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SCHOOL OF LAW

**THE PROTECTION OF FOLKLORE IN ZAMBIA: A COMPARATIVE STUDY WITH
KENYA'S LEGAL FRAMEWORK**

By:

PRECIOUS MUSABA

LLB22216719

**AN OBLIGATORY ESSAY SUBMITTED TO THE UNIVERSITY OF LUSAKA IN
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE
BACHELOR OF LAWS (LLB) DEGREE.**

2025

DECLARATION

I declare that this dissertation entitled **THE PROTECTION OF FOLKLORE IN ZAMBIA: A COMPARATIVE STUDY WITH KENYA'S LEGAL FRAMEWORK** which is hereby submitted in partial fulfilment of the requirement for the award of a Bachelor's Degree at the University of Lusaka is my own original work and it has not been previously submitted for the award of a degree at this university or any other tertiary institution. I understand what plagiarism entails and I'm aware of the University's policy in this regard. Thus, where other people's work is cited, I have duly acknowledged. The errors or omissions in this work are solely mine.

PRECIOUS MUSABA



2025

SUPERVISOR'S RECOMMENDATION

I **NTEMENA MWANMWAMBWA** recommend that this dissertation prepared under my supervision by **PRECIOUS MUSABA**, entitled **THE PROTECTION OF FOLKLORE IN ZAMBIA: A COMPARATIVE STUDY WITH KENYA'S LEGAL FRAMEWORK** be accepted for examination. I have checked it carefully and I'm satisfied that it fulfills the requirement pertaining to the format laid down in the regulations governing directed research.

.....

N. MWANAMWAMBWA

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DEDICATION

I dedicate this dissertation to God. May He take all the glory.

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Table of Contents

DECLARATION	ii
RECOMMENDATION	iii
ACKNOWLEDGEMENT	iv
DEDICATION	vi
ABSTRACT	xii
CHAPTER ONE	1
1.0 INTRODUCTION.....	1
1.1 BACKGROUND OF STUDY	1
1.2 STATEMENT OF THE PROBLEM	2
1.3 OBJECTIVES OF THE STUDY.....	3
1.4 RESEARCH QUESTIONS	3
1.5 SIGNIFICANCE OF THE STUDY	3
1.6 SCOPE OF STUDY	4
1.7 DEFINITION OF KEY TERMS AND ACRONYMS.....	4
1.8 LITERATURE REVIEW	4
1.9 METHODOLOGY.....	9
1.9.1 Research Approach.....	10
1.9.2 Research Design.....	10
1.9.3 Research Type	10
1.10 DATA COLLECTION TECHNIQUE	10
1.10.1 Methods for Collecting Secondary Data	10
1.10.2 Data Analysis	10
1.11 ETHICAL CONSIDERATIONS	10
CHAPTER TWO.....	11
AN ANALYSIS OF THE PROVISIONS THAT GOVERN FOLKLORE PROTECTION IN ZAMBIA	11

2.0 Introduction	11
2.1 EXPRESSIONS OF FOLKLORE	12
2.2 Conclusion	21
CHAPTER THREE	22
AN ANALYSIS OF THE PROVISIONS THAT GOVERN FOLKLORE/CULTURAL EXPRESSIONS PROTECTION IN KENYA.....	22
3.1 Introduction	22
3.1 PART III- PROTECTION OF CULTURAL EXPRESSIONS	23
3.1.1 PART IV- GENERAL PROVISIONS	27
3.1.2 PART V- MORAL RIGHTS	31
3.1.3 PART VI- MANAGEMENT OF RIGHTS	34
3.2 Conclusion	35
CHAPTER FOUR.....	36
A COMPARISON OF THE LAWS PROTECTING FOLKLORE UNDER THE ZAMBIAN ACT AND KENYAN ACT.....	36
4.0 Introduction	36
4.1 Scope and Definition	37
4.2 Duration of protection	37
4.3 Registration, Formalities and benefit sharing	37
4.4 Moral rights and attribution.....	39
4.5 Exceptions & permitted uses.....	40
4.6 Enforcement & sanctions	40
4.7 Interaction with broader IP systems and regional instruments	41
4.8 Practical Implications	41
4.9 Conclusion	41
CHAPTER FIVE.....	42
CONCLUSIONS AND RECOMMENDATIONS.....	42

5.0 Introduction	42
5.1 Summary of chapters	42
5.1.1 Chapter one	42
5.1.2 Chapter two	43
5.1.3 Chapter three	43
5.1.4 Chapter four	44
5.2 Recommendations	44
5.2.1 Strengthening community participation and decentralization	44
5.2.2 Incorporate explicit moral rights	44
5.2.3 Enhance Implementation and Awareness	45
5.2.4 Create a National Folklore repository	45
5.2.5 Encourage Regional and International Cooperation.....	45
5.2.6 Strengthen enforcement mechanisms.....	45
5.3 Conclusion	45
BIBLIOGRAPHY	47

TABLE OF STATUTES

Constitution Of Kenya

Statutory Instrument (S.I.) No. 16 of 2021

The Protection of Traditional Knowledge and Cultural Expressions Act no. 33 of 2016.

The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore
Act No. 16 of 2016

TABLE OF CASES

Kamahuha Ltd v Winnie Njeri Kariuki & Samuel Mureithi Murioki [2019] KEELC 2164 (KLR)

ABSTRACT

This dissertation critically examined the protection of Traditional Cultural Expressions (TCEs) under the Zambian and Kenyan legal frameworks of Traditional Knowledge. Protecting folklore is a complex challenge due to its evolving nature, communal ownership and interaction with intellectual property laws. In Zambia, the Traditional Knowledge Act addresses the earlier gaps in legal protection, misappropriation, and benefit sharing and it does this by recognizing works that are anonymous in nature as well as establishing communal rights. Although the Act offers a strong legal basis, its adequacy depends on effective implementation, moral recognition, and community empowerment. Drawing lessons from Kenya's legal framework, a more participatory, rights based, and decentralized approach would ensure that the protection moves beyond statutory intent, to become a more living system that fully uplifts and preserves Zambia's cultural heritage.

Kenya's Traditional Knowledge and Cultural Expressions Act on the other hand offers a *sui generis* approach that integrates statutory and customary law. Community participation and judicial recognition of customary claims are highly promoted, however, it may face challenges such as inter ethnic conflict and coordination difficulties among law enforcement agencies.

The comparative study revealed that Kenya emphasizes moral rights and community devolution, while Zambia prioritizes access and benefit sharing (ABS) and a more centralized regulation. Both frameworks however remain shaped by Western concepts of intellectual property, which may clash with folklore's dynamic and communal nature. The study concludes that effective protection of TCEs in Africa requires stronger community involvement, recognition of customary laws, and a well balanced system that preserve moral, cultural and economic values.

CHAPTER ONE

1.0 INTRODUCTION

Expressions of folklore encompass the unique and diverse ways that a culture's beliefs and traditions are manifested. Traditional cultural expressions (TCEs), also called "expressions of folklore", may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.¹ Expressions of Folklore are seen as integral to the cultural and social identities and heritage of indigenous and local communities, reflecting core values and beliefs.² Because of how much these expressions are tied to the identities to a particular people, countries have recognised the need to offer them utmost protection. The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16 of 2016 is the first legal framework enacted in Zambia with the aim to expressly protect the access to, and use, of traditional knowledge, genetic resources and expressions of folklore. An integral feature of this Act is Part VI drafted for the protection of folklore specifically, showing the commitment to protecting and preserving Zambia's rich culture and heritage. In addition, Statutory Instrument (S.I.) No. 16 of 2021 was enacted to further this protection as it outlines the legal framework for accessing and using traditional knowledge, genetic resources, and expressions of folklore. Therefore, it is necessary to analyse how much protection this piece of legislation offers for expressions of folklore in line with another jurisdiction to ascertain the adequacy of the laws put in place. The focus of this study is to analyse the provisions that protect folklore in the Act and compare it to the legal framework in Kenya that protects expressions of folklore.

1.1 BACKGROUND OF STUDY

Oral traditions, music, dance, art, rituals, and other traditional cultural practices are all examples of Zambian folklore expressions. These practices are essential to Zambian

¹ World Intellectual Property Organization, *Traditional Cultural Expressions* [WIPO], [https://www.wipo.int/en/web/traditional-knowledge/traditional-cultural-expressions/index#:~:text=Traditional%20cultural%20expressions%20\(TCEs\)%2C,other%20artistic%20or%20cultural%20expressions](https://www.wipo.int/en/web/traditional-knowledge/traditional-cultural-expressions/index#:~:text=Traditional%20cultural%20expressions%20(TCEs)%2C,other%20artistic%20or%20cultural%20expressions), (accessed 9 April 2025)

² PACRA, *Tell me about Traditional Knowledge, Genetic Resources, and Expressions of Folklore* [PACRA] <https://info.pacra.org.zm/tell-me-about-traditional-knowledge-genetic-resources-and-expressions-of-folklore/>, (accessed 9 April 2025)

communities' cultural identity and heritage, reflecting their values and beliefs, and the Zambian government acknowledges the significance of preserving them, as outlined in Part VI of the Protection of Traditional Knowledge, Genetic Resources, and Expressions of Folklore Act. Balancing the preservation of cultural heritage while limiting the risk of cultural misappropriation may prove to be difficult. Through their efforts to protect expressions of folklore, Zambia has drawn inspiration from the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore³ to help formulate an adequate legal framework. A notable example of one of these expressions is the Tonga baskets that have evolved overtime. Organised around craft clubs frequently made up of grandmothers, mothers, daughters, sisters, and nieces, the women benefit from working as a collective.⁴ Meant to be an expression of the Tonga culture, overtime they have been subject to demand leading the Tonga women to balancing the gain of income with preserving their cultural identity. They take satisfaction in the fact that marketing the baskets allows them to share their cultural history with the world. They show a commitment to their cultural history by embracing new designs while maintaining the old techniques. However, by selling their baskets, they expose themselves to the possibility of misappropriation. As a subset of traditional cultural expressions, the protection of folklore is the need of the hour to preserve the cultural and traditional assets.⁵ Legal protection for the baskets would not only preserve the cultural heritage but would be a measure against misappropriation.⁶ Therefore, there's a need for adequate laws that preserve these expressions that show the uniqueness of a particular people.

1.2 STATEMENT OF THE PROBLEM

The protection of folklore is a critical issue in Zambia as the nation is rich in diverse cultural expressions that embody its historical narratives, beliefs, and values. In Zambia, expressions of folklore are often vulnerable to misappropriation and exploitation, both locally and internationally. This problem was exacerbated by the lack of comprehensive legal frameworks designed specifically to protect folklore, which can ultimately lead to the

³ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO)

⁴ C. Musiza, 'Traditional cultural expressions preservation and innovation: The Tonga Baskets of Zambia', *Open Air African Innovation Research* [Web blog], 13 January 2021 [Traditional cultural expressions preservation and innovation: The Tonga Baskets of Zambia | Open AIR](#) (accessed 14 April 2025)

⁵ Krishnan. T, 'Folklore and its Protection', *International Journal of Law Management & Humanities*, vol. 3, no.4, 2010.

