

**HARMONISATION OF MUNICIPAL LAWS FOR PROTECTION OF
EXPRESSIONS OF FOLKLORE IN THE EAST AFRICAN COMMUNITY:
THE CASE STUDY OF RWANDA AND TANZANIA**

JOVINE COSTANTINE

**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAWS (PhD)
DEPARTMENT OF PRIVATE LAW
THE OPEN UNIVERSITY OF TANZANIA**

2023

CERTIFICATION

The undersigned certify that they have read and hereby recommend and approve for acceptance by the Open University of Tanzania a thesis entitled; **“Harmonisation of Municipal Laws for Protection of Expressions of Folklore in the East African Community: The Case study of Rwanda and Tanzania”** in fulfilment for the degree of Doctor of Philosophy in Laws (PhD).

.....

Prof. Alex Boniface Makulilo
(Supervisor)

.....

Date

.....

Dr. Hashel Abdallah
(Supervisor)

.....

Date

COPYRIGHT

No part of this thesis may be reproduced, stored in any retrieval system, or transmitted in any form by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the author or the Open University of Tanzania in that behalf.

DECLARATION

I, **Jovine Costantine**, declare that the work presented in this thesis is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in fulfilment of the requirement for the Degree of Doctor of Philosophy in Laws (PhD).

.....

Signature

.....

Date

DEDICATION

To my beloved wife Regina, our children Hagai, Meshack, Abednego and Jeremiah for their constant love and prayers. To my parents Costantine Cleophace and Geneloza Costantine who raised me up from childhood to adulthood and inspired my academic journey. In particular, to the memory of my late father Costantine Cleophace who passed away in the year 2013. I will always miss his love and care.

ACKNOWLEDGEMENT

I am greatly indebted to a number of reputable and respectable people whose advice, encouragement and support contributed to the preparation and completion of this study. Since it is not possible to mention all of them here, I will only mention a few. I am so grateful to my supervisors, Prof. Alex Boniface Makulilo and Dr. Hashil Abdallah for their patience, support and perceptive guidance during the entire period of my study. I have learnt much from them. Their knowledge and accumulated experiences have been great asset for me not only in my studies but also for my career.

I also thank Hon. Dr. Benhajj Shaaban Masoud, Justice of the Court of Appeal of Tanzania, Hon. Dr. Ubena John, Judge of High Court of Tanzania and Hon. Dr. Fatma Rashid Khalfan, Judge of the High Court of Tanzania who tirelessly advised me to undertake the study. Furthermore, the Judiciary of Tanzania deserves special thanks for facilitating the study as well as allowing me to undertake the study. Likewise, I would like to thank the Director of WIPO Academy for enrolling me to pursue on line course about protection of Traditional Knowledge and Expressions of Folklore. The insights gained from the said course enabled me to have a deep-knowledge over the subject matter and hence applied the gained skills to complete this study.

I also appreciate and acknowledge Mr. Fredy Asobenie Kandonga, Senior Legal Officer from the Law Reform Commission of Tanzania and Mr. Beatus Kalumuna, Legal Officer from the Ministry of Foreign Affairs and East African Cooperation who emailed me soft copies of various reports revealing the status of harmonisation

of municipal laws in the East African Community. The reports assisted me to ascertain the extent of harmonisation of municipal laws for protection of expressions of folklore in the East African Community.

Further to that, I acknowledge to have been mentored by Prof. Eleonera Rosati, the Chief Editor of the Journal of intellectual property Law and Practice, in particular, during a review of my article titled “the Swakopmund Protocol for the protection of expressions of folklore: a review of implementation in Rwanda and Tanzania,” published by Oxford University Press. The said article was published as a mandatory requirement for the Doctoral Degree of the Open University of Tanzania.

I also sincerely appreciate the East African Community Editorial Team led by Mr. Simon Peter Owaka who reviewed my article titled “Protection of Expressions of Folklore: An Appraisal of EAC Law,” published by the East African Community in her official Magazine, Issue 35. Again, the said article was published as a mandatory requirement for the Doctoral Degree of the Open University of Tanzania.

In addition, I express my thanks to Mr. Kiwango Archibald Aristarch, the Chief Editor of the Journal of the Institute of Judicial Administration Lushoto (IJA-Journal) for accepting and publishing my article titled “Protecting Expressions of Folklore in Tanzania: Assessing the Suitability of Copyright Law.” Similarly, the article was published as a mandatory requirement for the Doctoral Degree of the Open University of Tanzania. My everlasting love and gratitude go to my wife Regina Ezekel Shembilu and my sons Hagai, Meshack, Abednego and Jeremiah for their support, love and many sacrifices they made to enable me to complete this

thesis. Finally, I would like to say thank you God. Your blessings and protection against all tragedies including Covid-19 have been the light towards the accomplishment of this thesis.

ABSTRACT

It is internationally recognised that expressions of folklore are valuable assets. They are rooted from various communities. They pass from one generation to another. However, due to advancement of technology, such assets have been misappropriated within the East African Community and at global level. This prompted international and the East African Community efforts to design mechanisms including harmonisation of laws for adequate protection of expressions of folklore. Despite such efforts, there are disparities in protecting expressions of folklore in the municipal laws of the East African Community Member States. Rwanda and Tanzania were selected as a case study. Therefore, this study was conducted to address two questions: one, to what extent has Rwanda and Tanzania harmonised their municipal laws for protecting and promoting expressions of folklore within the East African Community. Two, what are the appropriate mechanisms for adequately protecting and promoting expressions of folklore in Rwanda and Tanzania? The study relied upon doctrinal legal research complemented by comparative legal research. From gathered and analysed information, it was found that municipal laws on protection of expressions of folklore within the East African Community were not harmonised. It was also found that positive, defensive and sui generis approaches are appropriate mechanisms for adequately protecting expressions of folklore in Rwanda and Tanzania. Finally, instead of protecting expressions of folklore under the copyright law, the study recommends each East African Community Member State to have a specific law for protecting the expressions of folklore. The study recommends that like other communities, for instance the Pacific Community, the East African Community need to adopt a sui generis comprehensive legal framework for protecting expressions of folklore within the Community.

Keywords: *Harmonisation, Municipal Laws, Expressions of Folklore, East African Community.*

TABLE OF CONTENTS

CERTIFICATION	ii
COPYRIGHT	iii
DECLARATION.....	iv
DEDICATION.....	v
ACKNOWLEDGEMENT	vi
ABSTRACT	ix
TABLE OF CONTENTS	x
LIST OF LEGISLATION AND OTHER LEGAL INSTRUMENTS	xv
LIST OF MODEL LAWS, DIRECTIVES AND CONVENTIONS.....	xvi
LIST OF CASES	xviii
LIST OF ABBREVIATIONS AND ACRONYMS	xix
CHAPTER ONE	1
BACKGROUND TO PROTECTION OF EXPRESSIONS OF	
FOLKLORE IN THE EAST AFRICAN COMMUNITY	1
1.1 Introduction.....	1
1.2 Background to the Problem.....	1
1.3 Statement of the Problem.....	9
1.4 Literature Review.....	12
1.5 Research Objectives.....	24
1.5.1 General Objective	24
1.5.2 Specific Objectives	24
1.6 Research Questions	25
1.7 Research Methodology	25

1.7.1	Doctrinal Legal Research.....	25
1.7.2	Comparative Legal Research	28
1.8	Scope of Research.....	29
1.9	Limitations of the Study.....	33
1.10	Significance of the Study	34
1.11	Structure of the Study	35
1.12	Conclusion	38
CHAPTER TWO		39
CONCEPTUAL AND THEORETICAL FRAMEWORK ON		
PROTECTION OF EXPRESSIONS OF FOLKLORE		39
2.1	Introduction.....	39
2.2	Expressions of Folklore and Related Concepts	39
2.2.1	Expressions of Folklore	39
2.2.2	Protection of Expressions of Folklore.....	46
2.2.3	Harmonisation of Municipal Laws	52
2.3	Theories on Protection of Expressions of Folklore.....	60
2.3.1	The Theory of Minimum Standards Framework	60
2.3.2	Theory of One Size Fits All	62
2.3.3	Theory of Legal Transplantation.....	67
2.3.4	Theory of Legal Incrementation	69
2.4	Choice of Theory	72
2.5	Conclusion	74

CHAPTER THREE	76
INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK FOR	
PROTECTION OF EXPRESSIONS OF FOLKLORE	76
3.1 Introduction.....	76
3.2 International Protection of Expressions of Folklore	77
3.3 Regional Protection of Expressions of Folklore	96
3.4 Key Issues	100
3.4.1 Mechanisms for Protection of Expressions of Folklore.....	101
3.4.2 Sui generis and/or Model Laws for Protection of Expressions of Folklore	117
3.4.3 Application of Sui generis System and/or Model Law	136
3.5 Conclusion	138
CHAPTER FOUR.....	139
PROTECTION OF EXPRESSIONS OF FOLKLOREIN THE EAST	139
AFRICAN COMMUNITY	139
4.1 Introduction.....	139
4.2 Establishment of the East African Community.....	139
4.3 Legal Instruments for Protection of Expressions of Folklore in EAC.....	141
4.4 Institutions Responsible for Protection of Expressions of Folklore in EAC	144
4.4.1 Heads of State-Summit	145
4.4.2 Council.....	146
4.4.3 Secretariat	149
4.4.4 The East African Court of Justice	150

4.4.5	The East African Legislative Assembly.....	153
4.5	Harmonisation of Municipal Laws in EAC	154
4.5.1	Mechanisms for Harmonisation of Municipal Laws in EAC	159
4.5.2	Extent of Harmonisation of Municipal Laws in EAC	163
4.5.3	Challenges for Harmonisation of Municipal Law in EAC	171
4.6	Conclusion	175
CHAPTER FIVE		176
PROTECTION OF EXPRESSIONS OF FOLKLORE IN RWANDA		176
5.1	Introduction.....	176
5.2	Legal System of Rwanda	177
5.2.1	Sources of Laws in Rwanda.....	178
5.2.2	Laws for Protection of Expressions of Folklore in Rwanda	181
5.3	Protection of Expressions of Folklore in Rwanda	193
5.3.1	Expressions of Folklore Rights in Rwanda.....	197
5.3.2	Owners of Expressions of Folklore Rights in Rwanda.....	199
5.3.3	Mechanisms for Protection of Expressions of Folklore in Rwanda.....	199
5.3.4	Enforcement of Expressions of Folklore in Rwanda	201
5.3.5	Dispute Settlement Mechanisms.....	202
5.4	Institutions Involved in Protecting Expressions of Folklore in Rwanda	203
5.5	Conclusion	205
CHAPTER SIX		207
PROTECTION OF EXPRESSIONS OF FOLKLORE IN TANZANIA		207
6.1	Introduction.....	207

6.2	Legal System of Tanzania.....	207
6.2.1	Sources of Laws in Tanzania	209
6.2.2	Laws for Protection of Expressions of Folklore in Tanzania.....	212
6.3	Protection of Expressions of Folklore in Tanzania.....	224
6.3.1	Expressions of Folklore Rights in Tanzania	229
6.3.2	Owners of Expressions of Folklore Rights in Tanzania	229
6.3.3	Mechanism for Protection of Expression of Folklore in Tanzania	232
6.3.4	Enforcement of Expression of Folklore in Tanzania	238
6.3.5	Dispute Settlement Mechanisms.....	239
6.4	Institutions Involved in Protecting Expression of Folklore in Tanzania	246
6.5	Conclusion	250
	CHAPTER SEVEN.....	251
	COMPARATIVE DISCUSSION AND CONCLUSION.....	251
7.1	Introduction.....	251
7.2	Comparative Discussion and Key Findings.....	251
7.3	Conclusion	274
7.4	Recommendations.....	275
7.5	Future Research Agenda	276
	BIBLIOGRAPHY	278
	APPENDICES	287

LIST OF LEGISLATION AND OTHER LEGAL INSTRUMENTS

THE EAST AFRICAN COMMUNITY

The Protocol on the Establishment of the East African Community Common Market
of 2009

The Treaty for Establishment of East African Community of 1999

RWANDA

The Constitution of the Republic of Rwanda of 2003 as amended in 2015

The Law No. 28/2016 on the Preservation of Cultural heritage and Traditional
knowledge

The Law N^o 31/2009 of 26/10/2009 on Protection of Intellectual Property

TANZANIA

The Antiquities Act, Cap 333 [RE 2019]

The Constitution of the United Republic of Tanzania of 1977 as amended time to
time

The Copyright and Neighbouring Rights Act, Cap 218 [R.E 2019]

The Copyright Act, No.14 of 2003

The Copyright and Neighbouring Rights Regulations, GN No. 214A of 2000

The National Art Council of Tanzania Act, Cap 204 [RE 2019]

The National Museum of Tanzania Act, Cap 281 [RE 2019]

The Written Laws (Miscellaneous Amendments) (No.3), Act No. 9 of 2019

LIST OF MODEL LAWS, DIRECTIVES AND CONVENTIONS

Bangui Agreement of 1977 as revised in 1999

Berne Convention for the Protection of Literary and Artistic Works of 1886 as amended on September 28, 1979

Cariberra Agreement of 1947 as amended in 1997

Directive 2014/26/EU on Collective Management and Related Rights

Directive 2001/29/EU on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society

Lusaka Agreement establishing the African Regional Intellectual Property Organization of 1976

Model Provisions for National Laws on the Protection of Expressions of folklore against illicit Exploitation and other prejudicial actions, 1982

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002

Proposed WIPO Treaty on Protection of Traditional Cultural Expressions

The Swakopmunda Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961

The World Trade Organization Trade-Related Intellectual Property Rights Agreement (TRIPS) of 1994

UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions of 2005

UNESCO Convention on Safeguarding of Intangible Cultural Heritage of 2003

UNESCO Convention on the Protection of the World Cultural and Natural Heritage
of 1972

WIPO Copyright Treaty of 1996

WIPO Performances and Phonograms Treaty of 1998

LIST OF CASES

- Bulum Bulum and Another v R and T Textiles PTY LTD* [1998] 41 IPR 513
- Bulun Bulun v R and T Textiles Pty Ltd* [1998] 86 FCR 244, 256
- Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71; [1978] FSR 582
- Hamisi Mwinyijuma and Ambwene Yesaya v Tigo Company Ltd*, Civil Case No. 38 of 2011, High Court of Tanzania, Dar es Salaam (Unreported)
- Kamete Ene Ateti Marine v Mosupai Ole Ateti*, Civil Appeal No. 224 of 1995, Nairobi High Court (Unreported)
- Macmillan Aidan (T) Ltd v Nyambari Nyangwine J.A. Masebo and Two Others*, Commercial Case No. 81 of 2010, High Court of Tanzania, Commercial Division (Unreported)
- Mic Tanzania Ltd v Hamisi Mwinyijuma and Ambwene Yesaya*, Civil Appeal No. 112 of 2019, High Court of Tanzania, Dar es Salaam (Unreported)
- Mulpurrurru v Indofurn Ltd* [1994] 130 A.L.R 659
- New Zealand Maori Council v Attorney General* [1987]1 NZLR 641
- Yumbulul v Reserve Bank of Australia* [1991] 21 IPR 481

LIST OF ABBREVIATIONS AND ACRONYMS

ARIPO	African Regional Intellectual Property Organization
ALR	Australian Law Reports
Cap	Chapter
COMESA	Common Market for Eastern and South African
COSOTA	Copyright Society of Tanzania
COSOZA	Copyright Society of Zanzibar
CLR	Commonwealth Law Reports
CMP	Common Market Protocol
EAC	East African Community
ECOWAS	Economic Community of West African States
EC	European Community
EUCD	European Union Copyright Directive
FCR	Federal Court Reports
GLR	Ghana Law Reports
GN	Government Notice
GRKF	Genetic Resources, Traditional Knowledge and Folklore
Ibid	Ibidem
ILO	International Labour Organization
IP	Intellectual Property
IPR	Intellectual Property Rights
No	Number
NZLR	New Zealand Law Reports
OAPI	African Intellectual Property Organization

P	Page
PP	Pages
PICTs	Pacific Island Countries and Territories
RDB	Rwanda Development Board
RE	Revised Edition
REV	Revision
SAARC	South Asia Association for Regional Cooperation
SADC	Southern African Development Community
TCEs	Traditional Cultural Expressions
TK	Traditional Knowledge
TKECs	Traditional Knowledge and Expressions of Culture
TRIPS	Trade-Related Aspects of Intellectual Property Rights Agreement
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Declaration on the Rights of Indigenous People
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United State of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

CHAPTER ONE

BACKGROUND TO PROTECTION OF EXPRESSIONS OF FOLKLORE IN THE EAST AFRICAN COMMUNITY

1.1 Introduction

This chapter sets the context in which the study was conducted, using Rwanda and Tanzania as representative case studies for the East African Community Member States. The chapter provides the background that culminated in the conduct of the study. It also sets out the objectives and research questions, which guided the study all along. The key propositions of the study were twofold: First, much has been done that intensifies the integration of East African Community Member States into a common market.¹

The integration into a common market requires East African Community Member States to harmonise their respective laws, inter alia, with the view to having common standards for protecting expression of folklore² in the East African Community. The second and last proposition was the challenge as to how best to make such reform in order to eliminate disparities existing in the municipal laws of each East African Community Member States.

1.2 Background to the Problem

The accelerating development of technology, especially in the field of sound and audiovisual recording, broadcasting, cable television and cinematography has led to

¹For instance, see Maalim, M.J., The United Republic of Tanzania in the East African Community: Legal challenges in integrating Zanzibar, PhD Thesis, Tanzania German Centre for Eastern African Legal Studies, Tanzania, 2014, p.27.

²According to the provisions of section 2 of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010, an expression of folklore entails all literary and artistic works created by various communities and manifested in stories, paintings and traditional dances, available at <http://www.aripo.org>, (accessed on 20th August, 2018).

improper exploitation of the cultural heritage of the nation.³ According to section 2 of the Protection of Traditional Knowledge and Cultural Expressions Act, 2016⁴ exploitation means the employment of the greatest possible advantage of traditional knowledge and cultural expressions for selfish purposes, taking advantage of unwary traditional knowledge and cultural expressions holders and advertising or a publicity programme. It also includes manufacturing, importing, exporting, offering for sale and using cultural expressions beyond the traditional context.⁵

From the above, the expressions of folklore are being commercialized by such means on a worldwide scale. This has been done without respect for the cultural or economic interests of the communities in which they originate and without conceding any share in the returns from such exploitations of folklore to the peoples who are the authors of their expressions of folklore.⁶ It has been done because of globalisation and information technology revolution that have pushed the demand for intellectual property protection and expressions of folklore beyond the borders of sovereign nations.⁷

In the same trend and more often, it is liberalisation, international treaties, regional treaties, the media and the steady shift to free market economies that enable greater

³ The Secretariats of UNESCO and WIPO., Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions with a Commentary, UNESCO and WIPO, Geneva, 1985, p.3.

⁴ The Law of the Republic of Kenya passed on March 15th, 2016 by the Kenyan National Assembly, available at <http://kenyalaw.org>, (accessed on 20th August, 2018).

⁵ Misappropriation and illicit exploitation of TCEs was addressed in the case of *Mulpurrurru v Indofurn Ltd*, [1994] 130 A.L.R 659 and the case of *Yumbulul v Reserve Bank of Australia*, [1991] 21 I.P.R. 48, available at <http://www.austlii.edu.au/au/journals/MurUEJL/1995/4.html>, (accessed on 29th August, 2018).

⁶ The Secretariats of UNESCO and WIPO., (note 3).

⁷ Ibid.

movements of goods across the world.⁸ These situations lead to the need for better intellectual property protection and expressions of folklore.⁹

In recent years, the international community including the East African Community Member States has intensified its search for effective remedial measures to counter perceived negative effects on indigenous communities. These negative effects arise from the widespread commercial exploitations of traditional knowledge, particularly expressions of folklore. Indeed, indigenous groups have been unrelenting in their complaints about inadequate compensations, loss of community rights, misrepresentation of products and practices. These include unauthorised public disclosure and use of secret knowledge, images and other sensitive information pertaining to indigenous communities.¹⁰

It has also been emphasised that, protection of expressions of folklore seeks to control the usage of a particular work and ensure that such works are used within a particular context and on some occasions within a particular locality.¹¹ It could also be limited to particular occasions and in some instances, to particular persons or family. In most cases, people who come within the limitation of exploitation of a particular expression of folklore could exploit it and take both moral and financial benefit of the expression of the particular folklore.¹² In that respect, some authors view that, indigenous peoples see their identity as depending on survival of their art.

⁸ Adewopo A., *Protection and Administration of Folklore in Nigeria*, SSRN Electronic Journal, 2016, Vol.3, No.1, available at <http://ssrn.com/abstract=1127645> or <https://script-ed.org>, (accessed on 10th October, 2018).

⁹Ibid.

¹⁰ Ibid.

¹¹ Sand, S., *Sui Generis Laws for the Protection of Indigenous Expressions of Culture and Traditional Knowledge*, University of Queensland Law Journal, 2003, pp.188-198, <http://classic.austlii.au/journals/UQLawJ12.pdf>, (accessed on 20th November, 2018).

¹²Ibid.

Therefore, there are a number of reasons attributable to the rising international concern of the protection of indigenous expressions of culture.¹³ The reasons, which prove that expressions of folklore deserve the full protection, include increasing exploitation, inappropriate commercialisation and modification of the same by non-indigenous people. Another reason is that despite the high commercial value of sales, indigenous peoples often derive little or no benefit from the market consumption of their tradition's knowledge and artworks.¹⁴

In addition, other authors are of the views that significant improvements in the regulatory environment would provide indigenous groups greater control over the use of traditional knowledge including expressions of folklore.¹⁵ They also opine that the regulatory environment would also ensure access to traditional knowledge particularly expressions of folklore on mutually acceptable terms that respect indigenous culture.¹⁶

It is also noted that some measures have been taken at global level to rescue the situation of misappropriation of expressions of folklore. For instance, in 1989, the General Conference of UNESCO adopted a Recommendation on the Safeguarding of Traditional Culture and expressions of folklore. It called upon its member countries to take the necessary legislative steps to give effect to various

¹³ Farley, C., *Protecting Folklore of Indigenous People: Is Intellectual Property the Answer?* Connecticut Law Review, 1977, Vol.30, No.1, available at <http://ssrn.com/abstract=9223410>, (accessed on 10th December, 2018).

¹⁴Ibid.

¹⁵ Kuruk, P., *Protecting Folklore under Modern Intellectual Property Regime: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States*, American University Law Review, 1999, Vol. 48, No.4, pp.769-843, 2018).

¹⁶Ibid.

identification, conservation, preservation, dissemination, protection and international cooperation.¹⁷ Equally, the World Heritage Convention of 1972 encourages international cooperation for the protection of the cultural heritage of humankind. This instrument directs that such objective can be achieved through the development of a list of properties considered to have outstanding universal value.¹⁸

The above measures have been taken for the reasons that many developing countries including East African Member States have complains.¹⁹ Such complains are based on the fact that lots of copyrights and patents emanating from the developed world are unauthorised exploitation of their traditional knowledge and expressions of folklore.²⁰ They also complain that, their indigenous arts have been reproduced and that they have been used in advertising and marketing. They further lament that, they normally see indigenous designs more often and in new contexts.²¹ Thus, indigenous people in East Africa claim that exploitation of expressions of folklore is extensive and diverse within East Africa Region.

A good example is Kapotive Chair singers in Kagera Region who used Nyarwanda traditional style of dancing to perform their song²² without authorisation of the Nyarwanda community. Another example is a protest made against President Museveni when he wished to register a song rooted from Ankole Folklore titled

¹⁷Kuruk, P., Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property, A Global Primer, (E-book) Edward Elgar, 2020, p.xiii, available at <http://www.e-elgar.com>, (accessed on 20th May, 2020).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ See also WIPO., Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous People and Local Communities, WIPO, Geneva, Switzerland, 2017, p.3.

²¹ Ibid.

²² Called “Ee Mungu umenichunguza.”

“You want another rap” during Presidential Election campaign of 2010 in Uganda.²³

Unfortunately, unauthorised reproduction not only denies indigenous community economic benefit but also offend their religious beliefs.²⁴ In essence, traditional knowledge particularly expression of folklore has attracted widespread attention from enlarged audience.

Other traditional-based creations, such as expression of folklore, have at the same time taken on new economic and cultural significance with a globalised information society. This has brought to the fore an increased agitation at the international level for a system of protection for expressions of folklore.²⁵ In the East African Community, this has been done by establishing the East African Community with a view to cooperating in promoting and protecting indigenous works particularly expressions of folklore.

In order to achieve this goal, the treaty establishing the East African Community directs the East African Member States to harmonise their respective National laws with a view to enhancing cultural activities.²⁶ It is also observed that in 2009, East

²³*Yoweri Kaguta Museveni v Mr. Mwambusya Ndebesa and Dr. Katono Nzarwa Deo*, Civil Application No. 25 of 2010 for registration of Copyright, High Court of Uganda, (Unreported). See also Costantine, J., *the Swakopmund Protocol for the protection of expressions of folklore: a review of implementation in Rwanda and Tanzania*, Journal of Intellectual Property and Practice, 2022, Vol.17, No.10, p.834.

²⁴ Ibid. See also Kawooya, D., Copyright, Indigenous Knowledge and Africa’s University Libraries: The Case of Uganda, a paper presented at World Library and Information Congress, 20 to 24 August 2006, Seoul, Korea.

²⁵ The initiative has been taken to address some communities’ concerns. For instance, at international level, the Maasai name is widely used to promote and market products such as cars, shoes and clothes that are completely unrelated to the Maasai Community. See WIPO Document-experiences from Kenya on the protection of indigenous peoples’ rights, Geneva, 24th to 28th April, 2006, WIPO/GRTK/IC/9/INF/7(a) and Kuruk, P., (note 15)

²⁶ The East African Community Treaty of 1999, Art.119. See also Part 1 of Strengthening Popular Participation in the East African Community: An EAC Guide to EAC Structures and Processes, 2012, in particular, revealing the objectives of the EAC Community.

African member States went a step further to establish East African Common Market as an integral part of the East African Community.²⁷ The Common Market was established to widen and deepen cooperation among the Partner States in the economic and social fields for the benefit of the Partner States. Most specifically, the Common Market aimed at the realisation of accelerated economic growth and development through free movement of goods, persons, labour, rights of establishment and residence and free movement of services and capital.²⁸

According to the Common Market Protocol, the East African Member States undertake to co-operate in the field of intellectual property rights. Such co-operation aims at promoting and protecting creativity and innovation for economic, technological, social and cultural development in the Community. It further aims at enhancing the protection of intellectual property rights within the community.²⁹

It has already been revealed, the East African Common Market Protocol aims at enhancing the protection of intellectual property rights where the Member States undertake, inter alia, to cooperate in the field of traditional cultural expressions.³⁰ To achieve this goal, the Partner States undertake to approximate their national laws and harmonise their laws and systems.³¹

Furthermore, and according to the Protocol, the East African Partner States committed themselves to put in place measures to prevent infringement, misuse and

²⁷ The East African Community Common Market Protocol, Art.2.

²⁸ See the East African Common Market Scorecard of 2014 and 2016 tracking EAC Compliance in movement of Capital, Services and Goods and the EAC Secretariat Trade Report, 2008, p.2.

²⁹ See note 26.

³⁰ The East African Community Common Market Protocol, Art.43.

³¹ Ibid, Art.47. See also Nahayo, A., East African Community Tax Harmonisation: A Critical Assessment of Its Viability for Income Tax Laws, PhD Thesis, Tanzania German Centre for Eastern African Legal Studies, Tanzania, 2014, p.213.

abuse of intellectual property rights; exchange information on matters relating to intellectual property rights; promote public awareness on intellectual property rights issues and enhance capacity in intellectual property rights. They further committed themselves to establish mechanisms to ensure that the legal protection of the traditional cultural expressions, traditional knowledge, genetic resources and national heritage; and the protection and promotion of cultural industries is enhanced.³² Partner States also agreed to issue directives for co-operation in the administration, management and enforcement of intellectual property rights and elimination of discriminatory practices in the administration of intellectual property rights amongst Partner States.³³

According to Ayoyemi,³⁴ the move to harmonisation of the national laws will ensure that expressions of folklore and other indigenous products are adequately protected in Africa and East African community as well. He adds that harmonisation of intellectual property law in the region will ensure and attract foreign investment in the field of expressions of folklore through the process of effective administration.³⁵ Indeed, harmonisation of national laws is necessary for uniformity of laws in Africa including the East African Community and this will lead to indigenous innovations based on traditional knowledge systems including expressions of folklore in Africa to be adequately and effectively promoted and

³²Ibid, Art.43.

³³ Ibid.

³⁴ Ayoyemi, A., *A Continental Approach to Protecting Traditional Knowledge Systems and Related Resources in Africa*, SSRN Electronic Journal, 2009, available at <http://ssrn.com/abstract=1313582>, (accessed on 20th May, 2020).

³⁵ Ibid. See also the Kenya National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009, p.19.

protected in the East African regional legal framework.³⁶

Thus, the harmonisation of national legislation is expected to promote and develop intellectual property laws and matters relating to African or East African traditional knowledge system particularly the expressions of folklore.³⁷ It is against this background that prompted the researcher to conduct this study. The study that examined the extent of harmonisation of municipal laws within the East African Community Member States in compliance with the East African Community treaty and the East African Common Market Protocol with the view of promoting and protecting expressions of folklore within East Africa Region.

1.3 Statement of the Problem

The East African Community was established under article 2 of the East African Community treaty.³⁸ It was established, inter alia, for East African Community Member States to develop laws aimed at widening and deepening co-operation in economic, cultural and technology fields.³⁹ In line with this objective and pursuant to article 103(1) (c)⁴⁰ the East African Community Member States agreed to use and develop indigenous science and technologies. It is further reflected in the same treaty that the East African Community Member States agreed to harmonise laws on commercialization of technologies, promotion and protection of intellectual property rights and expressions of folklore.⁴¹

³⁶ Ibid.

³⁷ Ibid.

³⁸ The East African Community Treaty which entered into force on 7th July 2000 and amended on 14th December, 2006 and 20th August, 2007 respectively, available at <http://www.eac.int>, (accessed on 24th December, 2020).

³⁹ East African Community Treaty, Art.5.

⁴⁰ Ibid, Art.103 (1) (c).

⁴¹ Ibid, Art.103 (1)(i).

On that basis, the East African Community Member States initiated the process of establishing the Federation of East African Pharmaceutical Manufacturers. The establishment of such federation was made in collaboration with the Deutsche Gesellschaft für Internationale Zusammenarbeit, an international enterprise owned by the German Government. The East African Community Member States also approved the utilisation of Public Health Related WTO-TRIPS flexibilities and the approximation of national intellectual property legislation.⁴² Thus, the approval identifies the lowest common denominator of intellectual property legislation that can be used across all the partner states and promotes a maximum use of public health flexibilities.⁴³

Such initiatives were made for the purpose of harmonising and promoting regional pharmaceutical sector and hence improving the health of people within the member states. Again, through the East African Common Market Protocol; East African Community Members States agreed to harmonise their respective national laws with the view to effectively and adequately protecting expressions of folklore within East African region.⁴⁴ Besides, there are disparities existing in the municipal laws of each East African Community Member States for protecting expressions of folklore. That is to say, there is un-uniformity in the national legislation of the East African Community Member States as far as promotion and protection of expressions of

⁴² Such initiatives were made in February 2013 when East African Community Member States released a policy engineering the process. See also EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation, 2013. Likewise, Kazoba, K.G., Protection of Consumers and A Guard against counterfeit and substandard pharmaceuticals in Tanzania: Examining National, Regional and International Legal and Institutional Framework, PhD Thesis, Tanzania-German Centre for Eastern African Legal Studies, Dar es Salaam, 2013, p.132 discusses the flexibility of TRIPS Agreements in medical field.

⁴³ Ibid.

⁴⁴ The East African Community Common Market Protocol, Art.43.

folklore is concerned. For instance, expressions of folklore get a lesser protection in Rwanda compared to Tanzania. This is because the National Arts Council of Tanzania is allowed to impose and collect fees for the purpose of promoting or safeguarding expressions of folklore⁴⁵ while this is not the case in Rwanda. Equally, in Rwanda indigenous textiles⁴⁶ are expressly protected while in Tanzania the national law is silent.

Moreover, the national legislation of Tanzania protects only expression of folklore developed and maintained in the United Republic of Tanzania.⁴⁷ Similarly, the national legislation of Rwanda protects expressions of folklore developed and perpetually exercised on the territory of Rwanda.⁴⁸ This indicates that the expressions of folklore developed in other jurisdictions like Kenya, Uganda and Burundi do not qualify for protection in either Tanzania or Rwanda. This position of law defeats the purpose of establishing the East African Common Market with a view, inter alia, to harmonise municipal laws of East African Region for adequate and effective promotion and protection of expressions of folklore in the region and leads to unequal treatment or disparities in the protection of expressions of folklore in the East African Community Member States.

Most importantly, notwithstanding the disparities already pointed out; there is no any model law (like model law of the European community and the Pacific community) developed by East African Community supplementing the East African Community

⁴⁵ The Tanzania Copyright and Neighbouring Rights Act, s 26.

⁴⁶ Law No. 31/2009 on the Protection of Intellectual Property in Rwanda, s 11.

⁴⁷ The Tanzania Copyright and Neighboring Rights Act, s 3.

⁴⁸ Law No.31/2009, (note 45).

treaty and the East African Common Market Protocol. Lack of the said model law and presence of disparities in the national legislation of the East African Community Member States is a legal gap in promotion and protection of expressions of folklore or Traditional cultural expressions in the East African Community. This legal gap motivated the researcher to conduct this research with a view to ascertaining the extent to which the East African Member States have harmonised their municipal laws for promoting and protecting expressions of folklore in compliance with the East African Community Treaty and the East Africa common market Protocol.

1.4 Literature Review

In East Africa, there is a scarcity of literature on harmonisation of municipal laws for protection of expressions of folklore within the East African countries. On that basis and during the study, literatures from other jurisdictions were reviewed. Moni and Ben⁴⁹ express the need for model laws that can protect the intellectual property needs of traditional group. Their expression is based on the fact that traditional cultural expressions pass on from generation to generation and therefore it is difficult to protect them under copyright law that provides 50 years protection after the life time of the author.⁵⁰ Their views were important in this study especially in demonstrating the essence of harmonising law and coming up with sui generis model for protecting traditional cultural expressions. However, the authors were faulted on account that they arrived to such conclusion after analysing the intellectual property law of Kenya and they did not use comparative legal research to reveal how other countries in the

⁴⁹ Moni, M., and Ben, S., Intellectual Property Rights in Kenya, Konrad Adenauer Stiftung, Nairobi Kenya, 2009, pp.286-296, available at <http://www.kas.de>, (accessed on 20th May, 2019).

⁵⁰ Ibid.

East African Community have been protecting expressions of folklore. This is a knowledge gap that was explored by the researcher.

Susy⁵¹ is another author credited for advocating harmonisation of national laws for the purpose of adequate protection of expressions of folklore. He states that one cannot achieve legal harmonisation for adequately protecting expressions of folklore unless he or she observes the theories of harmonisation of intellectual property regime. According to him, theories of harmonisation of intellectual property regime include national treatment, material reciprocity, mutual recognition, minimum standards and the use of model law or protocol. His idea helped the researcher to reveal in-depth theories of intellectual property regime, particularly, in respect of protecting expressions of folklore. Nevertheless, since he was not specifically referring to the East African intellectual property regime and since he arrived at the conclusion without employing comparative legal research, then it was appropriate for the researcher of this study to conduct the study to assess on how expressions of folklore are promoted and protected in the East African Community.

Penyigey and Munkasi⁵² are other authors who advocates for legal harmonisation of copyright law. They are of the firm view that while reviewing the economic contribution of copyright-based industry in Hungary, focus must be put on legal harmonisation to meet territorial and single market requirement. They cited an example that, the European Community harmonised certain sub-areas within

⁵¹ Susy Frankel presented a paper on cross border Protection on Intellectual Property and relevance for the protection of Traditional Knowledge, Traditional cultural expressions and Genetic Resources during WIPO Seminar held in Geneva on 23rd June 2015, available at www.wipo.int, (accessed on 26th June, 2020).

⁵² Penyigey, K., and Munkasi, P., The Economic Contribution of Copyright Based Industries in Hungary, WIPO, 2005, available at www.wipo.int, (accessed on 27th May, 2020).

copyright through the imposition of certain directives and that Hungarian copyright law has been steadily adapting to the European Community's developing and constantly changing copyright regulations since the mid-1990s.⁵³ Their idea is in the European Community perspective;

However, it is relevant in this study in a sense that it assisted the researcher to demonstrate the extent to which the East African Community has harmonised its intellectual property law regime for adequate promoting and protecting expressions of folklore within the East African Community. In addition, issuance of directives in the European Community enabled the researcher to assess as to whether it is one of the tools employed by the East African Community for harmonising its members' municipal laws.

Kawooya⁵⁴ is another author who addresses the issue of harmonisation of intellectual property regime for protection of expressions of folklore. He recommends that appropriate legal protection, control, exploitation and ownership of folkloric resources is called for in Africa for the reason that the African contemporary intellectual property system not only presents conceptualisation challenges on ownership and control but also limits the extent to which Africa's knowledge output can be widely shared in the global knowledge arena without misappropriation or misuse. He adds that such appropriate legal protection cannot be achieved without

⁵³ For instance, see Hugenholtz, B.P., *Harmonizing European Copyright Law: The Challenges of Better Law making*, Kluwer Law International, Netherlands, 2009, pp.1-4.

⁵⁴ Kawooya, D., *Copyright, Indigenous Knowledge and Africa's University Libraries: The Case of Uganda*, 2006, available at <http://www.wipo.int> or <http://wipo.int/export/sites/www/tk/en/databases/creative-heritage/docs/dick-kawooya-uganda.pdf>, (accessed on 27th May, 2020).

harmonisation of intellectual property regime.

