harmonize the legal and institutional framework of the three government institutions, there have nonetheless been conflicts that in many ways continue to present problems in the implementation and enforcement of the 1994 Act and the Master Plan. One of the problems experienced, which gives rise to inter-institutional conflict, is the overlapping laws and areas of jurisdiction. For example, it is stated in the Stone Town Act of 1994 that only the Commission of Lands and Environment has the power to issue land-use titles in all areas of Zanzibar including the Stone Town Conservation area 'provided, and for avoidance of doubt it is hereby expressly provided, that nothing in this Act confers upon the Authority power to distribute, alienate or lease land in the conservation areas unless it is directed to do so by and on behalf of the Land Commission' (Zanzibar Stone Town Act 1994, p.10).

However, this is immediately followed by the proviso that this will be done on the recommendation of STCDA. In practice, the Commission of Lands and Environment has on many occasions proceeded to issue land titles without the recommendation of or reference to the STCDA. Such problems occur partly because of ambiguities in the law, but also lack of communication, rivalry and conflict of interests between the institutions. Therefore, despite the seemingly all-embracing powers and provisions of the 1994 Act, the STCDA has no legal powers over the Land Commission when it comes to land issues.

There has been overlapping jurisdiction between the STCDA and other authorities. The Ancient Monuments Preservation Act of 1948 recognizes buildings individually, with specific conservation and development strategies for each. When dealing with a single building such as Beit-al-Ajaib, the Department of Archives, Monuments and Museums expect their laws to carry more weight in the planning process than the Stone Town Act of 1994. Such problems occur rather frequently because laws are often drafted individually; seldom is there a serious attempt to synchronize them. At present, the only solution at hand is merely to encourage communication between the

institutions since until the laws are revised, they offer little conciliation.

Another institution that also simultaneously governs some activities in the Stone Town area is the Commission of Tourism. The Commission of Tourism is primarily responsible for tourism development in Zanzibar, i.e. economic activities and policies and programme design affiliated to tourism in the Stone Town Area. As a consequence, the implementation of the Conservation Master Plan is part and parcel of the Commission of Tourism policy areas. Due to these similar responsibilities and concerns between the authorities, it is not unusual to witness conflict of interest and objectives between them. For example, there have been several cases where the STCDA placed a limit on the number of hotels that could be developed in a specified area, e.g. Hurumuzi area, but the Commission of Tourism proceeded to issue hotel licences well above this limit. Subsequently, time and financial resources are lost in trying to resolve such conflicts.

FINANCIAL LIMITATIONS FOR EFFECTIVE IMPLEMENTATION AND ENFORCEMENT OF LEGISLATION

Following the neglect and resultant disrepair that the Stone Town experienced between 1964 and 1985, it is evident that vast sums of money are required to bring the town back to its original state. Currently, government contribution mainly supports the conservation operations by the STCDA with limited funds allocated towards tangible conservation works.

The STCDA is the sole custodian of the conservation and development of the Stone Town area. As such, it is vital for the Authority to have access to adequate funds to meet its obligations. Unfortunately, funds are not always made available, to the point whereby in one instance, along Kenyatta Road, a case was brought against the STCDA for failure to ensure the conservation and rehabilitation of a building that was in such a degraded state that it was threatening the structural integrity of other buildings next it. The STCDA made an appeal to the owner of the degraded building to rehabilitate the back section of the building that posed the most immediate threat to its neighbour. According to the owner of the degraded building, it would be cheaper for him to demolish the entire building than renovate only the back of the house. In such cases, since the owner was not breaking the law and the STCDA could not assist him financially, the only solution was to permit the demolition of the entire degraded building. This example clearly illustrates the extremely limited capacity of the STCDA to fulfil its mandate due to inadequate financial resources.

LACK OF PROFESSIONAL AND COMPETENT PERSONNEL

In addition to the inability to carry out conservation work due to limited funding, there is also a prevalent shortage of qualified and competent personnel. This is worsened by low morale among the staff due to poor remuneration. The consequences are incomplete inspection and monitoring of buildings, rent-seeking, professional apathy and lack of commitment to one's responsibilities. The STCDA depends solely on locally trained personnel. To hire lower-level personnel trained by local government institutions is relatively easy. However, for trained personnel at higher positions, there are no resources to finance their education. For that reason, the STCDA perpetually faces problem of finding sufficiently trained and experienced personnel to execute more specialized tasks, which ultimately affects the overall conservation of the Stone Town.