⁶ Ibid.

erosion of cultural heritage and identity. This realization led to the enactment of the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act no.16 of 2016.

Lungwangwa⁷ opines that one of the ways of determining and assessing whether national laws have been adequately drafted is through a comparative study with laws in other jurisdictions. Thus, this study seeks to analyse the legal framework governing the protection of folklore in Zambia and compare it with Kenya's legal framework; the Protection of Traditional Knowledge and Cultural Expressions Act no. 33 of 2016. While both Zambia and Kenya face similar challenges in preserving folklore, there are valuable lessons to be learnt from each country's approaches to legal protection, which can inform enhanced strategies for more effective safeguarding of cultural heritage.

1.3 OBJECTIVES OF THE STUDY

This study seeks to meet the following study objectives:

1. To analyse the provisions of the Zambian Act in relation to the protection of folklore in Zambia.
2. To analyse the provisions of the Kenyan Act in relation to the protection of folklore in Kenya.
3. To identify and compare the key similarities and differences in the approaches to folklore protection in Zambia and Kenya.

1.4 RESEARCH QUESTIONS

The research objectives will be met by the following research questions:

1. What are the Laws that cover folklore protection in Zambia?
2. What are the Laws that cover folklore protection in Kenya?
3. How do Zambian Laws on folklore protection compare with those in Kenya?

1.5 SIGNIFICANCE OF THE STUDY

This significance of this study is that it seeks to highlight the laws that have been passed on protection of folklore in Zambia whilst considering those passed in another jurisdiction to determine their adequacy. Folklore expressions are an important part of Zambia's

⁷ Lungwangwa, Vincent, Constitution Making Process: The Zambian Experience, (Lusaka: University of Zambia Press, 2015). <http://dspace.unza.zm/handle/123456789/4>

cultural identity and cultural heritage and by studying its protection this research will contribute to the further understanding of the preservation of Zambia's rich cultural heritage. This study seeks to also bring out the importance of recognizing and valuing expressions of folklore. The findings of this study are meant to add to the existing body of knowledge on the adequacy of folklore protection in Zambia. In addition, other researchers will also benefit as they will use this study in their review of literature.

1.6 SCOPE OF STUDY

This study is focused on analysing the provisions in The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act that seek to protect expressions of folklore. It also includes analysing of such laws in the jurisdiction of Kenya and making a comparison.

1.7 DEFINITION OF KEY TERMS AND ACRONYMS

Expressions of folklore – the term encompasses music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or any other artistic or cultural expressions.

PACRA- Patents and Companies Registration Agency

TCE - Traditional Cultural Expressions

TK Act- The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16 of 2016

TK/CE Act- Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016

The Agency- PACRA

1.8 LITERATURE REVIEW

Alan Dundes⁸ in *The Study of Folklore* rather than offering a definition of folklore, provides a list of various types of folklore to showcase the wide range of the field of study. Folktales, legends, myths, ballads, festivals, folk dance, and song are among the topics on his list, but he also provides examples of folklore that might not be as obvious, like counting rhymes for kids, recipes, types of houses, barns, and fences, latrinalia (informal writings in

⁸ Dundes. A, *The study of folklore*, Englewood Cliffs, NJ: Prentice-Hall, 1965.

public restrooms), and the sounds traditionally used to call specific animals. **Dundes** emphasises the list is not exhaustive, but merely a sampling of the subjects that folklore scholarship can address, and which merit study for the insight that they provide into specific cultures. This book has provided a general overview of what amounts to expressions of folklore.

Kapambwe Lumbwe⁹ in his thesis talks about how indigenous knowledge such as musical arts are unique ways of transmitting knowledge as they communicate verbal and non-verbal messages. He notes that the indigenous ways of life in Zambia have been greatly influenced by the musical arts, which have been used in a variety of contexts, including storytelling, divination, customary education, marriage, initiation, and worship.

Richard Bauman¹⁰ in *Folklore, Cultural Performances, and Popular Entertainments: A Communications-centered Handbook* uniquely bridges the study of traditional folklore with that of cultural performances (like ritual and festival) and popular entertainments (like tourism and spectacle). This highlights the shared communicative and performative aspects across these domains. This book has been insightful regarding understanding folklore, especially through the lens of communication and performance.

Michael Jon Andersen¹¹ in 'Claiming the glass slipper: The Protection of Folklore as Traditional Knowledge' provided insight on how oral tradition and culture are frequently used in talks of folklore in the subject of folklore studies. Although folklore experts frequently differ on the exact boundaries of folklore, it seems that there is agreement that the term is somewhat broad and has its roots in a local, oral tradition. Understanding this is what helps understand the type of protection that is required.

Meeta Deka¹² in 'Folklore and Northeast Indian History' highlights folklore as an important element of the cultural heritage of every tribe and nation and because of this it becomes just as important to the history of the nation as well. Folklore of a group reinforces its sense

⁹ Kapambwe Lumbwe, 'Ubwinga, a subset of Bemba Indigenous Knowledge Systems: a comparative study of pre-colonial and post-independence wedding ceremonies in Lusaka and Kitwe, Zambia' University of Cape Town, 2009.

¹⁰ Bauman. R, *Folklore, Cultural Performances, and Popular Entertainments: A Communications-centered Handbook*, New York, Oxford University Press, 1992.

¹¹ Anderson. M.J, 'CLAIMING THE GLASS SLIPPER: THE PROTECTION OF FOLKLORE AS TRADITIONAL KNOWLEDGE', *Case Western Reserve Journal of Law, Technology & the Internet*, Vol. 1, No. 2, 2010, [Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge](#) (accessed 14 April 2025)

¹² Deka. M, 'Folklore and Northeast Indian History', *Sociology Mind*, Vol.1 (2011), doi: [10.4236/sm.2011.14022](#) (accessed 14 April 2025)

of social and ethnic identity. She emphasises that folklore is a living and still developing tradition, rather than just a memory of the past and it is through such an understanding that folklore is considered as an important source for history. This article provides an understanding of how expressions of folklore have much importance and because of this they demand adequate protection.

Thankam Krishnan¹³ in 'Folklore and its Protection' speaks about why expressions of folklore require much protection. Emphasising the drastic change in society from knowledge based to material based, she observes how because of such a transition the traditional and indigenous communities across the world face a major issue of cultural misappropriation or/and theft of their cultural expression which for them is not a product, but part of their identity and existence and is their collective property. Such misappropriation is carried out without permission and is only utilized for profit with the greatest amount of impunity. **Krishnan** further observes that globalization, which is essential for bringing capital, labour, and services together across borders, pays little attention to the preservation of indigenous cultures, customs, and ethos, all of which are closely linked to the cultural identity of a people. This work has been useful in understanding that it is imperative that folklore be protected as a subset of traditional cultural expressions to maintain cultural and traditional assets.

Kenny Changwe, Tomaida C. Milingo and Esther Hara – Zulu¹⁴ highlight in their article 'Spiritual beliefs and cultural heritage preservation; A case of Mwela Rock Art Site in Kasama district of Zambia', how in the past decades, the concept of heritage has undergone some changes from safeguarding tangible heritage to inclusion of the intangible heritage preservation and interpretation. The study looked at the abrupt changes in heritage management in recent decades that have posed serious threats to the loss of cultural heritage sites, the loss of spiritual values and overall, the loss of cultural identity, all of which are being erased by adverse effects of economies, globalisation and modernisation among others.

¹³ Krishnan. T, 'Folklore and its Protection', *International Journal of Law Management & Humanities*, vol. 3, no.4, 2010.

¹⁴ Kenny Changwe et al, 'Spiritual beliefs and cultural heritage preservation; A case of Mwela Rock Art Site in Kasama district of Zambia' University of Zambia, 2021.

Phingiwe Duma¹⁵ in her dissertation, examines Zambia's traditional knowledge laws and how closely they adhere to the guidelines established by the International Intellectual Property Organization. She focuses on understanding how best the indigenous community can benefit from their traditional knowledge. She also offers recommendations on how Zambia should enhance its legal system to meet accepted norms that safeguard and assist the indigenous populace.

Dionyssia Kallinikou¹⁶ expresses in 'Protection of traditional cultural expressions or expressions of folklore' how the protection of expressions of folklore has been a point of discussion for many years but still remains a challenging issue. She opines that protection of traditional cultural expressions or expressions of folklore should not have only one solution fitting to all nations and communities, but that effective protection may be found in multiple options for protection, such as intellectual property laws, cultural heritage preservation laws, practical measures such as digital recording and documentation of cultural expressions, establishment of registers and archives on digital cultural content. Further, she emphasises that International Organizations should develop a guide for lawmakers and communities that describe the recommendations, guidelines, model provisions, technical assistance or other option for the protection and preservation of expressions of folklore. This work has provided an understanding of how at every level the goal should be the adoption of fair regulations based on principles of mutual respect, fairness and justice to protect cultural heritage of all nations.

Christine Haight Farley¹⁷, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' is an article that provides an understanding on the various methods of protection that can be incorporated into a legal system for the protect expressions of folklore.

Chuma Himonga¹⁸ opines that indigenous communities should be involved in the decision-making process regarding the use and protection of their traditional knowledge. She is of the view that this can adequately be achieved by putting up various forms of legal

¹⁵ P. Duma: the Traditional Knowledge Act Conforming to WIPO standards, a means of benefiting indigenous communities

¹⁶ Kallinikou. D, Protection of traditional cultural expressions or expressions of folklore, '*Can Oral History Make Objects Speak?*' Nafplion, Greece, 2005.

¹⁷ Farley. H.C, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer? *Connecticut Law Review* vol. 30, no. 1, 1997.

¹⁸ Chuma, H Global Health Action (2014)

recognition, such as customary laws, community protocols and many other regulations that empower indigenous communities to regulate access to the use of their traditional knowledge.

Elizabeth Ngwira¹⁹ in her dissertation examines Zambia's Traditional Knowledge and Folklore Act of 2016 and assesses the Act's viability. She emphasizes how crucial it is to comprehend the degree to which written law is applied. This piece of literature proved useful in understanding the practicability of the Act in safeguarding traditional knowledge.

Valsala Govindan Kutty²⁰ in 'National Experiences With the Protection Of Expressions Of Folklore/ Traditional Cultural Expressions: India, Indonesia and The Philippines', expresses how folklore is probably the most important and well-acclaimed component of the cultural heritage of a nation. Commercial exploitation of folklore has been seen as a threat to a nation's cultural heritage, and this is mainly in the developing countries. In this respect, several developed countries have a pragmatic stance that is predicated on the idea that folklore expressions that have their roots in the distant past have entered the public domain and are no longer protected. This opinion may be the consequence of a mindset that is more in line with the IP rules that were established during the industrial revolution to protect the interests of those who profit from the new outputs of intellectual labour. The developing world, on the other hand, held a completely opposite perspective, viewing the commercial exploitation of folklore outside of their community without sufficient compensation as a moral, cultural, and economic wrong. When numerous African nations included suitable clauses in their copyright laws, the strong feelings of developing nations regarding the necessity of a legal framework for the preservation of folklore were expressed. An important principle followed in most of these legal mechanisms is that the creations of communities are protected rather than that of the authors, thereby making a deviation from copyright laws. This study has added further understanding of the extent to which lack of protection can go and the need for such protection to be attributed to the people practicing the folklore expressions themselves.

