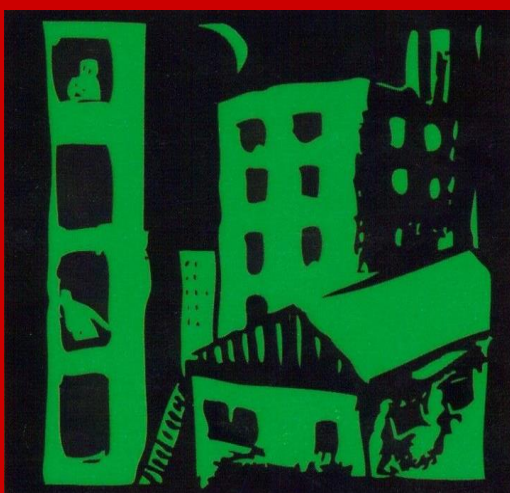


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Legislating marine intangible cultural heritage in South Africa

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ABSTRACT

South Africa is a developing country where there is insufficient conservation of tangible and intangible cultural heritage. In this article, it is argued that the adequate conservation of both forms of heritage is important to the realisation of democracy. A long history of colonisation and apartheid means that the identification and conservation of indigenous heritages is lacking. This article proposes that the National Heritage Resources Act 25 of 1999 (NAHRA), which provides for the recognition and protection of cultural heritage, including living heritage, also insufficiently provides for marine intangible cultural heritage (MICH) in South Africa. The remedy, however, is not simply to amend NAHRA but to attend to deeper problems of exclusion in South Africa and amend associated legislation. The insufficiencies in NAHRA reflect historical exclusions and colonialism in South Africa, a situation with important implications for communities under pressure to accept new strategies for ocean development. A major argument in

the article is the importance of MICH to cultural rights in South Africa and the role of less visible and less vocal stakeholder groups in oceans' management processes. The article notes the presence of environmental holism among indigenes and a dynamic intangible heritage in South Africa. It advances the significance of humanised approaches to heritage and ocean management in South Africa.

Keywords: intangible cultural heritage; National Heritage Resources Act, Protected Areas Act; Integrated Coastal Management Act; Eastern Cape, South Africa.

1 INTRODUCTION

South Africa remains one of the most unequal societies in the world. Over half of its 60 million citizens are unemployed and considered poor.¹ Inequality is visible and persists in the population's unequal access to a range of resources and environments, including access to coastal areas. This article proposes that the recognition and protection of indigenous marine intangible cultural heritage (MICH) in South Africa cannot be easily remedied by amendment of the National Heritage Resources Act 25 of 1999 (NAHRA).² The insufficient protection of MICH is the result of centuries of oppression and dispossession, and remedies to these are both more complex and more substantive. MICH protection is critical however, as it will serve the ocean "economy" strategy of the South African government. This is so especially in the effort to achieve an integrated and inclusive ocean governance as well as in seeking an effective, cross-sectoral ocean management approach.³ In this article, MICH refers specifically to the manifestations of human relations with the sea, as expressed via both cultural-ritual practices and spiritual beliefs concerning the sea and coast.

A second argument of the article⁴ is that although the South African government has laws to conserve natural heritage – principally, the National Heritage Resources Act 25 of 1999 (NAHRA) – and calls for inclusion in ocean management (the National Environmental Management: Protected Areas Act 57 of 2003⁵ (NEMA: PAA) and the

¹ World Bank "Poverty & equity brief: Sub-Saharan Africa – South Africa" (April 2020) available at https://databankfiles.worldbank.org/public/ddpext_download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_ZAF.pdf (accessed 14 January 2021).

² National Heritage Resources Act 25 of 1999.

³ See the Government of South Africa *Operation Phakisa* (2014) available at <https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Governance%20Documents/Marine%20Protection%20and%20Governance/OPOceans%20MPSG%20Executive%20Summary.pdf> (accessed 10 October 2021).

⁴ The research presented in this article is supported by NRF grant number 129962 and NRF grant number 125455. The field research presented in the article was conducted by Rosabelle Boswell and a team of researchers, whom the author acknowledges for their fieldwork contribution. These research assistants are Sharon Gabie, Jessica Leigh Thornton, Francois du Plessis, Athabile Xuba, Jenna-Lee Goeda, Thomas Terblanche, Ryan Pillay, Qawekazi Maqabuka, Bayanda Laqwela and Zanele Hartmann.

⁵ National Environmental Management: Protected Areas Act 57 of 2003.

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National Environmental Management: Integrated Coastal Management Act of 2008 [ICMA]),⁶ these laws neither specifically recognise nor protect MICH.

Thirdly, while the South African Bill of Rights, in Chapter 2(3), recognises and protects customary rights by requiring the state to not “unfairly discriminate directly or indirectly against anyone [on the basis of their] culture”, and Chapter 12 of the Constitution (1996)⁷ protects customary law and recognises the authority of traditional leadership, the former is a protective measure (as opposed to an active measure) and the latter has no bearing on MICH. Furthermore, the field research results noted in this article⁸ show that communities are sometimes excluded in ocean and coastal management regardless of the core principles of NEMA (as noted below), and their MICH is ignored. For example, an interviewee in the Western Cape Province said:

If you look at Mitchells Plain, Strandfontein, wherever you go where there is development, you will see that people of colour are removed from the coast. We are a kilometre away from the coast. Our back doors in Mitchells Plain are showing towards the sea. We don't have sea views. I am aggrieved as a person, as an activist that racial spatial patterns continue to exist, and I won't stop until that have been remedied. So, I use the quote of Nelson Mandela almost in all my speeches where he said, “we are a people living on the coast, we are so well endowed by living on the coast, yet this is a people dying of hunger and starvation”. I mean I know this quote by heart, and I use it whenever I deal with coastal matters. So, I deal with the coast from Muizenburg to Macassar. I would speak about the non-development; development is not happening ... coastal developmental rights are not given to us as a people.

While scholarly attention has been given to the plight of small-scale fishers⁹ who use the ocean for livelihood purposes, less attention has been given to cultural valuations of the oceans and, inter alia, intangible cultural heritage at the coast.

Lastly, South Africa is party to several international agreements¹⁰ concerned with sustainable management of cultural heritage resources. As such, its national laws should

⁶ National Environmental Management: Integrated Coastal Management Act of 2008.

⁷ Section 30 and 31 Constitution of the Republic of South Africa, 1996.

⁸ The field research discussed in this article was conducted from October 2020 to May 2022, from Port Nolloth in the Northern Cape province to Cintsas in the Eastern Cape province. Ethical Clearance for the research was issued by Nelson Mandela University and is available on request.