Kawooya is credited for indicating that some initiatives have been made at the global level like that of the UNESCO/WIPO's Model Provisions for National laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions adopted in 1982 encouraging countries to adopt appropriate laws to protect folkloric resources.⁵⁵ But, despite the fact that his views are relevant to this study, this study was called for on account that the situation referred to by the author of 1982 when UNESCO Model law was adopted against misappropriation of traditional cultural expressions, might be different from the contemporary situation and particularly in the East African Community.

The International Publishers Association (IPA)⁵⁶ is of the opinion that for the purpose of economic and legal certainty both at regional and international level harmonisation of intellectual property regime for protection of expressions of folklore is inevitable. Her views were significant in this research as it demonstrates the essence of or rationale of propagating harmonisation of national laws for protection of expressions of folklore in any Regional Community. However, the author did not assess historical and socio-economic structure of the East African Community Member States and hence the researcher of the current study assessed them when examining the extent of harmonisation of municipal laws on protection of expressions of folklore in the East African Community.

⁵⁵ See also UNESCO and WIPO., (note 3).

⁵⁶ GRKF Initial Draft Report for Harmonising Intellectual Regime on Indigenous Resources, available at www.wipo.int, (accessed 28th May, 2020).

Furthermore, the Expert Committee⁵⁷ which drafted the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions adopted in 1982 under the auspices of WIPO and UNESCO, believes that adequate legal protection of expressions of folklore is desirable. Such legal protection could be promoted at the national level by model provisions for legislation and that the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of expressions of folklore. Her views were useful in this study for the reason that they encourage adequate protection of expressions of folklore to avoid or eliminate the act of being exploited. Nevertheless, the Committee was faulted for not disclosing how model provisions would assist in harmonising national legislations to adequately promote and protect expressions of folklore.

Most importantly, explaining the importance of harmonisation; the International Bureau of WIPO⁵⁸ views that harmonised law or treaties help other countries to provide full protection within their territories to their own country's rightholders when their creations are exploited abroad, thereby protecting their interests and ensuring that local creators and enterprises enjoy the economic rewards from outside the country. The Bureau adds that, these benefits are particularly important in the era of global digital networks, when the distinction between the domestic and foreign markets is blurred, if not disappeared. This is because, the dissemination of works and other subject matters cannot be limited within national borders.

⁵⁷ WIPO, Report of First Session of Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, WIPO/GRTKF/IC/1/13, pp.156-175, available at www.wipo.int, (accessed on 27th May, 2020).

⁵⁸ WIPO., the Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), available at www.wipo.int, (accessed on 28th May, 2020).

The Bureau further observes that, implementation of the treaties will give stronger incentives to creators to produce new creations, and will promote the development of expressions of local culture. This view was relevant in this study as it demonstrates the importance of harmonising national laws with the view to adequately and effectively promoting and protecting expressions of folklore across the borders.⁵⁹ However, the knowledge gap is that it is not clear as to whether through harmonisation, traditional cultural expressions developed in one of the East African Community Member States can get protection in another country of the same community.

Berkman is another author who discusses several advantages of harmonisation and he is of the views that many countries have attempted to protect traditional cultural expressions (TCEs) by pooling their resources and creating intergovernmental organizations that monitor and seek to control the use of TCEs in foreign territories. He adds that this is an approach of harmonising local laws, which help in centralising administration, and avoiding duplication of costly efforts for protection of expressions of folklore across multiple countries.⁶⁰ His views were relevant and useful in this study as they indicate the benefits attained upon harmonising of local laws for promoting and protecting traditional cultural expressions in any region. However, such views are in general context in the sense that they do not indicate as to whether the East African Community like other communities in the World have attempted to harmonise the local laws for protection of traditional cultural

⁵⁹ See also Ezekiel, B.R., Equality of Treatment in Social Security: Case of Migrant Workers in the East African Community, PhD Thesis, the Open University of Tanzania, Tanzania, 2018, p.61.

⁶⁰ Berkman Centre for Internet and Society., Copyright for Librarians: The Essential Handbook, Elfi, Netherland, 2012, p.108, available at www.eift.net or <http://unesdoc.unesco.org>, (accessed on 2nd February, 2017).

expressions.

Bainbridge⁶¹ is another author who also advocates for the importance of harmonisation and he is of the settled view that under article 3 of the European Community Treaty, the EC members agreed to approximate their laws to the extent required for the functioning of the common market. That to achieve this objective, numerous harmonising directives have been issued to enhance the concept of a single market. This has assisted to eliminate disparities between national laws and reduced a danger of conflict between domestic law and the European community law on the freedom of movement of goods.⁶²

Bainbridge views were relevant and useful in this study as they indicate that harmonisation helps to minimise or eliminate conflict of national laws and community laws and enhance the concept of a single market. However, he is faulted for not specifically indicating that the East African Community Members agreed to harmonise their national laws to protect and promote traditional cultural expressions and whether such goal has been achieved or not. Marcella and Maurizio are other authors with the views that the approximation of national laws protecting intellectual property rights seems an inevitable process, since an increasingly global marketplace facilitates access to worldwide-protected works and consequent infringement. They also state that, standardised IP protection would be insufficient if limited to a confined area.⁶³ Despite the fact that their views are about harmonisation of

⁶¹ Bainbridge, D., *Intellectual Property*, 10th Edition, Pearson Education Limited, England, 2018, pp.863-890. Available at www.personed.co.uk or <http://www.prarson.com>, (accessed on 5th March, 2017).

⁶² Ibid.

⁶³ Marcella, F., and Maurizio, B., *Harmonisation of Intellectual Property Rights within and beyond the European Union: The Acquis Communautaire in the Framework of the European Neighbourhood Policy*, WPZ/25

intellectual property law within and beyond European Union, they do not cover harmonisation of protection of expressions of folklore in the East African Community.

Lindahl⁶⁴ demonstrates the essence or factors prompting harmonising of expressions of folklore protection regime and states that harmonisation can solve problems caused by discrepancies in the national law and that this can be in a form of complete harmonisation, optional harmonisation and minimum harmonisation. His view was relevant in this study to the effect that disparities existing in the national laws can be resolved through harmonisation. Nevertheless, the author does not indicate the methods used to detect the disparities in national legislation of a particular community like the East African Community.

Explaining the factors prompting harmonisation, Graham is of the views that the digital revolution has dramatically increased the ability of individuals and corporations to appropriate and profit from the cultural knowledge of indigenous peoples, which is largely unprotected by IPR law. In response, legal scholars, anthropologists, and native activists now propose new legal regimes designed to defend indigenous cultures by radically expanding the notion of copyright.⁶⁵ This move is relevant to the study as it assisted the researcher to assess the East African Community legal schemes in respect of controlling appropriation of traditional cultural expressions. However, the author was challenged for not addressing the

SEARCH WORKING Paper, 2013, available at <http://www.ub.edu/searchproject/results/workin-paper-collection>, (accessed on 10th June, 2020).

⁶⁴ Lindahl, F., Intellectual Property Rights in EU: Harmonisation and Unification instead of inconsistencies? LLB Dissertation, Jönköping University, Sweden, 2011, available at <http://hj.diva-portal>, (accessed 10th June, 2020).

⁶⁵ Graham, D., Literature Survey on Intellectual Property Rights and Sustainable Human Development, 2003, UNCTAD, p.97, available at <http://www.files.ethz.ch>, (accessed on 29th July, 2020).

factors that pushed East African Community members to have the objective of harmonising municipal laws for promotion and protection expressions of folklore.

Mireille is another author who discusses the pushing factors for harmonisation of intellectual property law in relation to free intercommunity trade in goods and services and his views are in relation to copyright law harmonisation in the European Community. Revealing the factors calling upon for harmonisation of copyright regime in EC, he states that, seven directives were issued in EC. The purpose of harmonising European copyright law was that first, there was a need to create a single community market for copyright goods and services and that legal barriers in the form of disparate copyright rules, that might lead to market fragmentation and distortion of competition, were removed.⁶⁶

Second, there was a need to improve the competitiveness of the economy in copyright goods and services in community and that this helped to establish a legal framework that guaranteed protection of intellectual property rights at par with the law in the counties of the European community's main competitors.⁶⁷ In addition, the need to protect intellectual creations and investment produced in the European community against unfair exploitation by users in non-members States was the third factor that pushed for copyright law harmonisation in the European Community.

Lastly, the emergency of internet or information society. This promised seamless copyright and related rights, brought a new urgency to the harmonisation process of

⁶⁶ Mireille, E., *Harmonising European Copyright Law: The Challenges of Better Lawmaking*, 2009, Kluwer Law International, the Netherlands, pp.5-7, available at <http://www.ivir.nl>, (accessed on 29th July, 2020).

⁶⁷ See also Hugenholtz, B.P., (note 53).

copyright law in European Community.⁶⁸ This view is relevant and useful in this study as it demonstrates that a single market cannot be achieved in any community like the East African community without harmonising national laws of the East African Community Member States. Despite its usefulness, the author's views are confined to harmonisation of copyright law and therefore he is challenged for not addressing the issue of harmonising national laws for protection and promotion of traditional cultural expressions.

Jeremy and Tobias emphatically state that the question of IP law, policy and practice appears to be most suitably addressed globally on account that several multilateral instruments, such as TRIPS, strive to introduce uniform minimum standards of IP protection around the world. They, however, takes the view that examination of global setting is insufficient. This is because regional, national and sub-national characteristics and perspective must be taken into account and examined.⁶⁹ Their views are relevant in this research on the basis that first, they demonstrate how the world at large strive to have a uniform standard of protecting IP and secondly, they are useful in this study as far as the examination of East African IP law, policy and practice is concerned. However, their views were faulted for not specifically disclosing the views of stakeholders on the issue of harmonisation of IP law, policy and practice for protecting and promoting expressions of folklore.

Fang is another author who explains how IP should be protected across the border. He is of the settled views that most countries do offer protection to foreign works

⁶⁸ Ibid.

⁶⁹ Jeremy, D., Tobias, S., *Innovation and Intellectual Property: Collaborative Dynamics in Africa*, UCT Press, Cape Town, 2014, available at <http://ssrn.com/abstract=2572909>, (accessed on 29th July, 2020).

under certain conditions, which have been greatly simplified by International Copyright treaties and conventions. He cites an example that the Bern Convention for the protection of literary and artistic works provides that each member country will recognise copyrighted works authored by nationals of other member countries.⁷⁰ This view was relevant and useful in this study on the basis that it demonstrates how IP and traditional cultural expressions can be protected across the border that is both at regional and international level. Despite the usefulness of his ideas, the author does not specifically address the issue of harmonisation of national laws with the view to protecting and promoting expressions of folklore across the border.

Eventually and in general, scholars have clearly shown that misappropriation of expressions of folklore is a challenge at both regional and global level. They have shown how some communities like the European Community issued harmonising directives and regulations to curb the challenge. Likewise, they have demonstrated that the East African Community Member States agreed to harmonise their laws, *inter alia*, to eradicate the challenge of misappropriation of expressions of folklore. However, they have not certainly indicated as to whether there is a need to use directives and regulations in the process of harmonising municipal laws in the East African Community. In addition, most of the reviewed literature have showed that harmonisation on national laws intend to enhance the concept of a single market. However, scholars have not addressed the issue as to whether the East African Community Member States have complied or fulfilled the obligation to harmonise their municipal laws as underpinned in the EAC Treaty and the EAC Common

⁷⁰ Fang, S., *Intellectual Property Basics*, Dorsey and Whitroy LLP, New York, 2011, p.4, available at <http://www.dorsey.com> or <http://www.ieee.org>, (accessed on 2nd August, 2020).

Market Protocol.

On the other hand, some scholars have revealed the kinds of harmonisation including maximum harmonisation and minimum harmonisation. However, they have not clearly indicated what kind of harmonisation can be employed in the East African Community. In other words, they have not addressed the issue that between maximum and minimum harmonisation which one is relevant for harmonising municipal laws in the East African Community. That is to say, do the East African Community need to have a unification of law i.e., maximum harmonisation or a minimum harmonisation where each Partner State is obliged to meet minimum standards when designing their laws for protecting expressions of folklore? Thus, this was one of the gaps addressed in this study.

In addition, the reviewed literature has not disclosed as to whether there is a need to have a specific legal framework for protecting expressions of folklore in the East African Community. Worth noting is that, the reviewed literature portrays how harmonisation of intellectual property regime can be achieved through issuance of directives and regulations. However, Scholars have not specifically extended such views to harmonisation of municipal laws for protecting expressions of folklore in the East African Community.

Moreover, the reviewed literature has not disclosed the mechanisms or international standards for protecting the expressions of folklore. Therefore, these are the gaps which the study addressed. In other words, the reviewed literature therefore leaves room for a further study exploring the best mechanisms for protecting expressions of

folklore and the extent of harmonisation of municipal laws for protecting expressions of folklore in the East African Community. Finally, from the reviewed literatures; it is evident that most of the authors have not demonstrated how the process of harmonisation of national laws within the East African Community can be achieved. There is also a knowledge gap in respect of the extent of harmonisation of national laws within the East African Community for promotion and protection of expressions of folklore. Further to that, there is also knowledge gap with regard to how each East African Community Member States protects the expressions of folklore. This is a knowledge gap that the researcher intended to fill by conducting this study.

1.5 Research Objectives

The following objectives guided the present study.

1.5.1 General Objective

The main objective of the study is to examine the extent of harmonisation of municipal laws on protection and promotion of expressions of folklore within the East African Community.

1.5.2 Specific Objectives

- i. To examine harmonisation of municipal laws on protection and promotion of expressions of folklore in Rwanda and Tanzania.
- ii. To identify appropriate mechanisms for adequately protecting and promoting expressions of folklore in Rwanda and Tanzania.

1.6 Research Questions

- i. To what extent have Rwanda and Tanzania harmonised their municipal laws for protecting and promoting expressions of folklore within the East African Community?
- ii. What are the appropriate mechanisms for adequately protecting and promoting expressions of folklore in Rwanda and Tanzania?

1.7 Research Methodology

Research methodology refers to a systematic way of solving a research problem. It involves a study of various steps and methods that a researcher needs generally to adopt in his investigation of a research problem along with the logic behind them. It is not only a study of methods but also of explanation and justification for using certain research methods and of the methods themselves. Thus, the research methodology is a set of rules of procedure about the way of conducting research.⁷¹In that regard, the study relied upon doctrinal legal research complemented by comparative legal research. It was also guided by the theory of legal transplantation which is a subset of Comparative legal research geared for legal reforms. Details and rationale for the selected methodology are elucidated below.

1.7.1 Doctrinal Legal Research

Doctrinal legal research entails the use of primary and secondary sources of law. It is concerned with the analysis of the legal doctrine and how it has been developed and applied. It is also known as pure theoretical research or black letter research.⁷²In

⁷¹ Abdallah, A., Regulation of Mobile Money Service in Tanzania, PhD Thesis, the Open University of Tanzania, Tanzania, 2017, pp.18-19.

⁷² Ibid, p.20. See also Kiunsi, B.H., Transfer Pricing in East Africa: Tanzania and Kenya in

addition, doctrinal legal research extends from the textual examination of statutory provisions and case laws to exploration of legal scholarly works with the intention of proposing a legal reform.⁷³ Therefore, doctrinal legal research is tremendously used in similar legal studies.⁷⁴

In that regard, the researcher opted for doctrinal legal research on account that traditionally, doctrinal legal research is the main methodology of legal research.⁷⁵ Thus, the researcher collected and examined the municipal laws protecting expressions of folklore or traditional cultural expressions in each East African Community Member States. Furthermore, principles of case law from various jurisdictions were applied and analysed in line with the harmonisation of East Africa legal regime on promotion and protection of expressions of folklore within the East African Community.

In addition, the researcher collected and analysed international instruments including soft laws. This was done to reveal categorizes of harmonisation and showing the appropriate mechanisms for adequately protecting expressions of folklore in the East African Community. Further to that, the researcher analysed protocol, treaties, conventions, cases, articles, reports, books, journals, dissertations, thesis and commentaries of various scholars addressing the issue of harmonising municipal laws for promoting and protecting traditional cultural expressions. This was done to

Comparative Perspective, PhD Thesis, the Open University of Tanzania, Tanzania, 2017, p.22.

⁷³ Mwamlangala, F.D., Privacy and Security in Cloud: Tanzania and South Africa in Comparative Perspective, PhD Thesis, the Open University of Tanzania, Tanzania, 2020, available at <http://respository.out.ac.tz>, (accessed on 25th April, 2022).

⁷⁴ Masoud, B.S., Legal Challenges of Cross-Border Insolvencies in Sub-Saharan Africa with Reference to Tanzania and Kenya: A Framework for Legislation and Policies, PhD Thesis, University of Nottingham Trent, UK, 2012, available at <http://respository.out.ac.tz>, (accessed on 25th April, 2022).

⁷⁵ Makulilo, A.B., Protection of Personal Data in Sub-Saharan Africa, PhD Thesis, University of Bremen, Germany, 2012, at p.12 describes doctrinal research as the main methodology of legal research because it primarily focuses on what the law is as opposed to what the law ought to be.

reveal the best standards for protecting expressions of folklore in East Africa and at international level. In view of that, various libraries and websites were visited for accessing relevant information on the subject matter.

Apart from that, the rationale for using doctrinal legal methodology in this study was also due to undisputed fact that it is regarded as the main legal methodology which focuses primarily on what a law is in a particular area and not what it ought to be.⁷⁶ Thus, doctrinal legal research was employed to analyse municipal laws and the East African Community law and hence ascertain the extent of harmonisation of municipal laws in the East African Community.

In particular, the researcher analysed the existing legislation, model laws, reports, case laws, and other publications and assessed how they relate to harmonisation of municipal laws for protecting expressions of folklore against misappropriation. The analysis demanded the use of different legal methods including inductive and deductive legal reasoning as well as rules of statutory interpretation to critically analyse the collected primary and secondary data against the research questions.

In the nutshell, this methodology was selected to answer the research questions, which specifically required ascertaining the extent of harmonisation of municipal laws for protection of expressions of folklore in the East African Community and identifying best mechanisms for protection of expressions of folklore in Rwanda and Tanzania. The methodology also facilitated the analysis, discussion and recommendation which encouraged the development and designing of appropriate

⁷⁶ Dobinson, I., and Johns, F., *Qualitative Legal Research* in McConville, M., and Wing, H.C., (eds) *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, pp.18-19.

legal framework for protection and promotion of expressions of folklore. Moreover, through application of legal interpretation and analysis, this methodology aided in formulating recommendations or solutions against misappropriation of expressions of folklore in East Africa, in particular, in Tanzania and Rwanda.

Lastly, various institutions and key persons were contacted for collecting documentary information revealing the extent of harmonisation and expressions of folklore protection in East African Member States; such institutions include the East Africa Community, Law Reform Commissions, the National Arts Council, the Copyright Society of Tanzania (COSOTA) and Ministry of Foreign Affairs and East Africa Cooperation. Thus, doctrinal legal research was applied with the view to collect primary and secondary data and hence analyse them and it was complemented by comparative legal research.

1.7.2 Comparative Legal Research

Briefly, since its inception in the 20th Century, comparative law has played a significant role in the science of legal interpretation in national courts, legal reforms as well as unification and harmonisation of laws. The essence of comparative law is the act of comparing the law of one country to that of another.⁷⁷ Most frequently, the basis for comparison is a foreign law juxtaposed against the measure of one's own law. However, the comparison can be broader: more than two laws, more than law, more than written words. It facilitates better understanding of the functions of the rules and principles of laws and involves the exploration of detailed knowledge of law of other countries to understand them, to preserve them, or to trace their

⁷⁷ Makulilo, A.B., (note 59). See also Mwamlangala, F.D., (note 72).

evolution. Accordingly, comparative legal research is beneficial in a legal development process where modification, amendment, and changes to the law are required.⁷⁸

From the above, comparative legal research was invoked in this study to complement doctrinal legal research. This is because and as it has already been indicated the study was guided by the theory of legal transplantation which is a subset of comparative legal research. In particular, the study addressed the issue of harmonisation of municipal laws on the protection of expressions of folklore in the East African Community and it involved comparison of municipal laws on the protection of expressions of folklore of two countries: Rwanda and Tanzania.

Essentially, comparative legal research helped a researcher to make a comparative analysis of the municipal laws on the protection of expressions of folklore between Rwanda and Tanzania. It also assisted the researcher to analyse EAC reports and ascertain the status of harmonisation of municipal laws along with the implementation of the East Africa Treaty and East African common market protocol. Finally, the comparative legal research was employed to identify alignments on the protection of expressions of folklore between the municipal laws of Rwanda and Tanzania with the East African Community law.

1.8 Scope of Research

The study confined itself on harmonisation of municipal laws for protecting expressions of folklore in the East African Community. It did not cover all the East

⁷⁸ Abdallah, A., (note 56).

African Community Member States for the obvious reason that, it would be difficult in terms of finance and time for the researcher to collect adequate and relevant data from all East African Member States. Further to that, some of the East African Community Member States like South Sudan has a fused legal system: inquisitorial and adversarial models and have been applying Sharia law that the researcher is not conversant with.⁷⁹

In that regard, the study only covered Rwanda and Tanzania. First, Rwanda has a fused legal system i.e., civil and common law system while Tanzania operates in common law system i.e., adversarial legal system. Based on such different legal systems, the researcher selected Rwanda and Tanzania to ascertain the extent and kind of harmonisation of municipal laws in the East African Community. Secondly, in order to have a sharp focus and an in-depth examination of the study, Rwanda and Tanzania were selected as the case study because prior to this study the researcher had pursued the LLM-Commercial Laws and became conversant with the intellectual property laws and investment laws of Tanzania and Rwanda.

In particular, he also studied and was awarded a certificate of completion of advanced course on Intellectual Property, traditional knowledge and traditional cultural expressions administered by the World Intellectual Property Organization Academy (WIPO Academy). Thus, the knowledge gained enabled the researcher to get reliable information on the protection of expressions of folklore from Rwanda and Tanzania.

⁷⁹ However, according to the report of International Commission of Jurists (ICJ) specifically focusing on South Sudan: An Independent Judiciary in An Independent State? Published in 2013 and accessed on 20th May, 2017 from www.icj.org indicated that there is a shift towards adversarial model that has not yet penetrated into the daily functioning of the justice sector across South Sudan.

Thirdly, language barrier is another factor that prompted the researcher to select Rwanda and Tanzania as a case study. Both the municipal laws of Rwanda and Tanzania that regulate the protection of expressions of folklore are crafted in English language well understood by the researcher. On the other hands, other East African Community Member States like Burundi her statutes are crafted in Kirundi and French language of which the researcher is not conversant with. At this juncture, it is worth noting that under item 7.2 of this study lessons on harmonisation of municipal laws for protection of expressions of folklore were drawn from the European Community, Pacific Community and Caribbean Community for illustration purpose and not as such a comparative in nature. The illustrations assisted the researcher to reveal the extent of harmonisation of the municipal laws protecting expressions of folklore within the East African Community.

Essentially, the rationale for such illustrations was to get insights or lessons on how the European Community, the Pacific Community and the Caribbean Community have harmonised their laws for protecting expressions of folklore. The question posed here is why the European Community, the Pacific Community and the Caribbean Community were selected for illustration purpose? In the first place, like the East African Community: the European Community, the Pacific Community and the Caribbean Community were established, inter alia, to deepen their corporation in economic matters and attain a single market.⁸⁰ In addition, the reviewed literature under item 1.4 of this chapter and item 7.2 of chapter seven of this thesis has demonstrated that the European Community managed to issue numerous directives

⁸⁰ See the Treaty on the Functioning of the European Community available at <http://europa.eu> and the Treaty establishing Caribbean Community, available at <http://www.caricom.org>, (accessed on 26th April, 2022).

and regulations with the view to harmonise municipal laws for protection of expressions of folklore in the European Community.

It is further evident that, the United Kingdom and Belgium are members of the European Community.⁸¹ The former colonised Tanzania and hence Tanzania inherited her legal system from England. On the other hand, Rwanda was colonised by Belgium and hence inherited her civil law system from Belgium. On that basis, selection of the European Community assisted the researcher to illustrate and determine how the directives and regulations have been invoked for harmonising municipal laws protecting expressions of folklore in the East African Community.⁸²

Similarly, the Pacific Community was selected on account that like the East African Community, the Pacific Community has a diversity of expressions of folklore which are misappropriated in a large scale. The misappropriation led the Pacific Community to design or develop a Regional Framework for protection of expressions of folklore.⁸³ Further to that, in the Pacific Community, particularly, in Australia, misappropriation of expressions of folklore has been tested through judicial action⁸⁴ and thus this assisted the researcher to analyse the precedents or case laws from the Pacific Community.

⁸¹See the Treaty Establishing European Community available at <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/>(accessed on 29th April, 2022).

⁸² Another factor which prompted the researcher to select European community is that in 2008 an attempt was made between East African Community and European Community to sign economic partnership Agreement. Both the economic blocks intended to widen their economic market. See the Agreement Establishing a Framework for An Economic Partnership Agreement between the East African Community Partner States, on the one part, and the European Community and its member States on the other part.

⁸³See the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002. Accessed from <http://pacific-data.sprep.org> or <http://www.cambridge.org>. on 8th May, 2022. See also Pacific Secretariat., the Report of Indigenous Agricultural Knowledge in the Pacific Community: With Special Reference to Article 9 of the International Treaty for Plant Genetic Resources for Food and Agriculture, Fiji, 2011.

⁸⁴For instance, in the case of *Bulun Bulun and Mulpururru v. R and Textiles Ply Ltd* (1998) 86 FCR 244 where permanent injunction was issued against misappropriation of TCEs. Accessed from <http://www5.austlii.edu.au>

Equally, the Caribbean Community was selected on account that the Community have initiated processes to have a regional framework for protection of expressions of folklore against misappropriation.⁸⁵ Moreover, most Caribbean people have their origin in Africa and thus the East African Community and the Caribbean Community share cultural expressions.⁸⁶

In addition, like the selected Communities; the East African Community Member States have different legal system. Finally, it is important to reiterate that the study only covered Rwanda and Tanzania where by the laws from the two jurisdictions were compared to ascertain the extend of harmonisation for protection of expressions of folklore within the East African Community.

1.9 Limitations of the Study

In this study the researcher encountered with three main challenges. The challenges were: the researcher not being familiar with the languages used to craft some statutes of EAC Member States, outbreak of pandemic disease Covid-19 and existence of different legal systems among the East African Community Member States. First, it has been portrayed in item 1.8 that laws of some East African community Member States were crafted in the language which the researcher was not conversant with such as French and Kirundi languages. This challenge was mitigated by selecting

⁸⁵See WIPO/GRTK/KIN/O8/1 available at <http://www.wipo.int/tk/en/index.htm/> revealing Regional Expert Meeting on the establishment of A Caribbean Framework for the Protection of Traditional Knowledge, Folklore/Traditional cultural expressions and Genetic Resources,(accessed on 23rd April, 2022). Similarly, Legall S., Protecting Traditional Knowledge and Folklore/Traditional Cultural Expressions Policy and Legal Challenges for Caribbean Countries: A paper presented at the Regional Expert Meeting on the Establishment of a Caribbean Framework for the Protection of Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources, 18th March, 2008, Kingston, Jamaica is relevant here.

⁸⁶WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), available at www.wipo.int/,(accessed on 29th April, 2022).

Rwanda and Tanzania whose laws on the protection of expressions of folklore were crafted in English language that the researcher understands well.

The second challenge was outbreak of pandemic disease. This challenge affected the usual way of meeting with supervisors and attending seminar presentation. However, such situation or challenge was mitigated by use of technology. That is to say, the mode of supervision and communication changed from face to face to internet or email communication. Thus, the supervision was carried through sending and receiving tracked works from supervisors. Equally, zoom platforms were used during seminar presentation and this enabled the researcher to complete the study.

The third challenge is about existence of different legal systems among the East African Community Member States. As it has already been stated, the East African Community Member States operate in different legal systems. This state of affairs posed methodological challenges for the study. However, the researcher decided to invoke doctrinal legal research complemented by comparative legal research to collect and analyse international instruments administered by UNESCO and WIPO along with the municipal laws regulating intellectual property in Rwanda and Tanzania and hence successfully completed the study.

1.10 Significance of the Study

The study contributes to the existing body of knowledge on the protection of expressions of folklore within the East African Community. In particular, it enhances or encourages the East African Community Members (including Rwanda and Tanzania) to have concerted efforts in combating misappropriation or

unauthorised exploitation of expressions of folklore. Certainly, concerted efforts will enable East Africa member States to regulate misappropriation, unfair and derogatory use of expressions of folklore within and outside East African Region. The information gathered and analysed serves as a catalyst for the East African Community to adequately promote and protect expressions of folklore and hence combat misappropriation of expressions of folklore. It will also strengthen East African cultural identity and its economic contribution to traditional cultural owners in the East African Community.

It further reveals the differences or disparities existing in municipal laws protecting expressions of folklore within the East African Community Member States. Hence, the study will assist the East African Community to develop or design a regional legal regime guiding the East African Community Member States to amend or adjust their national legislation for eliminating disparities existing therein. It will further assist EAC to address the challenges associated with harmonisation of municipal laws in the East African Community. The study also contributes to the existing body of knowledge on protection of expression of folklore. Such knowledge will help the East African Community to go with the pace of the rapid development and technological advancement in the promotion and protection of expressions of folklore and hence the East African economic and cultural value of expressions of folklore will increase.

1.11 Structure of the Study

This study contains seven chapters that address various issues in the following manner: Chapter one examines the background to protection of expressions of

folklore in the East African Community. It contains information in respect of the general introduction on protection of expressions of folklore. That is to say, it has the background of the study, the statement of the problem, the objective of the study, research questions and methodology for collecting and analysing data. It also contains the justifications or significances of promoting and protecting expressions of folklore in the East African Community.

Chapter two provides conceptual and theoretical framework on protection of expressions of folklore. It clarifies various concepts. These concepts include harmonisation of the law in promotion and protection of expressions of folklore and its theories like one size fits all and legal transplantation, legal incrementalism and minimum standards framework. It further clarifies the concept of expressions of folklore, protection of expressions of folklore, ownership of expressions of folklore and chosen theories.

Chapter three discusses international and regional legal framework for protection of expressions of folklore. It contains information on how protection of expressions of folklore emerged at global and regional level. It further discloses international and regional instruments designed to protect and promote expressions of folklore. It also examines key issues and the mechanism used at international level and regional level in protecting expressions of folklore.

Chapter four discusses protection of expressions of folklore in EAC. It contains information on legal instruments and institutions responsible for protection of expressions of folklore in the EAC. It further contains information about

harmonisation of municipal laws on protection of expressions of folklore and its justifications. It further addresses the question to what extent do the municipal laws harmonise the protection of expressions of folklore in the EAC. It also reveals the mechanism employed by the EAC to harmonise municipal laws in protecting expressions of folklore. Lastly, it reveals the challenges encountered by the EAC in the process of harmonising Municipal laws for protecting TCEs.

Chapter five explains protection of expressions of folklore in Rwanda. The chapter reveals how expressions of folklore are protected in Rwanda. It contains salient features existing in the municipal laws of Rwanda in promoting and protecting expressions of folklore in Rwanda and in the East African Community at large. Thus, the national legislation of Rwanda was analysed along with the international and regional instruments to ascertain or identify the standards or the mechanisms employed in Rwanda to promote and protect expressions of folklore in Rwanda and the EAC.

Chapter six examines protection of expressions of folklore in Tanzania. The chapter reveals how expressions of folklore are protected in Tanzania. It contains salient features existing in the municipal laws of Tanzania in promoting and protecting expressions of folklore in Tanzania and in the East African Community at large. Thus, the national legislation of Tanzania was analysed along with the international and regional instruments to ascertain or identify the standards or the mechanisms employed in Tanzania to promote and protect expressions of folklore in Tanzania and the EAC.

Chapter seven presents comparative discussion and conclusion. It contains comparative analysis information and key findings to the research question as to what extent the East African Community has achieved the objective of harmonising municipal laws for protection of expressions of folklore. It reveals the challenges encountered by the EAC in a bid to harmonise municipal laws for effective and adequate protection of expressions of folklore in the EAC. It further demonstrates the disparities existing between the national laws of Rwanda and Tanzania on the protection of expressions of folklore. It discusses and makes illustrations on how the European Community, Pacific Community and Caribbean Community have harmonised their laws for protecting expressions of folklore. It further contains recommendations based on the key findings and the best mechanisms or standards of harmonising municipal laws for effective and adequate protection of expressions of folklore in East African Community Member States.

1.12 Conclusion

The chapter has revealed that misappropriation of expression of folklore in the East African Community is a challenge. This is caused, inter alia, by technological advancement and the disparities existing in the municipal laws on the protection of expressions of folklore within East Africa Region. The chapter has demonstrated that East African members agreed to harmonise their municipal laws with the view to eliminate such disparities and hence curb the aforesaid challenge. Thus, the researcher set out research questions, methodology and systematically examined the research problem.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK ON PROTECTION OF EXPRESSIONS OF FOLKLORE

2.1 Introduction

This chapter examines concepts and theories related to protection of expressions of folklore. Section 2.2 of this chapter, primarily, addresses two key concepts, namely: expressions of folklore and harmonisation of law for protection of expressions of folklore. Other concepts considered or covered here are control and ownership of expressions of folklore. Similarly, section 2.3 discusses various theories on protection of expression of folklore.

The theories are not limited to legal transplantation and one size fits all. This section also shows the strengths and weaknesses of these theories. In that respect, clarification of the concepts and theories assisted the researcher to explain how the two selected countries Rwanda and Tanzania have been protecting the expressions of folklore as revealed under chapters five and six of this thesis. Section 2.4 deals with the choice of theories. Finally, section 2.5 gives the summary of this chapter.

2.2 Expressions of Folklore and Related Concepts

This section discusses key concepts related to expressions of folklore. These concepts include the expressions of folklore, protection of expressions of folklore and harmonisation.

2.2.1 Expressions of Folklore

The expression of folklore is a key concept in this study. In this respect, it is internationally accepted that expressions of folklore or traditional cultural

expressions (TCE) covers all tangible or intangible forms in which traditional knowledge and culture are expressed, appear or are manifested. This is clearly illustrated by WIPO which acknowledges that expressions of folklore are manifested in various forms of expressions.⁸⁷

The first form of expressions are verbal expressions such as stories, epic poems, legends, poetry, enigmas and other narratives; words, signs, names and symbols. The second forms of expressions are musical expressions such as songs and instrumental music. The third forms of expressions are corporal expressions such as dances, plays, ceremonies, rituals and other interpretations or performances. Another form of expressions of folklore is tangible expressions such as works of art and, in particular, drawings, paintings (including body paintings), wood carvings, sculptures, pottery, terra cotta, mosaics, cabinet work, iron works, jewellery, basketry, embroidery, knitting, textiles, glassware, tapestries, clothing, handicrafts, musical instruments and architectural works.⁸⁸

Similarly, in East Africa Region, particularly, in Tanzania expressions of folklore in one hand comprises of intangible expressions that include verbal expressions such as stories, epics, legends, poetry, riddles and other narratives including words, signs, names and symbols. It also includes musical expressions such as folk songs and instrumental folk music. Moreover, intangible expressions also cover expressions incorporating movement or action, such as dances, plays, ceremonies, rituals and

⁸⁷ WIPO., Protection of Traditional Cultural Expressions/Folkloric Expressions, Reviewed Objectives and Principles, Ninth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, April 24 to 28, 2006, WIPO/GRTKF/IC/9/4, available at www.wipo.int, (accessed on 15th September, 2020).

⁸⁸Ibid. See also WIPO., Intellectual Property Handbook, WIPO, Geneva, pp.57-59.

other performances. On the other hand, it comprises tangible expressions such as productions of folk art, drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, metalwork, woodwork, jewellery baskets, needlework, beadwork, textiles, glassware, carpets, costumes; handicrafts, musical instruments and architectural forms which are the products of creative intellectual activity, including individual and communal creativity.⁸⁹

From the legal point of view, article 2.11⁹⁰ stipulates that, expressions of folklore mean production of characteristic elements of the traditional cultural heritage, constituted by the whole store of literary and artistic works created on the national territory by unknown or unidentified authors presumed to be nationals or belong to the country's ethnic communities, and which are handed down from the traditional artistic or literary aspirations of a community.

Equally, article 21⁹¹ provides that expressions of folklore are literary and artistic works created within the national territory by unknown or unidentified authors presumed to be nationals of the country or of its ethnic communities, which are handed down from generation to generation and thereby constituting one of the fundamental elements of the traditional cultural heritage of the nation. Most important, article 10⁹² describes the expression of folklore to mean all literary, artistic, religious, scientific, technological and other traditions and productions

⁸⁹See also the Protection of Traditional Knowledge and Cultural Expressions Act No. 2016, s2, available at <http://kenyalaw.org>, (accessed on 29th October, 2020). This is also reflected in Wekesa, M., *Traditional Knowledge-the need for Sui generis System of IPRS Protection* in Wekesa, M and Sihanya, B., Intellectual Property Rights in Kenya, Konrad Adenauer Stiftung, Nairobi, Kenya, 2009, p.268.

⁹⁰On Copyright and Neighbouring Rights and Enacting Other Provisions, Law No.15 of August 8, 1994.

⁹¹ On Copyright No.12 of April 29, 1992.

⁹² On the Protection of Copyright of March 15, 1984.

created by the national communities, passed on from generation to generation and therefore constituting the basic elements of the national cultural heritage.⁹³

In addition, article 4⁹⁴ restates the expressions of folklore to entail all literary, artistic and scientific works created on the national territory by authors presumed to be nationals of Burundi, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage. Further to that, article 3 of Rwanda Law⁹⁵ stipulates that expressions of folklore to mean works protected in the same way as original works. The law provides further that, expressions of folklore mean all the literary, artistic, religious, scientific, technological and other traditions and productions created from generation to generation by unidentified, individual Rwandese and thus constitute the fundamental elements of the Rwandese heritage.