¹⁹ E. Ngwira: The Traditional Knowledge and Folklore Act (the law and feasibility of the Act and Practice)

²⁰ Kutty. G. Valsala, 'NATIONAL EXPERIENCES WITH THE PROTECTION OF EXPRESSIONS OF FOLKLORE/ TRADITIONAL CULTURAL EXPRESSIONS: INDIA, INDONESIA AND THE PHILIPPINES', *World Intellectual Property Organization (WIPO)*, 2002, [National Experiences with the Protection of Traditional Cultural Expressions/Expressions of Folklore - India, Indonesia, the Philippines](#) (accessed 16 April 2025)

Terri Janki²¹, 'Case Studies On Intellectual Property And Traditional Cultural Expressions' is a case study that highlights various cases concerning misappropriation of expressions of folklore and expresses how discussions of policy and legal options for the improved protection of expressions of traditional cultures should be guided as far as possible by the real needs articulated by Indigenous and local communities and, most importantly, their actual experiences with the intellectual property system. This study has clarified the need for adequate policies and legal reforms centred around actual experiences of the people.

D. A Agyei²², 'Bridging the International Gap in the Protection of Folklore: Analysis of the Ghanaian Approach Against Comparative Experiences from Selected African Countries' is an article that provides an analysis of the ways that expressions of folklore are protected amongst different African countries, analysing the legal frameworks put in place. It further compares the experiences of each country and how adequate the legal frameworks have been.

The proposed study is different from the reviewed literature because it seeks to examine the laws put in place, centred specifically on folklore and how its protected. It seeks to look at the effectiveness of the recently passed Act and its practicability by comparing it with another nation that strives to equally protect and preserve its nation's rich heritage. Thus, this study will seek to compare the ways that Zambia is protecting its expressions of folklore with Kenya's legal framework on how folklore is protected seeing as Kenya has to a great extent developed various means of ensuring that the expressions of folklore are adequately preserved and protected against different forms of exploitation. This will provide a clear understanding as to whether Zambia's national laws have been adequately drafted.

1.9 METHODOLY

This study will utilize the following research methods:

²¹ Janke. T, 'CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS', *World Intellectual Property Organization (WIPO)*, 2003, [Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions - Study #1](#) (accessed 16 April 2025)

²² D. A Agyei, 'Bridging the International Gap in the Protection of Folklore: Analysis of the Ghanaian Approach Against Comparative Experiences from Selected African Countries', *TEXAS INTELLECTUAL PROPERTY LAW JOURNAL*, vol. 28, no. 393, 2020.

1.9.1 Research Approach

Desk research, also known as secondary research or complementary research, involves gathering information and data from existing sources, such as books, journals, articles, websites, reports, and other published materials.²³ Users analyse and synthesize information from already available information.²⁴ Thus, data for this research will be gathered from secondary source as it will largely be a desktop examination of Zambian and Kenyan laws and further comparing them to ascertain the adequacy of how the Zambian laws on the protection of expressions of folklore have been drafted.

1.9.2 Research Design

The research design that will be used for this study is the desktop design. This is because the study will look into the current legislation on folklore protection within Zambia and Kenya.

1.9.3 Research Type

Primarily being desktop research, this study will involve the review of the laws protecting folklore in Zambia and in Kenya.

1.10 DATA COLLECTION TECHNIQUE

1.10.1 Methods for Collecting Secondary Data

Secondary data for this study will be collected using journals, books, statutes, e-sources, reports and other academic writings by scholars in relation to the topic of study.

1.10.2 Data Analysis

Data analysis will involve a thorough analysis of the laws on the protection of folklore in Zambia and then compare them to Kenya.

1.11 ETHICAL CONSIDERATIONS

The researcher commits to adhere to a number of ethical principles. This will involve seeking the University of Lusaka for permission to conduct any field research if need be. Additionally, in accordance with academic standards and the ethical standards of the legal

²³ Kiely. T. J, 'What Is Desk Research? Meaning, Methodology, Examples', *Meltwater*, 2025, [What Is Desk Research? Meaning, Methodology, Examples](#) (accessed 17 April 2025)

²⁴ Ibid.

profession, the researcher will identify and acknowledge all works used in the research by correctly citing them to prevent plagiarism.

CHAPTER TWO

AN ANALYSIS OF THE PROVISIONS THAT GOVERN FOLKLORE PROTECTION IN ZAMBIA

2.0 Introduction

This chapter seeks to analyse the provisions in the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act that specifically govern the protection of traditional expressions of folklore (TCEs) in Zambia. **The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16**²⁵ was assented on June 6, 2016, and enacted on June 7, 2016. It provides for the legal framework for the protection of, access to, and use of, traditional knowledge, genetic resources and expressions of folklore, which guarantees equitable sharing of benefits arising from the utilization of those resources and effective participation of holders.²⁶ It emphasizes the customary values and governance principles in protecting TCEs and embeds the spiritual, cultural, and social value of TCEs.²⁷ The Act uses the term expressions of folklore and defines these to be any form, whether tangible or intangible, in which traditional culture and knowledge is expressed, appears, or manifests.²⁸ Part VI of the Act provides for the ways in which TCEs are protected in Zambia.

The Act offers protection that is both defensive and positive in nature. It is defensive in the sense that it seeks to ensure that third parties are prevented from obtaining intellectual property rights for the use of traditional knowledge, associated genetic resources, or the

²⁵ Act 16 of 2016

²⁶ Zambia: Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, 2016 (Act No. 16 of 2016), *WIPO*, available at https://www.wipo.int/en/web/wipolex/w/news/2016/article_0009 (accessed 12th August 2025)

²⁷ Charlene Musiza, 'Weaving gender in open collaborative innovation, traditional cultural expressions, and intellectual property: The case of the Tonga baskets of Zambia', *Cambridge University Press Open African Innovation Research*, South Africa (2024)

²⁸ Act 16 of 2016

expressions of folklore. It is positive in the sense that it prohibits access or use without the prior informed consent of the holder.²⁹

Apart from this piece of legislation, it's important to note that a statutory instrument was enacted to provide for the registration process and relevant procedures to undergo known as **The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Regulations, 2021**³⁰. By regulating two main areas, (i) the registration of traditional knowledge, genetic resources, and folklore expressions, and (ii) access to genetic resources, these regulations aim to protect Zambia's traditional knowledge, genetic resources, and folklore expressions and guarantee their proper documentation.

2.1 EXPRESSIONS OF FOLKLORE

Section 46³¹ of the **Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act** provides for the protection of expressions of folklore. This provision establishes that the law will protect a wide range of folkloric expressions, regardless of their format. It then defines two main categories of these expressions.

Subsection (a) highlights Creative and Cumulative Intellectual Activity. This part of the provision looks at the process of creation. It acknowledges that folklore is often not the product of a single, identifiable person. In the process of creation, the provision identifies two ways of creation; collective creativity and individual creativity with unknown identity.

Collective Creativity: The law acknowledges that many forms of folklore, including oral narratives, traditional songs, and community dances, are the product of a group's continuous, shared creative process. Considering that culture is a foundation of a society, it is important that any community find ways of preserving it by all means necessary.³² This provision gives them that assurance.

Individual Creativity with Unknown Identity: It also takes into consideration situations in which a single person may have been the original creator of an expression, but their identity

²⁹ IP ARIPO "what is traditional knowledge quoted in Chibesa Mwansa 'THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE EXPRESSIONS IN ZAMBIA. LESSONS FROM INDIA AND SOUTH AFRICA'.

³⁰ SI 61 of 2021

³¹ Act 16 of 2016

³² Sitwe Benson Mkandawire and Harrison Daka, 'Cultural Preservation Literacy in Zambia: A Case Study of the Lala People of Serenje District', *Multidisciplinary Journal of Language and Social Sciences Education*, Volume 1, No. 1 <https://dspace.unza.zm/server/api/core/bitstreams/c53ebc1e-2380-4aff-9b69-2b4d9fd13057/content> (accessed 15 August 2025)

has since faded. The expression is protected by law because it has become a part of the collective heritage. The problem of "anonymous works" in a folkloric setting is addressed here.

Subsection (b) highlights Cultural Identity and Traditional Heritage.

Community's Cultural Identity: Expressions that are essential to a community's identity are protected by law. This could include distinctive storytelling techniques, rituals, or weaving patterns that are exclusive to a given tribe.

Developed, Maintained, or Used in Accordance with Customary Laws: This part ties the community's customary laws and customs to the legal protection. It indicates that a community's internal governance and customs pertaining to its own heritage are acknowledged by the law and given legal weight. It guarantees that communities have a voice in the use and transmission of their traditions and upholds the idea of cultural autonomy. Therefore, the cultural literacy that members of the community demonstrate must be accompanied by cultural preservation knowledge which is key in the sustainability of that culture.³³

This provision all together reflects a modern, sui generis approach to protecting folklore. It acknowledges the continuous and cumulative nature of creative activity within a community and empowers the same communities as the custodians of their heritage by establishing legal protection that is rooted in the community's cultural identity and customs. Thus, the provision creates somewhat of a legal umbrella for a wide variety of cultural expressions, making it a powerful way to prevent misappropriation.

Section 47³⁴ of the Act provides for Formalities and measures relating to protection of expressions of folklore.

Subsection 1 provides for Automatic Protection. Unlike patents or trademarks, which require a formal registration process to be protected, the Act states that expressions of folklore are protected automatically from the moment they are created. There is no requirement for formalities or registration to obtain protection.³⁵ This ensures that a

³³ Ibid, Sitwe Benson Mkandawire and Harrison Daka

³⁴ Ibid, Sitwe Benson Mkandawire and Harrison Daka

³⁵ Ibid, Charlene Musiza.

community's heritage is protected by law even if they are unaware of the Act or do not have the resources to register.

Subsection 2 and 3 speaks about Notification to the Agency. Though TCE protection is automatic with no requirement for registration, according to section 47(2), notification to the PACRA (Patents and Companies Registration Agency) may be required for evidentiary purposes for certain categories of TCEs that are of special cultural or spiritual value or sacred.³⁶ The notification process is purely declaratory and it does not create the right itself, as the right already exists automatically under subsection 1. This notification serves to create a public record and a stronger evidentiary trail in the event that a dispute were to arise. It also specifies that this process does not require a community to publicly disclose, document, or record their sacred or secret expressions of folklore, which helps in respecting their cultural privacy and autonomy. This is a crucial safeguard against forced public disclosure, which could lead to further misappropriation.

Subsection 4 speaks about Transboundary Folklore. It addresses the complex issue of folklore that exists across national borders. For millennia, human beings have spread out over the globe, either willingly or through coercion.³⁷ Because of this, different traditional communities have similar expressions of folklore, making it difficult to ascertain who the source is. The Act includes domestic and regional protection within the ARIPO framework, a vital provision considering territorial boundaries were arbitrarily drawn resulting in communities being separated– for example, the Tonga are found in Zambia and Zimbabwe.³⁸ The Act thus grants custodians of TCEs the right to register transboundary TCEs in accordance with the Swakopmund Protocol.³⁹ This allows for a clear legal record to be maintained within Zambia, even if the same tradition or expression is shared with a community in another country.⁴⁰ It's a pragmatic solution to a common reality of shared cultural heritage among neighbouring nations. However, since there is a mechanism for TCEs shared with a community outside of Zambia to be registered in Zambia, this does

³⁶ Ibid, Charlene Musiza.