⁹ Sunde J *Customary governance and expressions of living customary law at Dwesa-Cwebe: Contributions to small-scale fisheries governance in South Africa* (PhD dissertation, 2014, University of Cape Town); Muhl E-K & Sowman M “Rights, resources, rezoning and the challenges of governance in South Africa's oldest marine protected area” *Conservation & Society* (2020) 18(4) at 366–77.

¹⁰ United Nations *United Nations Declaration on the Rights of Indigenous Peoples* (2007) available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 10 January 2021); UN Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), UN Convention for the Safeguarding of the Intangible Cultural Heritage (2003) and UN Convention on the Protection of the Underwater Cultural Heritage (2001) available at <https://unesdoc.unesco.org/> (accessed 5 October

seek to realise forms of cultural management noted in these agreements. Since the inception of Operation Phakisa,¹¹ the South African government's oceans economy strategy, many coastal "development" initiatives (including further plans for offshore mining) are being implemented. In this rapidly evolving context, inclusive coastal management legislation is critical. As Wynberg and Hauck show, development which is insensitive to local social and cultural dynamics may affect medium- to long-term ocean sustainability and human development.¹²

The discussion in this article also adds that attention to MICH is critical to conservation of human rights. In a country affected by centuries of oppression and high unemployment, the government should revise NAHRA to include MICH as part of its broader effort to restore the cultural rights of South Africans. Presently, NAHRA is prioritising tangible heritage conservation, and this refers largely to the heritage of colonisers. The conclusion to the article is that a more inclusive and democratic oceans economy forms part of a more inclusive and democratic South Africa. Recognising MICH may also draw the government's attention to the social benefits of the oceans, something which, because of the focus on 'use' benefits, remains undefined.

2 THE SOUTH AFRICAN CONTEXT AND RELEVANCE OF CONSERVING MARINE CULTURAL HERITAGE

In recent decades, critical heritage studies¹³ propose that heritage conservation is politicised and unequal, and risks ossifying culture rather than maintaining its dynamism. Despite these critiques, heritage conservation remains a compelling proposition for states and their inhabitants. It both endorses a rights-based approach to development and is also a globally accepted route for the conservation of socially meaningful public sites, memories and legacies. In the following, a discussion is offered on the legacy of dispossession in South Africa, and argument is made regarding the silencing of ICH as part of dispossession in South Africa, despite the significant legal reform since 1994.

2023). However, South Africa is not party to the UN Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

¹¹ See the Government of South Africa *Operation Phakisa* (2014) available at <https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20Documents/Marine%20Protection%20and%20Govenance/OPOceans%20MPSG%20Executive%20Summary.pdf> (accessed 12 October 2021).

¹² Wynberg R & Hauck M "People, power and the coast: A conceptual framework for understanding and implementing benefit sharing" (2014) 19(1) *Ecology and Society* at 27 available at https://www.researchgate.net/publication/260553201_People_Power_and_the_Coast (accessed 22 February 2023).

¹³ Erasmus Z "Throwing the genes: A renewed biological imaginary of 'race', place and identification." (2013) 60(136) *Theoria* at 38–53. <https://doi.org/10.3167/th.2013.6013604> (accessed 1 October 2023); Boswell R "Salted identities: Biocultural heritage for a rehumanized ocean management in South Africa" (2022) 47(2) *Anthropology and Humanism* available at <https://doi.org/10.1111/anh.12402> (accessed 7 June 23); Winter T "Clarifying the critical in critical heritage studies" (2013) 19(6) *International Journal of Heritage Studies* at 532–45.

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South Africa is part of the early history of humanity, and its peoples inland and at the coast are contributors to cultural evolution both in the region and on a worldwide scale. Archaeologists have now reliably identified these contributions at inland sites (e.g., at Mapungubwe) and at coastal sites (such as Mossel Bay) on the South Cape coast. Research at the coast reveals the existence of resourceful aquatic hunter-gatherers, whose way of life produced material culture, dietary practices and social innovations for a cohesive existence.¹⁴ Recent botanical and archaeological research also suggests that precolonial African populations at the coast were culturally rich and knowledgeable in their use of coastal fauna and flora for healing purposes. Botanical research and ethnography have revealed that descendants of the Khoi-San (South Africa's First Peoples) hold rich knowledge of a wide array of edible plants at the coast¹⁵ and that their intangible cultural heritage includes an environmental holism that calls for deep respect of both forest and sea.¹⁶ These knowledges formed part of a complex (and socially diverse) whole that informed cultural practices and beliefs in coastal settings prior to colonisation.

Interrogating the land question in South Africa and reflecting on the provision of infrastructure and social services a decade after the first democratic elections in South Africa, Ntsebeza and Hall¹⁷ remark that “despite [some] achievements, there is compelling evidence that structural poverty, a key apartheid legacy is deepening”. Prior to the Union of South Africa in 1910, however, the situation was vastly different. Mafeje,¹⁸ Bundy,¹⁹ Hendricks, Ntsebeza and Hellicker²⁰ all note the existence of dynamic agricultural production among the African peasantry in South Africa. With the discovery of gold in 1894, the colonial government aggressively pursued African wage labour,

¹⁴ Marean C “The roots of our evolutionary blue heritage” in Boswell R, O’Kane, D & Hills, J (eds) *The Palgrave handbook of blue heritage* (2022) 13 at 23.

¹⁵ De Vynck JC, Van Wyk, BE & Cowling R “Indigenous edible plant use by contemporary Khoi-San descendants of South Africa’s Cape south coast” (2016) *South African Journal of Botany* 102 60 at 69, available at <https://www.sciencedirect.com/science/article/pii/S0254629915003737> (accessed 28 November 2022).

¹⁶ Boswell R & Thornton JL “Including the Khoi-San for a more inclusive blue economy in South Africa” (2021) 17 (2) *Journal of the Indian Ocean Region* 141 at 160 available at <https://www.tandfonline.com/doi/abs/10.1080/19480881.2021.1935523> (accessed 28 November 2022).

¹⁷ Ntsebeza L & Hall R *The land question in South Africa: The challenge of transformation and redistribution* Pretoria: HSRC Press (2007) at 2.

¹⁸ Mafeje A “The agrarian question and food production in Southern Africa” in Kwesi K Prah (ed) *Food security issues in Southern Africa* Institute of Southern African Studies: National University of Lesotho (1988) available at https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/6001/isas_sass4.pdf?sequence=1 (accessed 20 February 2023).

¹⁹ Bundy C *The rise and fall of the South African peasantry* London: James Currey (1979).