Worth noting is that expressions of folklore have unique characteristics provided under the UNESCO–WIPO Model Provisions.⁹⁶ According to the Model, expressions of folklore are productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community. The section lists various expressions of folklore to include verbal expressions, musical expressions, such as folk songs and instrumental music; expressions by actions, such as folk

⁹³ Such unique characteristics of expressions of folklore are also embodied by WIPO Secretariat., in the Report on Traditional Knowledge-Operational Terms and Definitions, presented at Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session, Geneva, 13th to 21st June, 2002, WIPO/GRTKF/IC/3/9.

⁹⁴ No.1/9 Regulating the Rights of Authors and Intellectual Property in Burundi, May 4, 1978.

⁹⁵ Governing Copyright of November 15,1983. In addition, expressions of folklore encompass Rwandan traditional folk music.

⁹⁶For National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions of 1982, s 2. Equally, expressions of folklore need to be used within traditional context. This is reflected in WIPO., Response of Antigua and Barruda to Questionnaire on National Experiences with the legal protection of expressions of folklore.

dances, plays and artistic forms or rituals; whether or not reduced to a material form; and tangible expressions, such as: productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; musical instruments and architectural forms.⁹⁷

Certainly, and from the above authoritative provisions, expressions of folklore involve music, dance, song, handicrafts, designs, stories and artwork; elements of language, names, geographical indications and symbols; and, movable cultural properties and other items resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, language in general and other similar elements of heritage in the broad sense.⁹⁸

Ultimately, expressions of folklore entail all literary and artistic productions created on the national territory and passed from generation to generation and constituting one of the basic elements of the national traditional cultural heritage. Therefore, national traditional cultural heritages require protection. In this context, control and ownership are concepts related to protection of expressions of folklore. It is viewed that indigenous people, local communities and their descendants are creators, possessors, guardians, and holders of traditional cultural expressions or expressions of folklore.⁹⁹ They have been entrusted with the custody, care and the safeguarding,

⁹⁷ See also Zografos, D., *Origin Related Intellectual Property Rights as Best Policy Option for the Protection of Traditional Cultural Expressions*, PhD Thesis, Queen Mary University of London, United Kingdom, 2008, pp.23-27.

⁹⁸ WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, third sessions June 13 to 21 2002, WIPO/GRKF/IC/3/9.

⁹⁹ *Bulun Bulun v R and Textiles Pty Ltd (1998)86 FCR 244*, available at <http://www.austlii.edu.au>, (accessed on 28th September, 2020). See also Kariuki, F., *Notion of Ownership in IP: Protection of Traditional Ecological Knowledge vis-à-vis Protection of TK and Cultural Expressions Act, 2016 of Kenya*,

protection and preservation of the traditional cultural expressions, in accordance with the laws, customary practices of indigenous peoples and according to current international norms on intellectual property.

According to customary laws and traditional practices, these people in the collective and traditional context, maintain, preserve, develop and use and control traditional cultural expressions as authentic and genuine elements of their cultural and social identity and their cultural heritage.¹⁰⁰ It is also viewed, that individuals, States and families are not owner of traditional cultural expressions (TCEs) rather TCEs are owned by indigenous people or local communities.

Indigenous peoples, creators and holders had for centuries been deprived by the colonisers of their tradition's knowledge and traditional cultural expressions (TCEs) and had their natural resources stolen from them. Despite this fact, there have been international community endeavours to design mechanisms for sanctions in the event of violation of the rights of indigenous peoples.¹⁰¹ These views are justified under article 31 of UNDRIP¹⁰² where it is enshrined that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. These include human and genetic resources,

Journal of Intellectual Property Rights, Vol. 24, 2019, pp.89-102.

¹⁰⁰ Molly, T., and Jane, A., Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, WIPO, Geneva, 2010, available at www.wipo.int, (accessed on 26th April, 2019). In addition, this also is disclosed in WIPO's Report on Customary law, traditional knowledge and Intellectual Property: An Outline of Issues, WIPO, Swaziland, 2013, pp.4-10.

¹⁰¹ WIPO, Comments on the Draft Articles on Traditional Cultural Expressions, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, Twenty Second Sessions, July 9 to 13, 2012, available at www.wipo.int, (accessed on 27th July, 2020).

¹⁰² United Nations Declaration on the Rights of Indigenous Peoples of 2007, available at www.un.org, (accessed on 26th April 2019).

seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. In conjunction with indigenous peoples, States are responsible to take effective measures to recognise and protect the exercise of these rights.¹⁰³

Indeed, as per the WIPO Report on intellectual property needs and expectations of traditional knowledge holders,¹⁰⁴ some social scientists hold the view that expressions of folklore are the creation of a group of people who belong to the same contiguity of dwelling place and culture regardless of whether the location of residence is city, town or village. These scholars are of the view that expressions of folklore are the creative product of a community sharing similar habitat and culture. Their customs and beliefs, the language spoken and the traditional patterns of livelihood share certain common characteristics. Their folklore is reflected in their creative ideas and is the common property of the community.¹⁰⁵

Therefore, expressions of folklore refer to the product of human creativity, creation of people who live in a particular geographical area, share the same language, culture, mechanism of livelihood and living conditions. The life styles and traditions of the folk are characterised by a common identity. Expressions of folklore are the

¹⁰³ Ibid. See also Malezer, L., Indigenous Peoples' Perspectives on the right to maintain, control, protect and develop their intellectual property over traditional knowledge, a paper presented during IGC 24th Session, 22nd April, 2013, p.1 revealing States are required to take effective measures to recognize and protect indigenous right.

¹⁰⁴ WIPO, Report on Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), available at <http://www.int>, (accessed on 26th September, 2020).

¹⁰⁵ Ibid. See also WIPO., Customary Law and Practices of Indigenous Communities of Bangladesh: The Case of Garo Community, Geneva, 30th November to 8th December, 2006, WIPO/GRTKF/IC/10/INF/5(e).

product of the creative ideas of the people who express such creativity through verbal, artistic or material forms, and this in turn is transmitted orally or in written form or through some other medium from one generation to another, belonging to a literate or non-literate society, tribal or non-tribal, rural or urban people.¹⁰⁶

2.2.2 Protection of Expressions of Folklore

Protection is another concept related to expressions of folklore. According to article 4 (7),¹⁰⁷ protection of expressions of folklore means the adoption of measures aimed at preservation, safeguarding and enhancement of the diversity of cultural expressions. Indeed, preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalisation and promotion of tangible or intangible cultural heritage in order to ensure its maintenance and viability. Protection may thus include safeguarding against loss through archiving, documenting and recording. It may mean acknowledging and giving effect to the broader range of collective and individual rights that are linked to traditional cultural expressions (TCEs) and their cultural and legal environment. Also, it may mean building capacity to support traditional creativity and the communities and social structures that sustain and express them.¹⁰⁸

¹⁰⁶ Valsala, K., National Experience with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, Geneva, 1999, available at <http://www.worldcat.org>, (accessed on 10th December, 2022).

¹⁰⁷ Of the UNESCO Conventions on the Protection and Promotion of the Diversity of Cultural Expressions adopted at the General Conference of the United Nations Educational, Scientific and Cultural Organization held in Paris from 3 to 21 October, 2005.

¹⁰⁸ For instance, Torkornoo, G., *Creating capital from Culture-Re-thinking the Provisions of Expressions of Folklore in Ghana's Copyright Law*, Annual Survey of International and Comparative Law, 2012, Vol.18, Issue No.1, pp.1-43. Also, Kremers, N., *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U. S. Intellectual Property and Policy Really Aimed at Meaningful Protection for Native American Culture?* Fordham Intellectual Property, Media and Entertainment Law Journal, Vol.15, 2004 is relevant here.

In relation to the safeguarding and preservation of intangible cultural heritage, much valuable work is being carried out under the United Nations Educational, Scientific and Cultural Organization (UNESCO), Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 and the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005.¹⁰⁹

In fact, the last quarter of the twentieth century witnessed an unprecedented pace of activities in the area of legal protection of expressions of folklore. Developing countries considered expressions of folklore as an important component of their cultural heritage and perceived the threats posed by its improper exploitation as a matter of concern. Realising the magnitude of the problem, efforts were made by the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization to find out a long-lasting solution through a mechanism for protection and preservation of expressions of folklore. This resulted in the formulation of Model Provisions for national laws relating to legal protection of folklore. Some national governments enacted legislation based partially on these Model Provisions adopted by UNESCO and WIPO, namely the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982.¹¹⁰

In addition, technological developments have always had their impact on the intellectual property regime. Newer forms of exploitation facilitated by modern technologies, especially in the fields of information technology and biotechnology,

¹⁰⁹ Ibid.

¹¹⁰ Ibid. Similarly, see James, S., Keynote address on the Rights of Indigenous Peoples, 26th Sessions for IGC held on 3rd February, 2014.

posed new challenges for the protection of expressions of folklore. Realising the sentiments of the member countries, WIPO launched certain new initiatives as reflected in its Program and Budget for the biennium (1998- 1999) for exploration of the issues relating to intellectual property rights of holders of indigenous knowledge.¹¹¹

As part of these initiatives, WIPO conducted a study to evaluate the national experiences of some selected countries in respect of expressions of folklore, to come to terms with the problem, its solutions and the future course of action at the international level. The three countries selected for the study were India, Indonesia and the Philippines. The objectives of the study were to examine how effective the protection of the expressions of folklore is being achieved in these countries so as to derive directions for future work in this field and also to assess the relevance of the model provisions already drawn up for framing legislation, in these countries.¹¹²

Apart from such initiatives, other scholars view that traditional cultural expressions (TCEs) including handicrafts, are valuable cultural, social and historical assets of the communities who maintain, practise and develop them. They are also economic assets that can be used, traded or licensed for income generation and economic development. Unfortunately, however, traditional techniques and the design, reputation and style associated with handicrafts are vulnerable to imitation and misappropriation. All too often cheap imitations undermine sales of traditional handicrafts as well as the quality reputation of the genuine products. In that respect,

¹¹¹ Ibid.

¹¹² Valsala G.K., National Experience with the Protection of Expressions of Folklore: India, Indonesia and Philippines, 2002, WIPO/GRTKF/STUDY/I, p.8.

other scholars suggest that expressions of folklore can adequately be protected under the existing intellectual property (IP) laws while others opine that expression of folklore needs its own kind system of protection.¹¹³

Thus, proposals and solutions are being identified for the legal protection of traditional cultural expressions to prevent their misuse, misappropriation, or other kind of illicit exploitation. These can also be useful for the protection of traditional handicrafts. Negotiations on a *sui generis* international legal instrument for the protection of TCEs are currently taking place in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). These negotiations aim at addressing the linkages between the intellectual property (IP) system and the concerns of TCE holders. A number of countries and regions have also developed their own *sui generis* systems for protecting traditional cultural expressions (TCEs).¹¹⁴

Notably, it is suggested that the protection of expressions of folklore is important for communities in all countries, particularly perhaps in developing and least developed countries. On one level, expressions of folklore play an important role in the economic and social organization of those countries, and placing value on such knowledge is a viable means of promoting a sense of national cohesion and identity. Indeed, protection of expressions of folklore enables the communities to exploit their creations and innovations commercially as a contribution to their economic

¹¹³ WIPO, Intellectual Property and Traditional Handcrafts, issue No.5, 2016, available at www.wipo.int, (accessed on 20th April, 2019).

¹¹⁴ Ibid. This is also reflected in International Trade Centre and World Intellectual Property., Marketing Crafts and Visual Arts: The Role of Intellectual Property: A Practical Guide, Geneva, Switzerland, p.94.

development and prevent the use and commercialisation of their traditional cultural expressions by others.

Other communities safeguard their cultural expressions for reasons that IP be not obtained by anyone over them. In that regard, some communities use positive protection to acquire IP over their traditional cultural expressions while others who are not interested in acquiring IP protection use defensive protection to prevent others to obtain IP over their expressions of folklore.¹¹⁵ Therefore, there are numerous objectives for protection of expressions of folklore. Such objectives include recognise and promoting its intrinsic value, promoting cultural integrity, to reward and protect traditional based creativity and innovation.

Likewise, WIPO¹¹⁶ has explained in detail the aims of protecting expressions of folklore. First, expressions of folklore are protected because they have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values. WIPO further acknowledges that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity.

Second, expressions of folklore are protected to maintain and promote cultural integrity, intellectual and spiritual values of the peoples and communities that

¹¹⁵WIPO, Background Paper No.1 on Consolidated analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, 2003, p.15.

¹¹⁶ WIPO, Report of Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on the Protection of Traditional Cultural Expressions of Folklore, Ninth Session, 2006, available at <http://www.wipo.int>, (accessed on 20th January, 2021).

preserve and maintain expressions of these cultures and folklore.¹¹⁷ Moreover, expressions of folklore are protected to respect indigenous people's rights under national and international law and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities. Further to that, expressions of folklore are protected to provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives there from, control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use.¹¹⁸

In addition, expressions of folklore are protected to empower indigenous peoples and traditional and other cultural communities to exercise rights and authority over their own traditional cultural expressions/expressions of folklore and respect the continuing customary use, development, exchange and transmission of traditional cultural expressions within and between communities.¹¹⁹ Equally important, protection of expressions of folklore aims at the preservation and safeguarding of the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of indigenous peoples and traditional and other cultural communities, and for the benefit of humanity in general.¹²⁰

¹¹⁷ Ibid. Equally, see Oluwatobiloba, O.M., WIPO and the Reinforcement of the Nagoya Protocol: Towards Effective Implementation of an Access and Benefit sharing Regime for the Protection of Traditional Knowledge associated with Genetic Resources, PhD Thesis, Queen's University, Kingston, Ontario, Canada, 2016, p.116.

¹¹⁸ Ibid.

¹¹⁹ For instance, violation of the aboriginal customs and associated rights in Australia was addressed in the case of *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 14, available at <http://www.austlii.edu.au>, (accessed on 20th October, 2020).

¹²⁰ Ibid. In addition, see A Report of Intergovernmental Committee on Intellectual Property and Genetic

Apart from that, expressions of folklore are protected to reward and promote tradition-based creativity and innovation especially by indigenous peoples and traditional and other cultural communities. Protection of expressions of folklore further promote intellectual and artistic freedom, research practices and cultural exchange with terms which are equitable to indigenous peoples and traditional and other cultural communities; contribute to the promotion and protection of the diversity of cultural expressions.

Indeed, cultural expressions are protected to promote the use of traditional cultural expressions for community-based development, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations.¹²¹ Finally, expressions of folklore are protected to preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorised parties over traditional cultural expression and derivatives rights. As a result, protection of expressions of folklore intends to eliminate the problem of misappropriation and other prejudicial matters against expressions of folklore.¹²²

2.2.3 Harmonisation of Municipal Laws

Harmonisation of municipal laws is another key concept in this study. It is viewed that harmonisation refers to the process of coordinating different Partner States legal

Resources, Traditional Knowledge and Folklore, Twenty Fourth Session, April 22 to 26, 2013 that requires more attention on protection of intellectual property rights of Indigenous Peoples Community. This is also discussed in Beer, J., and Oguamanam, C., *Innovation and Intellectual Property: Collaborative Dynamics in Africa*, UCT Press, South Africa, 2014.

¹²¹ Ibid.

¹²² See WIPO., *The Protection of Traditional Knowledge: Revised Objectives and Principles*, IGC Sixteenth Session, Geneva, 3rd to 7th May, 2010, WIPO/GRTKF/IC/16/5, p.5.

provisions by eliminating major differences and uncertainties that exist therein and creating consistency and minimum standards of copyright protection to facilitate compliance and enforcement of copyright across borders and facilitate operation of common or single market.¹²³ Such inconsistency or uncertainties can be eliminated by using harmonising instruments like treaties and protocols.

Indeed, in the contemporary world, harmonisation is an important feature of the modern legal system. For instance, harmonisation of the laws of the European member States is a core instrument of the European Union. Many international treaty obligations entail duties to adopt and conform to legislation and ensure its application. International and regional human rights treaties provide important examples of this. There is a considerable scholarly literature on different harmonisation issues, but not bringing together the outcome of this scholarship in a comparative analysis or in developing more general theory on the harmonisation process or different aspects of it.¹²⁴

There is a need for bringing together scholars of a range of legal, social science and humanities disciplines, including from within the law, general legal theory or jurisprudence, constitutional law, comparative law, international law, human rights law and EU law, and the different national and international legal areas most affected by harmonisation. Contributions are made in integration studies, international relations, European studies, and political theory. In this way models on

¹²³ Telephory, D.B.M., *Harmonisation of Copyright within the East African Community: An Analysis of Kenyan and Tanzania Copyright Legislation*, LLM Mini-thesis, University of the Western Cape, South Africa, 2013, p.vi

¹²⁴ Andenas, M., *Theory and Practice of Harmonisation*, 2008, A paper available at from <http://ials.sas.ac.uk>, (accessed on 20th September, 2020).

harmonisation process are needed to understand the process.¹²⁵

A number of instruments are often used in harmonising municipal laws. This includes international treaties, regional treaties and convention. On other hand, directives and regulations are used and a good example is in the EU. Some main types of directives are minimum standards directives, maximum standard directives, framework directives, and directives in the process of open method of coordination. The regulation, which has direct effect without any legislative transposition, often requires different implementation measures to have its effect in national law.¹²⁶

Importantly, in the EU, there is an emerging scholarship comparing the transposition of directives in different national laws. Currently, there are eight directives, including the Consumer Sales Directive and the Unfair Terms Directive, leaving aside other directives in the consumer field such as the Consumer Credit Directive, the Unfair Commercial Practices Directive and the Product Liability Directive. Maximum harmonisation and the use of mandatory rules in the directives may have had a profound effect on the privacy of the Member States, which if it has had such an effect, remains under explored.¹²⁷

Essentially, the international conventions in the long run established tradition for harmonisation of commercial law provides another field of emerging scholarship, for instance, the United Nations Convention on Contracts for the International Sale of

¹²⁵Ibid. Also, see Mazziotti, G., EU Digital Copyright Law and the End User, PhD Thesis, European University Institute, Florence, 2007, p.65 that reveals the legal basis and objectives of copyright harmonization in the EU.

¹²⁶ Ibid.

¹²⁷ Ibid. In contrast, see the benefits of minimum harmonization emphasized in Ezekiel, B. R., *Harmonisation of Social Security Laws in the East African Community: a myth or reality?* African Journal Law and Practice, 2021.

Goods, 1980), the UNCITRAL Model Law on International Commercial Arbitration 1985, UNIDROIT's Principles of International Commercial Contracts, the EBRD's Secured Transactions Project, and the ICC's Uniform Customs and Practice for Documentary Credits.¹²⁸

Moreover, in comparative law there is a current discourse about legal transplants. Notably, there is also a challenge to the idea of convergence between national legal systems and traditions. One issue here is to link the theoretical models that have emerged here with the scholarship on harmonisation in different fields.¹²⁹ Fundamentally, harmonisation of copyright and related rights plays an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

Thus, harmonisation helps to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property and expressions of folklore.¹³⁰ Indeed, a harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, fosters substantial investment in creativity and innovation. These include network infrastructure, and in turn, leads to growth and increased competitiveness of European industry, both in the area of content provision and information technology

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ See also Nansubuga, C., *The Need for Developing a Successful Competition Regime in Uganda: An Analysis of the Factors hindering the Operationalisation and Implementation of the East African Community Competition Act*, LLM Thesis, University of Cape Town, South Africa, 2015, p.57 demonstrating that harmonisation helps to ensure a level of predictability and certainty as to what an economic actor can expect when subject to the jurisdiction of another member State.

and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.¹³¹

Further to that, technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights needs to be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.¹³²

Without harmonisation at community level (EU), legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, thus leading to a re-fragmentation of the internal market and legislative inconsistency.¹³³ The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased trans-border exploitation of intellectual property. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.¹³⁴

¹³¹ WIPO., Report of the Economics of the Intellectual Property: Suggestions for further Research in Developing Countries and Countries with Economies in Transition, 2009, pp.13-142, available at www.wipo.int, (accessed on 19th December, 2020).

¹³² Ibid.

¹³³ Ibid. See also WIPO., The Report on Economic Contribution of Copyright-Based Industries in Hungary: Creative Industries, Series No.1, 2005, p.9 discusses European Legal Harmonisation in Hungarian Copyright Law.

¹³⁴ Ibid.

On the other hand, it is argued that the community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as it is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.¹³⁵

More so, the concept of harmonisation is often divided into three different forms; complete, optional and minimum harmonisation.¹³⁶ It is easy to understand why complete harmonisation is also called exhaustive harmonisation. The point of this method is to enact a rule for all Member States of a particular Community, precluding national legislation in the same area. Less strict is the method of optional harmonisation, where the provision of directive needs is only to be followed when trade of goods is taking place between Member States of the Community.¹³⁷ If export or import is not intended, it is optional to follow the provision in question. Finally, the method of minimum harmonisation is the same as the establishment of minimum standards that should be seen as a floor rather than a roof. The Member States are at any time free to impose higher domestic standards, but not lower.¹³⁸

¹³⁵ Directive 2001/29/EC of the European Parliament and the Council, Art.2 to 7. The articles provide for the harmonization of certain aspects of copyright and related rights in the information society.

¹³⁶ Lindahl, F., (note 64), p.20.

¹³⁷ Ibid.

¹³⁸ Ibid.

This is also viewed by Ezekiel subscribing to the views of Pennings, an author who argues that harmonisation ranges from standard harmonisation to minimum harmonisation. Standard harmonisation is that type of harmonisation that requires that all member States in a regional community should adopt the same standards. This type of harmonisation does not allow Member States to deviate from the regionally set standards. What is required is that governments of Partner States should re-orient their domestic legislation and actions towards confirming to the community law and systems or institutions through harmonisation.¹³⁹

In respect of minimum harmonisation, Ezekiel argues that this is the degree of harmonisation envisaged by a regional integration body or Community that advocates for setting a threshold that member states must meet in order to be regarded as compliant with the requirements of regional cooperation that follows harmonisation as part of its path to reaching integration objectives.¹⁴⁰ Under minimum harmonisation model, Member States are at liberty to exceed the prescribed minimum thresholds or standards as set in harmonising instruments. Under harmonisation, the international or regional treaties or conventions impose a duty upon Member States to adopt, confirm their legislation to international or regional instruments and ensure that the domestic legal order does not contradict international or regional legal system and legal rules.¹⁴¹

Furthermore, it is viewed that harmonisation can solve problems caused by discrepancies in national law, but do nothing about problems due to the territoriality

¹³⁹See Ezekiel, R. B., (note 59) and Milej, T. P., *Legal Harmonisation in Regional Economic Communities-The Case of the European Union*, in Majamba, I. H., and Dovelung, J., *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities*, Law Africa Publishing (K) Ltd, Nairobi, Kenya, 2018, p.139.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

of intellectual property rights. For example, a patent obtained in Sweden that can prevent goods lawfully produced in Finland from being traded is a problem not to be solved by harmonisation, neither is the problem of similar trademarks belonging to unrelated right holders. In these cases, the solution would instead be the concept of unitary intellectual property rights.¹⁴²

Ultimately and regarding harmonisation, it is propounded that the Pacific Model Law is a hybrid of the national and regional approaches. It sets out a high-level framework for national legislation and leaves matters of detail or implementation to be determined by policy-makers in accordance with their national laws and systems. It has also been designed with the circumstances of PICTs in mind, with the expectation that it will form the basis of a harmonised legal framework for the regional protection of traditional cultural expressions.¹⁴³ It is elucidated that harmonisation of law can be achieved through issuance of directives. Magogo views harmonisation directives as a legislative measure adoptable by Partner States for resolving the differences that cause uncertainties in copyright rules by consolidating similarities to facilitate the implementation of the established common market.¹⁴⁴ He cites example that the EU Member States are obliged to domesticate directives on harmonisation of copyright and the national courts must incorporate the judgments of the European Court of Justice into their copyright regimes to ensure that copyright and related rights contribute to the achievements of the objectives of the single internal market.¹⁴⁵

¹⁴² Lindahl, F., (note 136), pp.6-30.

¹⁴³ The Secretariate of the Pacific Community Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law of 2002, Pacific Community, 2006, p.18.

¹⁴⁴ Telephory, D.B.M., (note 123), p.vi.

¹⁴⁵ Ibid, p.54.

In particular, harmonisation directives in the field of copyright law particularly in protection of expressions of folklore have the effect of approximating national laws. For instance, in relation to copyright law, the EU has adopted a number of directives. These directives attempt to standardise the core criteria for protection of expressions of folklore at global level where there are eight (8) directives harmonising parts of copyright law.¹⁴⁶ In summing up, harmonisation is a tool that assists in eliminating disparities in the municipal laws and hence promotes single market.

2.3 Theories on Protection of Expressions of Folklore

Protection of expressions of folklore is justified as necessity for encouraging innovation, creativity and investment in research and development activities. On the other hand, protecting traditional cultural expressions may have social and economic costs, in particular when TCEs owners make inefficient use of the protected goods while preventing others from using them more efficiently.¹⁴⁷ In that regard, a number of theories have been developed for protecting expressions of folklore. Such theories are also related to harmonisation of municipal laws for protection of expressions of folklore. The theories related to protection of expressions of folklore and harmonisation of law are expounded in the next subsections.

2.3.1 The Theory of Minimum Standards Framework

The first theory is minimum standards framework. This theory seeks for eliminating inconsistencies, incompatibilities and complexities in the Community where there is legal pluralism like in the East African Community. It is argued that in protecting

¹⁴⁶Ansgar, O., Common Principles of European International Intellectual Property Law, Mohr Siebeck, UK, 2012, pp.1-5.

¹⁴⁷Nwauche, E., The Sui Generis and International Property Protection of Expressions of Folklore in Africa, PhD Thesis, the North-West University, 2016, pp.27,32,270-295.

expressions of folklore, Member States of a particular community like the East African Community may agree to set a threshold for protecting expression of folklore. That is, each Member State must meet such standards in order to be adjudged as compliant with requirement of regional cooperation.

Under the theory of minimum standards framework, States are at liberty to exceed the prescribed thresholds or standards as set in their agreement.¹⁴⁸ It thus, pertinent to point out that Minimum Standards Framework is one of the theories for harmonising municipal laws. However, since this theory permits Member States to set mechanisms above the agreed ones, then, through this theory, it is difficult to eliminate inconsistencies in the national laws of the Member States.¹⁴⁹ In that respect, the study assessed whether the theory of minimum standards framework on harmonisation for protection of expressions of folklore is clearly articulated under the East African Community law and determined as to whether it has been employed to harmonise municipal laws for protection of expressions of folklore in the East African Community.

From legal point of view, article 17¹⁵⁰ recognises application of the theory of minimum standards framework. It actually seeks to promote exchange of information, including indigenous knowledge and traditional cultural expressions, from all publicly available sources relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries. This provision has the potential to promote knowledge sharing for research and

¹⁴⁸ Ezekiel, R.B., (note 139), p.63.

¹⁴⁹ Ibid, p.63.

¹⁵⁰ Of Convention on Biological Diversity (CBD) of 1992.

development. The language of the Convention of Biological Diversity articles in relation to traditional knowledge has the potential to facilitate the core elements of traditional knowledge commons: non-appropriation, recognition of existing cultural norms and regulations that govern traditional knowledge, freedom of access and prior informed consent. The Convention of Biological Diversity also leaves room for flexibility, as it provides minimum standards, but not mandatory harmonisation.¹⁵¹

Apart from that, the coming into effect of the TRIPS Agreement commits all member nations of the WTO to a minimum standard of intellectual property protection, with little or no regard to individual members' socio-economic priorities and needs.¹⁵² Thus, it is well known that the TRIPS agreement, one of the most important agreements in the WTO system, established a minimum standard for IP protection.¹⁵³ From the above discussion, it is therefore important to point out that the minimum standards framework is essential in harmonisation of municipal laws. It usually promotes integration process with the view to have a single market in any regional Community like the East African Community.

2.3.2 Theory of One Size Fits All

The second theory is one size fits all. In the outset, this theory is geared at unification of municipal laws. It is argued that at global level the harmonisation

¹⁵¹ Ibid. See also Ingrassia, A., and Manzella, D., *The Legal Framework for Management of Animal genetic Resources*, Food and Agriculture Organisation of the United Nations, Rome, 2005, pp.11-12.

¹⁵² Chidi, O., *Beyond theories: Intellectual Property Dynamics in the Global Knowledge Economy*, Wake Forest Intellectual Property Law Journal, 2009, Vol.9, pp.34-35. Similarly, Moly, T., and Jane, A., *Intellectual Property and the Safeguarding of Traditional Culture: Legal Issues and Practical Options for Museums, Libraries and Archives*, WIPO, Geneva, 2010, p.23 indicates that many counties are members of the World Trade Organisation and are therefore bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and that the TRIPS Agreement sets minimum standards of protection for most forms of IP.

¹⁵³ Wenqi, L., *Evolution of Intellectual Property Protection in Post-Mao China: Law and Enforcement*, PhD Thesis, the Erasmus University Rotterdam, China, 2014, pp. 41-43. See also minimum approach discussed in East African Community Regional Intellectual Property Policy on the Utilisation of Public Health-related WTO-TRIPS flexibilities and the approximation of national intellectual property legislation, 2013.

wave required a new approach for protection of expressions folklore. National legislation introduced the theory of one size fits all. It is important to note that the theory of one size fits all was legally fastened after the drop out of restrictions regarding free capital movement in European Community and created opportunities for regulatory arbitrage in countries with better regulatory legislation.

Indeed, the privatisation wave in the 1990s led to change of the laws with the view to create a mass property and the necessity of ownership protection in European Community.¹⁵⁴ However, the theory of one size fits all is viewed to have limited application in modern practices. The obligatory nature of the theory is consistent with requirements of a specific country and is unsuited for global implementation due to its weaknesses.¹⁵⁵

Nevertheless, globalisation has ensured that expressions of folklore and intellectual property (IP) increasingly assume a central role in global and regional trade.¹⁵⁶ A high degree of international trade transactions encompasses protection of expressions of folklore and knowledge-based intangible IP products such as patents, trademarks, copyright, designs and related products. As the barriers to globalisation disappear, international IP transactions transcending jurisdictional borders continue to grow and evolve as innovations in modern technology develop. It has been advanced that the growth in IP transactions has rendered intellectual property rights a key element at

¹⁵⁴ Nedelchev, M., *Good Practice in Corporate Governance: One-Size-Fits-All vs Comply-or-Explain*, International Journal of Business Administration, 2013, Vol.4, No.6, pp 75-81.

¹⁵⁵ Ibid. See also Nedelchev, M., *Good Practices in Corporate Governance: One-Size-Fits-All vs. Comply-or-Explain*, MPRA, 8th November, 2013, Paper No.52225 available at <http://mpa.ub-muenchen.de/52225>, p.5 reveals the strengths and weaknesses of One-Size-Fits-All Approach in harmonization processes. Its most weakness is that the approach is inflexible.

¹⁵⁶ Wengi, L., (note 153).

all levels of trade diplomacy.¹⁵⁷

The IP system of a country is often evaluated solely in legal terms; whether it complies with international standards and whether the enforcement mechanisms in place are stringent or otherwise. The comparison of local copyright, patent, trademark and other laws to international standards would not produce a detailed picture of the IP regime in question. Recent literature on protection of expressions of folklore and the development of IP regulation globally has condemned the theory “one size fits all” to intellectual property (IP) regulation and intellectual property rights (IPR) enforcement. This is elucidated by the observations of the United Kingdom (UK) Commission on Intellectual Property that illustrate the current difficulties in reconciling international objectives with national infrastructures, needs and interests of developing countries and I quote:

“Protection of expressions of folklore and design of intellectual property systems may, if we are not careful, introduce distortions that are detrimental to the interests of developing countries. Developed countries should pay more attention to reconciling their commercial self-interest with the need to reduce poverty in developing countries, which is in everyone's interest. Higher IP standards should not be pressed on developing countries without a serious and objective assessment of their impact on development and poor people. We need to ensure that the global IP system evolves so that the needs of developing countries are incorporated and, most importantly, so that it contributes to the reduction of poverty in developing countries by stimulating innovation and technology transfer relevant to them, while also making available the products of technology at the most competitive prices possible.”¹⁵⁸

Thus, the domination of the theory ‘one size fits all’ to protection of expressions of folklore and IP regulation is seen to continue as a result of the narrow debate on its

¹⁵⁷ Ibid.

¹⁵⁸ UK Commission, Report of Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London, September, 2002.

protection, the relatively small number of participating groups and the focus on reforming national legal systems so as to be seen as compliant with international IP rules and standards. In order to foster innovation, encourage economic, and trade development, there is a need to examine IP systems from a broader perspective than mere comparisons. Therefore, in order to deduce a comprehensive understanding of an IP system in a given country, there is a need to contextualise the IP system in the light of factors such as the legal system, culture, ideology, and political economy.¹⁵⁹

In addition, it has increasingly been argued that the current international IP regulatory system gives rise to extensive globalised localism whereby developed countries through trade diplomacy attempt to embed their national standards of IPR protections through international IP treaties agreements. This in turn transforms what has been previously regarded as local laws into international norms without taking into consideration the ability of the legal infrastructures to accommodate such norms, and whether these norms will facilitate incremental innovation and industrial adaptation in other nations. In essence, the development of the international IP regulatory system in this “one size fits all” manner is not viewed to address the social, legal, political interests and capacity of developing countries and emerging economies, nor enable them to become established producers of IP products and services.¹⁶⁰

Further to that, the direct targets of the policies, protocols and practices vary, yet they all engage in specific issues that arise in the development, production and

¹⁵⁹ A paper on Modernizing International Trade Law to support innovation and sustainable development: Legal Reform in Light of Saudi Arabian Vision 2030-The Interplay between Trade, Intellectual Property Rights and Innovation by Dr. Hamdan D. Alghamdi and Dr. Sarah S.Zaghloud.

¹⁶⁰ Ibid.

circulation of traditional cultural expressions. For instance, many museums have developed ethical guidelines that set minimum standards of the professional practice within the institutions. Other ethnographic cultural institutions have developed specific ethical codes of conduct for researchers when working with indigenous peoples and traditional communities.¹⁶¹ Direct targeting researchers is important because they are generally the documentarians of the ethnographic materials that eventually libraries, museums and archives will manage and maintain custody. What is evident in these emergent practices is the intention to create new and better ways of responding to the needs of tradition-bearers. Certainly, there is no one-size-fits-all approach; there is a range of processes that are particular to each circumstance. For example, the assignment of rights created by the museum, library or archive to the community would potentially engender positive relationships and in turn clear usage rights around the material. In sharing information about these, it is hoped that they will provide a resource for developing new ideas and new possibilities and they may serve as a basis for further identifying IP-related good practices and guidelines.¹⁶²

Moreover, the purpose of including them is to profile innovative initiatives underway and to suggest areas for further complementary work. While WIPO and its Member States do not necessarily endorse these protocols and guidelines, at this stage, there is great interest in ascertaining their effectiveness and entering into productive conversations about what works, what does not, and why.¹⁶³ It is argued that the law on protection of expressions of folklore lacks an analogous mechanism

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Molly, T., and Anderson, J., *Op.Cit*, p.68.

for liberalising access to patented inventions that achieve this status, such as isolated, purified human embryonic stem cells and information technology standards.

While patent law is relatively short term of protection mitigates the harshness of exclusive rights on foundational technologies, this one-size-fits-all approach ignores the reality that certain inventions can become infrastructure well before expiration of the patent term, particularly in rapidly advancing industries such as biotechnology and information technology.¹⁶⁴

It is assumed that on the regional level, the EU follows a “one-size-fits-all” approach. On the country level, however, we expect the EU to adapt its strategies with regard to the specific conditions on the ground. In addition, the EU should also react to significant changes in the country context.¹⁶⁵ From the discussion, it therefore observed that, one size fits all theory is not appropriate for the study. This is because no one size fits all.

2.3.3 Theory of Legal Transplantation

Legal transplantation is the third theory. Item 1.7 of this study provides that the theory of legal transplantation is a subset of comparative legal research. It was relied upon to complement doctrinal legal research in this study. In that regard, it is pertinent to point out that globalisation has led the legal systems to influence each other throughout history and legal transplants have not been immune to that process

¹⁶⁴ Peter, L., The Evolution of Intellectual Infrastructure, SSRN Electronic Journal, 2008, available at <https://ssrn.com/abstract=1042261>.

¹⁶⁵ European Union, The European Union and the Promotion of Good Governance in its Near Abroad, One Size Fits All? SFB-Governance Working Paper Series No.18, December, 2008, p.6 available at www.sfb-governance.de/en/publikationen, (accessed on 9th September, 2017).

either. Nowadays we do not just see examples of legal transplants but come across cases of 'cross-fertilization' of case law. Therefore, this study reveals different theories of legal transplants in comparative law and also analyses some particular cases that have eventually worked efficiently both in the country of origin and in the country where those laws were adopted.¹⁶⁶ This is clearly illustrated under item 7.2 of this thesis.

Indeed, we can no longer say that legal transplants are impossible; they are a reality we cannot run away from. Amongst the many challenges faced by this phenomenon, the primary one is to overcome all the obstacles imposed by a legal globalisation that is threatening developing countries by focusing more on the liberalisation of markets, rather than on laws supporting social welfare. Despite this fact, there is still hope for a new concept of legal globalisation. That includes executing a serious study of the trends that not only developing countries are in need of, but also is a need of the developed countries, which is the adoption of laws towards social welfare, one of the biggest challenges that face modern legal comparatists today.¹⁶⁷

Eventually, there is an important distinction between those legal transplants that are based on a simple copy-paste act and others that are a result of the harmonization of legal ideas with existing waves and fashions. The former basically refer to a mere import of legal rules (either complete or partial) as an act that is blindly copied and pasted, whose aim is to achieve modernisation of the society through the adoption of trends designed elsewhere and valued as positive or good by the receptor society.