³⁷ Temitope Kuti, 'Implementation of Traditional Knowledge Protection mechanisms in Africa: the Challenge of Trans-boundary Traditional Knowledge', 2019 [Implementation of Traditional Knowledge Protection Mechanisms in Africa: The Challenge of Trans-boundary Traditional Knowledge by Temitope Kuti :: SSRN](#) (accessed 12 August 2025)

³⁸ Ibid, Charlene Musiza.

³⁹ Ibid, Charlene Musiza.

⁴⁰ Ibid, Charlene Musiza.

not take away the rights of the custodians in Zambia. In such a situation, there may be a potential for conflict, and this is anticipated in **section 4(4)(e)**⁴¹, which states that holders of TCEs have the right to use alternative dispute settlement procedures at ARIPO to settle disputes arising from TCEs shared across national boundaries.⁴²

Therefore, this provision establishes a system of folklore protection that is both robust and flexible. It mirrors the automatic protection of copyright, however it avoids the formal requirements that would disadvantage marginalized communities. The provision's combination of automatic protection, optional evidentiary registration, and a mechanism for transboundary folklore demonstrates a refined approach to safeguarding Zambia's diverse cultural heritage.

Section 48⁴³ of the Act provides for the beneficiary of expressions of folklore. This provision defines the beneficiary of an expression of folklore as the traditional community and sets out two criteria that a community must meet to be considered the beneficiary.

Subsection (a) highlights custody and protection. It states that the rightful beneficiary is the community to whom the "custody and protection" of the folklore has been entrusted. This means the law gives legal recognition to the internal, traditional governance systems of communities. A community's own rules, rituals, and practices for safeguarding their heritage are now recognized and supported by national law. The law does not impose an external definition of "custodian" but defers to the community's own customs.

Subsection (b) speaks about Maintenance and Use. As a fundamental component of its cultural identity, the community must actively be "maintaining and using" the expression of folklore for them to be considered beneficiaries of it.

This provision therefore creates a legal personality for the traditional community as the holder of a folkloric expression. It ensues that the legal rights and benefits derived from folklore flow directly to the communities that are its true custodians.

Section 49⁴⁴ provides for protection of expressions of folklore against unlawful acts.

⁴¹ Act 16 of 2016.

⁴² Ibid, Charlene Musiza

⁴³ Act No. 16 of 2016

⁴⁴ ibid

Subsection (1) provides for General Protection. This subsection sets out the three key threats to expressions of folklore.

Misappropriation: defined in Black's Law dictionary⁴⁵ as the application of another's property. This can also be termed as biopiracy which is the appropriation of traditional knowledge for commercial profits.⁴⁶

Misuse: A good, substance, privilege, or right used improperly, unforeseeably, or not as intended.⁴⁷

Unlawful Exploitation: Commercializing the folklore without the community's consent and without proper benefit-sharing.

This general statement establishes a clear legal right for communities to control and protect their folklore from these key threats.

Subsection (2) provides for prohibited acts requiring prior informed consent. This section outlines the actions that are prohibited without the traditional community's prior informed consent. It essentially establishes two different types of protection: one for words, signs, names, and symbols, and another for most expressions of folklore.

For words, signs, names, and symbols: Preventing the usage of these components in a way that is misleading or offensive to culture is the main goal of this category. It is crucial to prohibit use that disparages, offends, or falsely implies a link to a community. Like a trademark, this clause safeguards the community's reputation and stops others from making money by insinuating a connection to their cultural identity. These provisions are like economic and moral rights under copyright.

For most expressions of folklore: The inclusion of moral rights is important in this context because the law forbids the acquisition of intellectual property rights over the folklore, which is a crucial "defensive" measure to prevent biopiracy, as well as the distortion, mutilation, and other derogatory actions that would compromise the integrity of the folklore.

⁴⁵ Black's Law Dictionary

⁴⁶ John Reid, Biopiracy: The Struggle for Traditional Knowledge Rights, 34 Am. Indian L. Rev. 77, 79 (2009) quoted in Meera Nayak, 'The Misappropriation of Traditional Knowledge', 2019 [The Misappropriation of Traditional Knowledge – Denver Journal of International Law & Policy](#) (accessed 14 August 2025)

⁴⁷ The Law Dictionary <https://thelawdictionary.org/misuse/>

For most folklore expressions, this list includes a wide range of actions that are typically found in copyright law, such as reproduction, publication, and broadcasting.

Subsection (3) provides for prohibited acts in use and exploitation. This last subsection adds a vital economic component while restating a few prohibitions.

Derogatory actions (3a): This restates the protection of moral rights found in subsection (2), highlighting its significance in relation to any use or exploitation.

Misleading Allegations (3b): This serves as a safeguard for consumers. It prohibits false, confusing, or misleading indications– in relation to goods or services– that refer to, draw upon, or evoke TCEs of a traditional community–wording that mirrors geographical indication protection.⁴⁸

Equitable Remuneration (3c): This brings out the benefit-sharing component of the law. It forbids using folklore for profit without fair compensation or benefit sharing. The traditional community must decide and agree upon the terms, or the Agency (PACRA) must decide if an agreement cannot be reached. This clause, which guarantees that communities receive fair compensation for their cultural assets, is one of the Act's core economic components.

Section 50⁴⁹ provides for exceptions and limitations for protection of expressions of folklore. This part specifies three major areas where the protection of folklore does not apply.

(a) Normal Traditional Use: The law's protection does not restrict or hinder the normal use of folklore by members of the community it belongs to. The Act protects folklore from outsiders, not from its own custodians. This ensures that folklore can continue to develop, be exchanged, and be transmitted in its traditional context, according to the community's own customary laws.

(b) Uses Outside the Traditional Context: Uses that take place outside of the traditional community are the main target of the law's protection. This is true whether the use is for commercial exploitation or not.

(c) Non-Commercial Exceptions: The law provides limited exceptions for non-commercial uses. These are similar to "fair use" or "fair dealing" in copyright law. Fair Use is a legally

⁴⁸ Ibid, Charlene Musiza.

⁴⁹ Act No.16 of 2016.

permissible use of copyrighted material for specific purposes such as commentary, criticism, news reporting, research, teaching or scholarship.⁵⁰ This makes it possible to use folklore in fields like media, research, and education without getting permission beforehand. This guarantees that folklore can be included in a country's scholarly record and public discourse. The clause also permits archiving, which is essential for the preservation of cultural material.

Subsection (2): For the exceptions to apply, this subsection imposes a strict set of conditions.

Fair Competition and Practice: Any use, even if it's for research or education, must be used in a fair manner. This prevents a researcher, for example, from misusing their research to gain an unfair commercial advantage.

Acknowledgement of Source: This is a key moral right. Any person or entity that uses folklore, even under an exception, must acknowledge the traditional community as the source. This simple act provides a vital measure of recognition and cultural respect.

Non-Offensive Use: The use of folklore must not be in an offensive manner to the traditional community. This therefore gives traditional communities legal basis to object to uses that are culturally disrespectful, even if they fall under an exception.

Thus, this section strikes a balance between the preservation of cultural heritage and the necessity of its ongoing existence and dissemination. It avoids the common mistake of making folklore so difficult to acquire that it becomes a relic. The law primarily acts as a barrier against outsiders who want to use the folklore for commercial or culturally offensive purposes, but it also creates a framework that allows communities to freely practice and pass on their own traditions without interference.

Section 51⁵¹ creates an indefinite duration for protection, tied directly to the criteria set out in Section 46. For as long as it fulfills the criteria set out in **Section 46⁵²**, the term of

⁵⁰ What is “fair use”, and how does it apply to copyright law? *Digital Millennium Copyright Act*
<https://dmca.harvard.edu/faq/what-%E2%80%9Cfair-use%E2%80%9D-and-how-does-it-apply-copyright-law>
(accessed 14 August 2025)

⁵¹ Act No.16 of 2016

⁵² *ibid*

protection is continuous and indefinite. Thus, this clause guarantees that outsiders cannot misappropriate a community's customs just because a specific amount of time has passed.

Section 52⁵³ provides for licensing agreements. A licensing agreement is a contract between two parties (the licensor and licensee) in which the licensor grants the licensee the right to use the brand name, trademark, patented technology, or ability to produce and sell goods owned by the licensor.⁵⁴ In other words, a licensing agreement grants the licensee the ability to use intellectual property owned by the licensor.⁵⁵

Subsection (1): Right to License. It expressly gives the traditional community, the holder, the power to enter into a licensing agreement. This implies that the community has the authority to decide how its folklore may be used and to demand payment or other advantages in exchange. It is an important economic right.

Subsection (2) & (3): Formal Requirements. These subsections impose strict formal requirements on licensing.

Void Agreements: One important rule is that any permission to utilize folklore that is not accompanied by a formal licensing agreement is null and void. This forces all parties to follow the correct procedures and stops verbal or informal agreements from being enforced.

No Assignment: This clause expressly forbids giving away a folkloric expression. Folklore in a community can only be licensed, as opposed to copyright, which can be sold altogether. The licensee only has a restricted right to utilize the folklore; the community still owns and controls it.

PACRA Approval: To be valid, every licensing agreement must be approved by the Agency (PACRA). This is a vital safeguard. The Agency acts as a regulatory body to ensure that the terms of the agreement are fair, equitable, and in the best interests of the community. This protects the community from exploitation by more powerful commercial entities.

⁵³ Act No.16 of 2016

⁵⁴ CFI Team, Licensing Agreement, *CFI* <https://corporatefinanceinstitute.com/resources/accounting/licensing-agreement/> (accessed 15 August 2025)

⁵⁵ *ibid*

Subsection (4) & (5): Agency Intervention. This is a powerful provision that allows the Agency to act as a third-party licensor. It permits the Agency to grant authorization to exploit folklore even without the community's direct involvement in the negotiation.

In such a case, the Agency has a duty to ensure that the authorization provides for benefit sharing. The Agency must also resolve any disputes or uncertainties "as far as possible" in accordance with the community's customary laws and practices. This is a legal directive to respect the community's traditional governance systems. Lastly, the Agency is legally obligated to transfer all benefits, whether monetary or non-monetary, directly to the traditional community.

Subsection (6): The Licensing Register. This subsection ensures transparency and a public record. The Agency is required to maintain a register of all approved licensing agreements. This allows for public oversight and can serve as crucial evidence in any disputes that may arise.

This clause provides a framework for the commercial exploitation of folklore that is based on regulatory supervision and community empowerment. Benefit-sharing becomes a crucial component of any commercial use, a legal framework is established that allows communities to negotiate and profit from their heritage, exploitation is prevented by voiding agreements that do not meet formal requirements, and the state agency is given a protective role to ensure fair transactions and protect the community's long-term interests.