²⁰ Hendricks F, Ntsebeza L, and Hellicker K *The promise of land: Undoing a century of dispossession in South Africa* Johannesburg: Jacana (2013).

implementing the Glen Grey Act, which dispossessed black Africans by forbidding them “to buy and own land outside the 7 percent of land reserved for their occupation”.²¹ Black sharecropping and labour tenancies were also abolished. Dispossession inland intensified after the Native Land Act of 1913 and the institution of apartheid from 1950. Dispossession was also implemented at the coast, as Africans were forcibly removed from coastal areas and forced to move to “Homeland” states. The process denied black South Africans access to the majority of the country’s coastline. It effectively cut them off from the ecological, leisure and spiritual domains which are critical to marine knowledge, well-being, ancestral veneration, and sociality.

In South Africa, dispossession has been discussed in relation to the loss of land, and the state has tangibly responded by producing the Department of Rural Development and Land Reform, as well as a White Paper of Land Reform.²² These seek to restore, redistribute, reform and develop land for the benefit of the majority population. Akinola, Kaseeram and Jili note, however, that the process has fallen short of public expectation and that land reform and that current efforts have not delivered “a radical and rapid break from the past”²³ that necessitates the kind of change black South Africans can sustainably benefit from. An argument of this article is that dispossession has also happened at the coast and the state has yet to address it: a failing that is now being amplified in national heritage legislation.

In the South African Bill of Rights Chapter 2(3), the state is required to protect South Africans’ cultural rights. And, through NAHRA, the state has pledged to protect both tangible and intangible cultural heritage.²⁴ Furthermore, South Africa is party to the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) (henceforth the World Heritage Convention), the UN Convention for the Protection of the Underwater Cultural Heritage (henceforth the UCH Convention), but not the Convention for the Safeguarding of the Intangible Cultural Heritage (2003).²⁵ In 1999, the state promulgated the country’s World Heritage Convention Act 49 of 1999, a law to guide the identification and nomination process for World Heritage Sites. The World Heritage Convention Act and the broad provision for living heritage suggests that the government is galvanised to conserve both tangible and intangible heritage. The South African Heritage Resources Agency (SAHRA) is tasked to manage such heritages, including Underwater Cultural Heritage (UCH), which is presently understood as tangible assets of historical and cultural value. However, and as the discussion in this article reveals, UCH also consists of intangible elements associated with the marine

²¹ See Ntsebeza & Hall (2007) at 2.

²² Government of South Africa *White Paper on Land Reform* Pretoria (1997).

²³ Akinola AO, Kaseeram I and Jili N *The new political economy of land reform in South Africa* London: Palgrave Macmillan (2021) at 2.

²⁴ Tangible heritage includes sites, monuments, artifacts and objects of cultural value. Intangible heritage consists of folklore, beliefs, values, rituals and practices related to culture. Tangible and intangible heritage is not always divisible.

²⁵ Henceforth referred to as the ICH Convention.

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environment. NAHRA is insufficient in this regard, since it focuses only on tangible elements of heritage in the marine environment.

The South African government has also ratified the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007).²⁶ In April 2021, as well as at the United Nations Permanent Forum on Indigenous Issues,²⁷ the state affirmed its commitment to protecting the rights of indigenous peoples. To conserve the access of future generations to environmental benefits, South Africa has also sought, post-1994, to realise, through various laws, the aims of the Convention on Biological Diversity (CBD).²⁸ This means that it has also pledged to protect biodiversity for the benefit of present and future generations. At the continental level, and in order to fully realise the aims of the World Heritage Convention, South Africa is part of the UNESCO IOC sub-commission for Africa and Adjacent Island States (IOCAFRICA).²⁹ It has thus “accepted” the IOCAFRICA strategic plan (2014-2021), which emphasises an inclusive and culturally sensitive ocean management approach. That it is part of the IOCAFRICA and party to the international conventions and declarations noted above suggests that South Africa has pledged to advance a more culturally inclusive heritage conservation approach.

When considering marine heritage in South Africa, however, one finds that marine heritage is considered as natural heritage to be protected as per the World Heritage Convention. This is clear from any assessment of NAHRA, the NEM: PAA and ICMA. Thus, while these laws encourage inclusion in ocean management, they consider marine heritage as purely *natural* heritage, that is, the site-specific, tangible, and biological national estate of South Africa. This approach excludes the possibility of MICH recognition and protection.³⁰ Furthermore, to date, South Africa lacks Marine World

²⁶ United Nations *United Nations Declaration on the Rights of Indigenous Peoples* (2007) available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 10 January 2021).

²⁷ Government of South Africa South Africa’s National Statement: 20th Session of the Permanent Forum on Indigenous Issues, General Discussion, Item 6: Follow up to the Outcome Document of the World Conference on Indigenous Peoples and the 2030 Agenda for Sustainable Development available at <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2021/04/South-Africa-National-Statement-20th-Permanent-Forum-on-Indigenous-Issues-item-6.pdf> (accessed 12 October 2021).

²⁸ United Nations *The Convention on Biological Diversity* (1992) available at <https://www.cbd.int/convention/text/> (accessed 19 January 2021).

²⁹ Intergovernmental Oceanographic Commission *Strategic plan for the IOC’s sub commission for Africa and the Adjacent Island States 2014-2021* UNESCO Regional Office for Africa (2014) Nairobi, Kenya available at <https://ioc-africa.org/component/phocadownload/category/4-about-iocafrika.html?download=45:ioc-inf-1318-strategic-plan-for-the-ioc%E2%80%99s-sub-commission-for-africa-and-the-adjacent-island-states-english> (accessed 28 November 2022).

³⁰ However, it may also be argued that there are provisions for MICH in South African legislation. In providing opportunities for the protection of ICH more broadly, legislation can be applied to marine ICH.

Heritage sites. According to UNESCO,³¹ these are sites that accommodate both natural and cultural heritage, making the protection of MICH possible in those 50 or so countries which have them. That South Africa has more than 3,000 km of coastline and no Marine World Heritage sites that include provision for MICH is problematic, especially in a democratic society where cultural rights are supposed to be upheld, and where such rights have been violated under both colonialism and apartheid.³²

Marine World Heritages (and the Marine Protected Areas) are gaining prominence worldwide. UNESCO states:

The World Heritage natural sites protect over 2,420,000 km² of the planet's land and marine waters, including 643,000 km² of inland lands (27 per cent) and 385,000 km² of coastal and island lands (16 per cent). About 1,380,000 km² are located in marine waters (57 per cent), an area roughly the size of the entire Gulf of Mexico.³³

By 2021, there were 52 Marine World Heritage sites. Such sites are becoming more appealing to governments worldwide as they are critical to the conservation of marine biodiversity and fish stocks (devastated as they are by climate change impacts on the oceans). The sites are also critical to coastal livelihoods, recreational and ecotourism receipts;³⁴ they will become even more critical, as the number of people living at the coast continues to increase. Worldwide, nearly 600 million people are currently coastal dwellers.³⁵ The significance of these facts is that South Africa has a long history (and current reality) of dispossession and cultural alienation. Ethnographic research, as we show next, indicates the extent to which Africans remain isolated from the sea and coasts of the country. Thirdly, the government is poised to leverage the ocean economy for development of various kinds. South Africa cannot afford to pursue an exclusionary ocean management approach, one that only pursues the conservation of marine biodiversity and seeks to implement protection of natural marine heritage.