¹⁶⁶Gaitan, P.M., *Challenges of Legal Transplants in a Globalized Context: A case study on working examples*, LLM Dissertation, the University of Warwick, UK, 2014.

¹⁶⁷ Ibid.

The latter suggests a synchronisation- harmonization with prevailing waves and tendencies truly motivated by a transition process and the need to catch up with other societies and associations, justified by a high chance of improving and developing its legal system for the benefits of their nationals.¹⁶⁸

The difference between these two flows lies in the motivation roots of the legal transplant. In the first scenario, there is a blind copy-pasting act of the legal rule on one hand hoping that it would aptly suit a modern society just for the sake of fitting in and without any prior assessment. On the other hand, in the synchronisation- harmonization view that the motivation goes beyond a simple copy-paste act, that exceeds the interests of the origin country (the exporter) as there is an actual transition process that needs to be completed. The adaptation to the local legal culture then successively follows once the legal institutions start following the imported models.¹⁶⁹ Therefore, the second scenario that requires prior assessment and subsequent adjustment of contextualization of legal transplantation is appropriate to this study.

2.3.4 Theory of Legal Incrementation

Legal incrementation is the fourth theory in this study. In the outset, legal incrementation theory explains a set of judge-made legal regimes that create exclusionary entitlements in different kinds of intangibles.¹⁷⁰ Surprisingly, intellectual property scholarship has paid little attention to this kind of law-making

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Balganes, S., *The Pragmatic Incrementalism of Common Law Intellectual Property*, SSRN Electronic Journal, 2010, available at <http://ssrn.com/abstract=1572847>. It is also available at Penn Law: Legal Scholarship Repository https://scholarship.lawupenn.edu/faculty_scholarship/305.

mechanisms and techniques that these regimes employ to navigate through several of the intellectual property law's substantive and structural problems.¹⁷¹

Besides, common law intellectual property regimes employ a process of rule development that is called pragmatic incrementalism. It involves the use of pragmatic and minimalist techniques that emphasize: caution in the face of uncertainty; the use of value neutral legal standards; customary practices to tailor the regime to different contexts, and balancing the ex-ante and ex post effects of adjudication.¹⁷² In that regard, courts develop rules that are flexible, context-dependent, and capable of affirming multiple values without looking for a single overarching theory.¹⁷³ In the process, the regimes effectively avoid the problems of uniformity and over breadth.

On the other hand, the patent and copyright systems are today in a state of crisis, with scholars and policymakers recognising the need for a fundamental overhaul. Yet, few have turned to the common law method for solutions. It is argued that common law intellectual property may provide us with a way forward, by drawing attention to the simple strengths and its likely benefits for Intellectual Property law.¹⁷⁴

A point to note here is that, at international level, legal incrementalism theory was invoked to bring reform in bankruptcy field and was relied upon to develop UNCITRAL Model Law on Cross-Border Insolvency. In that respect, by looking at

¹⁷¹Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

what made this specific mechanism of bankruptcy reform successful in the face of so many past failures, and in the face of ongoing normative disagreement about international bankruptcy system design, the theory may be employed to reform the municipal laws for protection of expressions of folklore within the East African Community.¹⁷⁵

The study further reiterates that the theory of legal incrementalism enabled the drafters of UNCITRAL Model Law on Cross-Border Insolvency to earn concessions of regulatory sovereignty that might otherwise have been impossible. The study therefore tests procedural incrementalism against recent reform efforts that have built upon the growing momentum of the Model Law, such as UNCITRAL model law.¹⁷⁶ In short, by involving the theory of incrementalism in legal reform, the drafters of the UNCITRAL Model Law sought to capitalise upon the theorised willingness of States to be more likely to accept differences on matters of procedure than on matters of substantive law. This explains not only the specific areas where the Model Law pushes universalism, but also the broader characterization of the Model Law as a modest document that is concerned, overall, with procedural matters. It also explains that the Model Law advances universalism by deploying a robust jurisdiction selecting choice-of-law rule.¹⁷⁷

Finally, it is therefore hereby stressed that legal incrementation theory aims at maintaining legal certainty and the East African Court of Justice may invoke the theory to develop rules for protecting expressions of folklore within the East African

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ See also Pottow, J, A. E., *Procedural Incrementalism: A Model for International Bankruptcy*, University of Michigan Law School Scholarship Repository, UK, 2006, pp.935-1015, available <http://respository.law.umich.edu/articles/619>.

Community, in particular Rwanda and Tanzania.

2.4 Choice of Theory

The present thesis is about harmonisation of laws for protection of expressions of folklore. Out of the four theories explained above and based on the nature of the study the theory of legal transplantation and minimum standards framework were selected to guide the study for the reasons expounded below.

To start with legal transplantation theory, it was indicated in item 1.7 of this study that legal transplantation is a subset of the comparative legal study. It was invoked to compare the domestic laws of Rwanda and Tanzania that regulate the protection of expressions of folklore in such countries. That is why the theory of legal transplantation was selected to guide the study. It has already been revealed in this study that we can no longer say that legal transplants are impossible; they are a reality we cannot run away from.

Amongst the many challenges faced by this phenomenon, the primary one is to overcome all the obstacles imposed by a legal globalization that is threatening developing countries by focusing more on the liberalization of markets, rather than on laws supporting social welfare. Despite this fact, there is still hope for a new concept of legal globalization, one that includes executing a serious study of the trends that not only developing countries need, but also is a need of the developed countries, which is the adoption of laws towards social welfare, one of the biggest challenges that face modern legal comparatists today.¹⁷⁸

¹⁷⁸ Geitan, P.M., Challenges of Legal Transplants in a Globalized Context: A case study on working examples,

Eventually, there is an important distinction between those legal transplants that are based on a simple copy-paste act and others that are a result of the harmonization of legal ideas with existing waves and fashions. The former basically refer to a mere import of legal rules (either complete or partial) as an act that is blindly copied and pasted, whose aim is to achieve modernisation of the society through the adoption of trends designed elsewhere and valued as positive or good by the receptor society. The latter suggests a synchronisation- harmonization with prevailing waves and tendencies truly motivated by a transition process and the need to catch up with other societies and associations, justified by a high chance of improving and developing its legal system for the benefit of their nationals.¹⁷⁹

The difference between these two flows lies in the motivation roots of the legal transplant. In the first scenario, there is a blind copy-pasting act of the legal rule on one hand hoping that it would aptly suit a modern society just for the sake of fitting in and without any prior assessment. On the other hand, in the synchronisation-harmonization view, the motivation goes beyond a simple copy-paste act, that exceeds the interests of the origin country (the exporter) to actual transition process that needs to be completed. Adaptation to the local legal culture then successively follows once the legal institutions start following the imported models.¹⁸⁰

Based on the objectives of the study, the second aspect of legal transplantation is relevant here. Thus, the theory was chosen because it is a subset of the comparative legal research that was invoked in this study to complement doctrinal legal research.

LLM Dissertation, the University of Warwick, UK, 2014, pp.12-13.

¹⁷⁹ Ibid.

¹⁸⁰ Geitan, P.M., (note 186), pp.13-15.

It also important to remember that legal reforms by legal transplanted theory usually depend upon making prior assessment, contextualization of socio-economic factors and customization in a particular State or community.

On the other hand, the theory of minimum standard framework that is about setting thresholds complements legal transplant in this study. Thus, in this study the theory of minimum standards framework was relied upon to assess as to whether harmonisation of municipal laws for protection of expressions of folklore is clearly articulated under the East African Community law. Secondly, the study also assessed whether minimum standards framework has been or may be employed by the East African Community to develop regional comprehensive legal regimes for protection of traditional cultural expressions.¹⁸¹

Finally, and from the discussion above, it is pertinent to note that the theory of legal transplanted and the theory of minimum standards framework are essential in harmonisation process. This is because the theories seek to eliminate disparities in the protection of expressions of folklore in any community.

2.5 Conclusion

The chapter has explained various concepts related to harmonisation of municipal laws and protection of expressions of folklore. It guides a reader on the subsequent chapters. In essence, it indicates that expressions of folklore are manifested in various forms and that indigenous people are owners, controllers and developers of

¹⁸¹Kuruk, P., Key Policy Issue on Intellectual Property and Traditional Cultural Expressions, a paper presented on June 8, 2017 in Geneva at the Seminar on Intellectual Property and Traditional Cultural Expressions organized by WIPO.

the same. Importantly, the chapter has revealed that because of technological advancement, there is a challenge of protecting cross- border cultural products. This challenge led European community to take essential steps to approximate municipal laws.

Thus, this indicates that in the East African Community, protection of immigration cultural products can only be protected through harmonisation of municipal laws, which is the core issue of this study. The chapter indicates that harmonisation of municipal laws for protection of expressions of folklore can be achieved through directives, model laws and applications of harmonisation theories like legal incrementalism and one size fit for all. Lastly, the theories of legal transplantation and minimum standards framework were chosen as relevant and guided the study.

CHAPTER THREE

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK FOR PROTECTION OF EXPRESSIONS OF FOLKLORE

3.1 Introduction

In the first place, international and regional protection of traditional cultural expressions covers a number of issues. Such issues include the preservation and safeguarding of cultural heritage, the promotion of cultural diversity, the respect for cultural rights, the promotion of artistic development and cultural exchange, the needs and interests of indigenous and traditional communities as well as the promotion of tradition-based creativity and innovation.¹⁸²

It is also worthy keeping in mind that, indigenous and local communities have called for various forms of protection of expressions of folklore or traditional cultural expressions to include protection of traditional literary and artistic productions against unauthorised reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and culturally and spiritually offensive uses. Indigenous and local communities also claim for protection of handicrafts, prevention of false and misleading claims to authenticity and origin or failure to acknowledge source; and defensive protection of traditional signs and symbols.¹⁸³ This claim has been made both at international and regional level.¹⁸⁴

From the backdrop, this chapter provides an overview of the international and regional protection of expressions of folklore. It further explains various themes

¹⁸²Samantha, N., United Nations Educational, Scientific and Cultural Organisation and Intellectual Property Rights, LLM Thesis, Kare College of Law Margao, Gao, India, p.23.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

underpinned in international instruments for protection of expressions of folklore. Such instruments are developed and administered by two UN agencies namely, the World Intellectual Property Organization (WIPO) and United Nations Educational, Scientific and Cultural Organization (UNESCO).

The chapter also addresses protection of expressions of folklore at regional level. As far as this study is concerned, regional instruments covered under this chapter are those addressing protection of expressions of folklore, developed and administered by African economic blocks with exclusion of the East African Community (EAC). Protection of expression of folklore in the EAC is specifically covered under chapter 4 of this thesis.

Other regional instruments like that of the European community and the Pacific community are discussed under chapter seven of this thesis for illustration purpose. Thus, section 3.1 of this chapter gives the introduction, section 3.2 covers international protection of expressions of folklore and section 3.3 covers regional protection of expressions of folklore. Section 3.4 discusses various key issues that include mechanisms, model laws and sui generis legislation for protection of expressions of folklore. Finally, section 3.5 concludes this chapter.

3.2 International Protection of Expressions of Folklore

There are numerous international instruments for protecting indigenous peoples' rights including expressions of folklore. Such instruments are administered by UNESCO and WIPO. Each instrument provides various themes on protection of expressions of folklore. The instruments were developed after several discussions at

international fora.¹⁸⁵

The discussions evolved on the need for a strong legal mechanism for the protection of expressions of folklore and it was since the 1960's. The two main international fora where most of the discussions were held were the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of expressions of folklore, UNESCO is concerned with the cultural aspect of expressions of folklore.¹⁸⁶ Thus, UNESCO has undertaken several initiatives at the international, regional and national levels concerning the identification, conservation, preservation and dissemination of expressions of folklore.

To start with instruments developed by UNESCO, Brendan¹⁸⁷ is of the view that the most comprehensive articulation of indigenous peoples' human rights including expressions of folklore, is found in the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP). The declaration formally recognises indigenous peoples' rights to self-determination, to promote, develop and maintain their own legal regimes, in accordance with international human rights standards.¹⁸⁸ It also recognises their rights to resources they have traditionally owned, occupied or otherwise used or acquired, and requires that these rights be adjudicated with due

¹⁸⁵ See WIPO., Intellectual Property and Traditional Cultural Expressions/Folklore Booklet No.1, WIPO revealing the brief history and timeline for international discussions and legislative development for protection of expressions of folklore at international level. Similarly, Amegatcher, A.O., Ghanaian Law of Copyright, 2nd Edition, Omega Law Publishers, the United Kingdom, 2014, p.38 indicates that the idea of protecting expressions of folklore came out of the efforts of the UNESCO and WIPO which had organised a series of meetings concerning the legal protection of expressions of folklore.

¹⁸⁶ Asian-African Legal Consultative Organization Secretariat., Expressions of Folklore and its International Protection, Vasant Marg, Vasant Vihar New Delhi, India, 2004, AALCO/43/BALI/2004/SD/S15.

¹⁸⁷ Brendan, M.T., *Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights*, Law Environment and Development Journal, 2013, p.142.

¹⁸⁸ Ibid.

respect for their customs and laws. States are obliged to establish and implement fair, impartial, independent, open and transparent processes to recognise and adjudicate indigenous rights over their expressions of folklore. This has to be done with due recognition for their laws, traditions and customs.¹⁸⁹

Further to that, the declaration gives specific recognition to indigenous peoples' rights over their cultural heritage and intellectual property. It requires states to provide redress, including compensation, when there has been the breach of indigenous peoples' rights. It also requires that indigenous peoples have access to prompt, just and fair procedures to resolve disputes with states or other parties, and access to effective remedies for breaches of their individual and collective rights. These procedures and any decision taken under them must give due regard to the indigenous peoples' customary laws and traditions and to international human rights.¹⁹⁰

Article 31 of the declaration elucidates that indigenous people have rights to the maintenance, control, protection and development of cultural heritage, traditional cultural expressions (TCEs) and that States are required to take effective measures to ensure the ongoing recognition and protection of such rights.¹⁹¹ Besides, Hiranras is of the firm views that customary international law has already crystallised around indigenous peoples' rights to self-determination and cultural integrity. Customary international law has also been claimed to recognize indigenous peoples' rights to

¹⁸⁹Ibid. See also, WIPO., the Protection of Traditional Knowledge: Draft Articles requires States take effective legal, policy or administrative measures for protecting traditional knowledge.

¹⁹⁰ Ibid. Also Tobin, B., The Role of Customary Law in Access and Benefit sharing and Traditional knowledge Governance: Perspective from Andean and Pacific Island Counties, WIPO, 2013 discusses the essence of customary law in protecting expressions of folklore.

¹⁹¹Hiranras, N., The Intellectual Property and Alternative Legal Protection for Thai Cultural Heritage Properties, Traditional Knowledge and Products, PhD Thesis, Durhan University, Thailand, 2015, p.120.

their language, sacred sites and cultural articles.¹⁹²

On the other hand, the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries is the international instrument that establishes binding legal obligations for member States to, inter alia, recognise and protect traditional cultural expressions. The Convention requires that special safeguards be given to indigenous peoples' rights pertaining to their cultural heritage. The convention permits indigenous peoples to participate in benefits of their cultural heritage and to receive compensation for any damage arising there from.¹⁹³ States are also obliged to secure indigenous peoples' participation in decision-making processes affecting them, and to recognise and respect their customary laws and traditional decision-making institutions.

ILO Convention has inspired constitutional changes to recognise indigenous rights in many countries, particularly in the East African Community Member States. More recently, the Convention has spurred developments in national legislation for consultation with indigenous peoples prior to the grant of rights for the exploitation of traditional cultural expressions.¹⁹⁴

The International Covenant on Economic, Social and Cultural Rights 1966¹⁹⁵ is another instrument that addresses the issue of protection of the expressions of

¹⁹² Ibid.

¹⁹³ See also WIPO., Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Twenty Second Session, Geneva, 9th to 13 July, 2012, WIPO/GRTKF/IC/22/INF/8, disclosing access and benefit sharing from indigenous works.

¹⁹⁴ See also Recommendations on the Safeguarding Traditional Cultural and Folklore on preservation and conservation of folklore adopted by the UNESCO General Conference at its Fifth Session, Paris, 15th November, 1989.

¹⁹⁵ The International Convention of Economic, Social and Cultural Rights were designed in 1967, among other things, to protect folklore and promote economic stability of indigenous people.

folklore or traditional cultural expressions. The Convention provides that in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created where everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Article 15 (1) of the Covenant constitutes an apt basis on which to avoid bio-misappropriation and for introducing positive protection for traditional cultural expressions (TCEs), which is not based on the intellectual property rights (IPRs) model.¹⁹⁶ The increasingly visible impact of certain types of IPRs on human rights needs to be addressed by ensuring that measures are taken to protect everyone who is likely to be negatively affected by the strengthened intellectual property rights (IPRs) standards.¹⁹⁷

Apart from that, the International Covenant on Civil and Political Rights 1966¹⁹⁸ is one of the international instruments which address traditional cultural expressions. This Covenant elaborates on the civil and political rights and freedoms listed in the Universal Declaration of Human Rights. It recognises the rights to self-determination, and the rights of peoples to freely own, trade and dispose of their natural wealth and resources. In the context of traditional cultural expressions and indigenous resources, article 27 states that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be

¹⁹⁶ Kihwelo, P.F., Traditional Intellectual Property Protection in Tanzania: The Case of Traditional Medicinal Knowledge, PhD Thesis, the Open University of Tanzania, Tanzania, 2009, p.24 elaborating positive protection of traditional knowledge.

¹⁹⁷ Ibid.

¹⁹⁸ The Convention came into force on 23rd March 1976.

denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Under the Convention, other relevant articles on protection of expressions of folklore are article 1 (2) and 47. According to article 1 (2) all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may people be deprived of their own means of subsistence and article 47 states that nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.¹⁹⁹

Other important instruments which are administered by the UNESCO, include the Convention for the Protection of Cultural Property in the Event of Armed Conflict.²⁰⁰ This is Hague Convention, which was adopted in 1954 in the wake of the massive destruction of cultural property during the Second World War and later amended in 1999. It provides a system of protection of cultural property during both international and internal armed conflict. Cultural property includes monuments, architecture, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological significance, which are movable and immovable properties of great importance to the cultural heritage of every people.

¹⁹⁹ Hiranras, N., (note 199), p.122.

²⁰⁰ Its preamble clearly indicates that any damage to cultural property, irrespective of the people it belongs to, is a damage to the cultural heritage of all humanity, because every people contribute to the world's culture.

The First Protocol specifically prohibits the appropriation of cultural property as war reparation, while the second specifies the sanctions to be imposed for serious violations of the Convention and defines the conditions on which individual criminal responsibility shall apply as well as establishing an Intergovernmental Committee.²⁰¹

The Convention concerning the Protection of the World's Cultural and Natural Heritage of 1972²⁰² is another UNESCO instrument for protection of expressions of folklore. This Convention was adopted by UNESCO in 1972.

According to article 5, the State members shall endeavour to do the following to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory: adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and integrate the protection of that heritage into comprehensive planning programmes, set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff possessing the means to discharge their functions; develop scientific, technical and research studies and work out operating methods to make the state capable of counteracting the dangers that threaten its cultural or natural heritage; take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and

²⁰¹See Preston, H., Accounting for the Legal Social Ecology of Traditional Knowledge/ Traditional Cultural Expressions in Intellectual Property Instruments, a paper presented to IGCand Hiranras, N. (note 207), p.123.

²⁰² Ibid.

natural heritage and encourage scientific research in this field.²⁰³

In addition, the Convention on the Protection of the Underwater Cultural Heritage of 2001²⁰⁴ is another important convention for protection of expressions of folklore. This Convention sets a common standard for the protection of the underwater cultural heritage, with a view to preventing its looting or destruction by ensuring its universal protection, the facilitation of State Party co-operation and the setting of professional standards. However, this convention does not change the sovereignty rights of states or regulate the ownership of cultural property. The underwater cultural heritage encompasses all traces of human existence, such as shipwrecks and underwater ruins, which lie or were lying underwater and have a cultural or historical character.

The Convention for the Safeguarding of the Intangible Cultural Heritage of 2003²⁰⁵ is also relevant convention on the protection of expressions of folklore. This Convention highlights the need to distinguish between intangible heritage and natural and material heritage. Intangible cultural heritage is understood to be the practices, representations, expressions, knowledge, skills as well as the instruments, objects, artefacts and cultural spaces associated therewith those communities, groups and, in some cases, individuals recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interactions with nature and their history. It provides them with a sense of identity

²⁰³ Ibid.

²⁰⁴ Ibid. See also Dromgoole, S., *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, the International Journal of Marine and Coastal Law, 2003, Vol. 18, No 1.

²⁰⁵ Hiranras, N., (note 209), p.125.

and continuity, thus promoting respect for cultural diversity and human creativity.

More importantly, central themes of the Convention are the safeguarding, respect and increasing awareness of intangible cultural heritage. This heritage is manifested in oral traditions and expressions, and includes language as a vehicle of intangible cultural heritage. It is also manifested in performing arts, social practices, rituals and festive events, knowledge and practices to do with nature and the universe and traditional artistry. The convention provides the responsibilities and obligations of member states towards protection and safeguard of expressions of folklore. Worthy to note is that, the Convention lists intangible cultural heritage in need of urgent safeguarding, which is composed of intangible heritage elements that the concerned communities and State Parties consider require urgent measures to keep them alive.²⁰⁶

Another UNESCO instrument on the protection of express of folklore is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.²⁰⁷ This Convention addresses many forms of cultural expression that result from the creativity of individuals, groups and societies and that are conveyed by cultural activities, goods and services, particularly in developing countries. It acknowledges that each individual can have freer and immediate access to a rich diversity of cultural expression from within or outside of their country. It also contains a series of Parties' rights and obligations, which are aimed at protecting and promoting the diversity of cultural expression in a spirit of mutual reinforcement

²⁰⁶ Ibid, p.126.

²⁰⁷ Ibid, p.127.

that is complementary with other international treaties, and guided by concerted international actions and co-operation.

In addition, UNESCO's Recommendations on the Safeguarding of Traditional Culture and Folklore 1989 are also relevant. These recommendations are concerned with the preservation of the intangible aspects of heritage: traditional culture and folklore. The fragility of intangible heritage, particularly with respect to oral traditions, is noted. The document defines the nature of folklore and its forms (language,²⁰⁸ literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts) and recommends conservation strategies, including the documentation of traditions, the establishment of archives, the creation of folklore museums, and support for those who transmit traditions.

Furthermore, it recommends development of educational programmes to encourage the study of folklore and calls for scientific research on the preservation of folklore. It notes the negative impact that industrial cultures and the mass media have on traditional culture and calls for support for folk traditions to counter these effects. These recommendations were a significant step forward and the first attempt to safeguard intangible cultural heritage, and traditional culture and folklore, using an international instrument. It brought to the attention of states the importance of this neglected area of their heritage and the considerable debate over its international protection.²⁰⁹

²⁰⁸ Language as element of folklore was discussed in line with access to justice by Khalfan, F.R., *Legal Aspects of Language Barrier in Mainland Tanzanian Courts*, PhD Thesis, the Open University of Tanzania, Tanzania, 2018.

²⁰⁹ Ibid.

Apart from international instruments on protection of expressions of folklore administered by UNESCO, there are a number of international instruments administered by WIPO. WIPO or WIPO and UNESCO developed such instruments. WIPO is a specialist United Nations (UN) agency, dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding public interest.

The World Intellectual Property Organization Convention established WIPO in 1967 with the mandate to promote the protection of intellectual property globally by co-operation between states and in collaboration with other international organizations. The fundamental objectives of WIPO articulated under the convention include promotion and protection of intellectual property throughout the world where appropriate, in collaboration with any other international organization.²¹⁰

To begin with, since 1960s both WIPO and UNESCO have made multiple attempts, both together and separately, to provide protection for expressions of folklore in a binding, multi-lateral instrument. In the case of WIPO, these attempts are still ongoing and the aim of creating an international instrument remains its goal.²¹¹ In the early 1978 when WIPO in cooperation with the UNESCO initiated its efforts to protect expressions of folklore, the expressions of folklore was considered as a subset of traditional knowledge. Since then, the work on expression of folklore has progressed to a more advanced stage than the work on traditional knowledge in

²¹⁰See WIPO., Final Report on National Experiences with the Legal protection of expressions of folklore, Third Sessions, Geneva, 13th to 21st June, 2002, WIPO/GRTKF/IC/3/10.

²¹¹ Collins, S., The Commoditisation of Culture: Folklore, Playwriting and Copyright in Ghana, PhD Thesis, University of Glasgow, Scotland-UK, 2015, p.31.

general.

The idea for protection of expressions of folklore, by applying copyright law was raised in 1967 at the Stockholm Diplomatic Conference for the revision of the Berne Convention for the Protection of Literary and Artistic Work. At the Conference the provision of article 15.4 (a) were included in the Stockholm Act of the Convention, and retained in the revision adopted in Paris in 1971.²¹² The cited article articulated that in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.²¹³

Despite the success in the use of the copyrights law for the protection of the expressions of folklore at the national level, the application of copyright law had some fundamental limitations. First, whereas copyright requires an identifiable author, this is not the case in expressions of folklore. Expressions of folklore are generally regarded the property of certain community or indigenous people and the notion of authorship is a problematic concept in many traditional societies. Secondly, copyright has a time limit.

For folkloric expressions that are important elements of people's cultural identity, it would be more appropriate to have permanent protection. Third, copyright normally requires works to be fixed, and some of the expressions of folklore are not fixed, but

²¹²Ibid.

²¹³ Ibid.

are passed on orally from generation to generation. These issues made it clear that protection under copyright law is not the answer to the question of how to preserve the community owned, cultural heritage expressed as folklore.²¹⁴

Another attempt to address the desperate need for effectively protecting the expressions of folklore has been to provide for such provisions under the laws relating to neighboring or related rights. What is envisaged under the laws governing neighboring rights is indirect protection, as the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 protects the rights of performers, producers of phonograms and broadcasters. In respect of performances of expressions of folklore, developing countries were advised to adhere to the Rome Convention and the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971 to protect performances and broadcasts of expressions of folklore.²¹⁵ A point to remember is that another effort made was the adoption of the Model Law on Copyright for Developing Countries in 1976 Tunis Meeting, with a specific provision for the protection of works of national folklore.

As the existing laws of copyright and related rights do not provide an adequate form of protection of the expressions of folklore, attention turned into the possibilities of a sui generis solution.²¹⁶ In 1978, the International Bureau of WIPO prepared a first draft of sui generis model provisions for intellectual property type protection of

²¹⁴See note 93.

²¹⁵Ibid.

²¹⁶ WIPO., Intellectual Property and Traditional Knowledge, Booklet No 2, one of a series dealing with intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore discusses advantages of sui generis protection of expressions of folklore.

expressions of folklore against certain unauthorized uses and against distortion. The Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention noted the model provisions and approved the proposal of WIPO that special effort should be made to find solutions to the intellectual property protection aspects of expressions of folklore.²¹⁷

Apart from the piecemeal amendments in the existing intellectual property rights (IPR) regime for the protection of expressions of folklore, the major achievement was the adoption of the Model Provisions on the Protection of Expressions of Folklore in 1982. This model law came into existence after the WIPO and UNESCO convened several joint meetings to study the draft model provisions. The outcome of the meeting was submitted to the Committee of Governmental Experts, convened by the WIPO and UNESCO in Geneva in 1982, which adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions. The Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention welcomed the development of the Model Provision as a first step in the establishment of a *sui generis* system of intellectual property type for protection of expressions of folklore.²¹⁸

As hinted earlier, while the WIPO had been attempting to protect the expressions of folklore through piecemeal amendments in various international instruments, no comprehensive attempt was made to draft an international instrument for its

²¹⁷Ibid.

²¹⁸ Ibid.

protection. Acknowledging the need for further research in this field before formulating an international instrument, WIPO and UNESCO agreed on the formulation of a World Forum on the Protection of Expressions of Folklore.²¹⁹ A meeting of the group was held in Phuket, Thailand in April 1997 and was attended by 180 participants from approximately 50 countries.

The major outcome of the meeting was the recognition of the need for preservation and conservation of expressions of folklore throughout the world, legal means of protection of expressions of folklore within national regimes, economic repercussions of exploitation and international protection of expressions of folklore. Pursuant to the outcome, WIPO conducted folklore-focused research activities and in 1998 and in 1999 conducted nine fact-finding missions to 28 countries to better understand the needs, expectations and general situation of traditional knowledge holders.²²⁰

In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. The consultations recommended that WIPO should increase and intensify its work in the field of expressions of folklore protection and recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work in this area.

²¹⁹ WIPO Secretariat., Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999).

²²⁰ Ibid.

Recommendations for the legal protection of expressions of folklore focused on the development of a *sui generis* form of legal protection at the international level and considered the UNESCO-WIPO Model Provisions to be an adequate starting point and relevant groundwork for future work in this direction.²²¹ Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its twenty-sixth session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).²²²

These were noted in the following general terms: the Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultation: intellectual property issues that arise in the context of access to genetic resources and benefit sharing; protection of traditional knowledge, whether or not associated with those resources; and the protection of expressions of folklore.²²³

In September 2003, the WIPO General Assembly at its thirtieth session decided to extend the mandate of the WIPO IGC and the mandate required the IGC to accelerate its work and to focus in particular on the international dimension of expressions of folklore protection. The new mandate excludes no outcome of the IGC's work, including the possible development of an international instrument or instruments in this field.²²⁴

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

The Committee first met on April 2001 and by the end of December 2003, the Committee convened five sessions. The Committee's work programme focused on an ongoing technical analysis of the use of the existing intellectual property and sui generis approaches for the protection of expressions of folklore. More specifically, it tackled these issues at several interlocking levels: First, debating broader policy and legal questions, including how IP rights can operate to promote the interests of holders and custodians of expressions of folklore, ranging over conventional IP rights, extension and adaptation of IP rights and specific or sui generis legal system that have been created in a number of countries.

Second, sharing practical experience by surveying, documenting and analysing protection of expressions of folklore in many countries and several regions, to give practical input into the policy debate. Third, developing practical tools and mechanisms to support custodians of expressions of folklore and indigenous and local communities in identifying and promoting their interests in relation to the IP system.²²⁵

The Committee built its work on the existing basis of consultations and earlier works done by its various bodies. An active programme of consultation and dialogues has complemented the formal proceedings of the Committee, with emphasis put on the fostering of regional dialogue, and the enhanced participation of indigenous and local communities in WIPO activities. The Committee has also provided a framework for interaction with other international processes concerned with IP

²²⁵See note 194, AALCO/43/BALI/2004/SD/S15.

aspects of expressions of folklore.²²⁶

In addition, the Committee's work has already led to a much greater understanding of the concept and issues it has addressed, and has clarified how to deal with concerns and inadequate recognition and protection of expressions of folklore. The discussions highlighted the expectation of a number of countries that specific steps should be taken to strengthen protection, including the development of specific new international instruments. Others pointed out that the significance of the issue and their complexity meant that further analysis and clarification was needed before crystallising formal outcomes; there is a view that more work needs to be done to explore the full potential of the existing IP rights and systems to protect expressions of folklore.²²⁷

Indeed, the Committee has already considered diverse approaches to protecting expressions of folklore through the intellectual property (IP) system. Some of them relates to the scope and operation of the IP system and the range of interest it embodies and mediates; other issues concern the interaction between the IP system as such, and a broader set of legal systems and policy interest. General concern was expressed in the Committee about the need for both the preservation and for protection of folklore, in a manner that is responsive to the community values and legal systems of the communities that create and maintain these intellectual and cultural traditions.²²⁸

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Asian-African Legal Consultative Organization Secretariat., (note 237).

According to Oguamanam, WIPO undertook a series of fact-finding missions (FFMs) in 1998/99, to gather firsthand information of uses of traditional knowledge, which included expressions of folklore as a sub-set, and how states incorporated and implemented protection of folklore in their jurisdictions and hence prepared a report.²²⁹ The FFM Report identified several areas, variously legal, conceptual and administrative, that required attention and illustrated the diverse positions on the protection of folklore across Member States.

Amongst the issues raised on which Member States desired guidance were the identification and classification of expressions of folklore, greater understanding and clarity on the subject matter for which protection is sought. Others were the role of the Model Provisions as a possible foundation for the elaboration of regional and international frameworks for the protection of expressions of folklore, and ascertaining the economic value of folklore.²³⁰

Following the FFMs, WIPO and UNESCO undertook Regional Consultations on the Protection of Expressions of Folklore, 1999. The African Regional Meeting took place in Pretoria, South Africa in March 1999. The African states recommended that folklore should receive protection at the national level as a matter of urgency.²³¹ To WIPO and UNESCO, they recommended that work towards the protection of expressions of folklore and of traditional knowledge should be taken in parallel, considering the common elements, as well as the distinct characteristics and social

²²⁹Oguamanam, C., *Understanding African and like-minded Countries' position at WIPO-Intergovernmental Committee on TKGRF*, The Law Review of the Franklin Pierce Center for the Intellectual Property, 2020, Vol.60, No.2, pp.386-458.

²³⁰ Ibid.

²³¹ See also Adewopo, A., *Protection and Administration of Folklore in Nigeria*, 2006, a paper available at <http://ssrn.com/abstract=1127645>.

functions of each.

In addition, they recommended that the WIPO and UNESCO increase their efforts to develop, in the shortest possible time, a broad consensus among States in favour of an adequate and effective international regime for protection of expressions of folklore.²³² Therefore, it is worth noting that both WIPO and UNESCO have jointly and together aspired for international mechanisms for protecting expressions of folklore. Thus, the next subsection explains regional framework for protection of expressions of folklore.

3.3 Regional Protection of Expressions of Folklore

As already indicated in section 3.1 of this chapter, this part covers the protection of expressions of folklore in Africa regional economic blocks with exclusion of the EAC. This is because based on the objectives of the study, protection of expressions of folklore in the EAC is set out in chapter 4. Thus, this section covers the protection of expressions of folklore in SADC, COMESA and ECOWAS economic blocks where there are two important institutions dealing with protection of expressions of folklore in African continent. The first institution is the African Intellectual Property Organization (OAPI). OAPI reflects the collective thought of the like-minded nations for the legal protection of creations of expressions of folklore and was established under Bangui Agreement.²³³

It is worthy to note that, Chapter I of Annex VII of the Bangui Agreement provides for specific protection for expressions of folklore and for works inspired by

²³² Ibid.

²³³ Nandjembo, L.P.I., *The Effectiveness of the Swakopmund Protocol on the Protection of Traditional Knowledge in Namibia*, LLM Mini Thesis, University of Western Cape, South Africa, 2017, p.11.

expressions of folklore. The Agreement also deals with the protection for expressions of folklore in Chapter II on the protection and promotion of cultural heritage. The Agreement makes provision for national treatment.²³⁴ Historically, the Bangui Agreement was originally developed in 1977 and under article 5 (1) (xii) included provision for the protection of expressions of folklore and works derived from folklore.

The 1977 Bangui Agreement was amended in 1999. Article 67 (2) (i)²³⁵ restated the protection of expressions of folklore and works derived from folklore which are protected as part of a larger category of protected cultural heritage. In terms of its scope, the Agreement is wide-ranging and acknowledges that folklore exists in a multiplicity of forms. The Agreement defines folklore as the literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation.²³⁶ It also enumerates under article 68 (2) a list of potential manifestations of folklore which includes: literary works of all kinds, whether oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles; artistic styles and productions and dramatic, dramatico-musical, choreographic and pantomime productions.

Although the Bangui Agreement is not explicit in terms of who hold the rights in expressions or works derived from folklore, it places significant responsibility on

²³⁴See Sabanda, G.H., The Need for Legal Protection of Traditional Knowledge (TK), Traditional Cultural Expressions/Folklore (TCEs), and Associated Genetic Resources, A Keynote Address during the WIPO Asia-Pacific Forum in Cochin, India on 4th to 6th April, 2006 and WIPO., Protecting Traditional Knowledge and Cultural Expressions: The Experience of indigenous peoples in Philippines, Ninth Session, Geneva, 24th to 28th April, 2006, WIPO/GTRKE/IC/9/INF/7(c).

²³⁵ Of Bangui Agreement of 1991, available at <http://www.wipo.int> or <http://www.oapi.int> (accessed on 27th January, 2021).

²³⁶Oguamanam, C., (note 241).

Member States to ensure that provision is made for the protection, safeguarding and promotion of the cultural heritage.²³⁷ The Bangui Agreement requires that anyone, national or non-national, wishing to utilise folklore for commercial purposes must get permission from the relevant competent authority. Specifically, under Article 73 (2) (a), the Agreement requires that permission be gained for: the publication, reproduction and distribution of copies of any cultural property, whether classified or not, listed or not, ancient or recent, and considered by this Agreement as part of the national cultural heritage. Thus, far from preventing artists' access to folklore as a resource for their work, the Bangui Agreement suggests that it is the responsibility of the State to encourage such use.²³⁸

Another institution responsible for protection of expressions of folklore is the African Regional Intellectual Property Organization (ARIPO). Under article 111 (c) of the Lusaka Agreement establishing the African Regional Intellectual Property Organization, ARIPO member States adopted the Swakopmund Protocol, inter alia, to protect expressions of folklore.²³⁹ The protocol was adopted as efforts to recognize the intrinsic value of traditional cultures and folklore and including their promotion and protection against unlawful exploitation or misappropriation of expressions of folklore.²⁴⁰

Before adoption of the Swakopmund Protocol, ARIPO Agreement did not mandate its members to protect expressions of folklore. Such mandate was set out in August,

²³⁷ Nandjembo, L. P. I., (note 245).

²³⁸ Ibid, p.67.

²³⁹ The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore adopted on 23rd November, 2007, available at <http://aripo.org>, (accessed on 29th January, 2021). See also Costantine, J., The Swakopmund Protocol for the Protection of expressions of folklore: a review of implementation in Rwanda and Tanzania, *Journal of Intellectual Property Law and Practice*, 2022, vol.17, No.10, pp.834-843.

²⁴⁰ This is revealed in the preamble of the Swakopmund Protocol.