Section 53⁵⁶ provides for benefit sharing relating to expressions of folklore.

Subsection (1): The Right to Benefit Sharing. This subsection establishes the fundamental right of a traditional community to receive a share of the profits from the commercial use of its folklore. Where the user is permitted to use the expressions of folklore, a mutual agreement is entered into which is preceded by negotiation. It makes benefit-sharing a core part of any commercial use of folklore.

Subsection (2): Judicial Intervention in Disputes. This part is an important safeguard. It acknowledges that communities may not have the same bargaining power as large commercial entities, therefore if a mutual agreement cannot be reached, the court has the

⁵⁶ Act No. 16 of 2016

authority to step in and determine the appropriate level of benefit sharing. The court acts as a final arbiter, ensuring that the principle of equitable benefit sharing is upheld.

Subsection (3): Non-Monetary Benefits. This subsection broadens the definition of "benefit" beyond just money. It recognizes that benefits can also be non-monetary, such as contributions to community development. It understands that communities may prioritize different things, such as the construction of a school, a health clinic, or support for a cultural festival, over direct financial payments. The provision specifies that the nature of these non-monetary benefits should be based on the "material needs and cultural preferences expressed by a traditional community," ensuring the benefits are relevant to the community's own goals.

2.2 Conclusion

This chapter analysed the provisions of The TK Act that seek to protect TCEs. Protection of folklore is quite a debatable topic due to its intricacies and difficulties⁵⁷, however, the enactment of the TK Act has addressed many of these difficulties. Various concerns raised by scholars have as well been addressed in this Act. Victoria Mwamba⁵⁸ argued that Traditional knowledge and cultural expressions are not adequately protected by Zambia's laws and as a result there is risk that this knowledge may be exploited without the holders having recourse from anyone or under any law. Similarly, Rita Chileshe⁵⁹ expressed how due to the lack of such protection, companies misappropriate/exploit it, and the local communities are not benefiting from their knowledge. These concerns raised above have been resolved by the enactment of this Act. From the problem of "anonymous works" being protected, to the aspect of benefit sharing where folkloric expressions have been used, this Act has identified and addressed these issues, adding on to the confidence that Zambia's rich cultural heritage is safe.

⁵⁷ Krishnan. T, 'Folklore and its Protection', International Journal of Law Management & Humanities, vol. 3, no.4, 2010.

⁵⁸ V. Mwamba, Protection of Traditional Knowledge in Zambia: Prospects and Challenges, (UNILUS, LLB Dissertation, 2013.)

⁵⁹ R.Chileshe, A Comparative Analysis of Legal Regimes for the Protection of Traditional Knowledge. (UNILUS 2015).p.3

CHAPTER THREE

AN ANALYSIS OF THE PROVISIONS THAT GOVERN FOLKLORE/CULTURAL EXPRESSIONS PROTECTION IN KENYA

3.1 Introduction

This chapter seeks to analyse the provisions in Kenya's Traditional Knowledge and Cultural Expressions Act 2016⁶⁰ (hereinafter TK/CE Act) that seeks to protect TCE's. It was assented to on 31st August 2016 and commenced on 21st September 2016. It is an Act of Parliament to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(1) (c) of the Constitution; and for connected purposes⁶¹. Article 11⁶² provides that the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation, and because of this the state shall promote all forms of national and cultural expression through different means and the Parliament shall enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage and recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya. Article 40⁶³ provides for the protection of the right to property and protects against deprivation of it. Article 69(1)(c)⁶⁴ states that the state shall protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities. Further, Kenya was the first ARIPO country within the region to take a historic step and develop a legal framework to validate legislation to protect traditional knowledge and folklore and this step was pursuant to Articles 11, 40 and 69(1)(c) of the Kenyan Constitution. Thus, the TK/CE Act was enacted in a way that it recognises these salient provisions of the Kenyan Constitution.

Before the TK/CE Act, Kenya had a National Policy in place that recognised the need to have laws that protect TCEs and other forms of culture. The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009⁶⁵ had been

⁶⁰ No. 33 of 2016

⁶¹ *ibid*

⁶² Constitution Of Kenya

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (Republic of Kenya, 2009)

developed as a response to three main challenges that Kenya had been facing; accelerating technological development, integration of the world economic, ecological, cultural, trading and information systems and the growing relevance of intellectual property rights to these areas of activity.⁶⁶ The policy recognises the unique cultural innovations of the Kenyan people resulting from long-term interaction with the environment and nature.⁶⁷ The policy aimed to develop a system that did not only document and preserve traditional knowledge created in the past which may be on the brink of disappearance, it also envisaged a system that contributed to the promotion and dissemination of innovations which are based on the continuing use of tradition, but also about preserving what exists as an indispensable and powerful tool for fostering continuous traditional innovation and creativity to contribute to national development.⁶⁸ The TK/CE Act was thus a huge development for Kenya as a legislation was finally put in place that addressed the many challenges pointed out by the policy. The TK/CE Act uses the term "cultural expressions" to mean any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested. It provides for the protection of Cultural Expressions in several parts, but for the purposes of this analysis Part III, which is the Protection of Cultural Expressions, Part IV which are the General Provisions, Part V which are moral rights and Part VI which is management of rights will be looked at.

3.1 PART III- PROTECTION OF CULTURAL EXPRESSIONS

Section 14⁶⁹ of the TK/CE Act establishes the Protection criteria of cultural expressions

Subsection (a) recognizes creative and cumulative intellectual activity. This clause acknowledges how cultural expressions are dynamic and are the results of generations of continuous, collective creativity. It also discusses the special case of folklore, in which an expression may have had an unidentified original creator but has now been incorporated into the community's collective cultural property. This sets it apart from traditional copyright, which necessitates an identifiable author.

Subsection (b) establishes that the protection will extend to expressions that are characteristic of cultural identity and cultural heritage. This is an essential component that

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ No.33 of 2016

establishes a direct connection between the community and the legal protection. Since an expression is a fundamental component of a community's identity and legacy, as highlighted in Article 11 of the Kenyan Constitution⁷⁰, it is protected. As a powerful form of cultural self-governance, the law also recognizes the community's own customary laws and procedures for preserving and using the expression.

Subsection (c) brings up generational transmission. This criterion emphasizes that an expression must have been transmitted within a community from one generation to the next in order to be protected. Additionally, it acknowledges the various functions of these expressions, ranging from ritualistic and economic to narrative and recreational, demonstrating a comprehensive and inclusive view of cultural value.

Subsection (d) highlights Individually or Collectively Generated expressions. Even though a significant amount of folklore is the product of group creativity, this criterion acknowledges that some expressions may have been created by an individual. Both methods of producing cultural expressions are protected.

Subsection (e) provides for protecting TCEs that are distinctively associated with or belonging to a community. This clause reinforces the link between the expression and a specific community. The law protects those expressions that are uniquely or distinctively associated with a particular group, making it a form of communal property.

Subsection (f) highlights TCEs that are integral to the cultural identity of a community. This final criterion is the most comprehensive. It links legal protection to a community's custodianship or guardianship of the knowledge. It necessitates that the knowledge be acknowledged by the community through formal or informal established processes, such as customary laws. This gives legal weight to traditional power structures and social norms.

Without a definition of what a folklore is, the statute rather sets out the nature and characteristics of traditional creative works that qualifies as folklore for its protection.⁷¹ This leaves the ambit very wide and open to all folklore that meets the standards set now and in the future.⁷²

⁷⁰ Constitution of Kenya

⁷¹ D. A. Agyei, Bridging the International Gap in the Protection of Folklore: Analysis of the Ghanaian Approach Against Comparative Experiences from Selected African Countries *TEXAS INTELLECTUAL PROPERTY LAW JOURNAL* Vol. 28:393, 2020

⁷² *ibid*

Section 15⁷³ brings out Formalities relating to cultural expressions. It establishes a hybrid system that is both simple for communities to use and structured enough for the government to manage.

Subsection (1) provides that protection of cultural expressions shall not be subject to any formality. This entails automatic protection. Similar to Zambia's Act, it states that there are no formalities involved in protecting cultural expressions. This implies that the rights of a community are inherent or that they exist automatically. Their cultural expressions are legally protected without them having to complete any paperwork, pay a fee, or go through any registration procedures. The purpose is to make the law accessible and to ensure that a traditional community doesn't lose its rights due to a lack of formalities.

Subsection (2) and (3) provide for voluntary registration. These subsections introduce a voluntary registration system, even though protection is automatic. For purpose of recognition, county government are responsible for collecting information, documenting, and registering cultural expressions. This process is not a requirement for protection, but it serves as a way to create a formal record of a community's cultural expressions. This process does not require the public disclosure of the cultural expressions, which is a vital safeguard for sacred or secret traditions.

Subsection (4) and (5) provide for shared expressions.

Subsection 4 deals with cultural expressions shared between a community in Kenya and a community in another country i.e. transboundary. It gives the national and county governments the responsibility to register the Kenyan community as the owner of the expression and maintain the relevant records. This establishes a legal basis for the Kenyan community to assert its rights in a trans-jurisdictional context.

Subsection 5 handles cultural expressions shared by communities in different counties within Kenya i.e. inter-county. It assigns the responsibility for registration to the respective county governments, ensuring that all communities with a legitimate claim are recognized.

Subsection (6) deals with dispute resolution. It outlines how the national or county government should handle disputes that arise from concurrent claims to the same cultural expression by different communities. A clear hierarchy of factors is provided by the law:

⁷³ No.33 of 2016

Customary Law and Protocol: The primary source for resolving the dispute should be the customary laws and protocols of the communities in question. This gives legal weight to traditional conflict resolution mechanisms.

Local Information Sources: Other local information that may be useful in resolving the claim may also be considered under this clause.

Other Means: This essentially means any additional techniques that may be used to ascertain ownership.

Subsection (7) highlights the declaratory function of registration. This final subsection reinforces the initial principle of automatic protection. It explicitly states that registration has a "mere declaratory function" and "shall not in itself confer rights." This means the registration is a public declaration of an existing right, not the source of the right itself. This avoids the risk of a community losing its rights just because it didn't register.

Section 16⁷⁴ establishes the right of protection. The provision identifies the beneficiaries as the "owners and holders" of cultural expressions. This is a crucial detail. Section 14 and 15 of the Act establish that this typically refers to the traditional community itself. The Act recognizes that the community, not a single individual, holds the rights to its collective cultural heritage.

Section 17⁷⁵ provides for the duration of protection of cultural expressions. This provision establishes a system of perpetual protection. It rejects the idea that a community's cultural heritage can eventually fall into the "public domain" after a set period. As long as the cultural expression continues to meet the criteria defined in Section 14, meaning it's a living tradition that is characteristic of a community's identity, is transmitted intergenerationally, and is maintained according to customary laws, it remains protected. Kenya's Act 33 adopts a unique approach and makes the length of protection of folklore conditional on maintained and sustained creativity in any particular folk lore.⁷⁶ This is a clear departure from standard intellectual property. The position taken appears logical and is suggestive of

⁷⁴ *ibid*

⁷⁵ *ibid*

⁷⁶ *Ibid*, D. A. Agyei

a conscious effort of indigenous communities upholding and maintaining their cultural heritage at all times in order to be accorded protection under Act 33.⁷⁷

3.1.1 PART IV- GENERAL PROVISIONS

Section 18⁷⁸ provides for the protection of cultural expressions against unlawful acts.