There has been discussion about using multiple legislation in a complementary way (as a bouquet of protective measures rather than as individual pieces of policy).

³¹ UNESCO "Operational guidelines for the implementation of the World Heritage Convention" (2019) available at <https://whc.unesco.org/en/news/2259> (accessed 28 November 2022).

³² For an equally detailed analysis of the challenges affecting marine heritage, see: Sharfman J *Troubled waters: Developing a new approach to maritime and underwater cultural heritage in sub-Saharan Africa* Leiden: Leiden University Press (2017).

³³ UNESCO "Navigating the future of world marine heritage: Results from the First World Heritage Marine Site Managers' meeting", Honolulu, Hawaii, 1-3 December 2010 at 11 available at <https://unesdoc.unesco.org/ark:/48223/pf0000193111> (accessed 28 November 2022).

³⁴ Mohammed EY & Uraguchi ZB "Impacts of climate change on fisheries: Implications for food security in sub-Saharan Africa" in Hanjra MI (ed) *Global food security* (2013) Nova Science Publishers available at <https://pubs.iied.org/sites/default/files/pdfs/migrate/G03625.pdf> (accessed 1 October 2021).

³⁵ World Oceans Review *Living with the oceans: A report on the state of the world's oceans* (2010) available at <https://worldoceanreview.com/en/wor-1/coasts/living-in-coastal-areas/#:~:text=At%20a%20rough%20estimate%20more,to%20400%20to%20500%20million.> (accessed 25 January 2020).

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Scholarship on the issue of human relations with the ocean strongly emphasises a lengthy and symbiotic connection.³⁶ The studies also stress the interdependence of tangible and intangible heritage.³⁷ Heritage scholars have long interrogated the uses of heritage,³⁸ noting how the poor rarely have their heritages publicly signified.³⁹ They emphasise the importance of recognising ICH, not only for the sake of policy formulation but also for the pluralising of pasts and the deepening of democracy.⁴⁰ For example, they argue that hegemonic narratives and representations of a nation's heritage can lead to the erasure of other historical narratives and the violation of rights to cultural expression and representation.⁴¹ In the context of global environmental conservation, the conservation of cultural heritage is deemed critical to preserving biodiversity. Many indigenous communities worldwide hold biocultural knowledge they have used for generations to sustainably use and manage natural resources.⁴² Thus, conserving ICH and ultimately MICH is not only important to cultural inclusion and the recognition of cultural rights, but also critical to the conservation of biodiversity *tout court*.

In South Africa, the legal MICH recognition and conservation would also be key to redressing an unequal past and to foregrounding the cultural riches of the majority population, including the indigenous knowledge systems of the country's First Peoples. Recognising, planning for, and including MICH in ocean management advances decolonisation in South Africa. It will also globally foreground South Africa's role in shifting global narratives on the part of First Peoples in transformative ocean

³⁶ Wang J "A review on marine heritage study: Focusing on the relationship between community and marine heritage, the value, conservation and management of marine heritage" (2019) 3 *International Journal of Geoheritage and Parks* 145 at 151.

³⁷ Bouchenaki M "The interdependency of the tangible and intangible cultural heritage" *The World Heritage Convention: Future challenges and possible lines of actions European Conference* Roros Norway 3-5 September 2003 available at <http://openarchive.icomos.org/468/> (accessed 28 November 2022).

³⁸ Smith L *The uses of heritage* London: Routledge at Abstract (2006).

³⁹ Kirshenblatt-Gimblett B "Intangible heritage and the metacultural production of heritage" (2004) 561/2 *Museum International* 52 at 65.

⁴⁰ Graham B, Ashworth GJ and Tunbridge, JE *Pluralising pasts: Heritage, identity and place in multicultural societies* London: Pluto Press (2007).

⁴¹ Erasmus Z "Throwing the genes: A renewed biological imaginary of 'race', place and identification" (2013) 60(136) *Theoria* at 38-53; Boswell R "Salted identities: Biocultural heritage for a rehumanized ocean management in South Africa" (2022) 47(2) *Anthropology and Humanism* available at <https://doi.org/10.1111/anhu.12402> (accessed 7 June 23); Winter T (2013) at 532-45; Graham B, Ashworth GJ & Tunbridge, JE (2007).

⁴² Kang Shua Y "Cultural heritage conservation and the planet" (2019) in UNESCO (ed) *Asia Conserved III – Lessons Learned from the UNESCO Asia-Pacific Awards for Cultural Heritage Conservation (2010-2014)* UNESCO: Southeast University Press available at <https://unesdoc.unesco.org/ark:/48223/pf0000374412> (accessed 28 November 2022).

governance and management. The next part of the discussion offers insight into the legal aspects involved in MICH recognition and protection.

3 AN OVERVIEW OF THE LEGAL CONTEXT

The National Heritage Resources Act 25 of 1999, forms part of a legislative suite which aims to advance heritage conservation in the country. In a comprehensive review of heritage legislation, the following laws are identified as important to heritage conservation in South Africa: Culture Promotion Act 35 of 1983; Cultural Institutions Act 119 of 1998; South African Geographical Names Council Act 118 of 1998; National Heritage Council Act 11 of 1999; National Council of Library and Information Services Act 6 of 2001; National Library of South Africa Act 92 of 1998; African Library for the Blind Act 91 of 1998; Legal Deposit Act 54 of 1997; National Archives and Records Service of South Africa Act 43 of 1996; and the Heraldry Act 18 of 1962.

None of these make specific reference to living or intangible cultural heritage, as they all emphasise tangible heritage such as sites, monuments and artefacts.⁴³ The heritage laws are framed by the South African Constitution, which provides a framework for the national, provincial, and local spheres of government.