2002 when ARIPO Agreement was amended to include protection of expressions of folklore. With technical assistance from WIPO, ARIPO began to investigate the legal options for the development of a legislative framework and a regional legal instrument for the protection of traditional knowledge and expressions for folklore.²⁴¹ At WIPO's IGC Council's tenth session in 2005, the IGC requested that OAPI and ARIPO work together to develop a harmonised legislative framework that could be adopted by the competent organs of the two organisations. Though this aim is yet to be realised, ARIPO's subsequent efforts did result in the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

Section 2 of the Swakopmund Protocol lists down categories of expressions of folklore subject for protection. Such categories include any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; musical expressions, such as but not limited to songs and instrumental music; expressions by movement such as but not limited to dances, plays, rituals and other performances; and tangible expressions, such as productions of art, in particular drawings, designs, paintings, carving, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts, musical instruments; and architectural forms.²⁴²

²⁴¹Costantine, J., (note 251).

²⁴² See Mulenkel, L. Indigenous Peoples' Perspective on the right to maintain, control, protect and develop their intellectual property over traditional knowledge, a paper presented to Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Twenty Fourth Session, Geneva, 22nd to 26 April, 2013.

In addition, section 16, the Protocol states that protection shall be extended to expressions of folklore, whatever the mode or form of their expression, which are: the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.²⁴³

Moreover, section 18 states that the owners of the rights in expressions of folklore shall be the local and traditional community. The theme of community control continues throughout the document. For example, rather than the term of protection being perpetual, the Protocol links the term to the lifecycle of the community, and requires that authorisation to utilise folklore be gained from a national authority that acts on behalf of and in the interest of the community concerned.²⁴⁴ Lastly, the Protocol places significant emphasis on enabling traditional communities to utilize folklore and be acknowledged in any third-party use where practical and possible. This vindicates both positive and defensive protection of expressions of folklore.

3.4 Key Issues

This section deals with a number of key issues related to protection of expressions of folklore. These include mechanisms for protection of expressions of folklore, model laws, sui generis legislation and application of sui generis system. Each key issue is elaborated in detail as shown in the subsequent sections.

²⁴³ Collins, S., (note 222), p.69.

²⁴⁴ Ibid.

3.4.1 Mechanisms for Protection of Expressions of Folklore

A number of international and regional instruments articulate mechanisms for protection of expressions of folklore. However, some authors have different views on the adequacy of the articulated mechanisms for protection of expressions of folklore. Samantha²⁴⁵ argues that experience on protection of traditional cultural expressions has shown that no single template or comprehensive one-size-fits-all solution is likely to suit all the national priorities, legal and cultural environment, and the needs of traditional communities in all countries. Instead, effective protection may be found in a menu of differentiated and multiple options for protection, perhaps underpinned by an internationally agreed set of common objectives and core principles.²⁴⁶

On his part, Nwauche²⁴⁷ expresses that the importance of international protection for expressions of folklore lies in the articulation of minimum standards of protection, which ensures that expressions of folklore are protected in accordance with these minimum standards in all States party to the framework. One of the difficulties in the international protection of expressions of folklore lies in a consensus as to these minimum standards which are still being sought in the proposed WIPO international treaty on the protection of expressions of folklore.

At present, even though there are national frameworks for protection of expressions of folklore such as those in Nigeria, Ghana and Kenya, many countries in Europe

²⁴⁵ Samantha, N., United Nations Educational, Scientific and Cultural Organisation and Intellectual Property Rights, LLM Dissertation, Kare College of Margao-Gao, India, 2013.

²⁴⁶ Ibid.

²⁴⁷ Nwauche, E.S., The Sui Generis and Intellectual Property Protection of Expressions of Folklore in Africa, PhD Thesis, the North-West University, South Africa, 2016, p.263, available at <http://repository.nw.ac.za>, (accessed on 15th April, 2012).

and North America have no such protection making them likely sites for the misappropriation, distortion and mutilation of expressions of folklore.²⁴⁸ On the other hand, WIPO's report indicates that a number of options for protection of expressions of folklore are available at international level and regional level and include existing IP systems, unfair competition, adapted IP rights (sui generis aspects of IP systems) and stand-alone sui generis systems, as well as non-IP options.

IP options include trade practices and labeling laws, use of contracts, customary and indigenous laws and protocols, cultural heritage preservation laws and programmes, common law remedies such as unjust enrichment, rights of publicity, blasphemy, and criminal law. Thus, there are certain existing mechanisms and frameworks for regional and international legal protection of expressions of folklore.²⁴⁹ Some of the mechanisms for protection of expressions of folklore are revealed in the legal instruments discussed below.

Foremost, article 5 (1) of the Berne Convention is relevant here. The article reveals national treatment principle. It provides that authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention, and that protection in the country of origin is governed by domestic

²⁴⁸ Ibid. See also Nwauche E., *The Protection of Traditional Cultural Expressions in Africa*, Springer International Publishing, Cham, Switzerland, 2017, p.53.

²⁴⁹ WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, Geneva, July 7 to 15, 2003, WIPO/GRTKF/IC/5/3. This is one of the series of Background report dealing with intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore.

law. However, when the author is not a national of the country of origin of the work for which he is protected under this convention he shall enjoy in that country the same rights as national authors.²⁵⁰

From the above provisions, for those countries which protect expressions of folklore as copyright works, the Berne Convention provides that all States that have ratified the Convention must protect foreign works according to the principle of national treatment. This means in effect that those countries that protect expressions of folklore as copyright works and are signatories to the Berne Convention enjoy protection for their expressions of folklore in each other's countries. However, the comparison of terms and other provisions may again limit the practical relevance of this observation.²⁵¹ Apart from that, under the IP treaties of certain regional organizations, expressions of folklore are protected in the territories of the States signatories to those agreements according to the principle of national treatment.²⁵² For clarity, it is worth noting that the principle of national treatment is one of several standards, which enable nationals of one country to enjoy legal protection in a foreign jurisdiction.

Other standards include assimilation, fair and equitable treatment, the most-favoured national principle, reciprocity, and mutual recognition. It is also important to state that national treatment is the predominant one. The principle of national treatment is fundamentally a rule of non-discrimination. At the regional or international levels, it

²⁵⁰ Ibid.

²⁵¹ Nwauche, E. S., (note 259). See also Inniss, A. A., Review of the book *the Protection of Traditional Cultural Expressions in Africa*, by Enyinna Nwauche, Journal of Social, Behavioral, and Health Science, 2021, vol.15, Issue 1, pp.104-106.

²⁵² Ibid.

provides that country A must offer the same protection to the nationals of country B, as country A gives its own nationals. The principle of national treatment allows countries the autonomy to develop and enforce their own laws, while meeting the demand, for international protection. Reciprocity is a mechanism that allows regional or international protection without harmonisation.²⁵³

It is worth noting that certain national laws, such as that of Panama, provide for a form of national treatment, but this aspect may not yet have been tested in practice. These existing measures appear to have been less used and/or known. While the majority of States desired some form of international protection for TCEs, a certain number were not ready to embark upon the development of such an agreement. Certainly, several legal and conceptual questions remain and the diversity of approaches at the national level complicates efforts to reach broad international agreement.²⁵⁴

Also, most national laws provide a mechanism for the protection of foreign works, and it remains open to States in their establishment of national laws for the protection of traditional cultural expressions to provide for the protection of foreign expressions based on national treatment or reciprocity. In this way, networks of national laws, each providing for reciprocal protection of foreign expressions of folklore, could eventually lead to sub-regional, regional and even inter-regional systems of protection.²⁵⁵ Samantha is of the firm views that indigenous and local

²⁵³Ibid.

²⁵⁴WIPO., Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, Geneva, 7th to 15th July, 2003, WIPO/GRTKF/IC/5/3.

²⁵⁵ Ibid.

communities have called for various forms of protection. These include: protection of traditional literary and artistic productions against unauthorised reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and/or culturally and spiritually offensive uses; protection of handicrafts, particularly their style; prevention of false and misleading claims to authenticity and origin/failure to acknowledge source; and defensive protection of traditional signs and symbols.²⁵⁶

It is important to note that some communities wish to gain and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially contribution to their economic development.²⁵⁷ It should also be remembered that IP's protection is to prevent unwanted use by others. Communities might wish to gain IP protection in order to actively exercise IP rights to prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally offensive or demeaning use.

The first two approaches involve positive protection that is, obtaining and asserting rights in the protected material. Positive protection can therefore serve as the legal basis for any commercial and other dealings that TCE holders may choose to pursue with other partners, and stop third parties from using TCEs in an unauthorized or inappropriate way.²⁵⁸ Defensive strategies, by contrast, aim at preventing others from

²⁵⁶ Samantha, N., (note 257), p.24. See also WIPO., Experiences from the WIPO Pilot Training Program on Intellectual Property and Cultural Documentation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Thirteenth Session, Geneva, 11th to 17th October, 2008, p.2 indicating that the Maasai customary laws are normally used to protect Maasai expressions of folklore.

²⁵⁷ Ibid.

²⁵⁸ Janke, T., True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self-Determination into Practice, PhD Thesis, the Australia National University, Australia, 2019, pp.107-213 discusses positive

gaining or maintaining adverse IP rights. Various positive and defensive strategies can be used together, depending on what the holders or custodians of tradition cultural expression (TCEs) want to achieve. Likewise, a community's secret or sacred tradition cultural expression (TCEs) may be protected defensively; while handicrafts may be positively protected as part of a community trading enterprise and against imitations or fakes.²⁵⁹

Furthermore, the Rome Convention extends protection to performers who are defined in article 3 as actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play, or otherwise perform literary or artistic works. It is generally thought that performers of expressions of folklore would qualify for protection under the Rome Convention since some expressions of folklore would qualify as literary or artistic works. It was the specific omission of expressions of folklore that created some doubt as to whether expressions of folklore are contemplated by the Rome Convention.²⁶⁰

Apart from that, a number of principles for the protection of expressions of folklore are listed in Draft IGC 27. The principles are reflected in its objectives, which include recognition that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value. These include social, cultural, spiritual, economic, scientific, intellectual, commercial, and educational values. This is done, while acknowledging that traditional cultures and folklore constitute frameworks of innovation and creativity

and defensive mechanisms for protection of expressions of folklore.

²⁵⁹ Ibid.

²⁶⁰ Narciso, A., *The Legal Protection of Folklore: Can Copyright Assist or a Sui Generis Right Necessary?* PhD Thesis, University of Leeds, 2007, pp. 258-263.

that benefit indigenous peoples and traditional and other cultural communities, as well as humanity as a whole. Another objective is the promotion of respect for traditional cultures and folklore, the dignity, cultural integrity, and philosophical, intellectual, and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore.²⁶¹

In addition to objective principles, article 3 of Draft IGC 27 introduces a tiered approach to the protection of folklore based on the nature of the expression. Where the expression of folklore is sacred or secret, article 3 recognises the importance of a form of positive protection of the collective and exclusive rights against third party use. If the expression is in the public domain, but not widely known, a number of options are available. One option requires only a respect for the moral rights of communities coupled with fair and equitable compensation for the use of the expressions of folklore. While this is an example of negative protection, the other option leans towards positive protection in terms of an agreement based on the prior informed consent of the community.²⁶²

Further to that, the term of protection of expressions of folklore is addressed by article 6 of Draft IGC 27, which offers three options. One option limits protection to the ability of the expression of folklore to meet the criteria for protection – with the exception of moral rights, which shall be indefinitely protected. The second option aligns the term of protection with the tiered framework of protection in article 3 of Draft IGC 27. The third option stipulates time-limited protection for the economic

²⁶¹WIPO., Intellectual Property and Traditional Cultural Expressions, Booklet No.1, pp.16-19.

²⁶² Ibid.

aspects of traditional cultural expressions.²⁶³

Also, there is a proposed article 8 (2) which deals with the possibility of alternative dispute resolution. In terms of this provision, where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognised by international and/or national law. In a nutshell, article 8(3) provides that national law should govern the means of redress to safeguard the protection offered for expressions of folklore and article 8 (4) recognises the rights of member states to revoke any IPR right made up of expressions of folklore obtained without prior informed consent.²⁶⁴

In addition, the TRIPS Agreement requires WTO member states to implement minimum standards of intellectual property protection with certain flexibilities in national legislation. The TRIPS Agreement allows member states the flexibility to determine how to implement these minimum national standards. Again, as the TRIPS Agreement requires only minimum standards, it follows that World Trade Organization (WTO) member states can enact higher standards of intellectual property protection.²⁶⁵

Another key component of the World Trade Organization (WTO) Agreement is the compulsory dispute settlement mechanism for disputes relating to the interpretation

²⁶³WIPO Secretariat., Traditional Knowledge Operational Terms and Definitions, Third Session, Geneva, 13th to 21st June, 2002, WIPO/GRTKF/IC/3/9.

²⁶⁴ Nwauche, S.E., (note 263). See also WIPO Secretariat., Overview of Activities and Outcomes of the Intergovernmental Committee, Fifth Sessions, Geneva, 7th to 15 July, 2003, pp. 4-6.

²⁶⁵ A document prepared by International Bureau of WIPO., The Advantages of Adherence to the WIPO Copyright (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), pp.8-10.

of provisions of the Agreement. Consequently, disputes over whether national legislation violates the TRIPS Agreement may become a subject matter of the WTO dispute settlement mechanism. It is therefore plausible to imagine a complaint that national legislation protecting expressions of folklore breaches the TRIPS Agreement because it breaches the minimum standards of intellectual property required by the TRIPS Agreement.²⁶⁶

Given the nature of the TRIPS Agreement, it is important to determine whether or not expressions of folklore are protected as part of the minimum standards of intellectual property protection in the Agreement. The TRIPS Agreement does not mention traditional knowledge or expressions of folklore and does not provide minimum standards for expressions of folklore. To conclude, however, that for this reason, the TRIPS Agreement does not affect expressions of folklore would be too hasty an assumption. There may indeed be a connection in that the minimum standards of intellectual property protection mandated by the TRIPS Agreement impact on subject matter that may also qualify as an expression of folklore.²⁶⁷

Therefore, if WTO member were to implement copyright reform on the basis of the TRIPS Agreement, the effect of the national legislation could also affect certain expressions of folklore which are eligible for copyright. In this regard, there are many provisions in the TRIPS Agreement which apply to expressions of folklore and the nature of these provisions may indicate a link between the TRIPS Agreement and

²⁶⁶ Ibid.

²⁶⁷ Ibid. See also Kaushal, N., *Traditional Knowledge in the Manacles of Intellectual Property Protection: A Study of Indian Indigenous Communities Rights and Claims*, LLM Thesis, University of Toronto, Canada, 2012, pp.26-28.

expressions of folklore. The possibility that the TRIPS Agreement's provisions on copyright and related rights will apply to expressions of folklore would appear to be indirect because, as noted above, the content of the expression of folklore is protectable as copyright. Article 9 (1) of the TRIPS Agreement incorporates articles 1– 21 of the Berne Convention 1971 and the Appendix thereto.

The other provisions of the TRIPS Agreement with respect to the availability, scope, and use of copyright and related rights include article 10 (1) which stipulates that computer programmes shall be protected as literary works; article 10 (2) which recognises databases; and article 11 which recognizes rental rights. Article 12 stipulates that the term of protection for copyright other than photographic work or work of applied art shall not be less than 50 years. Article 13 stipulates that members shall confine limitations or exceptions to exclusive rights to certain special cases which neither conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the right holder.

Since this is a minimum standard, WTO members may well be concerned if national legislation or an international treaty protecting expressions of folklore were to lower these standards. If national legislation chooses to use copyright and related rights to protect expressions of folklore, it will be difficult to sustain an argument that the TRIPS Agreement does not affect to the legislation. The matter may not be straightforward if the national legislation is *sui generis*, but in many ways appears to lower the minimum standards imposed by the TRIPS Agreement.²⁶⁸

²⁶⁸ Ibid.

The nature of protection mandated by the TRIPS Agreement for geographical indications is such that any national legislation on geographical indication is likely to fall within the ambit of the TRIPS Agreement. WTO member states are obliged to provide the legal means for interested parties to prevent the use of geographical indications that constitutes unfair competition. Arguably, a misappropriation of a geographical indication would constitute unfair competition. Along this line of reasoning, it would seem that because the obligations imposed by the TRIPS Agreement are broad, most national legislation seeking to protect geographical indications as expressions of folklore would satisfy the obligations with respect to the protection of geographical indications. It may well be that national legislation protecting expressions of folklore is within the purview of the TRIPS Agreement.²⁶⁹

Also, the obligation to ensure that undisclosed information is protected from unfair competition would attract the same comments as the obligation to protect geographical indications. Most national legislation which seeks to protect undisclosed information would satisfy the requirements of article 39 of the TRIPS Agreement. This fact may cast such national legislation within the purview of the TRIPS Agreement. Again, as stated above, these provisions mandate minimum standards for intellectual property and not expressions of folklore.²⁷⁰ The argument that the TRIPS Agreement does not apply to folklore may be attenuated if a WTO state were to choose a positive protection of expressions of folklore through the grant of intellectual property rights or rights akin to intellectual property rights.

²⁶⁹See Prazmowska, K., *Misappropriation of Indigenous Cultural Heritage-Intellectual Property Rights in the Digital Era*, Santander Art and Culture Law Review, 2020, Vol.2, Issue No.6, pp.115-150.

²⁷⁰ Ibid.

It may well be argued that choosing this route of protection, necessarily draws in the TRIPS Agreement because; to hold otherwise, would unduly prejudice national intellectual property rights. The implications of the application of the TRIPS Agreement to expressions of folklore require that national legislation implementing the Agreement conform to its structure. For example, it is clear that the main thrust of the protection of expressions of folklore is to restrict their misappropriation by intellectual property rights except with the consent of and benefit to the owners of the expressions of folklore.

In large measure, the content from which copyright is created is fundamentally affected by the protective regimes of expressions of folklore subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.²⁷¹ Furthermore, article 1 of the convention on cultural heritage declares that its purpose is to safeguard the intangible cultural heritage; to ensure respect for the intangible cultural heritage of the communities, groups, and individuals concerned; to raise awareness at the local, national and international levels of the importance of intangible cultural heritage, and of ensuring mutual appreciation thereof; and to provide for international cooperation and assistance. A number of issues need to be clarified with respect to the objectives of the convention of cultural heritage.

First, it is clear that the definition of intangible cultural heritage contemplates expressions of folklore and is therefore of importance in understanding the

²⁷¹ WIPO., Experience from Zambia on Indigenous and Local Communities' concerns and Experience in Promoting, Sustaining and Safeguarding their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources, WIPO/GRTKF/IC/8/INF/6 (c).

protection of the latter. This definition highlights the fact that communities are at the heart of intangible cultural heritage and it is what is significant to them that matters in identifying intangible cultural heritage.²⁷²

Secondly, the meaning of safeguarding as set out by the Convention of Cultural heritage would indicate a remit larger than mere protection. It contains measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly; through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.²⁷³

Article 11 of the Convention of Cultural heritage requires each state party to take the necessary measures to ensure the safeguarding of the intangible cultural heritage within its territory. These measures are to include identifying and defining the various elements of the intangible cultural heritage present in its territory with the participation of communities, groups and relevant non-governmental organisations. To ensure identification with a view to safeguarding, article 12 of the Convention of cultural heritage requires each state party to draw up, in a manner geared to its own situation, one or more inventory of the intangible cultural heritage present in its territory. These inventories must be updated regularly. While article 14 imposes a number of obligations with respect to education, awareness-raising, and capacity-building, article 15 requires the widest possible participation by communities, groups and individuals.

²⁷²Berkman Center for Internet and Society., Copyright for Librarians: the essential Handbook, EIFL, Netherlands,2012, pp.18-33.

²⁷³ Zimu-Biyela, A.N., The Management and Preservation of Indigenous Knowledge in Dlangubo Village in Kwazulu-Natal, South Africa, PhD Thesis, University of South Africa,2016, p. 141.

Apart from that, UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions enables state parties to adopt trade and cultural policies at national level in order to develop and sustain a cultural industry that is able to energise and participate in the global trade in cultural goods and service. In this regard, the Convention for the Protection and Promotion of the Diversity of Cultural Expressions (CCD) supports the development of an effective policy regime for the protection and promotion of expressions of folklore.²⁷⁴

Since a key element in the CCD is that it enables member states to protect and promote the diversity of cultural expressions within the territories of member states, there is no doubt that the Convention is protectionist in that it favours local cultural industries over their foreign counterparts. Most of the CCD state parties are also WTO member states. Given the WTO's essence of free trade, a fundamental bone of contention is how the protectionist rules of the CCD can interface with the free trade rules of the WTO.

At the global level, the CCD could be said to challenge a key process in globalisation: the standardisation of markets, products, and processes based on the neo-liberal ideal that states are equal and that the market is the best way for states to maximise their resources and global wealth. Free trade emphasises the commercial aspects of cultural goods and in a globalised world, there is a very strong chance that foreign cultural goods marketed by powerful monopolistic multinational companies could swamp local cultural goods and ultimately impose foreign cultural values.²⁷⁵

²⁷⁴Abolarin, E. E., *Sustainable Development and the Rights of Indigenous Peoples of the Niger Delta: Towards A Legal Framework*, LL. D Thesis, University of South Africa, South Africa, 2021.

²⁷⁵ Ibid.

The CCD further represents a rejection of the idea that free trade is an end in itself and more important than non-trade values such as culture, which are equally important. In this way it can be understood that it is the inability of the WTO to accommodate national non-trade concerns that led to countries with a common interest to seek protection outside of the system. Furthermore, article 1 of the CCD lists the objectives of the Convention. The rights and obligations of state parties are set out in article 6 and seem ideally suited to guide the articulation and development of a state's cultural policy and measures. Each state party is permitted to adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory. It is important to note that these measures are not restricted to cultural policies but include all measures.²⁷⁶

In that regard, article 7 of the Convention permits state parties to adopt measures to promote cultural expressions which should provide an environment in their countries which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expression, paying due regard to the special circumstances and needs of women, as well as various social groups, including persons belonging to minorities and indigenous people. A related provision in the Convention is article 13 which encourages state parties to endeavour to integrate culture within their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

²⁷⁶ Okoro, H.C., Promoting Creative Economies in Nigeria and South Africa through Communal and Collaborative Intellectual Property Rights, Strategies, PhD Thesis, University of Cape Town, South Africa, 2021, p.41.

In addition, attention must be drawn to article 8 of the Convention which provides that in peculiar situations, a state party may adopt special measures to protect cultural expressions in its territory which are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.²⁷⁷ The Convention does not create a compulsory dispute settlement mechanism. Its members are free to reject the conciliation provided for in article 25 of the CCD. Moreover, state parties have a wide discretion as to what measures they can adopt in their territories even if the Convention grants them the right to do so. State parties are consequently under no obligation to take those measures and there may be nothing much that can be done if a state party does not take all or any of these measures. This is largely due to the use of the word may in the relevant articles. Furthermore, this discretion is evident in the relevant parts of the CCD which provide for international cooperation.²⁷⁸

Worthy to note is that the Lusaka Agreement and Swakopmund Protocol are a strong example of the negative protection of expressions of folklore in that it reserves the right of communities to object to third-party use of their expressions of folklore. Essentially, the Preamble of Lusaka Agreement provides that ARIPO member states strive for effective and continuous exchange of information, harmonisation and co-ordination of their laws, policies and activities in intellectual property. This is equally reflected in the Swakopmund protocol which enshrines a number of mechanisms for protection of expressions of folklore.²⁷⁹

²⁷⁷Nwauche S. E., *Protecting Expressions of Folklore within the Right of Culture in Africa*, 2010. A Paper available at <http://hdl.handle-net/10394/4064>, (accessed on 16th October, 2021).

²⁷⁸ Ibid.

²⁷⁹ Nwauche, E. S., *The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa*, *The Journal of World Intellectual Property*, 2014, Vol.17, no.5-6. Pp.191-201 reveals the role of Communities in the management of expressions of

Article 16 of the Protocol on protection criteria for expressions of folklore clearly shows that protection shall be extended to expressions of folklore, whatever the mode or form of their expressions. This is in line with its article 17 which indicates that no any prescribed formality for protection of expressions of folklore. It also stipulated that customary laws and practices of the community shall be used in protecting the expressions of folklore.

Also, article 24 of the protocol underscores the principle of national treatment. The article directs those eligible foreign holders of expressions of folklore that they shall enjoy the benefits of protection to the same level as holders who are nationals of the country of protection, taking into account as far as possible the customary laws and protocol applicable to the expressions of folklore concerned. Apart from that, article 24 (2) of the Protocol entrust ARIPO with the task of settling cases of concurrent claims from communities of different countries with regard to expressions of folklore. It further directs the ARIPO to make use of customary, local information sources, alternative dispute resolution mechanisms and any other practical mechanism of this kind, which might prove necessary. Finally, this subpart of the chapter has shown that regional and international frameworks are relevant in designing an optimum framework for the protection of expressions of folklore.

3.4.2 Sui generis and/or Model Laws for Protection of Expressions of Folklore

Acknowledging that copyright did not easily map on to the protection of expressions of folklore, WIPO and UNESCO pursued the development of sui generis model laws

folklore. See also Costantine, J., (note 250).

that could compensate for the characteristics that differentiate folklore from conventional copyrightable works. Therefore, a number of model laws on the protection of expressions of folklore have been revealed and discussed in this subsection.

To start with, in March 1976, nine years after the inclusion of Article 15(4) in the Berne Convention, WIPO and UNESCO adopted the Tunis Model Law on Copyright for Developing Countries. Unlike the Berne Convention, the Model Law is not binding. It was designed to cater for the specific needs of developing countries who at this time still largely had versions of colonial legislation, by providing a framework in which their national copyright statutes could be developed. Included in the Model Law is protection for folklore under section 6. The Model Law defines folklore as all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.²⁸⁰

Though this represents the first attempt to define folklore in an international legal instrument, the definition drew criticism as it provides no definition of what constitutes the traditional cultural heritage, nor any criteria by which folklore might be identified. However, the Tunis Model Law does address many of the shortcomings identified with the Stockholm Revisions. For example, the Model Law specifically recognise works of folklore as the object of protection under section 6 (1) and vests the rights in such works with a national competent authority. Further,

²⁸⁰Narciso, A., (note 278).

for the first time, section 6 (2) allowed for the protection of works of folklore without any limitation in time.

The Model Law allows that works of folklore, unlike conventional copyrightable works, do not have to be fixed in a material form in order to qualify for protection. Under section 5 (bis), the Model Law states that with the exception of folklore, a literary, artistic or scientific work shall not be protected unless the work has been fixed in some material form. The reason for excluding folklore from the criteria of fixation, which in the common law tradition is required for a work to receive copyright protection, is articulated in the commentary to the section. It states that ‘the fixation requirement cannot possibly apply to works of folklore: such works form part of the cultural heritage of peoples and their very nature lies in their being handed on from generation to generation orally’. Accordingly, the Model Law clearly attempts to accommodate key characteristic elements of folklore in a manner that the Stockholm Revisions had not.

Significantly, the Model Law also acknowledges the status of folklore in Africa as a resource for artists creating derivative works by protecting ‘works derived from folklore’ as original works under section 2 (1) (iii). This means that a derivative work (such as a play text based on folklore) would be protected as an original work without prejudice to the folklore upon which it is based. To clarify this: under copyright law lies with the rights holder to authorise or deny an adaptation of their work. However, as WIPO notes, derivative works may themselves qualify for copyright protection if sufficiently original, the protection afforded to such derivative works vests only in the original aspects of the work. This is referred to as

thin copyright. This phrase is used to refer to the thin layer of original elements in a work where the remaining elements belong to either another author or are in the public domain.

As such, although a derivative work may be copyrightable, that protection cannot prejudice an earlier author's rights or, if the work is in the public domain, prevent any future artist from utilising the same work.²⁸¹ Another significant aspect of the Model Law is that it takes into account the fact that folklore is both a resource for the state or the originating community with an economic potential in its own right, and simultaneously an important resource from which artists create derivative works that feed into the creative economy.

Despite the progress made by the Model Law a year after its adoption, the 1977 Expert Committee on the Legal Protection of Folklore, convened in Tunis under the auspices of UNESCO and WIPO, concluded that there were still major difficulties protecting folklore, which 'involved issues such as definition and identification'. In order to address these issues, WIPO and UNESCO worked together to develop the 1982 Model Provisions Against Illicit Exploitation and Other Prejudicial Actions.²⁸² Like the Tunis Model Law, the Model Provisions were an attempt to provide a *sui generis* framework for the protection of folklore.

However, unlike the Model Law, WIPO and UNESCO saw them as a first step towards an international standard for the protection of folklore.²⁸³ During the

²⁸¹ Collins, S., (note 221).

²⁸² Ibid.

²⁸³ Ibid.

development of the Model Provisions, the Working Group articulated five key points that illustrate WIPO and UNESCO's position. These were: adequate legal protection of folklore was desirable; such legal protection could be promoted at the national level by model provisions for legislation; such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; the said model provisions should also allow for protection by means of copyright and neighbouring rights where such forms of protection could apply; and the model provisions for national laws should pave the way for sub regional, regional and international protection of creations of folklore. These points clearly demonstrate that a comprehensive multilateral instrument was still the ultimate aim of both organisations and that regional and sub-regional protection should be standardised.

In addition, the Model Provisions allow that folklore to be protected without limitation in time, that protection does not require fixation and that a fee is applicable for the use of folklore when they are made both with gainful intent and outside their traditional or customary context. However, it allows for the free borrowing of expressions of folklore for the creating of an original work of the author or authors.

The notes accompanying the Model Provisions state that the reason for this exception is that The Model Provisions do not want to hinder in any way the creation of original works based on expressions of folklore. Therefore, the Model Provisions maintain the position of the Tunis Model Law that folklore is both a national asset with economic potential but is also a generative resource for artists' creating

derivative works.²⁸⁴

Despite the fact that the Model Provisions seems to encompass a far more comprehensive array of expressions than the Tunis Model Law, in 2002 WIPO, noted that the Model Provisions did not have an ‘extensive impact on the legislative frameworks of member states because the scope of protected expressions was not extensive enough. Accordingly, following the adoption of the Model Provisions, two main problems were identified: firstly (as noted with the Tunis Model Law), that the Model Provisions do not fully explain the concept of protectable folklore, and secondly, the lack of a workable mechanisms for settling the question of expressions of folklore that can be found not only in one country, but in several countries of a region.

Like the Tunis Model Law, the Model Provisions had no binding legal status, but were designed to assist member states to develop their own legislation. However, confident that the Model Provisions addressed many of the key areas upon which previous attempts to protect folklore had faltered, WIPO and UNESCO explored the possibility of developing the Model Provisions into an international convention.²⁸⁵

Therefore, comprehensive and integrated legal-technical cooperation is needed, utilising, where appropriate, the full breadth of the IP system and other existing and available measures, and considering States’ respective international IP obligations. The success of such assistance would depend upon the full and committed

²⁸⁴ Collins, S., (note 303). See also Ogwezzy, M.C., *Protection of Indigenous or Traditional Knowledge under Intellectual Property Law: An Examination of the Efficacy of the Copyright Law, Trade Secret and Sui Generis rights*, International and Comparative Law Review, 2012, Vol.12, No.1, pp.7-37.

²⁸⁵ Ibid.

involvement of national governments. The need for inter-ministerial approaches is made clear by the diversity of ministries, departments, agencies and offices with jurisdiction over the protection of TCEs. The affected peoples and communities, and other stakeholders, such as the local legal profession, should also be consulted and involved where appropriate.²⁸⁶ It has been argued that model provisions, guidelines or recommendations could greatly assist national offices and institutions attempting to establish effective systems of protection, as well as provide coherence to emerging national and regional systems that are otherwise developing in diverse directions.

In general terms, it has been suggested that new model provisions, guidelines or recommendations for national laws should be developed in order to take into account changes to the legal, policy and technological context since the late 1970s and early 1980s when the Model Provisions were developed. These changes include: greater awareness of the range of rights and needs of indigenous and traditional peoples; growing understanding of the relationship between cultural heritage preservation, the promotion of cultural diversity and IP; the emergence of new cultural instruments addressing cultural heritage and diversity; changes to the IP landscape particularly in the form of the TRIPS Agreement, 1994 and the WPPT, 1996; and, technological developments and new forms of commercial exploitation that have arisen since the early 1980's.²⁸⁷

More specifically, certain more fundamental and conceptual limitations of the Model Provisions have been pointed to. Earlier it was pointed out that they provide a form

²⁸⁶WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, Geneva, July 7 to 15, 2003, WIPO/GTRKL/IC/5/3. This is one of document dealing with intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore.

²⁸⁷ Ibid.

of ‘blanket’ protection for public domain TCEs, although there is a wide ‘borrowing’ exception. It appears therefore that there is no protection against the making of derivative works based on public domain TCEs. On the other hand, the Model Provisions provide no form of defensive protection for specific TCEs that cultural communities have deemed worthy of protection through prior registration. It may therefore be that new model provisions in the form of guidelines or recommendations could address these and other issues.²⁸⁸

It has been observed that adequate legal protection of folklore was desirable and could be promoted at the national level by model provisions for legislation. Such model provisions were to be elaborated so as to be applicable both in countries where no relevant legislation was in force and in those where existing legislation could be further developed. They were also to allow for protection by means of copyright and neighbouring rights where possible. These provisions for national laws were to pave the way for subregional, regional and international protection of creations of folklore.²⁸⁹

It is argued that the Model Provisions were drafted in response to concerns that expressions of folklore were susceptible to various forms of illicit exploitation and prejudicial actions. More specifically, as stated in the Preamble to the Model Provisions, the Expert Committee believed that the dissemination of folklore might lead to improper exploitation of the cultural heritage of a nation, that any abuse of a commercial or other nature or any distortion of expressions of folklore was

²⁸⁸ Ibid.

²⁸⁹ WIPO., *Intellectual Property Handbook*, 2nd Edition, World Intellectual Property Organisation, Geneva, 2004, pp.59-66.

prejudicial to the cultural and economic interests of a nation, that expressions of folklore constituting manifestations of intellectual creativity deserved to be protected in a manner inspired by the protection provided for intellectual productions, and that the protection of folklore had become indispensable as a means of promoting its further development, maintenance and dissemination.²⁹⁰ Several countries have used the Model Provisions as a basis for national legal regimes for the protection of folklore. However, some have expressed the need for their improvement and updating.

Besides, the Pacific Model Law is a hybrid of the national and regional approaches. It sets out a high-level framework for national legislation and leaves matters of detail or implementation to be determined by policy-makers in accordance with their national laws and systems. It has also been designed with the circumstances of PICTs in mind, with the expectation that it will form the basis of a harmonised legal framework for the regional protection of traditional knowledge and expressions of folklore.²⁹¹

It is worthy note that protection of expressions of folklore may be achieved through sui generis measures and systems. It is viewed that sui generis system is a peculiar system which adequately protects expressions of folklore. The system is aspired on account that Conventional IP systems and adaptations thereof are not considered sufficient to cater for the unique character of TCEs.²⁹² For clarity, the calls for sui

²⁹⁰ Ibid.

²⁹¹ Secretariate of the Pacific Community., Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002, the Pacific Community Noumea, New Caledonia, 2006, p.11.

²⁹² WIPO Secretariat., the Protection of Traditional Cultural Expressions: Update Draft Gap Analysis, Geneva,

generis protection of TCEs arise from the shortcomings of the existing IP rights. The shortcomings in the Conventional IP system in relations to TCEs include: First, difficulty meeting certain formal requirements of IP Protection such as originality. This may be due at least in part to the fact that TCEs often date back prior to the time periods associated with conventional IP systems, or are developed in more diffused, cumulative and collective manner, making specific steps such as authorship difficult to establish at a fixed time.

Second, requirements in many IP laws for protected subject matter to be fixed in material form, given that TCEs are often preserved and transmitted by oral, narrative and other non-material forms. Third, the frequent informal nature of TCEs and the customary laws and protocols that define ownership, or other relationship, such as custodianship and guardianship, and that form the basis of claims of custodianship, cultural affinity and community responsibility.

Fourth, the concern that protection system corresponds to a positive duty to preserve and maintain TCEs, and not merely provide the means to prevent others from making unauthorised use (which is the characteristic function of IP rights). Fifth, the perceived tension between individualistic notions of IP rights (the single author) as against the tendency for TCEs to be originated, held and managed in a collective environment, often making it difficult to identify the specific author or analogous creator that IP Law is assumed to require, and sixth, limitations on the term of protection in IP systems. Calls for better recognition of TCEs often highlight the inappropriate nature of relatively brief terms of protection in conventional IP

systems, as interests and need for protection as seen as enduring beyond life spans for TCEs subject matter.²⁹³

From the above shortcomings of Conventional IP rights on the protection of TCEs many countries and several regional organizations have chosen to protect expressions of folklore or traditional cultural expressions through sui generis measures. Most have done so within their copyright laws, following largely the Model Provisions, 1982. Others have elected to establish stand-alone IP-like laws and systems, for example the Indigenous Peoples' Rights Act of 1997 of the Philippines.²⁹⁴

There are several distinct sui generis systems in the world on the protection of expressions of folklore. Such systems have been developed at global level and regional level. Indeed, one of the Regional Framework for protection of expressions of folklore is the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002. Under the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, 'traditional owners' have the right to authorise or prevent, amongst others, the adaptation, transformation and modification of the protected traditional cultural expressions.

An external user must receive consent to make new derivative works. These are works based upon traditional cultural expressions. Any IP rights in derivative works

²⁹³ WIPO Secretariat., The Protection of Traditional Cultural Expressions/Expressions of Folklore: Updated Draft Outline of Policy Options and Legal Mechanisms, Geneva, 2004, WIPO/GRTF/IC/9/INF/4, available at <http://www.wipo.int>, (accessed on 26th November, 2021).