Subsection (1) makes it illegal to "misappropriate, misuse, abuse, unfairly, inequitably or unlawfully access and exploit" cultural expressions. This clause is very inclusive and broad, intended to cover any kind of unethical or unauthorized use that might not be specifically mentioned in the subsections that follow.

Subsection (2) forms the core of the Act's protective function. It states that an outsider cannot use a cultural expression in a specified way without the prior and informed consent of the community (the "owners"). This provision gives the communities the exclusive right to control how their culture is used. The list of prohibited acts is extensive and closely mirrors the rights granted in conventional copyright law. It includes:

Reproduction and Publication: Making copies or publishing the cultural expression.

Public Performance and Broadcast: Performing a traditional dance or song in public or broadcasting it on TV.

Adaptation and Modification: Changing the cultural expression, such as turning a traditional story into a new play or modifying a traditional design.

Fixation: Recording the expression, like making a film of a ceremony or a sound recording of a chant.

Online Transmission: Making the expression available to the public on the internet.

Derivative Works: Creating a new work based on the cultural expression.

Commercialization: Selling, importing, or exporting the cultural expression or any products derived from it.

Subsection (3) however makes it clear that the owners of the cultural expressions are allowed to do the Acts mentioned in subsection (2) in the exercise of their cultural rights.

⁷⁷ Ibid, D. A. Agyei

⁷⁸ No.33 of 2016

Subsection (4) compels the national government, in consultation with the county government to establish mechanisms to prevent the misappropriation, misuse or unlawful access and exploitation of cultural expressions, without prior consent, including the acts mentioned in subsection (2). Consequently, the protection of folklore in Kenya is by the state and its institutions, but they merely manage the protection on behalf of the communities.⁷⁹

Subsection (5) provides a powerful defence against cultural offense and reputational harm. It specifically prohibits the use of words, signs, names, and symbols in a way that disparages, offends, or falsely suggests a connection with a community. This acts as a protective shield for a community's identity and dignity.

Subsection (6) This subsection focuses on the economic and moral dimensions of use. The Cabinet Secretary in consultation with county governments shall establish mechanisms to ensure that the community is identified as the source of any work adapted from its cultural expressions. They further establish mechanisms for adequate benefit sharing mechanisms. This ensures that communities receive a fair share of the profits from their cultural heritage. The terms must be agreed upon with the community or determined by the Cabinet Secretary if an agreement can't be reached.

Subsection (7) is an essential clause for safeguarding private and sacred cultural expressions. It mandates that the Cabinet Secretary put in place safeguards against the unlawful use, disclosure, and acquisition of intellectual property of cultural expressions that a community keeps hidden.

Section 19⁸⁰ sets out three core areas where the Act's protection does not apply.

(a) Internal Community Use: The law explicitly states that it will not "restrict or hinder the normal usage, development, exchange, dissemination and transmission" of cultural expressions by community members themselves. This is a vital point that confirms the law is for external protection, not for internal regulation. It ensures that communities can continue to practice and evolve their traditions without fear of legal action. This is a clear

⁷⁹ Ibid, D. A. Agyei

⁸⁰ ibid

acknowledgment and legal deference to customary law and the community's self-governance.

(b) External Use Only: The protection extends "only to uses" that occur outside the traditional or customary context. This clarifies the scope of the Act, which is aimed at preventing unauthorized external exploitation. Whether the external use is for commercial gain or not, it falls under the Act's regulatory scope.

(c) Non-Commercial Exceptions: The law provides specific, non-commercial exceptions similar to "fair use" or "fair dealing" in copyright law. This allows cultural expressions to be used for essential public purposes without requiring prior consent. These include uses for teaching, research, personal use, criticism, news reporting, and archiving. This provision ensures that cultural heritage can be used for education and preservation, which benefits society as a whole.

Subsection (2) & (3) impose important obligations on all users of cultural expressions, even those who fall under an exception.

Prior Informed Consent: All users must obtain prior informed consent. This empowers communities to control access to their knowledge.

Acknowledgment: Users must "sufficiently acknowledge the owners." This is a key moral right that ensures communities receive credit for their heritage. This can be done by mentioning the community or the geographical place of origin.

Compatibility with Fair Practice: All use must be "compatible with fair practice" and the community's customary laws. This provision makes disrespectful use illegal.

Non-Offensive Use: The use of cultural expressions "shall not be offensive to the relevant community." This gives communities a legal basis to object to uses that are culturally inappropriate or bring the community into disrepute.

Section 20⁸¹ addresses the complex issue of derivative works. It establishes a legal framework that permits the production of new works inspired by cultural expressions while guaranteeing the protection of the community's rights and fair sharing of the benefits.

⁸¹ No.33 of 2017

Subsection (1) confirms that any new intellectual property rights like copyright, trademark, or patent that arise from a derivative work will vest in the creator of that new work. For example, if a filmmaker creates a movie based on a traditional folktale, the copyright to the film itself belongs to the filmmaker, not the community. This ensures the Act doesn't stifle new creative works or create legal uncertainty for creators.

Subsection (2) is where the law's protective function comes into play. It mandates that for any commercial or industrial use of a derivative work based on a cultural expression; a formal authorized user agreement must be prepared between the creator (the user) and the community (the rights holder). This legally obligates the user to get a formal agreement for commercial use, preventing the kind of unauthorized exploitation that has been common in the past.

Subsection (3) outlines the mandatory clauses that every authorized user agreement must contain. These are designed to protect the community's interests. They include:

(a) Benefit Sharing: The agreement must include a benefit-sharing arrangement that provides for "fair equitable monetary or non-monetary compensation." Ownership of property is accompanied by an economic benefit.⁸² In many instances, whenever Folklore is exploited, indigenous peoples either derive no economic benefit, or derive little benefits that pale in comparison to the profits reaped by commercial exploiters.⁸³ Therefore, this provision ensures that the community receives a share of the profits from the derivative work. The inclusion of non-monetary benefits allows for flexible compensation, such as contributions to a community's development projects.

(b) Acknowledgment: The agreement must require the user to identify and disclose the cultural expression on which the work is based. This includes mentioning the community or its geographical location. This upholds the community's moral right to be acknowledged as the source of the work.

(c) No Derogatory Treatment: This clause is a crucial moral rights protection. It requires that the cultural expression in the derived work "will not be subject to derogatory treatment."

⁸² Ibid, D. A. Agyei

⁸³ Wanjohi Mark Mukuha, Protection Of Folklore In Kenya: The Case Of Maasai Handicrafts, 2015.

This prevents the user from distorting, mutilating, or misrepresenting the cultural expression in a way that is offensive or disrespectful to the community.

3.1.2 PART V- MORAL RIGHTS

Section 21⁸⁴ provides the meaning of moral rights in relation to cultural expressions. Moral rights are those which relate to the protection of the personality of the author and the integrity of his work, and similar matters.⁸⁵

Subsection (1) & (2). Subsection (1) highlights that it's the owners of the cultural expressions that are the holders of the moral rights, and Subsection (2) goes on to provide a detailed list of the moral rights that communities hold. They include:

Right of Attribution (a): This is the right of an author to be identified and named as the author of his/her work.⁸⁶ It means that any person using the expression must give proper credit to the community it belongs to. This is a fundamental principle of respect.

Right Against False Attribution (b): The right to object to false attribution of work is the converse of the right to be identified or paternity right.⁸⁷ This protects the community from having ownership of their cultural expression falsely attributed to them. It prevents a user from claiming that a community created a derivative work that they did not.

Right Against Derogatory Treatment (c): This provision protects the integrity of the cultural expression. It gives the community the right to prevent any act that results in a "material distortion, mutilation or alteration" of their cultural expression. The provision explicitly states that such acts are "prejudicial to the honor or reputation" of the community or the integrity of the expression itself. This is vital for preventing culturally inappropriate or offensive uses.

Right Against False Authenticity Claims (d): This protects the community from misleading claims about the authenticity or origin of the cultural expression. It ensures that a product or work cannot falsely claim to be a genuine expression of a particular community's culture when it is not.

⁸⁴ ibid

⁸⁵ George. M. Kanja, *Intellectual Property Law*, 2006.

⁸⁶ *Copyright Basics* Deakin University [Moral rights - Module 1: Copyright Basics - LibGuides at Deakin University](#) (accessed 4 September 2025)

⁸⁷ Ibid, George. M. Kanja

Subsection (3) & (4) define the unique nature of these moral rights.

Subsection 3 provides that the moral rights exist independently of the community's broader cultural rights. This means that even if a community licenses the economic use of its cultural expression, it still retains its moral rights to attribution and integrity. This ensures that the community can maintain control over the cultural and reputational aspects of their heritage, even if they're not directly managing the commercial use.

Subsection (4) is a key feature of moral rights. They are granted in perpetuity and are inalienable or transferable. This means they cannot be sold, given away, or waived. This ensures that a community's core rights to its cultural identity can never be lost, regardless of any agreements they enter into. This perpetuity is consistent with the duration of protection established in **Section 17**.

Section 22⁸⁸ governs the commercialization of cultural expressions.

Subsections (1) & (2): The Right to License and Prohibition on Assignment.

Subsection (1) gives the community the right to conclude a licensing agreement. This means a community can grant permission for someone else to use their cultural expression in exchange for payment, while the community retains ownership.

However, Subsection (2) imposes a major restriction; cultural expressions shall not be assigned. An assignment is the outright sale of a right. The law prohibits communities from selling their cultural heritage. This prevents the permanent alienation of a community's core identity and traditions, ensuring that their cultural expressions can never be fully transferred to an external party. This is a powerful protective measure.

Subsections (3) & (4) introduce crucial procedural requirements to protect communities from exploitation.

Written Agreements: All licenses and authorizations must be in writing and a copy must be submitted to the Cabinet Secretary and the relevant county executive committee member. This ensures transparency and provides a formal record of every agreement.

Invalidity: Subsection (4) states that any agreement that is not in writing has "no effect." This prevents informal or oral agreements from being legally binding protecting

⁸⁸ No. 33 of 2016

communities from unscrupulous users who might try to exploit them without a formal contract.

Subsections (5) & (6) empower the government to oversee the process and act as a resource for communities.

Advisory Role: The parties to a licensing agreement can seek advice from the Cabinet Secretary when drafting the document. This provides communities with a valuable resource to ensure the terms of their agreements are fair.

Public Register: The Cabinet Secretary is required to keep a register of all licenses and assignments. This creates a public record that can be used to track the use of cultural expressions, prevent unauthorized use, and provide a clear legal history for each expression.

Section 23⁸⁹ clarifies the relationship between the new rights created by the Act and existing intellectual property (IP) rights.

Subsection (1) establishes that the "cultural rights" provided in the Act are in addition to any rights that may exist under conventional IP laws like copyright or trademarks. This is a very important point. The Act doesn't replace existing IP laws; it complements them. For example, a traditional song might have its cultural expression protected under this Act, while a new recording of that song could be protected by copyright. This prevents a legal conflict and allows for multiple layers of protection.