One other problem that has continually affected the work of the STCDA has been the level of incompetence or sheer ignorance on the part of the lawyers assigned by the government to represent it. In one such case, a business community leader broke the law on several counts, first by proceeding with construction without obtaining a permit and then by constructing beyond what the permit and the law would allow. According to the law (the Ancient Monuments Preservation Decree 1948), buildings in the main market area are not to exceed the height of the main market building, since it is a gazetted monument. In this case, the businessman began adding an extra floor to an existing building, thereby exceeded the specified limit. In addition, he also painted his house red with roughcast finishing, in contravention of the Stone Town regulations and laws. The STCDA proceeded to demolish the unauthorized construction, only to find itself facing court action, which was, oddly enough, handled by the High Court instead of the District Court. Before the matter was concluded, the businessman offered to settle out of court. After weeks of negotiations and failing to arrive on a settlement, the judge ruled that the construction permit be granted. The STCDA had the right to appeal and stood a good chance of winning the case. However, the lawyer who had handled the case was unwilling to continue due to disinterest and lack of incentive.

BUREAUCRATIC IGNORANCE OF THE LAWS

Quite often, bureaucrats' ignorance of the law has proved costly to the STCDA. There have been recurrent cases where bureaucrats have made professional errors in handling STCDA's affairs, simply due

to the lack of knowledge or comprehension of the laws. A good example is the case of a citizen against the demolition of a building recommended by the STCDA. He won it on the grounds that instead of the STCDA serving him with a 'notice' of demolition, they served him with a 'letter' to inform him of the intent of demolition. In retrospect, had STCDA staff been more aware of the substance of the Act of 1994, this mistake would not have occurred.

POLITICAL INTERESTS AND INTERFERENCE

There are several cases where strong political interests overrule laws and legislations, and the STCDA has not been spared. Even though there has been a decline of this cancer in Tanzania since the 2000 elections, with the government taking tougher action against such behaviour, corruption of this type was fairly widespread before 2000. For the STCDA, a case occurred early in 1998 when a prominent businessman constructed a building without a permit from STCDA. This was in contravention of Section 14 (11) of the 1994 Act (p.8), which states that:

Any person who wilfully or negligently constructs, builds, alters or demolishes a building or any part of a building, street or open space, or changes the use of the building or open space, or contravenes any Buildings Regulations, Master Plan or any Regulations made under this Act, without a written permit from the authority, is guilty of an offence and shall be liable to a fine of not less than five hundred thousand shillings or twelve months imprisonment or to both such fine and imprisonment.

Instead of constructing two floors as the regulation explicitly states, he proceeded to add three extra floors, making his construction officially the highest building in the Stone Town with a total of five floors. After the 2000 elections, the new administration demanded that the three extra floors be demolished. In desperation, the businessman appealed to the minister, although he was technically not entitled to do so by law since he did not meet the conditions in the Stone Town Act of 1994, *Procedure of Appeal* (p. 13) which states that 'Any person who applies for a building permit, for a new building, extension, alteration or demolition of a building or the use of change of use of a building or plot which is required according to Building Regulation or a master plan made under this Act, aggrieved by the decision of the Authority shall have the right of appeal to the Minister'.

Nevertheless, the minister nevertheless granted the appellant his request not to demolish the three floors. Quite clearly, the minister made his decision outside the framework of the 1994 Act (p. 7), which states that the 'decision of the Minister on the point of fact shall be final and binding to the parties.' First and foremost, the decision of the Minister cannot be regarded as based 'on the point of fact' because he did not consult with the STCDA and thus did not present them with the opportunity to hear their side of the argument. Second, under the circumstances, the appellant was not eligible to an appeal. His hearing should have therefore been dismissed and not considered in the first place. Ultimately, in this particular case one can justifiably claim that political interests overruled the law. Corruption served the personal interests of the businessman.

CENTRALIZATION OF OPERATIONS

Zanzibar is almost like a city-state in size. Accordingly, the dividing line between the municipal government and the central government is often not clear. Although the municipality is in essence intended to be a local government, in many respects it functions as part of the central government. The remaining agencies are all merely organs of the central government and therefore manage the property in the historic area at that level (Siravo and Bianca 1996). The underlying problem of this arrangement is the ability of the central government to interfere with the STCDA's functions. Although this may still be a lingering problem (with central government occasionally making decisions on behalf of STCDA), it is no longer felt keenly as the new government has gone a long way with effecting decentralisation. The first positive indication of this process was the appointment and announcement of the Advisory Board of the STCDA, which was provided for by the 1994 Act but had not yet been implemented. The reason for the delay was to enable the central government to control the conservation area by making decisions from the centre because of its strategic importance to the Zanzibar economic development and above all to the people.

NEED TO REVIEW THE MASTER PLAN AND THE LEGISLATION

Since 1994, the Master Plan and the legislation have not been revised or amended despite the ongoing changes in the conservation and development objectives. For instance, there are new development plans that need to be incorporated in the Master Plan, which may not have been paramount to the development trajectories of the nation. The laws also need updating to reflect the changing needs of the society and the status of the property.