²⁹⁴ Samantha, N., (note 259).

vested in the author's works. However, if the work is used for commercial purposes, the rights-holder must share benefits with the traditional owners, acknowledge the source of the TCEs and respect moral rights in the traditional cultural expressions.²⁹⁵

Another Regional Framework for Protection of Expressions of Folklore is the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000. This Framework establishes a registration system for traditional cultural expressions. Under that Framework, a special office has been created within the country's IP office to approve the applications and maintain the register. The procedure before the IP office does not require the services of a lawyer and there are no application fees.²⁹⁶

Furthermore, the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999, provides for sui generis system for protection of expressions of folklore. It is important to remember that there are several criteria to take into consideration when establishing sui generis systems. Samantha²⁹⁷ is of the review that, in developing a sui generis system for the protection of TCEs, key issues must be addressed. These include but not limited to the goals of protection, material should be protected, the rights owned and managed, observance of procedures or formalities to obtain rights, enforcement of the rights and sanctions thereon.²⁹⁸

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid. Also, Mulat, S., Property Rights Approach Towards Traditional Cultural Expressions in Ethiopia: Challenges and Prospects, LLM Thesis, Addis Ababa University, Ethiopia, 2015, p.34 reveals the significances of sui generis systems in protecting expressions of folklore.

²⁹⁸ Ibid.

It is suggested that a sui generis system can be a standalone system or can be a combination with available options under conventional IP systems. Samantha is of the considered view that to determine whether a standalone sui generis system is necessary, or whether the existing rights and modifications to them can meet the needs identified and strike the right balance, it is important to address the question on how would a sui generis system relate to conventional IP systems particularly in respect of overlapping subject matter.

Efforts have been made for establishing sui generis system and according to Samantha, the Secretariat of WIPO continues to undertake, upon request, legal-technical cooperation activities for the establishment, strengthening and effective implementation of systems and measures for the legal protection of TCEs. As a component of this programme, it is developing a comprehensive Practical Guide for lawmakers, policy makers, communities and other stakeholders, and is also preparing more tailored guides for other interested parties, such as commercial users and handicraft organizations. In addition, the development of model contracts, codes of conduct and guidelines for use by folklore archives, museums and other institutions to assist them in managing the IP aspects of their cultural heritage collections is being explored.²⁹⁹

This legal development would build on the protection for expressions of folklore already provided in international treaties. It would lead to more effective protection of TCEs, basing it on a stronger shared understanding of the common principles and objectives of protection. This should help coordinate and strengthen international

²⁹⁹ Samantha, N., (note 316).

responses to concerns about failure to acknowledge and respect the cultural heritage of indigenous and traditional communities, and ensure that this heritage is used appropriately and equitably, while allowing cultural exchange and evolution to thrive.³⁰⁰

It is prudent to note that scholars have argued that several States have already provide specific legal protection for TCEs as intellectual property in their national laws or regulations, largely within their national copyright legislation, although the modalities of protection may differ.³⁰¹ In some cases, such states refer to TCEs simply as a form of copyright work, and most of the usual rules of copyright apply to them. Examples of these countries would include Barbados, Côte d'Ivoire, Indonesia and the Islamic Republic of Iran. Another group of States have included within their copyright legislation provisions specifically designed for expressions of folklore. Examples would include Burkina Faso, Ghana, Mexico, Mozambique, Namibia, Nigeria, Senegal, Sri Lanka, Togo, the United Republic of Tanzania, and Viet Nam. In most of these cases, the provisions are based upon the Tunis Model Law of 1976 or the 1982 Model Provisions.³⁰²

A third category comprises States that provide protection for expressions of folklore in distinct *sui generis* legislation, such as Panama and the Philippines. Panama's Law of 2000 provides perpetual and collective protection of the intellectual property type, based upon a registration requirement, for the handicrafts and other creations of its

³⁰⁰ Ibid.

³⁰¹ WIPO., *Intellectual Property Handbook*, 2nd Edition, World Intellectual Property Organisation, Geneva, 2004, pp.59-66.

³⁰² Ibid.

Indigenous peoples. The Bangui Agreement of the African Intellectual Property Organization (OAPI), as revised in 1999, establishes sui generis protection for TCEs. More recently, the Secretariat of the Pacific Community has developed a sui generis model law for the Pacific Island countries.³⁰³

However, when it comes to implementation, even in those countries which provide specific legal protection for TCEs, it appears from the results of the WIPO questionnaire that there are few countries in which such provisions are actively utilized or effective in practice. There appears to be little practical experience with the implementation of the existing systems and measures which countries have established in law. States have cited a variety of legal, conceptual, infrastructural and other operational difficulties they experience in implementing workable and effective legislative provisions at the national level. States have requested enhanced legal-technical cooperation in this respect.³⁰⁴

Some have argued that it is necessary to provide States and regional organizations with updated and improved guidelines or model provisions for national laws, taking into account the 1982 Model Provisions as a starting point.³⁰⁵ Most importantly, WIPO's fact-finding, other consultations and the 2001 questionnaire also evidenced a strong demand from among many countries for the effective international protection of TCEs. Similar calls have been made within the context of the WIPO Intergovernmental Committee, and it may be that eventually, on the basis of

³⁰³ Ibid. Example in Moody. O.O., The Nagoya Protocol: A Possible solution to the Protection of Traditional Knowledge in Biodiverse Societies of Africa, LLM, Mini Thesis, University of the Western Cape, South Africa, 2011.

³⁰⁴ Ibid.

³⁰⁵ WIPO., Intellectual Property Handbook, 2nd Edition, World Intellectual Property Organisation, Geneva, 2004, p.65.

successful national and regional experiences and a consolidation of approaches, it will be possible to develop a suitable framework for international protection.³⁰⁶

Apart from the work done by WIPO on the aspect of development of Sui generis system for protection of expressions of folklore, Molly and Jane argue that there is another institution involved in designing the system and that institution is the United Nations Permanent Forum on Indigenous Issues. According to them, the United Nations Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights. The Permanent Forum is coordinating many initiatives aimed at the implementation of the Declaration on the Rights of Indigenous Peoples.³⁰⁷

According to Molly and Jane,³⁰⁸TCEs occupy an ambiguous legal status; they may or may not benefit from one or several branches of IP protection. One difficulty in answering these questions is that no clear legislative framework exists to provide guidance over the management, access and use of TCEs. As international IP law was born in a very specific cultural context, it does not recognise indigenous or traditional customary laws relating to the ownership and management of cultural knowledge and property.

As previously mentioned, the main obstacle for tradition-bearers in claiming ownership of cultural heritage and TCEs that reside within cultural institutions is that

³⁰⁶ Ibid, p.66.

³⁰⁷ Molly,T., and Jane, A., *Intellectual Property and Safeguarding of Traditional Culture: Legal Issues and Practical Options for Museums, Libraries and Archives*, the World Intellectual Property Organization, 2010, available <http://www.wipo.int>, (accessed on 27th November, 2021).

³⁰⁸ Ibid.

they are often not legally recognised as the rights holders. This means that they have limited capacity to argue and assert legal rights and interests in order to negotiate management frameworks that are culturally appropriate.³⁰⁹

Many cultural institutions, at the turn of the 21st century, have developed protocols and procedures to protect the rights of tradition-bearers and source communities. There is a growing body of models on which cultural institutions may draw. However, this kind of soft law has all too often no real mechanism for enforcement. To address the gaps in current IP law in relation to TCEs, improved processes for identifying problems in the management of TCEs by museums, libraries and archives must be developed. This includes the development of mutually-beneficial strategies and relationships between cultural institutions and indigenous and traditional communities. The fact that the law is unclear at present should not be an impediment to foster better, more respectful behaviours and practices.³¹⁰

As already noted, there is, as yet, no general international law or legislative framework for managing TCEs. This limbo has produced confusion in terms of how cultural institutions handle their collections, and engage with indigenous peoples and traditional communities, who assert themselves as legitimate rights holders. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) was established in 2000 to fully investigate the extent of these issues.³¹¹ There are different sets of values and

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Molly, T., and Jane, A., (note 326).

customs at play. For indigenous and traditional communities, TCEs have intrinsic value as vital elements of their cultural heritage and identity. They hence contribute to the conservation and promotion of cultural diversity.

TCEs are both cultural and economic assets of the peoples and communities who are their creators, practitioners and custodians. TCEs can be economic resources that concretely contribute to providing livelihoods and easing poverty and socio-economic disadvantage for these communities, for example, through craft marketing. Indigenous and traditional communities are generally among the poorest and most disadvantaged in the world. Therefore, concern for properly dealing with TCEs is not simply an ethical issue.

Factors pushing for adoption of sui generis system for protection of expressions of folklore are associated with the question as to whether intellectual property systems protect traditional cultural expressions. According to Jane and Molly although all communities may not necessarily adopt a proprietary approach to their TCEs, they nevertheless are opposed to the unauthorized use of their TCEs and do take offence at unauthorized use and all the more so when it is for commercial purposes or is derogatory in nature.³¹² Existing IP measures can be useful to prevent such misuses and misappropriations, especially for the peoples and communities whose primary aims are to prevent the unauthorized use of their creative productions and to exploit their creative arts and contemporary adaptations of their TCEs in the marketplace.

³¹²Customary Law, Traditional, Knowledge and Intellectual Property: An Outline of the Issues, A paper prepared for WIPO, 2013. Also see Kutty, P.V., National Experience with the Protection of Expressions of Folklore/Traditional Cultural Expressions, prepared for WIPO.

Molly and Jane³¹³ cite examples of possible protection of expressions of folklore under existing IP Law as follows: photographs, sound-recordings and films that document indigenous and traditional customary practices and knowledge are often protected under copyright and/or related rights law, and as such, provide an indirect form of protection for TCEs. These derivatives of TCEs may benefit from the existing rights and responsibilities in relation to access, use and reproduction. In spite of all this, the conventional IP system has been identified by some as not only inadequate to comprehensively and appropriately protect TCEs but also as positively harmful, in some respects.

First, IP rules exclude most TCEs as such from protection, relegating them to an unprotected public domain. Second, follow-on creations derived from TCEs may receive protection as new IP, giving the right owners (whoever they may be) exclusive rights to determine the conditions under which third parties (including the TCE-holding communities themselves) may use the TCE. Furthermore, the types of rights provided by current IP law and the nature of the rights conferred do not reflect customary laws, values and protocols associated with TCEs.

It is perhaps not possible for international IP law to reflect them, as they are often unique and subjective to communities, and vary from one community to the other.³¹⁴ As a result, many stakeholders call for new *sui generis* systems to protect TCEs, i.e., special or standalone systems which would address TCE issues particularly. Several countries and regional organizations have already put in place national and regional

³¹³ Ibid.

³¹⁴ Ibid.

sui generis laws and measures. In concluding this part, some countries are calling for a sui generis approach, while others consider that existing IP law offers many solutions and therefore just needs a few changes. Others consider that a mixture of sui generis mechanisms and existing IP law is the best approach. These options are being discussed within the WIPO IGC, among other fora.³¹⁵

3.4.3 Application of Sui generis System and/or Model Law

Countries can elect to develop their own national system or opt to implement a regional approach (such as the Pacific Model Law) or an international approach. Each approach has its own advantages and disadvantages.³¹⁶ First is national approach. The benefit of developing a national system ‘from scratch’ is that it enables a country to develop measures that reflect and respond to its particular circumstances. However, the disadvantage is that in the absence of bilateral or multilateral agreements providing protection in foreign jurisdictions, protection is limited to within the particular country. This may, for example, lead to situations where a protection system in a country is circumvented by the use of the same or similar traditional knowledge in another country that does not have the necessary system of protection in place.³¹⁷

Second is regional approach. A regional framework can provide more effective protection than a national system. A framework approach, such as the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions

³¹⁵ Ibid.

³¹⁶ Secretariat of the Pacific Community., Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture based on the Pacific Model Law 2002, the Pacific Community Noumea, New Caledonia, 2006.

³¹⁷ Ibid.

of Culture (of which the Pacific Model Law form part), can achieve harmonisation across national systems through the use of minimum substantive standards while providing flexibility for countries to modify and adapt matters of detail to suit their particular circumstances. In this sense, a ‘regional approach’ means a regional framework that guides national laws and ensures a certain level of similarity between them. The national laws remain, however, national, and their application is limited to their respective territories. A regional system can also refer to a more integrated approach that could enable, for example, mutual recognition of rights between joining territories, reciprocal enforcement of rights in territories of the region, and a regional mechanism for the resolution of disputes. This is especially useful where particular traditional cultural expressions are not confined to one country, as is the case in the Pacific and other regions.³¹⁸

Third is international approach. It is often suggested that comprehensive protection can only be achieved by way of an international system. Such a system is likely to consist of norms and principles, such as those developed in WIPO IGC, with matters of detail left to national and regional levels. This is important given the world’s cultural diversity as well as jurisprudential diversity. It is also realistic, given the varied interests and concerns of countries with positions based on quite different assumptions and ideological standpoints concerning traditional knowledge and traditional knowledge-holding groups.

Nonetheless, any international regime that provides effective international legal protection will require a degree of harmonisation, and this can be achieved via norms

³¹⁸ Ibid.

and principles adopted at international level. An international system has as its main and most attractive feature the facility to enforce rights regarding TKECs of one ratifying country in another ratifying country (such as the international protection for copyright provided by the Berne Convention 1971). Discussions are continuing at WIPO IGC on the development and adoption of such a system. As already observed, at the international level, there are diverse interests at stake and a wide range of perspectives on the issues. The development of the Pacific Model Law has contributed valuably to the international discussions at WIPO, and the discussions serve to inform further consideration of the Model Law 2002 and, above all, its implementation in PICTs.³¹⁹

3.5 Conclusion

The chapter has revealed the essence of protection of TCEs against misappropriation and misuse both at international and regional level. It has also revealed a number of instruments developed by WIPO and UNESCO for protection of expressions of folklore. It has further disclosed the mechanisms employed for protection of expressions of folklore at international and regional level including benchmarking for mechanisms from other communities like the Pacific and the European community. More specific, model laws and sui generis for protection of expressions of folklore law have been discussed.

³¹⁹ Secretariat of the Pacific Community., Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture based on Pacific Model Law 2002, the Pacific Community Noumea, New Caledonia, 2006, p.10, available at <http://www.spc.int/culture> or <http://wipolex-res-wipo.int>, (accessed on 25th November, 2021).

CHAPTER FOUR

PROTECTION OF EXPRESSIONS OF FOLKLORE IN THE EAST AFRICAN COMMUNITY

4.1 Introduction

This chapter is in respect of protection of expressions of folklore in the East African Community. In particular, the main focus of this chapter is on the extent to which the East African Community (EAC) Partner States have harmonised their respective municipal laws for protecting expressions of folklore. In essence, the chapter addresses the question as to what extent harmonisation of municipal laws of each EAC Partner States over the subject matter has been carried out and/or achieved.

The chapter discloses institutions involved in harmonisation of laws and protection of expressions of folklore in the EAC. It also focuses on the EAC legal instruments, efforts and mechanisms employed by East African member states to harmonise municipal laws, in particular, laws relating to protection of expressions of folklore. The chapter further reveals the challenges encountered by EAC Member States in due process of harmonising their respective national legislation. The last section, that is 4.5 concludes the chapter.

4.2 Establishment of the East African Community

The East African Community was initially composed of three States, namely, Uganda, Kenya and Tanzania. Such relationship or arrangement of three States was attained in 1967. It was in accordance with the Treaty establishing the EAC which was signed by three Partner States in 1967.³²⁰ The community was established, inter

³²⁰ The Treaty for the establishment of the East African Community of 1967, as reflected under the

alia, with the view to achieve economic development among Partner States. However, its goals were not achieved and hence the community collapsed in 1977.³²¹ The former East African Community collapsed on the basis of political and economic reasons.³²²

Subsequently, the current East African community resumed in 2000. The current East Africa Community (EAC) is made up of seven Partner States, namely, the Republic of Burundi, the Republic of Kenya, the Republic of Rwanda, the United Republic of Tanzania, the Republic of Uganda, Southern Sudan and the Democratic Republic of Congo.³²³ The Treaty establishing the current EAC was signed in November, 1999 and entered into force in July, 2000. The Treaty sets out, among other things, a vision for the eventual economic integration of the EAC Partner States. The operationalisation of the economic integration under the Treaty has been provided for in the Customs Union and the Protocol establishing the East African Community Common Market.³²⁴

The Common Market Protocol provides for four freedoms, namely; free movement of goods; free movement of persons and labour; free movement of services; and free

Preamble of EAC Treaty of 1999, available at <http://www.eacj.org>, (accessed on 20th December, 2021). See also Kafeero, E., Customs Law of the East African Community in light of WTO Law and the Revised Kyoto Convention, Dissertation, University of Muenster in Westphalia, 2009, pp.80-89 on historical background of the East African Community.

³²¹ Ong'oyi, M. K. O., The Influence of National Interest of Regional Integration: The Case of Kenya in the East African Community, Thesis of Master of Arts in Political Science and Public Administration, University of Nairobi, Kenya, 2021, pp.40-53 clarify the evolution of Regional Integration in East Africa in perspective.

³²² See <https://www.eac.int> and the East African Community Trade and Investment Report, 2018. See also Briira, L.P., Collective Identity and Prospects: A Case study of the East African Community, PhD Thesis, Universität Mochum, Germany, 2015, p.21 indicates that the EAC collapsed in 1977 because of ideological different.

³²³ See Accession Agreement dated 8th April, 2022, available at <http://www.eac.int>, (accessed 27th April, 2022). Also, Nansubuga C., The Need for Developing a Successful Competition Regime in Uganda: An Analysis of the Factors hindering the Operationalisation and Implementation of the East African Community Competition Act, LLM Dissertation, University of Cape Town, pp.26-27 reveals the background and rationale for establishment of EAC.

³²⁴ EAC, Report on Harmonisation of EAC Partner States' Commercial Laws, 5TH November, 2012. The Report indicates that the Customs Union Protocol signed in March, 2004 and came into effect in June, 2005. The Report further indicates that the Common Market Protocol was signed on 30th November, 2009 and came into force on 1st July, 2010, upon being ratified by all Partner States.

movement of capital and the rights of establishment and residence. The establishment of the EAC Common Market intends to significantly boost trade and investments and make the region more productive and prosperous.³²⁵ Indeed, the EAC common market is essentially an arrangement whereby member or partner countries of a regional economic community operate as a single market for goods, services, capital and labour, having common revenue and trade laws.³²⁶

Despite the EAC Common market, each EAC Partner State has a primary responsibility for regulating its matters within its jurisdiction and thus each Partner State has its own laws. The laws include laws on the protection of expressions of folklore. Based on the factor that, each EAC Partner State has its own laws and, in a bid, to operationalise the protocol on the common market, the EAC Member States aspired for harmonisation of laws on the protection of expressions of folklore in accordance with international standards.

4.3 Legal Instruments for Protection of Expressions of Folklore in EAC

There are two important EAC legal instruments relevant to the study. These are East African Treaty and the EAC common market Protocol. To start with and by illustrating, the legal basis for harmonisation of EAC Partner States laws is reflected in the objectives of the Community underpinned under article 5 (1) of the Treaty. The article aims at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence,

³²⁵ Ibid.

³²⁶ Wasinde, W., *The EAC Common Market* in Ugirashebuja, E., East African Community Law: Institutional, Substantive and Comparative EU Aspects, Brill Nijhoff, Boston, 2017, pp.285-292. See also the EAC Investment Guide, 2020 which reveals that the main objective of EAC is to widen and deepen integration among the Partners States and hence thriving to becoming a single investment destination with harmonized investment laws, policies, strategies and regulation.

security and legal and judicial affairs, for their mutual benefit. Article 5 (2) of the Treaty is about establishment of a Customs Union, a Common Market, Monetary Union and ultimately a Political Federation.

Article 126 (1) of the Treaty provides that in order to promote the achievement of the objectives of the Community as set out in article 5 of the Treaty, the Partner States shall take steps to harmonise their legal training and certification; and shall encourage the standardisation of the judgments of courts within the Community.³²⁷ In order to achieve the objectives underpinned in article 126 (1), article 126 (2) (b) of the Treaty requires Partner States through their appropriate national institutions, to take all necessary steps to harmonise all their national laws pertaining to the Community.

From the above and in line with the objectives of the study set out in chapter one, it is vital to reveal that under article 43 (4) of the EAC Common Market Protocol, the EAC Partner States agreed to establish mechanisms to ensure: (a) the legal protection of the traditional cultural expressions, traditional knowledge, genetic resources and national heritage; (b) the protection and promotion of cultural industries; (c) the use of protected works for the benefits of the communities in the Partner States; and (d) the cooperation in public health, food security, research and technological development.

³²⁷ See also Ndayingurukiye, M., *Some Observations on Practical Aspects of the Harmonisation of Economic Laws in the East African Community Context*, in Majamba, H., and Dovelung, J., *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities*, Law Africa Publishing (K) Ltd, Nairobi, Kenya, 2018, pp.3-12.

Further to that, article 43 (5) of the protocol mandates the Council of EAC to issue directives for: (a) co-operation in the administration, management and enforcement of intellectual property rights; (b) the elimination of discriminatory practices in the administration of intellectual property rights amongst Partner States. It is also reflected under article 43 (6) of the protocol that the Partner States shall honour their commitments in respect of international agreements which relate to intellectual property rights. More so, under article 47 (1) and (2) of the protocol EAC States undertook for Approximation and Harmonisation of Policies, Laws and Systems. The Partner States undertake to approximate their national laws and to harmonise their policies and systems, for purposes of implementing this Protocol. It is also disclosed that the Council is mandated to issue directives for the purposes of implementing this Article.³²⁸

This is equally demonstrated by Ezekiel who elaborates that the third source of authority that provides the basis for harmonisation are Community regulations issued by the Council and contained in annexes to the Common Market Protocol that provide for the free movement of persons, free movement of workers, free movement of goods, services and capital, rights of establishment, rights of residence. The Council directives, regulations, guidelines and decisions may also provide guidance by setting standards for harmonisation. He also adds that article 16 of the EAC Treaty provides that the effects of regulations, directives, decisions and recommendations of the Council taken or given in pursuance of the provisions of the Treaty are binding on the Partner States, on all organs and institutions of the

³²⁸ The East African Common Market Protocol, Art.43 and 47.

Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under the Treaty be addressed.³²⁹ In upshot, the Treaty, the Protocol, regulations and directives discussed above are sources or foundation for harmonisation municipal laws for protection of expressions of folklore across the EAC region.

4.4 Institutions Responsible for Protection of Expressions of Folklore in EAC

A number of institutions are involved in the protection of expressions of folklore in East Africa Community. Such institutions are established under article 9 of the EAC Treaty³³⁰ and include the Summit-head of States, the Council, the Co-ordination Committee, Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat. Therefore, the institutional framework for the protection of expressions of folklore under the Community consists of the Executive, the Legislative and the Judicial arms.

The executive arm is composed of the Summit of the Heads of State, the Council as the policy making organ, the Secretariat which is the executive organ of the Community and EAC institutions. The Legislative and Judicial arms are made up of the East African Legislative Assembly and the East African Court of Justice respectively. The functions, mandates, and operational frameworks of these Organs and Institutions are set out in the Treaty, Protocols, and Rules of Procedures.³³¹ Their respective roles in promoting and protecting expressions of folklore in East African

³²⁹ Ezekiel, R.B., *Harmonisation of Social Security laws in East African Community: a myth or reality?* African Journal of Law and Practice, 2021, Vol.1 No.1, p.58.

³³⁰ See Ong'oyi, M. K, O., (note 343), p.69 discusses the organs of the East African Community.

³³¹ EAC, the Background of 4th EAC Development Strategy (2011/12-2015/16) deepening and accelerating integration, August, 2011.

Community are discussed below.

4.4.1 Heads of State-Summit

First of all, the Summit consists of the Heads of State or Government of the Partner States.³³² It is clearly indicated under article 10 of the Treaty that if a member of the Summit is unable to attend a meeting of the Summit and it is not convenient to postpone the meeting, that member may, after consultation with other members of the Summit, appoint a Minister of Government to attend the meeting. The Minister appointed to attend that meeting will have all the powers, duties and responsibilities of the member of the Summit for whom that person is acting. It is therefore important to note that the Summit is mandated to give general directions as to the development and achievement of the objectives of the Community, in particular, protection of expressions of folklore. The Summit has also mandate to consider annual progress reports and such other reports submitted to it by the Council. The reports include reports on harmonisation of municipal laws for protection of expressions of folklore.

The Summit is as well mandated to review the state of peace, security and good governance within the Community and the progress achieved towards the establishment of a Political Federation of the Partner States.³³³ Moreover, the Summit may delegate the exercise of any of its functions, subject to any conditions which it may think fit to impose to a member of the Summit, to the Council or to the

³³² The EAC Treaty, Art.10. See also Ngabo, M.P.I., *The Importance of an effective Institutional Framework for the Realisation of Regional Economic Integration Objectives: A case study of the East African Community (EAC)*, LLM Mini Dissertation, University of the Western Cape, South Africa, p.64.

³³³ The EAC Treat, Art.11.

Secretary General³³⁴ as well as any officer in the service of the Community authorised in that behalf by the Summit.³³⁵ The Summit is also mandated to cause all rules and orders made by it under EAC Treaty to be published in the Gazette; and any such rules or orders shall come into force on the date of publication unless otherwise provided in the rule or order.

To demonstrate and in line with the objective of the study, at their 11th Summit held on 20th November 2009, the Heads of State directed the EAC Partner States to undertake a review of their domestic laws with a view to causing necessary amendments to ensure that the same are consistent with the Treaty obligations arising from the Common Market Protocol by 31st December, 2010 and commence the implementation of the Common Market Protocol by discharging the obligations arising there from, inter alia, removing any existing restrictions on the freedoms and rights enshrined in the Protocol. Therefore, it is obvious that the Head of States are pioneers of harmonisation of municipal laws for protection of expressions of folklore in East Africa Community.

4.4.2 Council

The Council is another EAC organ. The Council consist of the Minister responsible for East African Community affairs of each Partner State; such other Minister of the Partner States as each Partner State may determine and the Attorney General of each Partner State.³³⁶ In that regard, it is worth noting that the Council is responsible to promote, monitor and keep under constant review the implementation of the

³³⁴ The EAC Treaty, Art.11 (5).

³³⁵ Ibid.

³³⁶ The EAC Treaty, Art.13.

programmes of the Community and ensure the proper functioning and development of the Community in accordance with this Treaty. It is also responsible to make policy decisions for the efficient and harmonious functioning and development of the Community and initiate and submit Bills to the Assembly.

Likewise, the Council gives directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and the Assembly. It further makes regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty and consider the budget of the Community.³³⁷ Further to that the Council is responsible to consider measures that should be taken by Partner States in order to promote the attainment of the objectives of the Community and make staff rules and regulations and financial rules and regulations of the Community.

Worth noting is that the Council is also obliged to submit annual progress reports to the Summit and prepare the agenda for the meetings of the Summit, establish from among its members, Sectoral Councils to deal with such matters that arise under this Treaty and establish the Sectoral Committees provided for under this Treaty. It is also responsible to implement the decisions and directives of the Summit as may be addressed to it and endeavour to resolve matters that may be referred to it.³³⁸ The Council may request advisory opinions from the Court in accordance with the EAC Treaty. The Council has also a mandate to cause all regulations and directives made or given by it under this Treaty to be published in the Gazette; and such regulations or directives shall come into force on the date of publication unless otherwise

³³⁷ The EAC Treaty, Art.14.

³³⁸ The EAC Treaty, Art.14.

provided therein.³³⁹

Notably, the Council has a key role in ensuring that all laws enacted by the East African Legislative Assembly are in conformity with the Treaty commitments and obligations and that all national laws are as far as practicable, proximate to other Partner States and has also a duty to oversee the harmonisation and approximation of laws exercise in EAC context.³⁴⁰ As far as harmonisation of laws is concerned, the Council is assisted by a Sub-committee on Approximation of Laws. The Sub-committee on Approximation of Laws was established under Article 14(3) (j) of the Treaty, with a mandate to study all the national laws with a view to harmonising the Partner States laws and advising the Council on the various aspects of the exercise. The Subcommittee is responsible and reports to the Sector Council on Legal and Judicial Affairs, whereas the Council ensures that Partners States amend their laws as per the recommendations of the Sub-Committee.

It is further assisted by Taskforce on the Approximation and Harmonisation of Laws. The Taskforce on the Approximation and Harmonisation of Laws was formed under the Sub-Committee with the main objective of facilitating the mandate of the Subcommittee. It submits its report to the Subcommittee on Approximation of Laws. The Task Force consists of high-level officers most of whom are lawyers from the Partner State Law Reform Commissions, Ministries of Justice/Attorney General's Chambers and Ministries responsible for EAC Affairs.

³³⁹ Ibid.

³⁴⁰ The EAC Treaty, Art.14 (3) (i).

For instance, Sector Council on Legal and Judicial Affairs urged Partner States to harmonise their entire national laws with the EAC common market protocol in accordance with the implementation programme adopted by Head of states at the 11th summit. Avail updates at every meeting of the sectoral council on partner states harmonisation of the national laws for purposes of implementing the protocol on the establishment of the EAC Common Market Protocol.³⁴¹In that regard, the Council has power to make legally binding regulations, issue directives, take decisions and make recommendations. For instance, the Council has issued several directives under article 14 of the Treaty and in accordance with the Common Market Protocol. However, the process of complying with the directives by the Partner States is also very slow.³⁴²

4.4.3 Secretariat

The Secretariat is also important organ in harmonising the laws related to protection of expressions of folklore in East African Community. It is worthy to note that the Secretariat was tasked by the Council to develop a matrix of country- specific recommendations on the harmonisation of laws. For instance, the EAC Secretariat commissioned a study to review the existing commercial laws of the EAC Partner States that have a direct bearing and impact on the establishment of the Common Market. The study aimed at recommending two (2) key areas to be harmonised, as a priority, which would have a more immediate impact on the achievement of the objectives of the Common Market.

³⁴¹EAC, The Council Report, 2010, EAC/SCLJA/09/2010.

³⁴²EAC, The Council Report for a meeting held in Dar es Salaam on 1st November, 2021, EAC/SCLJA/22/2021.

The study was expected to make proposals for the harmonisation of the relevant commercial laws in order to assist Partner States in the implementation of the Common Market Protocol and the realisation of the freedoms and rights under the Protocol. The Business and Investment law clusters were identified as the areas which would accelerate the implementation of the Common Market and creation of a common investment regime.³⁴³

4.4.4 The East African Court of Justice

The East African Court of Justice is a judicial body³⁴⁴ whose responsibility is to administer justice and ensure the adherence to law in the interpretation and application of and compliance with the Treaty. Like any other Court of law, it is vested with powers to administer justice by hearing and deciding cases and other matters brought before it.³⁴⁵ In other words, the Court is responsible for, among other things, determination of disputes that may arise under the Treaty and can also give advisory opinions regarding questions of law arising out of the provisions of the Treaty. The EACJ therefore, has a crucial role to play in conflict resolution and confidence building in the region. By playing its role effectively, the Court is expected to enhance the observance and upholding of human rights through good governance and democratic institutions in the region. Its judges are appointed by the

³⁴³ Ibid.

³⁴⁴ The EAC Treaty, Art.23. See also Ruhangisa, J.E., *The East African Court of Justice: Ten Years of Operation (achievements and challenges)*, A Paper presented during the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st-2nd November, 2011.

³⁴⁵ See the East African Court of Justice (EACJ), 20th Anniversary Report, 2001-2021 indicating the mandate of the East African Court of Justice. Also see Ruhangisa, J.E., *Role of the East African Court of Justice in the Realization of Custom Union and Common Market*, A Paper presented at Burundi National Assembly, Bujumbura, Burundi, 27th to 31st January, 2010. The paper, inter alia, demonstrates that EACJ is the main Judicial Organ in EAC and plays crucial role in EAC integration.

Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence in their respective Partner States.

In particular, article 27 (1) and (2) vests the court with jurisdiction to interpretation and ensuring of proper application of the EAC Treaty. Interpretation also covers provisions on harmonisation of municipal laws. The Court is mandated with original, appellate and other jurisdiction to hear and determine human rights issues. Such human rights issues include protection of expressions of folklore. Worth noting is that in 2013, the jurisdiction of East African Court of Justice was extended to handle trade and investment matters.³⁴⁶

Article 30 of the Treaty gives a right to any person who is resident in a Partner State to refer a case on the unlawfulness of any Partner State's act, regulation, directive, decision or action to the EACJ for redress. Furthermore, EAC nationals can resort to article 6 (d) that provides for good governance as a fundamental principle of the Community to bypass the human rights jurisdictional confinement imposed on the EACJ. According to article 6 (d) good governance is defined as encompassing adherence to the principles of rule of law as well as the recognition, promotion and protection of human and people's rights.³⁴⁷ However, from information gathered, no any resident of EAC Partner States has referred the matter on interpretation of the Articles of the treaty on harmonisation of municipal laws nor infringement of

³⁴⁶The Protocol operationalizing the extended Jurisdiction of the East African Court of Justice, Art. 3.

³⁴⁷ The Legal Framework of the EAC discussed by Elvin Membe Binda in EAC Trade Report, 2012, p.113.

expressions of folklore. Thus, it is worthy to note that in the process of the regional integration on which the East Africa Community has embarked, one would expect the EACJ to play an instrumental role not only through peaceful settlement of disputes, but more importantly by contributing to the harmonisation of the laws of Partner States through development of jurisprudence in the region.³⁴⁸

Moreover, the EACJ is considered as constituting a unique opportunity for the EAC integration in that it is the main judicial organ of the Community, accessible, independent and that it renders expeditious justice. The Court is accessible by a range of stakeholders from State level to that of a simple individual. In that regard, the following have expressly given access to the Court by the Treaty. First are the Partner states. When a Partner State considers that another Partner State or Community organ has failed to fulfill Treaty obligation, or that there is need for determination by the Court on legality of any Act, regulation, directive, decision or action on ground of being ultra vires the Treaty.

The second is Secretary General. Where the Secretary General considers that a Partner state failed to fulfill obligation or breached the Treaty. The third is the National court. Where national courts refer to EACJ for preliminary ruling question of Treaty interpretation or determination of legality of a community law or action.³⁴⁹

As it has already indicated under article 23, the East African Court of Justice ensures the adherence to law in the interpretation, application of and compliance with the rules and norms of the EAC Treaty. It provides necessary decisions and solutions to

³⁴⁸Ruhangisa, J.E., (note 367).

³⁴⁹ Ibid.

legal problems or disputes that arise.

Indeed, through other legal mechanisms, the Court could even prevent such disputes from escalating into lawsuits. Furthermore, article 33 of the treaty underpins that the decisions of the Court have precedence over decisions of national courts on a similar matter.³⁵⁰ To cite example from European Community, it is urged that national courts must incorporate the judgments of European Court of justice into their copyright regimes to ensure that the copyright and related rights contribute to the achievements of the objectives of a single internal market.³⁵¹

4.4.5 The East African Legislative Assembly

This is another important organ of the East African Community responsible to make laws. In the due process of legislating, the organs collaborate with other organs like the Council and the Summit to enact laws biffing the social economic structure of East Africa Community. The organ is also responsible for advising the Council and head of Head of States. For instance, article 9 provides that the East African Community Legislative Assembly is responsible for discussing all matters pertaining to the Community and make recommendations to the Council as it may deem necessary for the implementation of the Treaty. It further provides that the Assembly is responsible for liaising with the National Assemblies of the Partner States on matters relating to the Community.³⁵² In addition, articles 59, 62 and 63 indicate how the bill is presented, dated and finally assented by Head of States. In enacting the Community Acts, the East African Community Legislative Assembly normally

³⁵⁰The East African Court of Justice: Court Users Guide, 2013.

³⁵¹ See note 101.

³⁵²The Treaty establishing East African Community as amended on 20th August, 2007.

collaborates with other organs like the Summit and the Council. Such collaboration and enactment of laws also covers protection of expressions of folklore.³⁵³

4.5 Harmonisation of Municipal Laws in EAC

This section discusses five key issues: Harmonisation, rationale for harmonisation of municipal laws in the EAC, to what extent harmonisation have been achieved in the EAC, mechanisms for harmonisation and the challenges encountered in harmonising municipal laws by the EAC. To start with harmonisation, many scholars have addressed this issue in perspective of protecting intellectual property. Other scholars have discussed the issue in line with social security laws. The authors suggest that a number of stages for harmonisation of national laws are involved.

According to Ezekiel,³⁵⁴ there are four stages of harmonisation of national laws. He elaborates that harmonisation is expected to go through a number of stages: The first stage involves putting in place necessary institutions for the harmonisation process. While this is provided in the EAC Treaty and the EAC Common Market Protocol, there is no any institution in the EAC that is specifically set for harmonisation of municipal laws in the East Africa Community Member's States.

The second stage which is missing among East African Partner States is evidence of functioning analytical stage that should have been translating all necessary Community legal acts in each of the seven EAC partner states trying to incorporate the spirit of the EAC law in their national strategic plans for the adoption of the Acts of the Community in line with the EAC priorities.

³⁵³ Ibid.

³⁵⁴ Ezekiel, B.R., (note 351). See also the East African Scorecard of 2014 and 2016.

The third stage involves operational elaboration of the new legislation in each of the EAC partner states that is in line with the already set action plan towards harmonisation of national laws. This stage may be described as transposition stage where actual approximation of the national legislations of six the EAC partner states with the EAC acts is expected to be attained to a certain degree. It is expected that at the transposition stage, the national and EAC social security law experts do prepare new draft national laws or propose amendments to the existing national laws and by-laws, but come up with the regional wide model law for harmonisation legislation of partner states.

The fourth stage in the EAC legal harmonisation of laws requires adoption of the new laws, amendments of the existing incompatible social security laws through the legislative assembly and working on implementation of these harmonised laws in an adequate fashion. This has to do with the pragmatics or functionality of the harmonised laws and their practical effects and their effective management over the existing institutional set-ups.³⁵⁵ From the above four stages, it is observed that the author was addressing the issue of harmonisation of national social security laws among the EAC Partner States. However, such stages equally apply to the harmonisation of municipal laws for protecting expressions of folklore in the EAC. Next, is about the rationale for harmonising municipal laws. It is acknowledged that through harmonisation, national laws of Partner States are aligned to those of the Community.