Furthermore, South Africa has ratified the United Nations Convention for the Protection of Underwater Cultural Heritage (2001), but the Convention is focused on protection of *tangible* cultural heritage: shipwrecks and other underwater material culture. Discussion with the Marine Underwater Cultural Heritage (MUCH) team at the South African Heritage Resources Agency in September 2021 revealed a further institutional impediment. A team of three people (at the time) were tasked with identifying and conserving the country's entire marine underwater cultural heritage along South Africa's coasts, including all of the underwater heritage that may be found in the country's rivers, lakes and streams. In so far as heritage conservation is concerned, the Department of Arts and Culture (DAC) has the primary responsibility for matters related to heritage identification and management. DAC is advised by a National Heritage Council (NHC),⁴⁴ which has a variety of functions including the transformation of the heritage sector, promotion of access to heritage, and providing advice to the minister on national policies related to heritage. At the provincial level, the South African Heritage Resources Agency (SAHRA)⁴⁵ has provincial level authorities, whose task it is to implement the objectives of DAC and NAHRA. However, and despite these institutional arrangements, there appears to be little ICH conservation in South Africa and no MICH conservation.

⁴³ Cheadle Thompson & Haysom Inc. Attorneys *Department of Arts and Culture: Review of Heritage Legislation, Final Report Vol. 1* (2019) available at <http://www.dac.gov.za/sites/default/files/Review%20of%20Heritage%20Legislation%20Report.pdf> (accessed 25 January 2020).

⁴⁴ Government of South Africa, Department of Sports, Art and Culture, National Heritage Council available at <http://www.dac.gov.za/?q=national-heritage-council> (accessed 10 October 2021).

⁴⁵ Government of South Africa, South African Heritage Resources Agency available at <https://www.sahra.org.za/> (accessed 10 October 2021).

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South Africa also has law that addresses the conservation of marine biodiversity. Via NEM: PAA, the government seeks to “promote the sustainable utilisation of protected areas for the benefit of the people, in a manner that would preserve the ecological character of such areas”.⁴⁶ To date, South Africa has ten World Heritage Sites, but not a single ICH is inscribed on UNESCO’s List of Oral and Intangible Cultural Heritages. South Africa also has five sites proposed on UNESCO’s list of “tentative sites”.⁴⁷ However, none of these are relevant to MICH. South Africa’s proposals in this regard were last updated in 2015. Since it takes years for proposals to be accepted, it means that there is no immediate prospect of change around this issue. In addition, and as previously stated, South Africa has no Marine World Heritage sites. Worse still, and as at the time of writing, the country had no national authority designated to use UNESCO’s ICH emblem,⁴⁸ a gesture which would at least in part demonstrate the country’s public commitment to the conservation of ICH. Many other southern African countries have nominated national authorities to use the UNESCO emblem. In 2020 and under its Safeguarding Projects, UNESCO funded capacity-building for its state parties in southern Africa. Specifically, it created a project entitled “Strengthening sub-regional cooperation and national capacities in the countries of the southern African sub-region”.⁴⁹ The aim of the project is to build institutional capacity, foster cooperation between states parties, and advance legal reform to better recognise and protect intangible cultural heritage. The approaches taken create the necessary conditions (i.e. capacity, focus, resource deployment, and management knowledge) for the recognition and protection of MICH.

In the following section, ethnographic data is offered which shows that indigenous South Africans articulate a rich marine cultural heritage. However, this rich heritage is not fully protected, putting the heritage rights and responsibilities of future generations of South African coastal dwellers at risk. The ethnography specifically considers the marine intangible cultural heritage of indigenous, especially First Peoples in South Africa, given the systematic exclusion of these people under colonial rule and apartheid and the fact that they continue to be a vulnerable group in contemporary South Africa.

⁴⁶ Chapter 1, section 2(e) National Environmental Management: Protected Areas Act 57 of 2003.

⁴⁷ UNESCO “Tentative Lists” available at <https://whc.unesco.org/en/tentativelists/state=za> (accessed 28 January 2022).

⁴⁸ The UNESCO “Contact” (2020) available at <https://ich.unesco.org/en-state/south-africa-ZA?info=contacts#:~:text=Designated%20authority%20for%20the%20use,please%20contact%20the%20permanent%20delegation> (accessed 22 January 2021).

⁴⁹ UNESCO “Strengthening sub-regional cooperation and national capacities in seven Southern African countries for implementing the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage Part II” (2020) available at <https://ich.unesco.org/en/projects/strengthening-sub-regional-cooperation-and-national-capacities-in-seven-southern-african-countries-for-implementing-the-2003-convention-for-the-safeguarding-of-the-intangible-cultural-heritage-part-ii-00374> (accessed 22 January 2021).

4 INDIGENOUS MARINE INTANGIBLE CULTURAL HERITAGE

South Africa has a rich intangible cultural heritage (ICH) that is yet to be identified and inscribed on either the national or World Heritage List. Some of the country's ICH is apparent in its rich oral traditions, diversity of ritual practices, and many belief systems. The form and substance of the ICH of South Africa's First Peoples has been discussed elsewhere.⁵⁰ A further example can be found in Lake Fundudzi in Limpopo Province, which is known as a site of both natural and cultural heritage. The Vha-Venda peoples, often described as the People of the Pool, consider the lake sacred and have developed a range of folklore and ritual practices that emphasise its cultural richness.⁵¹ In brief, South Africa's ICH consists of enduring values, beliefs, cultural and culinary practices, as well as folklore and oratory.⁵² In the coastal context, these values, practices and beliefs reveal imagery, metaphor and storytelling that evoke the sea and coastal environment.

Presently, and as previously stated, sections 211–212 of the Constitution of South Africa (1996) recognise the authority of traditional leaders and traditional leadership. Section 211(3) specifically seeks to protect and elevate customary law on condition that “[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”.⁵³ Anthropologically (and quite possibly legally), the provision presents both a problem and a contradiction. First, customary law might not encompass all cultural practices or views (including those concerning MICH).⁵⁴ Secondly, Chapter 2(3) of the Constitution specifically upholds individual rights to culture, as opposed to group rights to culture. This means that culturally distinct groups (such as the Khoi-San) seeking particular rights such as the protection of their MICH or ICH cannot make any claim on a group basis. In the following section, the research method and findings are discussed.

5 RESEARCH METHOD, METHODOLOGY AND ETHNOGRAPHIC FINDINGS

The research findings presented involved anthropological field research in South Africa. This took place in Tsitsikamma and the surrounding towns of Kranshoek and Coldstream in the Eastern Cape Province of the country in October 2020. This work, as well as secondary research prior to 2020, reveals a rich MICH in South Africa. The data was collected by a multilingual, multiracial, multidisciplinary team of male and female researchers (sociologists, anthropologists, historians and filmmakers) in what may be described as the black African and coloured townships of Tsitsikamma and Plettenberg Bay (Kranshoek) noted above. Thirty individual unstructured interviews were

⁵⁰ Boswell R & Thornton JL (2021) 141 at 60.