For example, when the laws were enacted, the Stone Town of Zanzibar was not a World Heritage Site and therefore did not need to comply with World Heritage Convention. Today, with World Heritage status, the Act of 1994 has to be amended to reflect the necessary international conventions.

EMBEDDEDNESS OF THE SOCIETY

Embeddedness of society and government activities is another inherent problem that small communities such as that of Zanzibar find it difficult to control. Most of the population have relatives, friends and neighbours working for the government. As a result, there are many instances where laws are broken or disregarded due to prioritisation of personal relationships. It should be noted that this problem is also found within other institutions operating directly or indirectly in the Stone Town area and not necessarily confined to the STCDA.

Overcoming the limitations

Some of the problems discussed above are of a relatively minor nature and can be overcome or prevented with the minimum of effort. Others are more complex in their nature, however, involving political, economic and social embeddedness, thus making them harder to tackle.

REDUCING INTER-INSTITUTIONAL CONFLICT AND IMPROVING AWARENESS AND UNDERSTANDING OF THE LAW

Elimination of conflict between different institutions can be achieved through decentralizing the decision-making process, enhancing the level of communication between institutions and elaborating clearly defined jurisdictions of institutions. This last solution entails each of the different but related institutions being conversant with the legislation that governs the functions of the others. For example, in the event of overlapping legislations, the institutions should be well informed of the legislation that has the overriding powers. This applies, for example, to the situation where according to the 1994 Act, the STCDA has overriding powers in the Stone Town Conservation area over the Commission of Lands and Environment or the Zanzibar Municipal Council. The realization of some of these solutions should see each institution executing its assigned tasks more efficiently in line with the legislation relating to its operations. The above suggestions could be achieved through:

- providing educational programmes or seminars where the concerned bureaucrats are obliged to attend;
- disseminating information on the laws and regulations to bureaucrats of the concerned institutions as well as to others;

- encouraging inter-departmental dialogue and communication;
- reducing bureaucracy in order to eliminate confusion and loopholes;
- educating the community on the laws and regulations and the importance of respecting them.

Conclusion

Legislation is an integral part of the effective protection, preservation and development of immovable cultural heritage sites. Legislation alone is not enough, however. In the developing world where government infrastructure is weakly developed, funds are hard to come by, corruption is prevalent and poverty is the order of the day, there is need for a more holistic approach. The foregoing evaluation of the Stone Town Act of 1994 and its implementation clearly brings this into focus. It is hoped that this paper shows not only the importance of legislation, but also the need to encompass other factors in ensuring successful implementation and enforcement of the legislation. These factors, whether tackled simultaneously or individually, need to be addressed with caution and prudence. To mention but a few, there is a need to invest in educated, enthusiastic, well-informed and experienced bureaucrats, secure funds, reduce the interference of political interests and foster political will and government commitment. In the Zanzibar case, it is imperative to inform and involve the communities concerned in order to legitimize the operations of the STCDA, encourage state-society synergies that complement wider stakeholder involvement in the governing of the conservation area, and increase communication and harmonization of operations between institutions.

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Recommendations

IN THE FRAMEWORK of the AFRICA 2009 Programme, the 3rd Regional Thematic Seminar: Legal Frameworks for the Protection of Immovable Cultural Heritage was organized from 21–25 October 2002 in Mutare, Zimbabwe. The seminar brought together 22 participants from 13 countries in sub-Saharan Africa as well as staff from ICCROM, the Secretariat for the AFRICA 2009 programme.

The main objectives of the seminar were to:

- evaluate the current state of legal frameworks for immovable cultural heritage conservation in sub-Saharan Africa;
- identify key issues related to heritage legislation and possible strategies for dealing with them;
- identify key issues related to the links between formal and informal (traditional or religious) legislative frameworks and possible strategies for creating interactions between them;
- develop an action plan for follow-up activities including an eventual publication on immovable cultural heritage legislation in sub-Saharan Africa.

The seminar has taken into consideration the following:

- The importance of the AFRICA 2009 programme for the conservation and promotion of immovable cultural heritage of sub-Saharan Africa.
- The desire of the participants at this seminar to continue their collaboration in the implementation of the objectives of the AFRICA 2009 programme.
- The recognition of the importance of having good legislative frameworks for the protection of immovable cultural heritage, as demonstrated by the presentations during this seminar.

Accordingly, participants of the seminar have developed the following recommendations.

Fundamental concepts

Legislation should be for the people and by the people, reflecting the values of all the different segments of society. These values should be documented and well-defined within the heritage legislation. To achieve this, the law must provide for community values, customary rights, and traditional practices including those that relate to ownership and the right to use cultural landscapes.

Legislation should cover the interrelationship of tangible/intangible, and movable/immovable heritage.

Legislation needs to provide for a variety of diverse methods of conservation in keeping with different situations and types of heritage (e.g. conservation areas, inventories, landscapes and community-based systems).