³⁵⁵Ong'oyi, M.K.O., (note 352), p.11. See also Ezekiel, B.R., (note 376).

The aim is to create consistency of laws, regulations, standards and practices hence a fair play environment for all stakeholders. Harmonisation efficiently facilitates economic activities between Partner States.³⁵⁶ It reduces compliance and regulatory burdens for national or trans-national businesses. More importantly, it eliminates differences in legal regimes. Also, it provides an environment that supports effective operation and smooth management and development of the Community. It further supports the implementation of the objectives of the community.³⁵⁷

Harmonisation is necessary in order to ensure that within the EAC, there are no deterrent Partner States that are not on the strongest footing in terms of legislation and those Partner States traditionally regarded as “legally safe” are both regarded equally. Furthermore, there can be little doubt that the increase in inter-state trade promotes economic development and growth. In order to further economic growth, developed and developing countries alike have entered into relationships characterised by interdependence. This interdependence has prompted a move towards economic convergence and this is where the idea of regionalism originates; it is rooted in the observation that small and fragmented markets hamper economic development and trade, and that economic development is measured, *inter alia*, by the ability of a country to create a good environment for the private sector. Regional integration arrangements are intended to pave the way towards the creation of larger regional markets. A larger market benefits the participating countries in that it enhances domestic competition, encourages economic diversification, increases

³⁵⁶ Harmonisation and Approximation of Laws that Impact on the Implementation of the Common Market. A paper presented at the EAC awareness seminar for Judicial Officers, 13th to 19th November, 2010, Gisenyi, Rwanda by Javason Kamugisha.

³⁵⁷ Ibid.

return on investment, thereby attracting more investment.³⁵⁸

According to Emmanuel³⁵⁹ evidence from the harmonisation of energy laws in other trade communities globally suggests that harmonisation results in increased efficiency and approvals for the energy sector thereby cutting one or two years off the overall approval process (thereby allowing project development to occur quicker) thus enhancing domestic GDP. There is a tremendous variation across East Africa in the legal framework and policy when the fundamentals of the energy industry and how a developer goes about exploration, project development, operations and decommissioning are considered. These variations, combined with the economic consequences of mismanagement of the sector, create investment uncertainty.³⁶⁰

This investment uncertainty is increased by inefficient and cumbersome legislation found in some East African States. Even if a potential investor (and a potential trader for that matter) is not deterred by the unfamiliarity or possible complexity of a foreign legal system, he may be loathed to invest in a state whose laws have not been brought up to date with the developments in economic and international relations. Of course, once attracted, investor interests must be protected and each African state must have laws that provide such security to all investors. Harmonisation is also important when dealing with global trans boundary issues such as climate change. Climate change resulting from energy-related greenhouse gas emissions is a global challenge regardless of physical or geographical borders because they pose various

³⁵⁸ Harmonisation and Approximation of Laws that Impact on the Implementation of the Common Market. A paper presented by Javason Kamugisha at the EAC awareness seminar for Judicial Officers, 13th to 19th November, 2010, Gisenyi, Rwanda by Javason Kamugisha.

³⁵⁹ Tharani, A., *Harmonization in the EAC* in Ugarashebuja, E., East African Community Law: Institutional, Substantive and Comparative EU Aspects, Brill Nijhoff, Boston, 2017, pp.486-500.

³⁶⁰ Ibid.

threats especially to vulnerable regions such as the EAC.³⁶¹

Harmonisation is not only a public sector led initiative. The role of the private sector in African regional integration (which has to date been largely in the hands of governments and non-governmental organisations) is gradually increasing. Apart from its contribution to policymaking and advice to governments, the private sector can participate in the implementation of regional projects and provide financial and human resources, spread of expertise, and technological and management knowledge. It can also contribute to production of goods, job creation and increased market size and cross border investment.³⁶²

The harmonisation of legal regimes improves the capacity of states to coordinate their economic policies. If harmonisation of laws is extended beyond the coordination of economic policies to include substantive business laws among Partner States, individual traders will be encouraged, but so will potential investors who will have the needed assurance that they will be familiar with the legal procedure and consequences. Every investor, creditor or trader wants to be aware of the risks inherent in the undertaken commercial transaction. Where the content and effect of legal rights and obligations are more predictable, the legal risks and thus the transaction costs are reduced.³⁶³

Regional harmonisation is a necessary corollary to the overall aim to promote trade and investment and increase economic growth. In order to make the process of

³⁶¹ Tharani, A., *Harmonization in the EAC*, in Ugirashebuja, E., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, Boston, 2017.

³⁶² Ibid. See also the East African Common Market Scorecard of 2014 and 2016.

³⁶³ Ibid. See also Magogo, T. D.B., *Harmonisation of Copyright within the East African Community: An Analysis of the Kenyan and Tanzanian Copyright Legislation*, LLM Mini Thesis, University of the Western Cape, South Africa, 2013, p.49.

regional integration meaningful, traders and investors must be given the opportunity to avoid the doldrums of legal diversity, they must be allowed to rely on laws which are in line with the realities of business practice and which are up to date with international standards. This should involve the harmonisation of domestic substantive legal provisions. What remains for East African states is to find the most appropriate method by which such harmonisation would take place.³⁶⁴

A point of emphasise here is that, under the harmonisation process, national laws of Partner States are aligned to those of the Community. The aim is to create consistency of laws, regulations, standards and practices hence a fair play environment for all stakeholders. In that regard, harmonisation efficiently facilitates economic activities between Partner States. It reduces compliance and regulatory burdens for national or trans-national businesses. It further supports the implementation of the objectives of the Community. What is more important, it eliminates differences in legal regimes. Also, it provides an environment that supports effective operation and smooth management and development of the Community.³⁶⁵

4.5.1 Mechanisms for Harmonisation of Municipal Laws in EAC

Addressing harmonisation in the EAC Aleem Tharani pointed out that regional integration is a major development strategy for African countries who share the aim of continent-wide economic, social and cultural integration by 2028. An important aspect of this is trade liberalisation. This is to be achieved through regional free trade

³⁶⁴ Ibid.

³⁶⁵ Harmonisation and Approximation of Laws that Impact on the Implementation of the Common Market. A paper presented by Javason Kamugisha at the EAC awareness seminar for Judicial Officers, Gisenyi Rwanda, 13th to 19th November, 2010.

areas, progressing towards a customs union, a common market and ultimately monetary union of the East African Community.³⁶⁶

From the above and in line with the objectives of the study set out in chapter one, under article 43 (4) of the EAC Common Market Protocol, the EAC Partner States agreed to establish mechanisms to ensure legal protection of the traditional cultural expressions, traditional knowledge, genetic resources and national heritage; protection and promotion of cultural industries; use of protected works for the benefits of the communities in the Partner States; and cooperation in public health, food security, research and technological development.

Further to that, under article 43 (5) of the protocol, the Council of EAC is mandated to issue directives for co-operation in the administration, management and enforcement of intellectual property rights and the elimination of discriminatory practices in the administration of intellectual property rights amongst Partner States. It is also reflected under article 43 (6) of the protocol that the Partner States shall honour their commitments in respect of international agreements which relate to intellectual property rights.³⁶⁷

Under article 47 (1) and (2) of the protocol EAC states undertook for approximation and harmonisation of policies, laws and systems. The Partner States undertake to approximate their national laws and to harmonise their policies and systems, for

³⁶⁶ Possi, A., *General Principles Governing EAC Integration* in Ugirashebuja, E., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, Boston, 2017, pp. 202-2016.

³⁶⁷ The Protocol on the establishment of the East African Community Common Market.

purposes of implementing this Protocol.³⁶⁸ The question is how far such intended mechanisms have been achieved. A roadmap indicates that the EAC countries are in the process to harmonise their respective laws with intention to have common mechanisms or standards on the protection of expressions of folklore. Therefore, the EAC objectives for harmonising their municipal laws for adequately protecting TCEs have not yet been achieved. In other words, as far as harmonisation is concerned the EAC partner States have not implemented the Treaty establishing the East African Community and the Common Market Protocol.

Most importantly, and as has already been revealed, the Task Force was formed with the view to consider approaches or mechanisms for harmonisation. The Task Force recalled that at its 18th Meeting, the Sectoral Council on Legal and Judicial Affairs observed and discouraged the use of Model laws on account that model laws were not binding to Partner States and that the Treaty was silent on the same. It was further observed that Model Laws were as good as principles and may not necessarily improve the work of the sub-committee.

In view of the above, it was agreed that approximation which involves the development of guiding principles, benchmarking national laws to those principles (in matrix form) and making recommendations to the Council, issue directives to Partner States for implementation; and Acts of the Community be used as mechanisms for harmonisation of national law in the EAC.

³⁶⁸ The Protocol on the Establishment of the East African Community Common Market, Art.43 and 47.

It was further agreed in the meeting that the approach to be used be determined depending on the area of the law to be harmonised. Thus, the Task Force recommends to the Sub-Committee on harmonisation of laws in the EAC context to consider and approve the above approaches.³⁶⁹ Nevertheless, till to date, such approaches have not been approved. The Task Force identified priority areas for harmonisation (2018-2021) as follows: Investment laws; Financial Laws and Regulations- specifically banking, insurance and capital markets; Tax Laws and Transport Sector-specifically Road and air transport.

In addition, the Task Force identified Information and Communication Technology Systems, Industrial development and SMEs- specifically for the mining and mineral sector to promote mineral value addition; Agriculture and Food Security; and Education Sector.³⁷⁰ The Task Force further noted that other Community Sectors were already undertaking harmonisation of laws in their respective sectors in some of the priority areas identified above. It was further observed that there was inadequate collaboration between the sectors and the sub-committee which might lead to lack of efficiency and duplication of efforts.³⁷¹

The Task Force recommended to the Sub-Committee on Harmonisation of Laws in the EAC Context to consider and approve the identified Priority Areas for harmonisation for the period between 2018-2021; and recommend to the Sectoral Council on Legal and Judicial Affairs to direct that all harmonisation processes should be undertaken in collaboration with the Sub-Committee to increase efficiency

³⁶⁹ EAC, Report of the Meeting of the Task Force on Harmonisation of National Laws in the EAC Context, 30th January to 3rd February, 2018, p.4.

³⁷⁰ Ibid, p.5.

³⁷¹ Ibid, p.5.

and avoid duplication. Finally, Task Force prepared A roadmap for harmonisation of national laws in the EAC context (2018-2021), set timeline and responsible persons for perform the intended activities. On the other hand, the Sub-Committee further observed that some Partner States did not have laws in some of the areas of cooperation outlined in article 43 of the EAC Common Market Protocol on intellectual property laws and therefore urged Partner States to develop laws in these areas and that the EAC should develop a model law to guide Partner States in developing their model laws. These areas are: Layout designs of integrated circuits; Industrial designs; New plant varieties; Geographical indications; Trade secrets; Utility models; Traditional knowledge; Genetic resources; and Traditional cultural expressions and folklore.³⁷²

4.5.2 Extent of Harmonisation of Municipal Laws in EAC

This section explains the extent of harmonisation of municipal laws carried out in the EAC. The starting point is that under article 103 (i) EAC Member States agreed to harmonise laws on commercialisation of technologies and promotion and protection of intellectual property rights.³⁷³ It is also observed that under Article 119 (c) of EAC Treaty, Member States further signed provisions for the promotion of cultural activities, including the fine arts, literature, music, the performing arts and other artistic creations, and the conservation, safeguarding and development of the cultural heritage of the Member States including, historical materials and

³⁷² Excellency, under the Common Market Protocol, the EAC is yet to realise harmonization of its labour, employment, education and social policies, among others, despite the political will at the top.

³⁷³ The Treaty for Establishing the East African Community as amended on 14th December, 2006 and 20th August, 2007.

antiquities.³⁷⁴

Under article 119 (f) of the EAC Treaty, EAC Partner States acceded to and ratified international conventions that directly bear upon culture such as: (i) the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; and (ii) the UNESCO Convention on the Means of Prohibition and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.³⁷⁵ Furthermore, and in terms of article 119 (g) of the EAC treaty, Member States agreed on harmonising their laws for the conservation of their national antiquities and museums and the prevention of illegal trade in cultural property.

Importantly, in terms of article 76 (4) of the EAC Treaty, the Partner States concluded a Common market protocol. Under article 43 (1) and (2) of the Protocol,³⁷⁶ the Partner States undertake to co-operate in the field of intellectual property rights to: (a) promote and protect creativity and innovation for economic, technological, social and cultural development in the Community; and (b) enhance the protection of intellectual property rights.

For clarity, article 43 (2) reads that for the purposes of paragraph 1, the Partner States undertake to cooperate in the following areas: copyright and related rights; patents; layout designs of integrated circuits; industrial designs; new plant varieties; geographical indications; trade and service marks; trade secrets; utility models; traditional knowledge; genetic resources; traditional cultural expressions and

³⁷⁴ Ibid

³⁷⁵ Ibid.

³⁷⁶ Ibid.

folklore; and any other areas that may be determined by the Partner States.³⁷⁷ Finally, under article 47 (1) of the Protocol, the EAC States undertake to approximate their national laws and to harmonise their policies and systems, for purposes of implementing this Protocol.³⁷⁸

In compliance with the cited articles, the Sectoral Council on Legal and Judicial Affairs formed the Task Force (Sub-Committee on Harmonisation and Approximation of EAC National laws) to receive and consider National Reports on the Harmonisation of National Laws in the EAC context including to consider approaches to harmonisation. Further, to identify priority laws that require harmonisation under the 5th EAC Development Strategy and Common Market Protocol. The Task Force was required to prepare a roadmap for harmonisation of national laws in the EAC Context. The roadmap ranged from the year 2018 to 2021.³⁷⁹

The Sub-Committee has since identified the following priority areas of law for harmonisation to facilitate the implementation of the Common Market Protocol: Social security; Education and professional services; Investment; Tourism and Wildlife; Environment; Contract and Sale of Goods; and Intellectual property. The Sub-Committee identified the following priority areas of law for harmonisation for the financial year 2012/2013: contract and sale of goods; social security; and tourism and wildlife. The study identified the following as priority areas to be

³⁷⁷ East African Community Common Market Protocol, Art.43.

³⁷⁸ EAC Treaty, Art.47.

³⁷⁹ EAC, A Report on Harmonisation of National Laws in the EAC context, EAC Partner States formed the Task Force on Harmonisation of the National Laws in EAC context, 2018.

harmonised: licencing and business registration law; enforcement measures and debt recovery; the law relating to private public partnerships; and the law relating to mutual or reciprocal recognition and enforcement of foreign judgements.³⁸⁰

A part from that, the study on harmonisation of the East African Community Partner States Commercial Laws was commissioned. It was commissioned by the EAC Secretariat to review the existing commercial laws of the EAC Partner States that have a direct bearing and impact on the establishment of the Common Market. The study aimed at recommending two (2) key areas to be harmonised, as a priority, which would have a more immediate impact on the achievement of the objectives of the Common Market.

The study was expected to make proposals for the harmonisation of the relevant commercial laws in order to assist Partner States in the implementation of the Common Market Protocol and the realisation of the freedoms and rights under the Protocol. The Business and Investment law clusters were identified as the areas which would accelerate the implementation of the Common Market and creation of a common investment regime. However, no harmonisation has been achieved.³⁸¹

Regarding the consideration of national reports on harmonisation of national laws in the EAC context, the State Party or the Partner States made presentations on the status of harmonisation of national laws and undertook to provide updated reports to the task Force. The Task Force agreed and recommended that approximation which

³⁸⁰ EAC, Report on Hamonisation EAC Partner States Commercial Law, 5th November, 2012.

³⁸¹ Ibid.

involves the development of guiding principles, benchmarking national laws to those principles (in matrix form) and making recommendation to the Council to issue directives to the partner states for implementation, and Acts of the Community be used depending on the area of the laws to be harmonised.³⁸²

Thus, the Task Force recommends to the sub-committee on harmonisation of laws in the EAC context to consider and approve the above approaches. The recommendations were in line with the EAC African Common Market scorecard 2016, the Report on Harmonisation of EAC Partner States Commercial Laws, 2012 and the 5th EAC Development Strategy (2016/17-2020/21). The Task Force noted that commercial laws were approximated and recommended for harmonisation by Partner States and they included intellectual property Laws-traditional cultural expressions and folklore. The Task Force observed that there was a need for assessment of the progress made by Partner States in harmonising the identified laws including Laws on traditional cultural expression and folklore.

Further to that, the Task Force further identified priority areas for harmonisation (2018-2021) to include but not limited to investment laws, Financial Laws, Tax Laws and information and communication technology system. Nevertheless, the aspect of traditional and cultural expressions was left out. In other words, the field of study was not among the priority areas identified by the Task Force for harmonisation between the period of 2018-2021.³⁸³

³⁸² EAC, Report on Harmonisation of EAC Partner States Commercial, 05th November, 2012.

³⁸³ Ibid.

In addition, the Task Force recommended to the sub-committee on harmonisation of laws in the EAC context to consider and approve the identified priority areas for harmonisation for the period between 2018-2021 and recommend to the sectoral Council on legal and Judicial Affairs to direct that all harmonisation processes should be undertaken in collaboration with the sub-committee to increase efficiency and avoid duplication.

The Task Force agreed and prepared a roadmap for harmonisation of national laws in the EAC context (2018-2021). A number of activities were agreed upon to be undertaken by the sub-committee on harmonisation of National Laws in the EAC context for the period between 2018-2021.³⁸⁴ A roadmap developed by the EAC member States on harmonisation of laws indicates that harmonisation of municipal laws in the EAC is a gradual process and harmonisation intends to have common mechanisms or standards on the protection of expressions of folklore. Therefore, the EAC objectives for harmonising their municipal laws for adequately protecting TCEs have not yet been achieved.

The above position is also observed in the Report of Attorney General/Ministers of Justice of the East African Partner States held on 1st November, 2021 which indicates that despite the Council issuing seven directives to the Partner States for harmonising their national laws, such harmonisation has not been achieved.³⁸⁵ The Attorney Generals/Minister of justice directed the Sub-Committee on harmonisation and approximation of national laws to develop a template or common standard for harmonisation of national laws and report to the 24th meeting of the sectoral council

³⁸⁴ Ibid.

³⁸⁵ Ibid.

on legal and judicial affairs.³⁸⁶

Apart from that, EAC Common Market Scorecard³⁸⁷ indicates that achieving regional integration is not easy. However, the EAC Member States are determined to realize the objective of establishing the Common Market, i.e., the realisation of accelerated economic growth and development. Enhancing the movement of services and capital, eliminating barriers to movement of goods and bolstering the rights of establishment and residence will bring the region closer to achieving its dream. Eliminating internal barriers to trade and investment can also help EAC businesses achieve economies of scale and bolster their competitiveness thus, helping the region move closer towards a single investment destination. The Common Market can expand opportunities for the private sector and uplift the living standards of its citizens in a way that no Partner State can do on its own.³⁸⁸

In 2014, EAC launched the first East African Common Market Scorecard to track harmonisation processes. This initiative signaled Partner States' commitment to achieving regional integration and to doing so in a transparent way. This second publication of the Scorecard is evidence that this commitment holds strength.³⁸⁹ The East African Common Market Scorecard initiative contributes to the implementation of the Common Market by allowing Partner States to track their progress in fulfilling their commitments to liberalisation under the Common Market Protocol. The Scorecard examines selected commitments made by Partner States, outlines progress

³⁸⁶ Ref. EAC/SCLJA/22/2021.

³⁸⁷ EAC, East Africa Common Market Scorecard, 2016. Tracking EAC Compliance in the Movement of Capital, Services and Goods, available at <http://www.eac.int>, or <http://www.tralac.org>, (accessed on 24th November, 2021).

³⁸⁸ Ibid.

³⁸⁹ Ibid.

in removing East African legislative and regulatory restrictions to make them comply with the Protocol, and recommends reform measures. In doing so, it allows Partner States to identify key areas for improvement and, along with the EAC Secretariat and development partners, chart a path to eliminate the remaining barriers to a fuller regional market.

Since 2014, Partner States have eliminated some key restrictions to further trade and investment and have become more efficient at doing so. However, much remains to be done, before the gains of integration can be realised. A key component of the 2016 Scorecard work was the robust and energetic input of the private sector. EAC Partner States expect that the Scorecard will continue to contribute to better compliance of commitments under the Protocol, thus helping boost firm competitiveness and spur gains for all East Africans.³⁹⁰ This second Common Market Scorecard (CMS 2016) measures the progress made since the publication of the CMS 2014 regarding the legal instruments and measures of the Common Market Protocol.³⁹¹ In so doing, it aims to facilitate policy dialogue by tracking reforms, sharing success stories, and enabling research and analysis on the links between reforms in measured areas and desired outcomes.

The CMS 2016 will bring to light, in respect of the CMS 2014 recommendations, reforms undertaken by each Partner State as well as any new restrictions or nonconforming measures. This Scorecard's objective is to help Partner States comply with their obligations and enable the EAC to attract more investment,

³⁹⁰ East Africa Common Market Scorecard, 2016. Tracking EAC Compliance in the Movement of Capital, Services and Goods, available at <http://www.eac.int>, (accessed on 24th November, 2021).

³⁹¹ Ibid.

expand trade, and take full advantage of its integration potential. The CMS 2016 will be used to take informed implementation and/or policy actions in the areas that require further progress. However, the next generation of the Scorecard will need to not only track the legal compliance of implementation of the Common Market Protocol but to measuring timely implementation of measures, completion of commitments within target deadlines and outcomes.³⁹² Finally, this subpart of the chapter has shown that despite the Council issuing a number of directives to EAC partner States for harmonisation of municipal laws, formation of Task Force and a roadmap for harmonisation being prepared; yet to date, harmonisation of municipal laws has not been achieved in EAC.

4.5.3 Challenges for Harmonisation of Municipal Law in EAC

It is worthy to note that all the three Partner States have already incorporated the Treaty in their respective municipal laws such that the Treaty can now apply in the Partner States like any other domestic laws. However, the main challenges facing the community now include sustenance of political will, implementation of the Treaty, involvement of people of East Africa as a driving force of the Community, and financial viability.³⁹³ Thus, a number of challenges have been registered in the process of harmonisation of municipal law in the EAC.

To start with, in the due process of harmonisation the Task Force observed that inadequate collaboration between the sectors and the sub-committee affected

³⁹² East African Common Market Scorecard, 2016. Tracking EAC Compliance in the Movement of Capital, Services and Goods, available at <http://www.eac.int>, or <http://www.tralac.org>, (accessed on 24th November, 2021).

³⁹³ Ibid. See also Tharani, A., *Harmonization in the EAC*, in Ugirashebuja, E., *East Africa Community Law: Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, Boston, 2017, chapter 16.

harmonisation processes. Further to that, the Partner States Reports on the status of harmonisation of national laws do not offer adequate information on the implementation of the previous sub-committee's recommendations of laws.³⁹⁴ Other challenges are socio-economic challenges: financial restraints, conflicting commitments, language barrier and slow pace in the implementation of the Sub-Committees recommendations.

The challenges also included legal challenges like Partner States' different legal systems. To resolve this, the Secretariat was tasked to develop a matrix of country-specific recommendations on the harmonisation of laws.³⁹⁵ Something worthy to note is the funding challenge. The attempts to harmonise national laws have not yielded the desired results largely because of the limited funding available to the process and the Committee on Approximation and Harmonisation of Laws.

In addition, very little progress made in reforming, amending and enacting national laws which comply with and implement the provisions and objectives of the Common Market Protocol as the process is protracted and slow.³⁹⁶ To elucidate, the EAC countries have different level of economic development and they all face different social, economic and political problems including governance issues. The EAC countries are economically different and the extent to which these States can harmonise their systems depends largely on their economic strengths altogether,

³⁹⁴ EAC, Report of the Meeting of the Task Force on Harmonisation of National Laws in the EAC Context, 31st January to 3rd February, 2018, EAC/TF/SLCJA/20/2018.

³⁹⁵ Ibid.

³⁹⁶ EAC, A Report of EAC 22nd Meeting of the Sectoral Council on Legal and Judicial Affairs 1st November, 2021.

among other things. Socio-economic and political climate of each regional integration is a sensitive issue, and therefore, as it has previously been described on what is going on in each State of the Community in terms of civil wars, ethnic conflicts, economic development and trade issues affect the harmonisation. This hinders the speed of harmonisation and therefore care is needed to move forward. This is one of the reasons as to why harmonisation has been delaying considerably to the extent of creating accusation among community states that each other is hindering the speedier implementation of the EAC integration process.³⁹⁷

In addition, harmonisation of municipal law has to respect avenues available for each Member State to develop their home-grown national social security systems under the normal course of evolving social society systems. If this is the case, harmonisation does not get the status of playing down the role of Member States to develop comprehensive mechanisms in their respective domestic jurisdictions. Moreover, although the EAC regional integration treaties and other related instruments provide for possible avenues to be followed in order to move towards harmonisation, there are still lots of discrepancies and unequal national legislation in each Member State. National social security laws of member States continue to exist and remain unharmonised. This is because, the old patterns of nationalistic tendencies in legal regimes are yet to be totally dismantled and Member States remain deeply entangled or embedded in egoistic or self-centeredness spirit of nationalism.

³⁹⁷For instance, see Nahayo, A., *East African Community Tax Harmonisation: A Critical Assessment of its viability of Income Tax Laws*, PhD Thesis, Tanzania German Centre for Eastern Africa Legal Studies, Dar es Salaam, Tanzania, p.65.

Ezekiel observed further that, both the EAC treaty and EAC CMP do not define the concept of harmonisation anywhere at all. Even the term coordination that is also used extensively is not defined either in these instruments. However, the term harmonisation has been extensively used throughout the treaty and the EAC CMP as demonstrated in the previous discussion. The two regional instruments do not expressly indicate the degree of harmonisation that is envisaged or desired in the EAC.

Even the annexes to the Common Market Protocol do not clarify the steps to be followed in harmonisation.³⁹⁸ Whether the EAC follows standard harmonisation or minimum harmonisation, is not clear yet, as nowhere it is stated or elaborated. Even an outline that would adequately or at least sufficiently indicate the process or mechanisms by which this harmonisation is to take place does not exist at all. Thus, the implementation of the EAC CMP protocol does not state the level of harmonisation desired and one would guess that probably, by implication, the Community has been pursuing minimum harmonisation or gradual harmonisation. Equally, the EAC Treaty and the EAC CMP do not provide sanctions to the EAC Members States who do not adhere to the requirement of harmonisation.

Lastly, it is observed by Maalim that it may be inferred from few incidences above those internal dynamics add to other challenges on the inadequacy of harmonisation of national laws and speed of implementation of the EAC development strategy due to domestic problems.³⁹⁹ Even Trade disputes between Member States such as

³⁹⁸ Ibid, pp.1-63.

³⁹⁹Maalim, M.J., *The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar*, PhD Thesis, Tanzania German Centre for Eastern African Legal Studies, Dar es Salaam, Tanzania, p.148

between Tanzania and Kenya; Rwanda and Tanzania, Kenya and Uganda have been reflected in imposition of various non-tariff barriers on goods and services at different times thus suggesting that Member states are still engaged in nationalistic inclinations and egoistic centred economic wars.⁴⁰⁰

4.6 Conclusion

Harmonisation of laws is a key tool that has been employed to achieve the objectives of the East Africa Community. Efforts have been made to implement the East African Community Treaty and Common Market to realise the objective of harmonising their municipal laws, inter alia, for protection of expressions of folklore. Despite such efforts, there are a lot of setbacks for effective harmonisation of municipal laws. This is due to a diversity in Partner States' laws which hinder the attainment of objectives of the Community. Thus, the study has found that, since establishment of the Common market; harmonisation of municipal laws in the East African Community has not been achieved.

⁴⁰⁰ Ibid.

CHAPTER FIVE

PROTECTION OF EXPRESSIONS OF FOLKLORE IN RWANDA

5.1 Introduction

This chapter focuses on protection of expression of folklore in Rwanda. It reveals the legal system of Rwanda and sources of laws thereon. Furthermore, it shows to what extent expressions of folklore are safeguarded, promoted and protected in Rwanda. The chapter reveals several treaties and Convention of which Rwanda ratified with the view to meet regional and international standards in protecting the expressions of folklore.

The chapter further analyses the mechanisms used in protection of expressions of folklore in Rwanda. In particular, the chapter links the inception of common law and civil legal system with protection of expressions of folklore in Rwanda. Thus, it covers both legal framework and institutional framework for protection of expressions of folklore in Rwanda. Finally, the chapter gives a conclusion. From the above and in the present age of globalisation, information has become more mobile and more vital than ever before. Information is the lifeblood of development, the lifeblood of technology, of products and services, of Government and of business.⁴⁰¹

Information is codified and that its value is recognised. Intellectual property defines the limits under which information in the form of creations and innovations can be owned and how it can be transferred.⁴⁰² Therefore, Rwanda has a functioning

⁴⁰¹Rwanda Intellectual Property Policy, 2009, p.3 and Revised Policy on Intellectual Property in Rwanda, 2018, pp.4-5, available at <http://ictpolicyafrica.org>, or <http://org.rdb.rw>, (accessed on 26th November, 2021). The policy discloses that inappropriate and insufficient protection of Intellectual Property can distort free trade in developing countries.

⁴⁰² Ibid.

intellectual property system that, allows people to realise the full value of their creations, and to allow them to access the creations of others.⁴⁰³ This includes promotion and protection of expressions of folklore as explained in subsequent sections.

5.2 Legal System of Rwanda

Like most African States, Rwanda did not escape the wave of colonisation, and it gained independence from Belgium as an administered UN Trusteeship on 1 July 1962.⁴⁰⁴ Rwanda joined the East African Community, along with its southern neighbour Burundi on 6 July 2009.⁴⁰⁵ During colonialism, all legislation governing the country was made by Belgian authorities and the mainstay of criminal and civil legislation was the civil and criminal codes of the Belgian Congo.

Though criminal law had universal application, written civil laws were applied only to whites. Customary law continued to apply to the natives. Hence, the current Rwanda civil law legal system is based on German and Belgian civil law systems and customary law.⁴⁰⁶ It is important to note that Rwanda's civil legal system has been transformed from purely civil law to a combination of both civil law system and common law system. Such transformation has led to the reform of several laws, among others, the penal code and the law of evidence. In that regard, Rwanda adopted a new Constitution on 26th May 2003.⁴⁰⁷

⁴⁰³ Ibid.

⁴⁰⁴ Kabasinga, F., Updated Paper on Rwanda's Legal System and Legal Materials, Houser Global Law School Program, New York University School of Law, Washington New York, 2013, available at <http://www.nyulawglobal.org>, (accessed on 20th May, 2021).

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ It was revised in 2015. See also Nshimiyimana, D., Right of a Fair Trial in the Administration of

Apart from that, and based on the context of the study; Rwanda acceded to the Convention establishing the World Intellectual Property Organisation (WIPO) in 1983, as well as the Paris Convention for the protection of industrial property and the Berne Convention for the protection of literary and artistic works, in the same year. These Conventions were brought under the WTO's TRIPS Agreement in the 1986-1994 Uruguay Round. In 1996, Rwanda acceded to the WTO and has therefore been subject to the TRIPS Agreement ever since. The Agreement is based on basic principles of non-discrimination: national treatment (treating one's own nationals and foreigners equally) and most-favoured-national treatment (equal treatment for nationals of all trading partners in the WTO).

It is worth noting here that, Rwanda ratified the Swakopmund Protocol on 16th July, 2012 after she joined ARIPO when she signed the Lusaka Agreement on 24th June, 2011. Upon ratification, the Treaty and the Protocol became applicable in Rwanda. This is because Rwanda operates in a monist system as articulated under article 168 of the Constitution of Rwanda. She is also participating in the European Communities (EC) and the EAC economic partnership agreements (EPAs) where IP issues are being discussed.⁴⁰⁸

5.2.1 Sources of Laws in Rwanda

There are a number of sources of legislation in Rwanda. In particular, such sources are Presidential orders, Prime Minister's orders, Ministerial orders and official rules and regulations. Such laws are normally published in the official gazette of the

Criminal Justice in Rwanda, PhD Thesis, the Open University of Tanzania, Tanzania, 2020, pp.139-165 discussing some of the laws applicable in Rwanda.

⁴⁰⁸Costantine, J., (note 253), p.842.

Republic of Rwanda. The gazette also publishes statutes.

The hierarchy of laws in Rwanda is provided under article 95 of the Constitution of Rwanda, i.e., the constitution, organic law, international treaties and agreements ratified by Rwanda, ordinary law and orders.⁴⁰⁹ To start with, there are codes and laws of Rwanda found at the Ministry of Justice, namely: Constitutional Law and political Institutions; Judicial Law; Criminal Law; Private Law; Social Law; Business Law; Central Administration and Local Administration; Taxation, State's property and Finance, Planning; Specific Organizations; Treaties and International Conventions; Ministerial Orders and Penal Code.⁴¹⁰

Another source of law in Rwanda is court made laws.⁴¹¹ The judiciary is responsible for law making through its decisions. The judiciary branch hierarchy is as follows: The Supreme Court, high courts of the Republic, provincial courts, districts courts, and mediation committees. The new constitution in Rwanda also ushered in reforms in the judiciary such as new legislation, establishing new courts, procedures, structures, standard including academic and professional qualifications as well as regulatory and administrative frameworks.

At this point, it is also important to note that after the genocide, Rwanda faced a very special situation and therefore needed special interventions to try genocide perpetrators. One of the innovations was the establishment of Gacaca Courts to try genocide cases. Gacaca Courts exact different penalties including compensation, but

⁴⁰⁹ Ibid. See also Kabasinga, F., (note 427).

⁴¹⁰ Ibid.

⁴¹¹ Nshimiyimana, D., (note 430).

most importantly emphasise two aspects of confession and forgiveness as a way to heal the wounds.⁴¹²

It is worth to note that, the Supreme Court is the highest court in the country. The decisions of the Supreme Court are not subject to appeal save in terms of petitions for the exercise of the prerogative of mercy or revision of a judicial decision. Its decisions are binding on all parties concerned whether such are organs of the State, public officials, civilians, military, judicial officers or private individuals.

One can access Rwanda judgments and Laws on the website of the supreme court of Rwanda. This is possible by clicking on jurisprudence for cases and texts, des lois for laws. The Judgments are in Kinyarwanda and the website is in Kinyarwanda and French-the English parts are under construction. The High Court has jurisdiction to try in the first instance certain serious offences committed in Rwanda as well as some offences committed outside Rwanda as specified by the law.⁴¹³ Moreover, is about Rwanda Index. It is comprehensive and links to sources of information about Rwanda covering: government, media, human rights, environment, etc.

Lastly, with the promulgation of the Rwandan Constitution, legislative power is vested in an independent bicameral parliament composed of a Chamber of Deputies, whose members have the title of Deputies, and a senate has 26 seats of which 12 members are elected by local councils, 8 appointed by the president, 4 by a political organization forum, and 2 represent institutions of higher learning, to serve eight-

⁴¹² Ibid.

⁴¹³ Eunice M., A paper on Rwanda's Legal System and Legal Materials, Houser Global Law School Program, New York University School of Law, Washington New York, 2007, available at <http://www.nyulawglobal.org/lobalex/rwanda-htm> or <http://ials.sas.ac.uk>, (accessed on 27th November, 2021).

year terms. The Chamber of Deputies has 80 seats, 53 members elected by popular vote, 24 women elected by local bodies, 3 selected by youth and disability organizations, to serve five years terms.⁴¹⁴ The Parliament deliberates on and passes laws. It legislates and oversees executive action in accordance with the procedure determined by the Constitution.⁴¹⁵

5.2.2 Laws for Protection of Expressions of Folklore in Rwanda

Protection of expressions of folklore in Rwanda is underpinned in both domestic laws and international instruments of which Rwanda is a signatory or a member of particular treaties, convention and protocol.⁴¹⁶ In that respect, the first part of this section discusses domestic laws which protects expressions of folklore in Rwanda and the second part covers various international instruments protecting expressions of folklore. The instruments discussed here are those which Rwanda ratified and became a member.

5.2.2.1 Domestic Laws

In regard with domestic laws, there are two domestic legislations for protecting expressions of folklore in Rwanda.⁴¹⁷ These are Law no.28/2016 and Law no. 31/2009. Law no. 28/2016 preserves cultural heritage and traditional knowledge whereas Law no.31/2009 protects intellectual property rights in Rwanda. These laws were enacted in accordance with the constitution of Rwanda. Essentially, the genesis of the two laws is based on legislative development of intellectual property regime in

⁴¹⁴Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ Revised Policy of Intellectual Property in Rwanda, 2018, pp.7-13 disclosing legal framework of Rwanda (both international and domestic laws) for protection of expressions of folklore in Rwanda.

⁴¹⁷ See Article 292 of Law No.32/2009 which requires enactment of a specific law on the protection of expressions of folklore.

Rwanda as demonstrated below.

Historically, Rwanda protected expressions of folklore in Copyright law. Like other countries in Africa, Rwanda legislated her first copyright laws between 1961 and 1986; particularly, it was in 1983 when Rwanda enacted her copyright law. Such law was Law no 27/1983 of 15 November 1983 which was enacted to governing copyright in Rwanda. This law based on the Tunis Model Law on Copyright for Developing Countries. It was repealed by the Law No 31/2009 which came into force on 26/10/2009. To date, Law No. 31/2009 is operating. In the nutshell, it protects intellectual property i.e., both Copyright and Industrial property.⁴¹⁸

On the other hand, the Presidential Decree n° 277/14 of 6/5/1985 established the Commission for Copyright management as a public entity responsible to collect and distribution of royalties and was placed under the guidance of the Ministry in charge of Copyright (*Ministre de l'Enseignement Supérieur et de la Recherche Scientifique*). The Law further provided for the damages for an illicit use of work under copyright. Likewise, the Presidential decree n° 275/14 of 6/5/1985 imposed the tariffs for use of a work of cultural expression. Lastly, in 2016 Rwanda enacted a specific law for protecting traditional knowledge and expressions of folklore.⁴¹⁹ A part from domestic laws, there a number of international conventions and agreements of which Rwanda is a party. Thus, the constitution, appropriate laws and conventions for protection of expressions of folklore in Rwanda are discussed below.