⁵¹ Anyumba G & Nkuna M “Lake Fundudzi: A sacred lake in South Africa that is not open for tourism development” (2017) 6(4) *African Journal of Hospitality, Tourism and Leisure* 1 at 20.

⁵² Koitsiwe M *African indigenous astronomy of the Batswana in Botswana and South Africa* (PhD thesis, North-West University, 2020).

⁵³ Constitution of South Africa, 1996.

⁵⁴ It is surmised that this is because cultural practices are, by their nature, dynamic, requiring adaptive cultural management processes.

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conducted with both men and women, the majority of whom were aged 35–60 years old. Each interview lasted between 30 minutes and an hour, and the aim of the interviews was to ascertain the perceptions, experiences, knowledge and concerns that interviewees had about ocean management in the area.⁵⁵ The interviewees were Xhosa- and Afrikaans-speakers. In addition, two focus group interviews were conducted in which each group comprised approximately 10-15 people. As per the ethics requirements of the university to which the researchers are affiliated (Nelson Mandela University), pseudonyms are used in this article to protect the anonymity of the participants.

Questions asked in the focus groups and posed to the individual interviewees included: “What are your first memories of the sea/coast?”, “What does the sea/ocean mean to you?”, “How, if at all, has your relationship with the ocean/sea changed in recent years?”, “What, if any rituals do you, or your community, perform in relation to, or with the ocean?” and “Do you have any personal stories of the ocean/coast you wish to share with us?” The interviewees included women, small-scale fishermen, those who described themselves as “retirees” and “unemployed”, mothers, fathers, young adult men, a conservationist and a *sangoma*/healer-diviner.

The research also included analysis of secondary data previously collected by other scholars in the area.⁵⁶ This revealed that intangible cultural heritage exists in the lives of small-scale fishers and that, as Muhl and Sowman put it: “MPAs [marine protected areas] will not succeed unless consideration is given to their biophysical, socio-economic and governance context, and crucially, the values and beliefs of adjacent communities, resource users and managers.”⁵⁷

The secondary data findings also show that, for small-scale fishers, engagement with the coast and sea cannot be simply categorised as relevant to recreational or subsistence fishing. The data shows that even after the creation of the marine protected area in

⁵⁵ Thornton JL & Pillay R “‘Other’ social consequences of marine protection in Tsitsikamma, South Africa” in Boswell R, O’Kane, D & Hills, J (eds) *The Palgrave handbook of blue heritage* (2022) London: Palgrave Macmillan at 411–27.

⁵⁶ See Muhl E “Tsitsikamma, South Africa: Food security and livelihood threats to fishers bordering the Tsitsikamma marine protected area” 1 at 5 available at <https://www.communityconservation.net/tsitsikamma-south-africa/> (accessed 22 February 2021); Muhl E, Esteves-Dias A & Armitage D “Experiences with governance in three marine conservation zoning initiatives: parameters for assessment and pathways forward” (2020) *Frontiers in marine science* available at <https://www.frontiersin.org/articles/10.3389/fmars.2020.00629/full> (accessed 22 January 2021); Faasen H *Rights, resources, rezoning and the challenges of governance in South Africa’s oldest marine protected area* (unpublished M Thesis, University of Stellenbosch, 2006).

⁵⁷ Muhl E & Sowman M “Rights, resources, rezoning and the challenges of governance in South Africa’s oldest marine protected area” (2020) 18(4) *Conservation & Society* 366.

Tsitsikamma, small-scale fishers continued to cultivate a relationship with the sea, with one man turning his attention to writing poetry⁵⁸ or telling stories about the sea.

The Covid-19 lockdown and restrictions on inter-provincial travel in 2020 meant that in-person interviews had to be brief and participant-observation in the social lives of communities (the key to detailed ethnography), limited. The research was qualitative, involving (as noted) unstructured interviews with the interviewees in their home locales. Both the secondary and primary research findings show that the sea and coast hold value for community members in the recreational, sporting, historical and ritualistic or religious senses. Those interviewed articulated nostalgia and a sense of loss or deprivation due to being denied access to the coast and marine resources on account of the creation of the national park in Tsitsikamma and the marine protected area.⁵⁹ They spoke about the importance of the sea as a source of medicine⁶⁰ and the role of seawater in healing. They drew attention to the sea as the resting place of the ancestors,⁶¹ a belief which is apparent amongst both black African and coloured communities. Several spoke about the use of seawater as a powerful emetic,⁶² a means of “flushing out” both toxins and any evil visited upon a person afflicted in the spiritual realm. Those interviewed also drew attention to the unique natural landscape of the coast and sea, and the cultural, physical, and psychological benefits⁶³ they derived from being in that landscape. Their inputs clearly indicated that coastal communities obtain a range of culturally defined benefits from the coast and sea.

The MICH of the indigenous interviewees was also apparent in their sustained engagement with, and knowledge of, coastal flora and its healing properties. The communities who live in this region are not recent. As already stated, archaeological research reveals a long history of cooperative human settlement there.⁶⁴ Botanical and social science research shows that Khoi-San knowledge of coastal flora in the region is deep and environmentally sustaining.⁶⁵ Those identifying as Khoi-San descendants perceive the coast and sea as an integrated biome which is collectively useful to the expression of their intangible heritage: their myths, songs, stories, beliefs and practices. Land cannot be divided from sea, because “land [is] for the use of all those living on it ...

⁵⁸ Muhl E “Tsitsikamma, South Africa: Food security and livelihood threats to fishers bordering the Tsitsikamma marine protected area” 1 at 5 available at <https://www.communityconservation.net/tsitsikamma-south-africa/> (accessed 22 February 2021).

⁵⁹ Interview with Joy, 20 October 2020. Tsitsikamma.

⁶⁰ Interview with herbalist, 20 October 2020. Tsitsikamma.

⁶¹ Interview with John, 21 October 2020. Tsitsikamma.

⁶² Interview with Virgil, 21 October 2020. Tsitsikamma.

⁶³ Interview with Joy, 20 October 2020. Tsitsikamma.

⁶⁴ Marean CW “People on the Palaeo-Agulhas Plain” (2018) 14 *Quest Magazine* 14 at 17; Smith EI et al. “Humans thrived in South Africa through the Toba eruption about 74 000 years ago” (2018) 55 *Nature* 511 at 515.

⁶⁵ De Vynck JC, Van Wyk BE & Cowling RM (2016) 60 at 69.

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a religious symbol – a gift from God – that connected the tribe to the Supreme Being”.⁶⁶ But, it is not only a divine gift or legacy. Without access to land and coast and the heritage inherent in them, it is said that “people will not be able to reclaim their rightful place and dignity”.⁶⁷ The paragraphs below offer selected verbal accounts that illustrate the richness and persistence of the cultural valuation of the sea and coasts.