Subsection (2) defines the content of these additional rights. It outlines a community's right to maintain, control, protect, and develop its cultural heritage. This goes beyond a simple economic or legal right and frames it as a fundamental cultural right of the community. It recognizes that a community has an inherent right to self-determination over its own traditions and expressions.

Section 24⁹⁰ provides for equitable benefit sharing rights. This provision is the economic engine of the Act. It ensures that communities receive a fair share of the financial and other benefits that arise from the commercial use of their cultural expressions.

⁸⁹ No.33 of 2016

⁹⁰ *ibid*

Subsection (1) explicitly grants the owners and holders of cultural expressions the right to "fair and equitable sharing of benefits" from any commercial use. The law's preference is for this to be determined by mutual agreement. This empowers the community to negotiate and ensures that benefit-sharing is not a voluntary gesture, but a legal obligation.

Subsection (2) is a progressive and culturally sensitive part of the Act. It recognizes that "equitable remuneration" can be more than just money. It can include non-monetary benefits, such as contributions to community development projects like building a school or a clinic. The provision wisely links the nature of these benefits to the "material needs and cultural preferences" of the community, ensuring that the compensation is meaningful to them.

Subsection (3) provides the Cabinet Secretary with the authority to make regulations that prescribe what should be included in a benefit-sharing arrangement. This allows the government to set clear standards and guidelines, preventing exploitation and ensuring fairness.

3.1.3 PART VI- MANAGEMENT OF RIGHTS

Section 25⁹¹ is the procedural heart of the Act's authorization process. It outlines how a community can grant permission for the use of its cultural expressions and establishes the government's role in facilitating and safeguarding that process.

Subsection (1): Right to Grant Authorization. This subsection establishes two main ways a community can authorize the use of its cultural expressions:

Directly: A community can directly grant an authorization to a user for "exploitation and use."

Through an Agent: After consultations, the community can authorize a third party, which would be the national or county government or any other person, to act on its behalf. This provision is crucial as it empowers communities that may lack the legal expertise or resources to negotiate complex agreements. They can therefore delegate this responsibility to a trusted entity.

⁹¹ No. 33 of 2016

Subsection (2) & (3)(a) ensure that the authorization process is transparent and respects the community's own decision-making processes.

Notification: Communities must inform the Cabinet Secretary, in writing, of every authorization agreement that they may enter into. This creates a centralized record and allows the government to monitor the agreements. The government can keep track of them and store them for record keeping.

Community Consultation: Before granting any authorization, the community must undertake "appropriate and documented consultations" with its members. These measures ensure that the decisions are not made by a few individuals but a collective, community-wide process that follows traditional decision-making norms. The community plays an active role in the decision making processes.

Subsections (3)(b), (c) & (d) outline the mandatory terms for all authorizations to protect the community's interests.

Scope and Benefit Sharing: The authorization must comply with the scope of protection set out in the Act and, most importantly, provide for equitable sharing of benefits. This legally obligates the user to provide fair compensation to the community.

Dispute Resolution: In case of disputes or uncertainties over which communities should be involved, the Act directs that these be resolved using the customary laws and protocols of the communities. This gives legal weight to traditional conflict-resolution methods.

Direct Transfer of Benefits: Any benefits, whether monetary or non-monetary, must be transferred directly to the community. This prevents intermediaries from siphoning off funds and ensures the benefits reach the intended recipients.

Subsection (3)(e) acknowledges that the government's role in facilitating and registering these agreements is a service that may have associated costs. It allows for the national government to charge fees for its services, such as official publication and dispute resolution, as long as these fees are in accordance with the Act. This provides a mechanism for the government to fund its oversight role.

3.2 Conclusion

Kenya possesses a rich cultural heritage and because of this, protection of cultural expressions was something highly sought for decades. Before the enactment of the TK/CE

Act, Kenya protection of folklore was largely under Intellectual Property. Further, customary law was used by the traditional communities to protect and preserve their heritage. For example, the Maasai use customs and taboos to protect Folklore.⁹² The Act has thus incorporated these different aspects of protection and combined them resulting in a unique approach to protection of folklore. Laudable as the Kenyan statute may be, however, it is not devoid of challenges.⁹³ This is to be expected for being the pioneer enacting a sui generis protection of folklore among ARIPO member states.⁹⁴ The effectiveness of the Act will be largely dependant on the willingness and ability of different levels of government to work together and enforce community rights. Though the enhanced community involvement in the Kenyan statute's protection of folklore is to be applauded, it also stands the chance of breeding rivalry and unhealthy competition among ethnic communities over folkloric rights and benefit sharing. This is because folklore is now a potential wealth-generator for traditional communities and may therefore provide an incentive for leaders to seek exclusive control and to talk up inter-ethnic competition, when in fact many of these resources are shared between ethnic groups.⁹⁵ These challenges notwithstanding, Kenya's new Act represents a bold and forward-thinking effort to improve livelihoods and protect the cultural heritage of communities in Kenya by guarding against misappropriation of folklore in Kenya.⁹⁶

CHAPTER FOUR

A COMPARISON OF THE LAWS PROTECTING FOLKLORE UNDER THE ZAMBIAN ACT AND KENYAN ACT

4.0 Introduction

As opined by Lungwangwa⁹⁷, one of the ways of determining and assessing whether national laws have been adequately drafted is through a comparative study with laws in other jurisdictions. Thus, this chapter will seek to compare the provisions analysed on the

⁹² Ibid, Wanjohi Mark Mukuha

⁹³ Ibid, D. A. Agyei

⁹⁴ Ibid, D. A. Agyei

⁹⁵ John Harrington and Harriet Deacon, *Africa's Gift to the World*, KATIBA Institute (accessed 5 September 2025) <https://katibainstitute.org/traditional-knowledge-and-culture-expressions-act-2016/>

⁹⁶ Ibid, D. A. Agyei

⁹⁷ Lungwangwa, Vincent, *Constitution Making Process: The Zambian Experience*, (Lusaka: University of Zambia Press, 2015). <http://dspace.unza.zm/handle/123456789/4>

protection of expressions of folklore in chapter 2 and 3 respectively, thereby looking at the key similarities and differences of the two jurisdictions' approaches.

4.1 Scope and Definition

The Zambia Act refers to the subject as “expressions of folklore” and specifically lists tangible artistic forms, music, dance, and words as well as any “other output of creative and cumulative intellectual activity characteristic of a traditional community.” Protection covers both tangible and intangible forms.

The Kenyan Act uses the term “cultural expressions” which is broadly similar and sets out specific protection criteria (collective/creative, associated with a community, transmitted intergenerationally, characteristic of identity, etc.).

Both Acts are broad and cover similar categories (dances, songs, crafts, rituals, symbols). Zambia lists forms and connects protection to the traditional context and holders, whereas Kenya focuses on criteria (what is considered protected).

4.2 Duration of protection

In Zambia protection is automatic from the moment of creation. The Act specifies that protection lasts as long as the expression relates to the output of creative and cumulative intellectual activity and characteristics of a traditional community's cultural identity and traditional heritage.

In Kenya, Rights in TK are conferred without formalities and exist in perpetuity as long as the subject matter complies with the requirements for protection.⁹⁸ If the legal requirements are met, duration is essentially endless.

Both Acts provide effectively open-ended protection, and protection lasts for as long as the expression remains a living part of the community's culture.

4.3 Registration, Formalities and benefit sharing

In Zambia, the Registrar/Agency maintains a Register and certain categories may be notified for special protection. Registration is used for evidentiary reasons and can be used

⁹⁸ Francis Kariuki, Protecting Traditional Knowledge in Kenya: Traditional Justice Systems as appropriate Sui Generis Systems *WIPO-WTO Colloquium Papers*, 2019 https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2019/chapter_7_2019_e.pdf?utm_source=chatgpt.com (accessed 21 September 2025)

for licensing and benefit sharing arrangements. Regarding benefit sharing, Zambia centralizes Agency functions and makes clear connections to ARIPO procedures.

In Kenya, protection is not subject to formalities (no mandatory registration). Counties collect, document and register for recognition but registration is declaratory and does not itself create rights. Kenya also mandates a national digital Repository administered by the Kenya Copyright Board. Regarding benefit sharing, Kenya establishes more detailed administration by the Cabinet Secretary and counties, as well as written contracts and registration.

In **Kamahuha Ltd v. Kariuki & Murioki**⁹⁹, the High Court of Kenya recognised that customary or community-based claims can exist even when not formally registered, giving weight to customary ownership, transfers, and possession. Although the case is not directly about folklore expressions, this judicial approach is informative as it parallels the Kenyan Act on recognizing customary custodians and community origin of cultural expressions.

According to the Kenyan Act, the Cabinet Secretary has regulatory, approval, and registration responsibilities. Other requirements include benefit-sharing, duration, exclusivity, protections for moral rights, confidentiality of secret knowledge, a register of user agreements, the possibility of compulsory licenses in certain situations, and consultation with the owners of authorized user agreements regarding the detailed procedural regime. The county government is given registration/recognition duties.

In the Zambian Act, administration and operational detail rely on national institutions and the 2021 Regulations for procedural mechanisms (including access and licensing agreements, community rules and national oversight). Emphasis is more centralized and ABS-oriented (Access and Benefit Sharing oriented) with prior consent as a necessity. Benefit sharing is included in Kenya; however, management rights and moral protections are given higher prominence in the legal framework. Further, licenses and licensing agreements are specifically included in the Zambian Act.

In contrast, the Zambian legal system recognizes customary custodianship but imposes additional formal procedural requirements, such as licensing, registration, and agency oversight. These requirements may make it harder for communities to make customary

⁹⁹ Kamahuha Ltd v Winnie Njeri Kariuki & Samuel Mureithi Murioki [2019] KEELC 2164 (KLR)

moral claims without going through legal processes. Thus, the Kenyan case underscores how jurisprudence can reinforce moral and customary claims in cultural expression rights, not just statutory or economic ones.

Although there is strong statutory intent, Musiza's study of the Tonga community's basket weaving as a traditional cultural expression shows how Zambia's law faces implementation gaps. The study emphasizes how commercialization can empower people, but it also exposes issues including gender dynamics, unequal benefit sharing, and insufficient knowledge of legal rights. Though intellectual property protection may not be practical for the Tonga baskets, the Traditional Knowledge Act is a significant step in recognizing the customary values and governance principles in protecting traditional cultural expressions.¹⁰⁰ It was stated that registration, in terms of the Traditional Knowledge Act, could enhance the recognition of the baskets, preserve and promote the cultural heritage, and empower the Tonga women.¹⁰¹

4.4 Moral rights and attribution

The Kenyan Act provides clear and robust moral rights. Owners have the following unalienable moral rights: attribution, false-attribution, protection from false claims of authenticity or origin, protection from derogatory treatment. Moral rights are inalienable, perpetual and cannot be waived.

Zambia requires acknowledgement of the holder and prohibits derogatory distortion, mutilation, or politically/spiritually offensive uses. It requires acknowledgement and benefit sharing, but it does not use the same express "moral rights in perpetuity / inalienable" language that Kenya uses. Zambia prohibits disparaging usage and upholds integrity and acknowledgement, and it's the Agency that enforces these rules.