There is a need to move beyond monuments, taking a broader view of cultural heritage and its relevance in a variety of contexts.

The process for reviewing legislation/drafting new legislation

It is noted that many countries in sub-Saharan Africa have legislation that does not reflect the reality of contemporary situations for heritage conservation. In countries that show an interest in reviewing their legislation, there should be a detailed investigation and analysis of existing laws and the situations they have created in order to build on strengths and eliminate weaknesses. This review should be conducted by relevant experts from both within the institution and outside, and can be used to motivate legal reform.

The process of reviewing and drafting new or amended legislation should be a participatory exercise. Financial assistance is needed for the consultation processes, which can be expensive.

Provisions within legislation

Legislation should address diverse ways of protecting the immovable cultural heritage including, *inter alia*, cultural and environmental impact assessments, and proactive surveys and inventories of heritage.

Reference to relevant international conventions should be included in national heritage legislation. Heritage legislation should specify areas of possible inconsistency with other legislation and provide for methods of resolution. Where possible, legislation should provide mechanisms for conflict resolution through appeals processes, mediation and other channels.

While acknowledging that the best way of ensuring the protection of immovable cultural heritage is through cooperation and partnership with stakeholders, it is also recognized that provisions in heritage legislation should include strong penalties. The legislation should provide for easy adjustment of financial penalties to ensure their continued effectiveness. Ways should be explored to encourage governments to allow revenue from sanctions to accrue to the appropriate heritage institution.

Appropriate administrative structure

The appropriate forms of administrative frameworks need to be carefully evaluated at the national level within the process of researching new legislation. What is best suited to a given country should be provided for in the legislation, given that maximum flexibility is generally advantageous to the functioning of heritage conservation bodies.

New or revised legislation should provide for the rights of local communities and individuals to derive social and economic benefits from heritage development such as cultural tourism, incentives and adaptive reuse. Case studies in this area could be very useful, as could developmental models. There is need for investigation into how to relegate powers to national heritage to enable them to operate in this area.

New or revised legislation should provide for the creation of structures that represent affected sectors within government and civil society, including community institutions, in policy, administration and advisory positions. These structures should ensure effective communication, cooperation and partnership.

Funding

The financial implications of new legislation must be examined as part of the process of adopting new legislation.

Relevant ministries should provide adequate sources of finance to ensure the effective implementation of the legislation.

Sensitisation of decision-makers

Recognizing that review and implementation of legislation require the good will of politicians and other decision-makers, it would be useful to organize a programme through existing forums to sensitise parliamentarians on the importance of effective heritage legislation. Legislators in countries with positive experiences could be useful in this context.

Other useful techniques for sensitisation would include training heritage professionals in lobbying and in raising funds for community-based organizations that need resources to apply pressure to legislators. This might include, for example, bringing people to Parliament to address heritage issues, or taking legislators to sites to observe situations and listen to community and professional views.

State-based/community-based protection systems

It is important that efforts be made to revive community-based systems of conservation to ensure that communities are effective partners in conservation.

Where appropriate, community-based enforcement systems should be used in the protection of immovable cultural heritage. Community abilities to protect sites need to be strengthened through supplying tools and other materials that assist in management.

In many situations, coexistence is seen as the best option, i.e. state legal protection is needed to protect sites from outside interventions and pressures while communities continue to manage them. This idea is not only sensible in that community interest is then retained in the site, but it is also cost-effective for the state.

Concrete follow-up

Participants of this seminar should present the final Seminar Report to the staff of relevant departments, institutions and members of boards of trustees or councils to facilitate support for the revision of heritage legislation.

The following activities are recommended by the AFRICA 2009 programme:

- establishing a working group on heritage legislation.
- instituting a research and publication programme on issues pertaining to all aspects of heritage legislation in sub-Saharan Africa. This should

include case studies of successful/unsuccessful re-drafting of legislation and cooperation between communities and state institutions.

- considering a programme of exchange of expertise and the initiation of pilot projects (Projects Sites) in particular countries and at specific sites.
- when requested, facilitating outside expertise to assist countries in reviewing their heritage legislation.
- encouraging forums for relevant ministers accompanied by permanent secretaries and directors of heritage institutions to discuss the issue related to heritage legislation in Africa.
- initiating training activities for judicial and heritage officers to ensure awareness and enforcement of heritage law.

The AFRICA 2009 programme

The Africa 2009 programme undertook to:

- a) publish and distribute the papers and discussion from this seminar;
- b) establish a working group for developing reference material for those undertaking legal reforms;
- c) develop other programmes aimed at improving the legislation governing protection of cultural property.

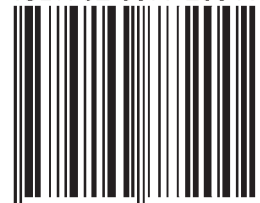
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