Joy (a pseudonym), a woman in her mid-fifties, who had lived for most of her life in Tsitsikamma was asked about her first memory of life at the coast. In response, she said:

In our area, we know what the beaches are like, we could go out to the beach freely. But now with the laws implemented and the marine protected areas it's quite a shock. Because they were so used to going and all of a sudden there was a brick or block. They had to pay money and they lost interest. They don't think it's fair that they have to pay to see the sea. It doesn't sit well with me. The space is for everyone to enjoy especially for the locals in the area. I have heard some stories that the authorities are trying to find ways that the locals can still enjoy the ocean. Maybe a reduced fee just for local people. The ocean was a second home. People miss that. Many of our kids have never been to the ocean. Even my cousin's boy, he is five years old he has never been to the ocean, I was shocked. There's no interest now, you cannot go, you not allowed to go. You have to pay and many people don't have enough money to pay.⁶⁸

She added:

The people have lost the tradition of how to look after the sea. For example, I grew up at the ocean, so I know not to litter or to take too much out. Don't hurt don't break off. But I think that other people have not been there for such a long time so now we need to educate the children first because they don't know not to kill that fish because it's not big enough yet. Or to even take that mussel out. They're not used to it anymore. Like I said, the tradition has been lost. Instead of it being a lifestyle we need to educate. Education takes a bit longer but if it's a lifestyle you just know. you just get into the flow of it you see. People should work on a little bit of education for the community. When they are educated, they can appreciate these things more, they will know exactly their role with the ocean and the ocean's role with them. The locals might be seen as destroyers, which I don't think is the case. They just need some direction as to how they do it [engage with the sea].

Another interviewee, a herbalist, said:

The sea has lots of medicine for us to make us healthy. I don't go to the doctor; I am my own doctor. If you want medicine, go to the sea. Give me a pot, I'll drink the medicine and I get healthy. But we are forbidden to go to the sea. We can't go to the sea anymore. I don't know how long it will take for us to be able to go back to where we come from. The community is hungry, we have tried to go to SANParks to allow us to go to the sea to fish, but there's just silence. We are a poor community; we don't have the money to pay

⁶⁶ Klaasen JS “Khoi-San identity: A contribution towards reconciliation in post-apartheid South Africa” (2018) 44(2) *Studia Historiae Ecclesiasticae* 1 at14.

⁶⁷ Klaasen (2018) at 8.

⁶⁸ Interview with 'Joy', October 2020. Tsitsikamma.

to go to the sea. Our children have grown without knowing the sea, they have never seen the sea even though here in the Tsitsikamma Park we have the sea right here. They have been born here and they know there's the sea, but they don't know how the sea looks. Those things have been taken away. The fish and perlemoen [abalone] we cook and eat are both food and medicine. Everything is in the sea what a person needs to live. I can make a powder from the perlemeon [abalone] to clear your head and your eyes. Bossiemedicine helps with flu, colds, asthma, strength.

When asked what it means for the children of the community to be forbidden from going to the sea, another interviewee said:

They are not free and restful and happy. They drink and smoke, as their heads are not cleared from the sea where they would be able to think more clearly. The children just have to sit in their houses, they can't go out. The children's minds are elsewhere, they steal, they do anything. We have nothing without the sea. We go to the sea at the end of every year to close the year and start the new year fresh. We go and camp and forget about the old year. We feel healthy and happy to start the new year with new life. We drink the sea water to clean our stomach.

He added:

I am happy to help the other people in the community with the medicine. I feel good when people get better with the medicine, I give them from the sea. The medicine comes directly from the sea, but we don't take more than what we need. We take a little from each plant, so the plants continue to grow.⁶⁹

In conversation, a SANParks official and resident of Tsitsikamma said the government should consider the "land and ocean as one, guaranteeing access, rituals and heritage".⁷⁰ He emphasised the social aspects of engaging with the sea, saying that "Friday afternoons were for teaching children to fish, [for] bonding time with brothers, sons and fathers". There was a strong element of commensality, as "catches were shared with neighbours and to supplement income". He expressed the view that "communities still feel marginalised in sustainability and environmental education ... indigenous forests were managed by ancestors, but residents don't even go there today".

Another interviewee, a man in his forties and resident of the village, also commented on the medicinal contribution of the ocean:

[We go] to the waterfall trail to collect, harvest and fish but not medicinal plants. Fishing is the one cultural practice that was able to be executed until 2000. The removal of plants was prohibited. In the forests only certain things were allowed. Residents could use the indigenous forests in catchment area to collect medicinal plants. Cut 1 kg or less for tea, long-leafed honey bush. Residents now have gardens at home with honey bush as there is now less stress on being caught harvesting. Local inhabitants are recruited by sangomas [diviner healers] outside Tsitsikamma to harvest [these medicinal plants].

When asked to describe his first time by the sea, Joseph, a male in his thirties, said:

⁶⁹ Interview with herbalist, October 2020. Tsitsikamma.

⁷⁰ Interview with SANParks official, October 2020. Tsitsikamma.

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My first time by the sea was special, I looked at the sea and was not sure what to do. It gives you life as there is lots to do with the sea. I lived on a farm, but I saw people fishing in Tsitsikamma and learnt how to fish. I am the only person who fishes besides my brother. I learnt from him. [Now] we fish on the sly (skelm visvang). I enjoy it but I am scared of being caught. We have to pay fines if we get caught, we wait until coast is clear, it is stressful.⁷¹

Many of those interviewed in Tsitsikamma and surrounds self-identified as coloured, and in conversation some alluded to their Khoi-San ancestry, referring to the “old” people or *ou mense*. In the Tsitsikamma area and surrounds, there are several coloured communities who identify themselves as descendants of the Khoi-San. Reference to the “old” people in discussions with the interviewees suggest that they may well be referring to Khoi-San ancestors, since archaeological and historical studies of this area indicate the strong presence of Khoi-San people. The reference is relevant to the discussion since, for the Khoi-San, water is their “source of life [and confers] a sense of belonging and their permanence to nature”.⁷² The sources also indicate the existence of environmental holism among the Khoi-San. Humans, wind, sea, sky and (fresh) water are perceived as integrated or seen as part of a synergistic whole:

Water connects their identity to time (the *longue durée* of time) and harmonises their relationship with Mother Earth and the sea. Water is vital for various rituals and cleansing ceremonies... For the Khoisan the wind that people breathe shows a connection and movement between them, animals, plants and water, as “wind smells lock participants into a web of relationships” (Low, 2007: 75). Wind also features in /Xam accounts of rain and storms (Hoff 1998). [There is] an ‘aqueous’ holism in San beliefs, the idea that humans are intricately connected to all forms of and mediums (i.e., wind) carrying water and that natural, seemingly inanimate elements possess life and therefore deserve respect and appropriate approach.⁷³