Moral rights are treated as a distinct, eternal, and unalienable category in Kenya whilst Zambia upholds integrity and demands recognition. However, rather than referring to unalienable moral rights, Zambia mainly expresses these protections in terms of prior informed agreement, the prohibition of disparaging behaviour, consent, prohibition of derogatory acts and benefit sharing. The focus is more on misuse, misappropriation, and

¹⁰⁰ C. Musiza, 'Traditional cultural expressions preservation and innovation: The Tonga Baskets of Zambia', *Open Air African Innovation Research* [Web blog], 13 January 2021 [Traditional cultural expressions preservation and innovation: The Tonga Baskets of Zambia | Open AIR](#) (accessed 9 October 2025)

¹⁰¹ Ibid

access/benefit sharing, less explicitly on integrity or derogatory modifications or public exposure as a moral harm.

4.5 Exceptions & permitted uses

Both laws seek expressly not to hinder normal customary use and transmission within communities. Both pieces of legislation limit protection to non-traditional uses (i.e., consent is required for non-traditional uses or commercial exploitation). Both permit non-commercial uses for research, education, archiving, criticism, reporting, and creating records to preserve cultural heritage, but these uses must be consistent with community respect and acknowledgement.

Thus, both strike a balance between community living and safeguarding against outside exploitation and the exceptions prioritize research, preservation, customary practices, and fair competition.

4.6 Enforcement & sanctions

In Kenya, for unauthorized exploitation, non-customary use, failure to acknowledge, derogatory treatment, false or misleading claims of connection with communities, and wrongful acquisition of intellectual property rights, the Kenyan Act contains criminal offenses and significant criminal penalties. Penalties and jail time are specifically stipulated with some offenses carrying up to 10 years imprisonment and also large fines depending on the offense. Kenya also has the authority to take administrative action, register and publish, and submit cases to the Cabinet Secretary or the courts.

In Zambia, for civil enforcement cases, the Agency and the High Court handle enforcement. The general penalty provisions of the Act include fines and imprisonment up to five years for specific offences and fines in penalty units up to significant amounts for general offences e.g. accessing or exploiting without consent, making false entries, or making misleading statements. Additionally, Zambia allows contracts that have not been approved by the Agency to be void.

Zambia provides for criminal punishments but prioritizes administrative monitoring through the Agency and civil enforcement through the High Court. Kenya, on the other hand, combines administrative control with strong criminal sanctions for misuse. Although Kenya's law is more specific in outlining specific criminal penalties for certain wrongdoings, both can have a significant deterrent effect.

4.7 Interaction with broader IP systems and regional instruments

Zambia has a clear connection to the ARIPO/Swakopmund Protocol and is contemplates registration with it as well as using its procedures for cross-border dispute settlement. At the centre lies the Agency (PACRA).

Instead of emphasizing ARIPO registration, Kenya establishes a domestic repository (the Kenya Copyright Board) and gives the Cabinet Secretary and counties more authority. International IP overlap is addressed elsewhere.

Therefore, Kenya gives domestic registers and administrative management (county + national levels) priority, while Zambia lays a greater explicit focus on ARIPO/regional registration.

4.8 Practical Implications

For communities/holders both Acts give a clear legal route to control, require prior informed consent, and give access to benefit sharing. Kenya's explicit moral-rights wording gives an extra layer of perpetual protection for integrity/attribution.

For commercial users both Acts require written/registered agreements (Kenya requires Cabinet Secretary registration to validate some agreements; Zambia requires Agency approval for access/licences). Without consent, users risk criminal penalties and civil suits.

For cross-border matters Zambia explicitly foresees ARIPO mechanisms and transboundary registration under the Swakopmund Protocol; users exploiting folklore across borders will need to account for those procedures. Kenya takes a domestic-first approach but does not remove international IP interactions

4.9 Conclusion

Oral literature, performance, rituals, symbols, and crafts are all examples of folklore expressions that reflect deeply embedded aspects of cultural identity. Legally protecting them is important for maintaining their identity, dignity, and collective memory in addition to their economic rights. Kenya and Zambia have both made significant strides in recognizing and protecting folklore expressions. Kenya's framework emphasizes moral rights, community devolution, and judicial recognition of customary claims, while Zambia's system focuses on ABS, central oversight, and regulatory control. Both operate within the limits of Western IP paradigms, which require legal fixity and documentation, often at odds

with the dynamic, collective nature of living cultural expressions. Effective protection requires enhanced community empowerment, recognition of customary law, and practical mechanisms that balance economic, moral, and cultural interests.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This research was premised on finding out whether the The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16 provides adequate protection of expressions of folklore. One of the objectives of this study was to compare Zambia's legal framework with that of Kenya to see the similarities and differences in the ways that the two jurisdictions have sought to provide protection for expressions of folklore, thereby finding out if the Zambian Act was adequately drafted.

This chapter offers a concise summary of the previous four chapters, starting with the research proposal. It then discusses the last three chapters in the order they are presented. It will have as its second object to give recommendations which Zambia can adopt to improve its protection of expressions of folklore in a way that can be beneficial to its holders.

5.1 Summary of chapters

This research comprises five chapters, which is in line with the university's standard format. Every succeeding chapter, with the exception of the first and current chapters, supports a specific objective mentioned in the proposal. In addition, the first, second and third objectives are covered in the second, third, and fourth chapters respectively.

5.1.1 Chapter one

This chapter serves as a thorough roadmap for the whole research project and is essential in directing the research with a systematic and well-organized approach to analyzing the legal issue. It sets the foundation and purpose of this research as it provides important background information and defines the research problem. It highlights the enactment of the The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16 and Statutory Instrument No. 16 of 2021 as Zambia's first dedicated

legal efforts to safeguard expressions of folklore from misappropriation. The chapter further illustrates the balance between cultural preservation and commercialization, framing the central problem of inadequate and poorly implemented protection. This chapter sets out the aim of the study which is to assess the adequacy of Zambia's legal protection for folklore through a comparative analysis with Kenya's Protection of Traditional Knowledge and Cultural Expressions Act no. 33 of 2016 and outlines the objectives, research questions, scope, and significance of this comparison. It concludes by explaining that the study employs a desk based comparative legal approach using secondary data to determine the effectiveness of Zambia's law in preserving and protecting its rich cultural heritage.

5.1.2 Chapter two

This chapter analysed the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16 and Statutory Instrument No. 16 of 2021 (the TK Act) and highlighted the provisions relating to the protection of expressions of folklore. It also briefly referred to the 2021 Regulations that supplement the Act by providing for registration and access procedures. The chapter concluded that the TK Act effectively addresses the major challenges faced in Zambia in relation to folklore protection, such as anonymity of creators, lack of benefit sharing, and exploitation by outsiders which was something previously criticized by scholars like Victoria Mwamba and Rita Chileshe. Through its blend of automatic protection, community empowerment, and benefit sharing mechanisms, the Act ensures that Zambia's rich cultural heritage is legally protected, and its custodians economically rewarded.

5.1.3 Chapter three

The chapter analysed The Protection of Traditional Knowledge and Cultural Expressions Act no. 33 of 2016 (TK/CE Act) of Kenya in relation to the protection of cultural expressions, which gives effect to Articles 11, 40, and 69(1)(c) of the Kenyan Constitution. It arose from Kenya's 2009 National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, which recognized the need to safeguard traditional innovation amidst globalization and technological growth. The TK/CE Act represented a landmark framework in Africa for protecting folklore. While the Act's effectiveness depends on strong intergovernmental cooperation and may risk inter-community rivalry over shared

folklore, the chapter concluded that it nonetheless demonstrates a progressive, community-centered model for safeguarding and monetizing cultural expressions.

5.1.4 Chapter four

This chapter compared the protection of folklore under Zambia's TK Act and Kenya's TK/CE Act. It established how both laws aim to safeguard community-based cultural heritage, but they differ in emphasis and administration. Both Acts cover similar tangible and intangible forms such as songs, dances, crafts, and rituals and emphasize community ownership and the need for prior informed consent. This chapter highlighted how Kenya's framework is more community centered, recognizing perpetual moral rights and devolving authority to county government, while Zambia's Act relies more on administrative oversight and formal licensing. Despite both Acts promoting cultural preservation and fair use, Zambia's approach remains more procedural and less participatory. The chapter concludes that while both countries have made progress, Kenya's framework offers more practical community empowerment and moral recognition, whereas Zambia's law, though comprehensive, requires improved implementation and stronger community involvement to achieve full effectiveness in protecting folklore.

5.2 Recommendations

Having highlighted the similarities and differences contained in both Acts, this research study proceeds to make recommendations. The research recommendations are centered on what additions can be made under the Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act No. 16 of 2016 in relation to the protection of folklore as well as any other recommendations that would be deemed useful to enhance effective protection.

5.2.1 Strengthening community participation and decentralization

Empower local communities to directly take part in the decision-making, registration, and benefit-sharing processes. Devolving certain functions to traditional authority or community-based institutions, like Kenya's county system, would make the protection more accessible and relevant locally.

5.2.2 Incorporate explicit moral rights

Add an explicit section (like Kenya's Act) granting perpetual and inalienable moral rights for the custodians, guaranteeing acknowledgement, protection from derogatory use, and

respect for the integrity of cultural expressions. This allows courts and agencies to treat these rights separately from economic rights.

5.2.3 Enhance Implementation and Awareness

Establish nationwide education and awareness programs to inform communities of their rights under the Act. Many custodians are unaware of their legal protections, limiting enforcement and benefit sharing mechanisms.

5.2.4 Create a National Folklore repository

Develop a digital and physical repository to document, archive, and manage traditional cultural expressions. This could preserve cultural materials while providing controlled access for educational and cultural use.

5.2.5 Encourage Regional and International Cooperation

Zambia must continue leveraging ARIPO and Swakopmund Protocol mechanisms to protect folklore across borders and ensure fair benefit sharing if Zambian folklore expressions are exploited internationally. Further, it can also negotiate bilateral or regional agreements to ensure Zambian folklore is protected abroad and vice versa.

5.2.6 Strengthen enforcement mechanisms

Itemise specific offences (misappropriation, false attribution, derogatory treatment, unauthorised IP registration) with clear penalties. This would give prosecutors a clearer legal basis than the current “general offences” section.

5.2.7 Provide detailed standards for user agreements

Borrow from Part VI in Kenya’s Act by prescribing in regulations what must be contained in an “access” or “user” agreement. Things such as benefit-sharing formula, confidentiality of secret or sacred expressions, duration, scope, exclusivity, dispute resolution clauses. This would give communities leverage and can give users certainty.

5.3 Conclusion

Zambia's Act establishes a robust legal foundation for the protection of folklore, but its adequacy depends on effective implementation, community empowerment, and moral recognition. Adopting a more participatory, rights-based, decentralized approach, while drawing lessons from Kenya’s moral rights and administrative models, would ensure that

the protection of Zambia's folklore moves beyond statutory intent and becomes a living, functional system that genuinely preserves and uplifts the nation's cultural heritage.

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