CASE STUDY 29

Legal and administrative systems at the national level in South Africa

South Africa has yet to ratify the Intangible Heritage Convention, but meanwhile the country has been putting in place a complex web of legislation and policy, as well as institutional frameworks, that will enable it to better safeguard the ICH (or what it calls ‘living heritage’).

#### The Constitution and devolution of power to the provinces

South Africa’s Constitution (1996) is the supreme law of the country, promoting equality, human rights, non-racialism and non-sexism and an accountable, responsive and transparent democratic State. The principles of multilingualism enshrined in the Constitution inform all legislation and policy, including cultural policy, the national language policy and any policies or legislation on ICH. Heritage and language policy at national level functions as framework (guiding) legislation for provincial and local levels of government, because cultural matters are considered concurrent competencies of national and provincial government.

#### Policies and institutions under the Ministry of Arts and Culture

Safeguarding living heritage (or assisting communities in doing so) is one of the responsibilities of the Department of Arts and Culture, where a special section for Living Heritage has been established. A draft Living Heritage Policy was formulated within the Department of Arts and Culture in 2009, under the framework of the existing cultural policy (the Arts, Culture and Heritage White Paper of 1996). This policy is currently being costed and is open to public consultation (2011). Personnel within the Department of Arts and Culture were allocated the responsibility for overseeing the inventorying of the ICH in the country. The Department oversees the National Heritage Council (which provides policy advice and coordination within the heritage sector) and the South African Heritage Resources Agency (which is responsible for managing intangible heritage values associated with heritage places and objects).

#### Policies and institutions under other ministries

The safeguarding of ICH is not just a matter for the Department of Arts and Culture, however. The Indigenous Knowledge Systems Policy of the Department of Science and Technology (2004) established an agency (the National Indigenous Knowledge Systems Office, or NIKSO) for inventorying ICH that may have commercial applications (this is called ‘indigenous knowledge’) and for fostering its contribution to the country’s economy while protecting community rights over it.

The Department of Trade and Industry has made some modifications to the country’s intellectual property legislation to accommodate indigenous knowledge. The Patents Act was amended in 2005, for example, requiring patent applicants to have permission from the communities concerned if the patent relied on an ‘indigenous biological resource, genetic resource, or the traditional knowledge or use’. Further amendments were proposed to the Performers’ Protection Act (to extend protection to ‘expressions of folklore’) and the Copyright Act (to extend protection to ‘works of a traditional character’ and establish a national trust fund in respect of traditional intellectual property). These changes were (2011) under discussion in Parliament.

Regulations were also drafted by the Department of Environment and Tourism ensuring that permits for research, bioprospecting and the export of indigenous biological resources are only granted with the prior informed consent of stakeholders giving access to the indigenous biological resources concerned (including communities who own the knowledge or the relevant land). The permit system ensures that communities are involved as far as possible in benefit sharing.[[1]](#footnote-1)

At the same time, other policies, legislation and regulations have been drafted under the Departments of Health and Agriculture, for example, protecting community rights over their ICH as well as the rights of people to have a good health outcome from traditional medical interventions.

1. . National Environmental Management: Biodiversity Act 2004, Regulations on bio- prospecting, access and benefit sharing, 8 Feb. 2008: http://faolex.fao.org/docs/pdf/saf85909.pdf [↑](#footnote-ref-1)