The cultural importance of the sea and coast to the Khoi-San is not merely historical; instead, cultural practices and beliefs involving the sea continue into the present:

In May 2017, several Khoi-San chiefs (#goab) came together to celebrate the “spirit of the water” in Nelson Mandela Bay in the Eastern Cape Province of South Africa. The chiefs performed a ritual of respect at fish traps in the Cape Recife Nature Reserve, a place considered sacred by the Khoisan. The fish traps in question are ancient man-made structures, believed to have been made by “strandlopers” or the beach walkers of the ancient San, during the middle Stone Age. In enacting the ritual, the Khoi-San chiefs and members of the attending group signified their respect for earth and concern about the reality of pollution and the exploitation of marine life ... The ritual suggested that there is much more to Khoi-San cosmologies of the sea.⁷⁴

⁷¹ Interview with ‘Joseph’, October 2020. Tsitsikamma.

⁷² Gabie S *Khoi-San ancestry and coloured identity: A study of the Korana Royal House under Chief Josiah Kats* (Unpublished thesis, University of the Witwatersrand, 2014) at 55.

⁷³ See Boswell & Thornton (2021) at 154.

⁷⁴ Boswell & Thornton (2021) at 154.

Today, the public perception is that black Africans and coloured people have little or no interest in the sea. There are even racist stereotypes that Africans cannot swim and are frightened of the ocean. But, as noted in this article (and as the poet Kholeka Putuma powerfully asserts),⁷⁵ this stereotype is no accident. Colonialism and apartheid dispossessed black people and removed them from “prime real estate” in South Africa, and this included the country’s coastal areas. Participant observation by the research team revealed that much of South Africa’s prime coastline is occupied by the white minority population. Nevertheless, as noted above, black South Africans continue to cultivate a rich MICH, though not one that is recognised or protected by the state. This lack of recognition and protection has the effect of dispossessing South Africans, even after apartheid, in effect denying them their intangible cultural heritage. Worse, the poor recognition and protection of MICH can have further deleterious effects for the population: when state-driven ocean development proceeds in South Africa, these cultural rights are not likely to be included in ocean governance.

6 RECOMMENDATIONS AND CONCLUSIONS

In 2009, 15 years after the first democratic elections, the South African government published a draft National Policy on Living Heritage, the aim of which was to advance the identification and protection of living heritage/intangible cultural heritage in South Africa. While NAHRA does take note of living heritage, it has yet to make provision for MICH. NAHRA has not been updated in more than two decades. Furthermore, despite the Constitution’s provision in respect of civil liberties *vis-à-vis* customary law, it does not protect *group* customary rights. Thirdly, the NEM: PAA and ICMA do not explicitly refer to marine cultural heritage. This means that MICH (and customary rights more generally) risk being inadequately considered by or excluded from ocean management decisions. Thus, there are presently no mechanisms in place for the protection of MICH. Access to one’s cultural practices and sites for ritual practice promote community solidarity, an individual sense of self, and confidence in one’s history and identity. It may also promote psychological well-being. MICH protection can facilitate this access and recognise coastal customary rights in South Africa. It is therefore recommended that the following be added to NEMA to better recognise and protect MICH and ICH in coastal areas.

The preamble to NEMA should be amended to indicate that the “State must respect, protect, promote and fulfil the social, *cultural*, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities”. The amended goal should be to “prevent pollution and ecological degradation; promote *ecological* conservation and *cultural heritage* conservation, secure ecologically sustainable development and use of natural resources while promoting justifiable

⁷⁵ Putuma K *Water* (2016) available at <https://pensouthafrica.co.za/water-by-koleka-putuma/> (accessed 10 October 2021).

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economic and social development”.⁷⁶ The amended principles noted in NEMA could be elaborated in NAHRA, NEM: PAA and ICMA.

In respect of NAHRA, the Act already states under its general principles (4) that “heritage resources form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management”.⁷⁷ However, it is recommended that Definition 2(xxi) be amended as follows – “living heritage” means the *gendered, territorial, atmospheric*⁷⁸ and *marine* intangible aspects of inherited culture”.⁷⁹ Definition 2(xxi) should refer to gendered intangible cultural heritage, considering gender bias in heritage conservation. Chapter 1(3) should include a new item (j), which refers to the *ritual practices and beliefs* attached to or associated with living heritage. Item (i) only refers to objects and makes no provision for ICH or MICH.

Insofar as NEM: PAA and ICMA are concerned, the following amendments are suggested. For NEM: PAA Part 4(53) a new section 3 relating to the protection of the cultural rights of those historically discriminated against needs to be added. This would enhance the protection referred to in respect of land rights in the previous section of 4(53) and deepen inclusivity in marine protection.

Insofar as the ICMA is concerned, the preambular comment, “AND WHEREAS much of the rich natural heritage of our coastal zone is being squandered by overuse”, should omit the word “natural” to be inclusive of cultural heritage. Chapter 1(a) of the ICMA should also be amended to state: “the cultural heritage of the Republic within the coastal zone, including *all material culture and intangible cultural practices related to the ocean and coasts ...*”.⁸⁰ In the definition section of the ICMA, cultural heritage should be amended to refer to “any place, *tangible or intangible cultural heritage*⁸¹ of aesthetic, architectural ...”.

Including MICH in NAHRA and effecting the proposed changes will result in a more decolonised South Africa, one where there is a transformative ocean governance. Solomon Plaatje noted the effect of oppressive legislation on the dispossession of South Africans after 1913: “[A]wakening on Friday morning, June 20 1913, the South African native found himself not actually a slave, but a pariah in the land of his birth.”⁸²

⁷⁶ National Environmental Management Act 107 of 1998 available at <https://cer.org.za/wp-content/uploads/2014/02/NEMA-107-of-1998.pdf> (accessed 12 October 2021)

⁷⁷ Section 5(4) of the National Heritage Resources Act 25 of 1999.

⁷⁸ In relation to air and air quality.

⁷⁹ Definitions, s 2(xxii) of the National Heritage Resources Act 25 of 1999.

⁸⁰ Chapter 1(a) National Environment Management: Integrated Coastal Management Act at 11.

⁸¹ Using these terms is also consistent with the terminology in the World Heritage Convention.

⁸² Plaatje ST *Native life in South Africa: Before and since the European War and the Boer Rebellion* Johannesburg: Ravan (1995) at 1.

Dispossession continues in South Africa; only now it is via insufficient legislation. The situation must be remedied if the full cultural rights of South Africans are to be restored.

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