⁴¹⁸ Ngarambe, M.L., The Protection of Performing Artists through Collective Management Organisations in Rwanda, LLM Dissertation, University of Rwanda, Rwanda, 2019, available in University of Rwanda digital repository at <http://dr.ur.ac.rw> or <http://hdl.handle.net/123456789/158>, (accessed on 29th April, 2022).

⁴¹⁹ Ibid.

To start with, the constitution of the Republic of Rwanda was adopted on 26 May 2003 by Rwandan Citizens. The same was amended in 2015.⁴²⁰ Article 5 provides that the national language of Rwanda is Kinyarwanda. The official languages are Kinyarwanda, French and English. It is worth to note that Kinyarwanda which is national language of Rwanda constitutes Rwanda national heritage and hence subject to protection. In addition, article 29 articulates that every person has a right to private property, whether personal or owned in association with others. It further provides that private property, whether individually or collectively owned is inviolable. The right to property may not be interfered with except for public interest, in circumstances and procedures determined by law and subject to fair and prior compensation.⁴²¹

Moreover, article 42 articulates that every foreigner legally residing in the Republic of Rwanda shall enjoy all rights save those reserved for nationals as determined under the constitution and other laws. On the other hand, article 50 provides that every citizen has the right to activities that promote national culture. In that respect, the article establishes the Rwanda Academy of Language and culture and that the law to be enacted shall determine its functions, organization and operation. Besides, article 189 refers to ratification of international treaties and agreements.

In particular, it is covered under part X which is on international treaties and Agreements. Further to that, article 43 enforces the requirement to respect others rights including moral matters. The Constitution also stipulates that the state has the

⁴²⁰ Nshimiyimana, D., (note 434).

⁴²¹ In the Revised Constitution of 2015, the right to private property is provided for under Article 34.

duty to safeguard and to promote positive values based on cultural traditions and practices so long as they do not conflict with human rights, public order and good morals. The State equally has the duty to preserve the national cultural heritage as well as genocide memorials and sites.⁴²²

Apart from the constitution, Law No. 31/2009 is relevant here.⁴²³ As indicated earlier, Law no. 31/2009 is a specific law for protection of intellectual property. This law protects the following categories of intellectual property: Industrial property, copyright, unfair competition, counterfeits and contains policy provisions. It further contains provisions to implement it. Its preliminary pages enumerate articles of the constitution of Rwanda which are relevant for protection of intellectual property rights. Such articles are article 29, 43, 31, 62, 66, 67, 88, 89, 90, 93, 95, 108, 118 and 201.

In the first place, article 1 of Law no. 31/2009 protects authors of literary, artistic, scientific works and performers. The law stipulates that protection of intellectual property rights includes all matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights, penalty awarded in case of noncompliance as well as other matters affecting the use of intellectual property rights. In addition, article 2 provides objectives of the intellectual property protection. These include encouraging creation of original works in literary artistic or scientific fields and their use, in the Republic of Rwanda, so as to contribute to cultural, social economic development of the population. Further to that, article 4 provides main branches of IP in Rwanda. As it has already revealed, the two main

⁴²² Ibid, Art.51.

⁴²³ See also note 421.

branches are industrial property and Copyrights and related rights which apply to literary, artistic and scientific works, to performances of performing artists, phonograms, and wireless broadcasting. Moreover, article 6 is a definition article and under para 24 provides that inspired work from folklore means works exclusively created on the basis of the elements borrowed to the Rwandan folklore.

Apart from that, article 8 provides for scope of application of law no. 31/2009 to copyrights. Para 1 covers works of authors or any other entitled person who are nationals of the Republic of Rwanda, or have their habitual residence or headquarters in Rwanda. Para 5 covers works that are eligible for protection in Rwanda by virtue of and in accordance with the Berne Convention or other international treaties to which the Republic of Rwanda is a party. What is worth noting here is that works that are not mentioned in paragraph one of this article may be entitled to protection granted by this law in so far as their country of origin or in which they are domiciled grants equivalent protection to artistic work from.⁴²⁴ Lastly, article 9 provides for a scope of application of law regarding related rights (performers, producers and broadcasters).

Moreover, Law no. 28/2016 which preserves cultural heritage and traditional knowledge is another relevant law. This is a specific law for protection of expressions of folklore. This is because, section one of its chapter III covers preservation and protection of expressions of folklore. In particular, article 29 requires the Registrar of intellectual property rights to keep the register of expressions of folklore which belong to the national heritage and ensure that they are

⁴²⁴ Ibid.

protected.

Likewise, article 31 provides for restrictions on registered expressions of folklore. It provides that no person shall misappropriate, use outside traditional context or unlawfully exploit a registered expression of folklore. Article 32 covers limitations applicable for protection of expressions of folklore. It articulates that subject to the provisions of article 34 of this law and after compliance with the ordinary traditional use of an expression of folklore, it is permitted to: expand and extend its use, its development, transmission, dissemination or its cession; be subject to exceptions for the purposes of teaching and research, private use, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions of an expression of folklore for inclusion in an archive or inventory exclusively for the purposes of safeguarding national heritage.⁴²⁵

Notably, article 33 covers duration of protection of expressions of folklore. It stipulates that, expressions of folklore belonging to the national heritage are protected so long as the expression fulfils the protection criteria referred to under this law. However, where an expression of folklore belongs exclusively to an individual protection related to last fifty (50) years from the date of the death of the owner, after this period, it is regarded and protected as the national heritage.

Nevertheless, article 34 provides for economic interests arising from expression of national folklore. It articulates that any person who uses an expression of national folklore for economic interests pays royalties determined by the competent authority.

⁴²⁵ It is regulated by the Law No.28/2016 which preserves cultural heritage and traditional knowledge in Rwanda.

It is also important to note that article 35 provides for economic interests arising from the transfer of an expression of national folklore. It clearly provides that the transfer in whole or in part of the right to an expression of national folklore for economic interests or the transfer of any other right for economic interests, is subject to the payment of royalties determined by the competent authority.

Worth noting is that article 36 covers the use of expression of folklore belonging to another person for economic benefits. It provides that for a person to use an expression of folklore belonging to another person for economic benefits, he/she must enter into a contract with the holder. Article 37 provides economic interests arising from the transfer of an expression of folklore belonging to an individual. It clearly provides that the transfer in whole or in part of the right to an expression of folklore belonging to an individual for economic interests, or the transfer of any other right for economic interests, is done in accordance with the contract between both parties.

Most important, article 2 is a definition part, it defines expressions of folklore as forms or manner, in which cultural knowledge is expressed or manifested. It further defines cultural heritage as a tangible and intangible heritage of a local community or of natural person related to the cultural tradition, passed down from generation to generation and with a particular value in terms of science, technology, history and archaeology, philosophy, art and religion and other areas related to culture.⁴²⁶ On the other hand, article 3 addresses the components of cultural heritage. It provides that the cultural heritage is composed of the following: tangible cultural heritage and

⁴²⁶ Law No.28 of 2016.

intangible cultural heritage and article 19 provides for criteria for registration of intangible cultural heritage.⁴²⁷

It provides that intangible cultural heritage is registered if it meets at least one of the following characteristics of the culture: to demonstrate a sublime cultural value to the society or the nationals; to represent originality of a work and an artistic genius passed down from generation to generation traditionally; to be linked to cultural rites, philosophy, beliefs and human arts and practices; to be likely to disappear and need special protection; to bear a unique or exceptional testimony to the development and Rwandan civilization in terms of arts, technology and history from generation to generation.⁴²⁸

Lastly, article 21 provides for repatriation of Rwanda cultural heritage.⁴²⁹ It provides that upon request by the Minister, the Minister in charge of foreign affairs claims for the return to Rwanda of cultural heritage exported unlawfully or kept beyond the designated time abroad. Apart from domestic laws, Rwanda is a signatory of various international instruments for protection of expressions of folklore as discusses below.

5.2.2.2 Ratified International Legal Instruments

With regard to ratified treaties and Convention, article 290⁴³⁰ covers application of international treaties. It provides that the provision of any international intellectual property treaty to which the Republic of Rwanda is a party, shall apply. In case of

⁴²⁷ Ibid.

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Law No. 31/2009.

conflict with the provisions of this law, the provisions of the international treaties shall prevail over the latter. Para 5 of article 6⁴³¹ provides works that are eligible for protection in Rwanda by virtue of and in accordance with the Berne Convention or other international treaty to which the Republic of Rwanda is a party.

The Convention further provides that works that are not mentioned in paragraph one of this article may be entitled to protection granted by this law in so far as their country of origin or in which they are domiciled, grants equivalent protection to artistic work. This demonstrates application of reciprocal principle in harmonising laws. It is further revealed under Law no 17/1983, that Rwanda acceded to the Convention establishing the World Intellectual Property Organisation WIPO. Also, on 18 August, 1983, Rwanda acceded to the Berne Convention for Protection of Literary and Artistic Works.⁴³² This led to review of Law no 17/1983 of November 18, 1983 to adequately regulate or govern the copyrights in Rwanda.

On the other hand, Rwanda acceded to the Berne convention on March 1, 1984. The Berne Convention is for the protection of literary and artistic works which provides for protection of creative works for a minimum period of fifty (50) years and creates principles for the protection of original created works. Before acceding to the Berne Convention, on November 10, 1989 Rwanda acceded to Universal Copyright Convention as revised on 24 July 1971 together with Appendix Declaration Relating to Article XVII and resolution relating to Article XI. It provides for protection of copyright and related rights.

⁴³¹ Ibid.

⁴³² Law No.18/1983.

Apart from that, Rwanda is also a member of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005. The Convention recognizes the sovereign right of States to maintain, adopt and implement policies to protect and promote the diversity of cultural expression, both nationally and internationally. The objectives of the Convention include: to promote and protect the diversity of cultural expressions; to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels; to reaffirm the sovereign rights of states to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory and to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchange in the world in favour of intercultural respect and a culture of peace.

Lastly, to strengthen international cooperation and solidarity in spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.⁴³³ Rwanda ratified the Convention on 16th October 2012. The Convention has been used with other existing documents to strengthen and formulate sustainable development policies. The Ministry of Sports and Culture has revised her cultural policy and some of the provisions are aligned to the objectives of the Convention especially with regard to the role of culture in Rwanda's sustainable development. The Convention has also been a catalyst to participatory policy making process among stakeholders from the public and private sectors and civil society. Measures have been established with

⁴³³ This is a UNESCO Convention, available at <http://en.unesco.org>, (accessed on November, 2021).

respect to culture and creative expression.⁴³⁴

Rwanda is also a member of the Hague Convention for the Protection of Cultural Property in the event of Armed Conflict. Rwanda ratified the Convention in March 2016. The Hague Convention is the first multilateral treaty to focus exclusively on the protection of cultural heritage during hostilities. The convention specifically highlights UNESCO's fundamental belief that the cultural heritage of each national belongs to all humankind. It also promotes the granting of enhanced protection so that the list of cultural property will grow over time.⁴³⁵

Rwanda is also a member of the Convention concerning the Protection of World's Cultural and Natural Heritage. The Convention Concerning the Protection of the World's Cultural and Natural heritage was signed on 16 November 1972 in Paris and was ratified by Rwanda on 28, December 2000. To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each state that is party to the convention must endeavour, in so far as possible, and as appropriate for each country as per article 5, to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.⁴³⁶

⁴³⁴Rwanda., Rwanda Report on the Implementation of UNESCO Convention of 2005. The Government of Rwanda ratified the UNESCO Convention of 2005 on the Protection of the Diversity of Cultural Expressions in 2012 and submitted its first Periodic Report to UNESCO in 2017.

⁴³⁵ Rwanda., The Report of New Bugesera International Airport Environmental and Social Impact Assessment Report Archaeology and Cultural heritage, January, 2018, available at <http://esa.afdb.org> or <http://www.miga.org> (accessed on 23rd December, 2021).

⁴³⁶ Rwanda., Rwanda Report on the Implementation of UNESCO Convention of 2005, the Government of Rwanda ratified the UNESCO Convention of 2005 on the Protection and Promotion of the Diversity of Cultural Expressions in 2012 and submitted its first Periodic Report to UNESCO in 2017. This information is available at <http://www.myculture.gov.rw> or <http://en.unesco.org>, (accessed on 23rd December, 2021).

Furthermore, Rwanda is a member of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. It is a UNESCO Convention. It was signed in 1970 in Paris and was ratified by Rwanda on 25 September 2001. It aims to ensure the protection of the cultural property of the States party to this convention against illicit import, export and transfer of ownership. Each state party to this convention must set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage.

The convention aims at contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property and ensuring that appropriate publicity is given to the disappearance of any items of cultural property. It also aims at establishing for the benefit of those concerned (curators, collectors, antique dealers, etc.), rules in conformity with the ethical principles set forth in this convention; and taking steps to ensure the observance of those rules; taking educational measures to stimulate and develop respect for the cultural heritage of all states, and spreading knowledge of the provisions of this convention.⁴³⁷

In addition, Rwanda is a member of the Lusaka Agreement. The Lusaka Agreement established the African Regional Intellectual Property Organization (ARIPO). ARIPO is a regional organization which aims to coordinate and harmonise the

⁴³⁷ Ibid. See also Chartrand, H.H., *Cultural Property and Related Agreements, Charters, Conventions, Covenants and Treaties, 1874-2008*, Compiler Press, UNESCO, 2009.

administration of intellectual property rights by its member countries. Rwanda joined to the African Intellectual Property Organization in 2011. Rwanda is also a signatory of Swakompunda Protocol on the protection of Traditional Knowledge and Expressions of Folklore. It ratified the Protocol through the Presidential Order n.17/01 dated 16/02/2011.⁴³⁸

The Swakopmund Protocol on the Protection of Tradition Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) provides a legal framework to protect traditional knowledge holders against any infringement of their rights as recognized by this protocol; and to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.⁴³⁹ Lastly, it has been discussed in chapter four of this thesis that Rwanda is a member of East African Community. This is evidenced by the Treaty establishing the East African Community and the East African Community Common Market Protocol. Nevertheless, protection of expressions of folklore against misappropriation in East African Community is a challenge.

5.3 Protection of Expressions of Folklore in Rwanda

As it has already been revealed, protection of expressions of folklore in Rwanda is enshrined in Law no 31/2009 and Law no. 28/2016.⁴⁴⁰ According to Law no.31/2009

⁴³⁸ Information extracted from the website of the World Intellectual Property Organisation (WIPO) and available at <http://www.wipo.int>, (accessed on 20th December, 2021). See also Takaendes, L., *The Role of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore in addressing the concerns of the Holders of Traditional Knowledge*, LLM Thesis. University of South Africa, South Africa, pp.19-24.

⁴³⁹ Costantine, J., *The Swakopmund Protocol for the Protection of expressions of folklore: a review of implementation in Rwanda and Tanzania*, *Journal of Intellectual Property Law and Practice*, 2022, vol.17, No.10, pp.834-843 and Nwaauche, E.S., *The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa*, *the Journal of World Intellectual Property*, 2014, Vol.17, No.5-6, pp.191-201.

⁴⁴⁰ The Law which provides for various mechanisms for protection of Intellectual Property Rights in

expressions of folklore are protected as part of copyright. The provisions on copyright are concerning with the protection of literary, artistic and scientific works apply to a range of types of works produced by Rwandans or in Rwanda. This includes works deriving from Rwanda national folklore.

In Rwanda, the economic rights for copyright are protected during the life of the author and for fifty years (50) after his or her death. The original owner of moral and economic rights is the author who has created the work. They have a number of specific rights under this ownership, including: subject to limitations mentioned by the provisions of this Law, the author of the work shall have the exclusive right to carry out or to authorise the following acts in relation to the work: reproduction of the work; translation of the work; adaptation, arrangement or other transformation of the work; rental of the original or a copy of an audiovisual work, a work embodied in a phonogram or a computer program; communication to the public of the work by communication to the public of the work, by distribution of the original or copy of the work to the public by sale or other transfer of ownership; public performance of the work; communication to the public of the work by broadcasting; and communication to the public of the work by wire or any other means.⁴⁴¹

In addition, Part III⁴⁴² is on protection of copyrights and related rights. Its article 195 provides that literary and artistic works that are original intellectual creations in the literary and artistic domain are subject to protection granted by this law, including in particular, the following works: Para 10 covers works of applied art like handcraft

Rwanda.

⁴⁴¹The Rwanda IP Policy, 2009, pp.21-22 and the Revised IP Rwanda Policy, 2018, available at <http://ictpolicyafrica.org> or <http://www.aripo.org> (accessed on 26th November, 2021).

⁴⁴² Of Law No. 31/2009.

works or works produced by industrial process. Thus, the protection of industrial designs is granted by the provisions of this Law relating to industrial designs. Para 12 covers works deriving from Rwanda National folklore.

Besides, article 196 provides for protection of derivative works and collections of works. The article clearly lists works that are subject for protection as works and collections of works. In particular, Para 1 covers translations, adaptations, arrangements and other transformations or modifications of works and the works of expressions of folklore and Para2 covers collections of works, works of expression of folklore or of simple facts or mere data like encyclopaedia, anthologies, collections of data, whether in machine readable or other form, provided that such collections are original intellectual creations by reason of selection or arrangement of their contents.

At this juncture, it is worth to note that the protection of any derivative work is without prejudice to any protection of a pre-existing work or expressions of folklore incorporated in or utilized for the making of such a work. Moreover, article 197 provides for legal requirements for protection of works. No any formalities. However, opportunity is available to authors of works for which their law shall apply to register their works to the empowered authority.

Before concluding the issue of protection, it is important to reveal expressions of folklore which are subjects for protection in Rwanda. It is viewed that in Rwanda, expressions folklore includes folk costume, folk dance, folk drama, folk art, folk belief, folk medicine, folk instrumental music, folk songs, symbols, festivals and

special day.⁴⁴³ Expressions of folklore cover a range of activities. For instance, language, hunting techniques and so on, is art of folklore.⁴⁴⁴ Thus, such works are the one which are considered by law no.31/2009 and Law 28/2016 subject for protection in Rwanda.

Furthermore, expressions of folklore in Rwanda include modelling and talks of mapping. It is also related to culture in sense that it is a mirror of culture. Folklore reflects culture of Rwanda because it relates to the way of life of people who produce it; their ceremonies, their institutions, their crafts and so on. It also expresses their beliefs, customs, attitudes and their way of thinking. Folklore actually gives a penetrating picture of the way of life of the people who produce it.⁴⁴⁵ Like other societies in the world, the Rwandan society has folklore of its own which encompasses all existing genres of folklore. Rwandan used to live in huts made of grass. Rwanda makes use of different objects which assume roles in folklores. These include, for instance, water pots and cooking pots. The music of Rwanda encompasses Rwanda traditional of folk music as well as contemporary East African Afrobeat, Congolese ndombolo and gospel music. The ikimba is the most revered musical tradition in Rwanda. It is a dance that tells the stories of Rwanda heroes and kings, accompanied by instruments like ngoma, ikembe, iningiri and inanga.⁴⁴⁶

In concluding this section, it is relevant to reveal the essence of protection of expressions of folklore in Rwanda. It is argued that expressions of folklore serve as a

⁴⁴³ Five years Strategic Plan for the Development of Creative Arts Industry (2017-2022), Rwanda Ministry of Culture, 2016, available at <http://www.myculture.gov.rw>, (accessed on 26th November, 2021).

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Retrieved from https://en.wikipedia.org/w/index.php?title=Music_of_Rwanda&oldid=989265731, (accessed on 22nd November, 2021).

form of amusement or entertainment. It also maintains the stability of culture and plays educative role. Expressions of folklore fulfill the functions of maintaining the stability of culture in the sense that it operates within a given society to ensure conformity to the accepted cultural norms and continuity from older generations to younger ones through the role it plays in education.⁴⁴⁷

5.3.1 Expressions of Folklore Rights in Rwanda

The rights of expressions of folklore in Rwanda include both economic and moral rights. Law no. 31/2009 protects both economic and moral rights to authors. Economic rights can be defined as those rights which enable the author to procure economic benefit example payment of remuneration due to the uses of the work. Article 200⁴⁴⁸ provides that it is the exclusive rights of the author to carry out or to authorise reproduction of the work, distribution of the work, rental of the work, public exhibition of the work, translation of the work, adaptation of the work, public performance of the work, broadcasting of the work and importation of copies of the work. Thus, generally, economic rights help the author to commercially exploit his creation.⁴⁴⁹

On the one hand, article 201 of Law no. 31/2009 is on economic rights derivative from folklore. It provides that Expressions of folklore are part of the national culture and heritage. The use, for profit making purposes of the work derivative from Rwandan national folklore shall be made in return for payment of royalties in conditions determined by the empowered authority. Any transfer of ownership in

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ashok, A., *Economic Rights of Authors under Copyright Law: Some Emerging Judicial Trends*, Journal of Intellectual Property Rights, 2010, Vol.15, pp.46-54.

whole or in art, for profit making purposes, of work derivative from Rwandan national folklore or any exclusive licence concluded on such work, for profit making purposes, shall be made in return for payment of royalties in conditions determined by the empowered authority. A part of funds equal to twenty five percent (25%) collected in accordance with this article is reserved to activities of creative works promotion. Article 207 of Law no.31/2009 provides for duration for economic rights protection. That is life time of the author and for fifty years after his or her death.

On the other hand, moral rights can be referred to those rights which relate to protection of personality of the author and integrity of his work⁴⁵⁰ that is right of the author to claim authorship of his or her work, they extend to the owner's right to exercise his or her economic rights as per Article 199.⁴⁵¹ The article also protects those right to be identified as the author of the work where the work is published commercially, performed in public, including where copies of the work are issued to the public except when the work is included by means of photography, sound or visual recording and broadcasting or distribution by cables.

Moral rights also include the right of the author to object and seek relief to any distribution, mutilation any other derogation action which prejudice his reputation as the author. Article 199 protects the moral rights of the community and/or geographical place from where the expression is obtained.⁴⁵² Article 206⁴⁵³ provides for duration of moral rights protection. It provides that the moral rights have no

⁴⁵⁰ Ibid.

⁴⁵¹ Law No.31/2009.

⁴⁵² Nwauche, E.S., *Protecting Expressions of Folklore within the Right to Culture in Africa*, PERJ, 2010, Vol. 13, No.4

⁴⁵³ Law No.31/2009.

limitation in time. They are imprescriptibly inalienable apart from transmissible to the author's heirs after his death or conferred to third person by testamentary disposition.

5.3.2 Owners of Expressions of Folklore Rights in Rwanda

Article 30⁴⁵⁴ articulates for beneficiaries or owners of expressions of folklore rights in Rwanda. It clearly reveals that a country, a private institution or an individual who has registered their expressions of folklore to the competent authority is the beneficiary or owner of protection of expressions of folklore. Moreover, article 254 discloses that expressions of folklore and the works of the public domain are considered part of the national culture and heritage of Rwanda. Works deriving from Rwanda national folklore enjoy copyright protection as derivative works and collection of works, without prejudice to any protection of pre-existing work or expression of folklore incorporated in or utilized for making of such a work. The use and any transfer of ownership of work derivative from Rwanda National folklore for profit making purposes is in return for payment of royalties, 25 percent of the amounts collected from works deriving from Rwanda's national folklore are reserved to activities of creative work promotion.⁴⁵⁵ Lastly, article 222 is on original ownership of copyright. It covers collective management of copyright and related rights.⁴⁵⁶

5.3.3 Mechanisms for Protection of Expressions of Folklore in Rwanda

Law no.28/2016 which preserves cultural heritage and traditional knowledge and Law no. 31/2009 which contains provisions for the protection of intellectual property

⁴⁵⁴ Law No.28/2016. See also Nwauche, E.S., (note 459).

⁴⁵⁵ Rwanda IP Policy, 2009, pp.17-18.

⁴⁵⁶ Law No. 28/2016 and Article 253 of Rwanda Copyright law are relevant here.

are relevant here. These laws articulate a number of mechanisms for protection of expressions of folklore. For instance, article 8⁴⁵⁷ reveals how foreign expressions of folklore are protected in Rwanda. In that respect, article 29⁴⁵⁸ provides for the means of protection of expressions of folklore. It expressly indicates that registers are used in a bid to protect expressions of folklore in Rwanda. This is in a sense that, the registrar of intellectual property rights keeps the register of expressions of folklore which belong to the national heritage and ensure that they are protected.

Likewise, article 30⁴⁵⁹ on beneficiaries of protection of expressions of folklore clearly reveals that a country, a private institution or an individual who has registered their expressions of folklore to the competent authority is the beneficiary of protection of expressions of folklore. It further provides that the expressions of folklore must be kept and used in their traditional practices. Thus, customary law comes into play. This is also covered under article 31⁴⁶⁰ on restrictions of registered expressions of folklore which provides that no person shall misappropriate, use outside traditional context or unlawfully exploit a registered expression of folklore.

In essence, articles 33 and 34 clearly indicate that an expression of folklore belongs exclusively to an individual; protection lasts fifty (50) years from the date of the death of owner after which it is regarded and protected as the national heritage. Also, any person who uses an expression of national folklore for economic interests pays royalties determined by a competent authority while article 36⁴⁶¹ underpins the use of

⁴⁵⁷ Law No.28/2016.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

⁴⁶¹ Law No.28/2016.

contracts as one of the mechanisms to protect expressions of folklore.

In a nut shell, it articulates how expressions folklore belonging to one person can be used by another person for economic benefits. Thus, for a person to use an expression of folklore belonging to another person for economic benefits, he/she must enter into a contract with the holder. From the analysis above, it is pertinent to note that Rwanda protects expressions of folklore in accordance to international standards. Therefore, there are appropriate mechanisms for protecting expressions of folklore in Rwanda.

5.3.4 Enforcement of Expressions of Folklore in Rwanda

It is generally noted that enforcement of IPRs is an important part of any IP regime. It is only through appropriate enforcement mechanisms. The enforcement provisions under the Rwanda IP Law provide for civil action against infringement of rights conferred by IPRs, discovery of evidence and right of information, provisional measures and injunction, criminal penalties in certain cases and special border measures.

These provisions have to be implemented in an appropriate and balanced manner to ensure that they equally support the needs of encouraging innovative and creative activities and investment and the needs to facilitate access to technology and essential goods and services.⁴⁶² This is related to another aspect of dispute settlement mechanisms. Dispute settlement mechanisms are discussed below.

⁴⁶² Rwanda IP Policy, 2009, p.19 and Revised Rwanda IP Policy, 2018, available at <http://ictpolicyafrica.org>, (accessed on 26th November, 2021).

5.3.5 Dispute Settlement Mechanisms

The new IP Law⁴⁶³ in Rwanda contains extensive provisions on enforcement of IP and provides a range of powers to the judiciary and special tribunals, the policy and customs authorities to address IP enforcement. The Law also provides safeguards for third parties in line with the TRIPS principles. The promulgation of the new law also coincides with the inauguration of the Commercial Court branch of the High Court of Rwanda under whose jurisdiction IP issues fall. These are particularly important developments for Rwanda. The reason is that while there are increasing complaints regarding counterfeiting, there is very limited technical and human capacity to address claims of infringement within the policy and the customs department. Since the creation of the Commercial High Court in May 2008 no IP cases have been brought before it. The situation may soon change, however, especially with the new IP Law. It is viewed that the low level of IP cases previously was attributed to the level of damages payable for infringement and lack of awareness.⁴⁶⁴

The mission of Rwanda's Intellectual Property (IP) Policy is to ensure that national IP Laws, institutional practices and strategies in public research institutions and industry are developed and implemented in a manner that contributes to building Rwanda's technological base and cultural industries and that advancements in science and technology benefit society.⁴⁶⁵ One of the objectives of the Intellectual Property policy enhances the protection of traditional knowledge and facilitates equitable access to genetic resources and benefit sharing.⁴⁶⁶

⁴⁶³ Law No.31/2009.

⁴⁶⁴ The Rwanda IP Policy, 2009, p.6, available at <http://ictpolicyafrica.org>, (accessed on 26th November, 2021).

⁴⁶⁵ Ibid, p.8.

⁴⁶⁶ The Rwanda IP Policy, 2009, p.9, available at <http://ictpolicyafrica.org>, (accessed on 26th November, 2021).

The main aim here is to promote and support the development of relevant legal systems and institutions for the protection of traditional knowledge and to ensure prior informed consent and benefit sharing for access to genetic resources in Rwanda. The legal systems and institutional framework should among others be aimed at: recognizing the value of traditional knowledge and responding to the needs of the knowledge holders; promoting respect for traditional knowledge and its conservation and preservation including repression of unfair and inequitable uses of the knowledge; promoting innovation and creativity and overall community development including facilitating legitimate trade in traditional knowledge-based goods and services; and preventing biopiracy.⁴⁶⁷

Lastly, Part IV⁴⁶⁸ is on enforcement of intellectual property. Article 289 is on protection of plants discovery genetic resources, traditional knowledge and folklore. The article further indicates that a special law is useful for protection of expressions of folklore. In 2016, a special law i.e., Law No. 28/2016 was enacted for adequately protecting expressions of folklore in Rwanda. However, it has not been tested in the court of law.

5.4 Institutions Involved in Protecting Expressions of Folklore in Rwanda

Article 11⁴⁶⁹ covers administration of intellectual property. It provides that Ministry in charge of industry property, Ministry in charge of copyright and cultural matters and intellectual property organ are responsible organs for protection of intellectual

⁴⁶⁷ Ibid, p.10.

⁴⁶⁸ Law No.31/2009.

⁴⁶⁹ Ibid.

property in Rwanda. On the one hand, article 12 prescribes the responsibilities of the Ministry in charge of copyright and cultural matters. Such responsibilities include responsibility to protect the moral rights in relation to copyrights, to promote and to provide services to artists and performers, to promote and protect the national culture and heritage and to carry out decrees provided by this law.

On the other hand, article 13 prescribes the responsibilities of the intellectual property organ. This organ is responsible for daily management of the intellectual property. It is, *inter alia*, responsible to assure a better utilisation, a free and fair economic use of works; to assure equitable remuneration and a just distribution of dividends arising from use of works, to develop and promote cultural industry and printing industry in Rwanda, to monitor activities of private institutions that manage jointly copyrights and related rights and to arbitrate all disputes arising from Intellectual property.

Furthermore, the lead agency for policy-making and legislative development on IP in Rwanda is the Ministry of Trade and Industry (MINICOM) except with respect to copyright where the lead agency is MINISPOC. Until mid-2008, a few staff at the Ministry of Trade and Industry (MINICOM) were responsible for all IP Policy and legislative work, as well as IP administration. At the Ministry of Sports and Culture (MINISPOC), which deals with copyright matters, there is also limited staff time dedicated to copyright. With the creation of the Rwanda Development Board (RDB) and its takeover of IP administration, there will be some staff time free at MINICOM and the MINISPOC to focus on policy-making, policy implementation and monitoring.

Thus, IP administration has now been moved to RDB as part of on-going legal and commercial reforms aimed at facilitating business entry and commercial activities. In addition to IP administration, RDB is also responsible for registration and administration of matters related to companies and secured transactions, among others. At the moment, the IP administration system, which all remains manual, is being set up with two new legal officers just recruited.⁴⁷⁰

Institute of National Museum of Rwanda is another institution responsible for implementing the laws on the protection of expressions of folklore in Rwanda. Basically, it is responsible for cultural heritage in Rwanda. It is responsible to maintain a list of record/declared sites (archaeological, historical and cultural) including Bugesera District, as well as information on the legal framework governing the cultural heritage resources in Rwanda.⁴⁷¹

5.5 Conclusion

This chapter has demonstrated efforts made by Rwanda in a bid to protect intellectual products, in particular, expressions of folklore. It has indicated a number of regional and international treaties ratified by Rwanda to meet the international standards and mechanisms on protection of expressions of folklore. It has further demonstrated that Rwanda has a unified legal system (the combination of common and civil legal system) on protection of expressions of folklore. Law no. 28/2016 was developed as a specific law on protection of expressions of folklore in Rwanda.

⁴⁷⁰ Rwanda IP Policy, p.5.

⁴⁷¹ Rwanda., A Report of New Bugesera International Airport Environmental and Social Impact Assessment, 2018, available at <http://esa.afdb.org> or <http://www.miga.org>, (accessed on 23rd December, 2021).

Lastly, the chapter has demonstrated how Rwandan folklores are embodied in Rwandan culture which has its own unique characteristics.

CHAPTER SIX

PROTECTION OF EXPRESSIONS OF FOLKLORE IN TANZANIA

6.1 Introduction

Tanzania is a union of Mainland Tanzania (Tanganyika) and Tanzania Zanzibar. There are two parallel and interdependent systems for protecting expressions of folklore; one for Mainland Tanzania and another for Tanzania Zanzibar. With that regard, this chapter provides protection of expressions of folklore in Mainland Tanzania and Zanzibar. Thus, the chapter shows to what extent Tanzania safeguards, promotes and protects expressions of folklore.

The chapter further reveals treaties and Conventions of which Tanzania ratified with the view to meet regional and international standards for protecting the expressions of folklore. It further analyses the mechanisms for protection of expressions of folklore in Tanzania. The chapter also links the inception of common law legal system with the protection of expressions of folklore in Tanzania, in particular, legal regime for protection of expressions of folklore in Tanzania. It also reveals the institutions involved in protecting expressions of folklore in Tanzania and finally, gives a conclusion to the chapter.

6.2 Legal System of Tanzania

As it has already been revealed, the United Republic of Tanzania is the union of the Republic of Tanganyika and the Peoples' Republic of Zanzibar.⁴⁷² On her part, Tanganyika regained its independence from the British, who administered her after

⁴⁷² Manning, C., and Kasera, S., *Updated Tanzania Legal System and Legal Research*, Houser Global Law School Program, 2016, available at <http://www.nyulawglobal.org/index.htm>, (accessed on 20th May, 2021).

the end of the Second World War (WWII) under the United Nations Trusteeship; on 9th December 1961. She became a Republic on 9th December 1962.⁴⁷³ On the other hand, Zanzibar became independent on 12th December 1963. Prior to her independence, Zanzibar was ruled by an Arab Sultanate, and enjoyed a protectorate status under the British.

One month after she gained independence, the Arab Sultanate regime of Zanzibar was overthrown by a popular revolution on 12th January 1964, which led to the creation of the Revolutionary Government of Zanzibar. It is worth noting that, the Republic of Tanganyika and the Peoples' Republic of Zanzibar entered into a union on 26th April 1964 to form the United Republic of Tanganyika and Zanzibar, which is now the United Republic of Tanzania.⁴⁷⁴

At the time of the Union, Tanganyika was being governed by a political party known as the Tanganyika African National Union (TANU), the nationalist party which won the country its independence, while Zanzibar was being ruled by the Afro Shiraz Party (ASP) which had led the popular revolution. The two states were by then being governed under the one-party system of government, i.e., the one-party state democracy, which was then very prevalent in Africa. In 1977, the TANU and ASP merged to form the Chama Cha Mapinduzi-CCM party, (otherwise known as the Revolutionary Party), which continued to exercise political control throughout the

⁴⁷³ See also Nyariki, D., WIPO Report on the Economic Contribution of Copyright-Based Industries in Tanzania, 2012, pp.13-15 disclosing Tanzania's Legal framework for Copyright expressions of folklore.

⁴⁷⁴ Matambalya, F., A Report of National Intellectual Property Strategy for the United Republic of Tanzania: An Overview of the interface between Development Aspiration and Practices in Harnessing Intellectual Property, 2012, available at www.wipo.int, (accessed on 20th January, 2022). See also Minning, C., and Kasera, S., (note 492).

country under the one-party regime.⁴⁷⁵

The United Republic of Tanzania was under the leadership of one-party system until 1992 when she adopted a new constitution, which enabled the organization of pluralist political parties, and hence in 1995, the first multi-party democratic elections were held in the country. Since 1995 the country has held such multi-party elections. Tanzania's legal system is based on the English Common Law system with various sources of laws which have been discussed in the subsequent section.⁴⁷⁶

6.2.1 Sources of Laws in Tanzania

As it has already been indicated, Tanzania's legal system is based on the English Common Law system.⁴⁷⁷ It derived this system from its British colonial legacy, as it does the system of government, which is based to a large degree on the Westminster Parliamentary model. It comprises a written Constitution. Unlike the unwritten British constitutional system, the first source of law for the United Republic of Tanzania is the 1977 Constitution. The constitutional history of Tanganyika traces its background from the 1961 independence constitution, which was adopted at the time of independence.

In 1962, Tanganyika adopted the Republican Constitution, which operated from 1962 up to 1965. These two were based on the traditional Lancaster style constitutions negotiated at independence by the British upon handover of state power

⁴⁷⁵ Ibid. See also Nyanduga, B.T., and Manning, C., *Guide to Tanzanian Legal System and Legal Research*, Houser Global Law School Program, New York University School of Law, Washington, New York, 2006.

⁴⁷⁶ Mirindo, F., *Administrative of Justice in Mainland Tanzania*, 2nd Edition, Law Africa Publishing Ltd, Nairobi Kenya, 2022.

⁴⁷⁷ Ibid. See Manning, C., and Kasera, S., (note 495).

to the newly independent states. In 1965, Tanganyika adopted an Interim Constitution while the country was waiting for a new constitution to be drafted, after it abolished the multi-party-political system and adopted a one-party State system. The process lingered longer than it was meant to and thus the constitution lasted from 1965 up to 1977 when a new constitution was adopted and it has since remained applicable to date, with fourteen subsequent amendments. This constitution is a union constitution; it operates both in Mainland Tanzania and Tanzania Zanzibar.⁴⁷⁸

The Constitution provides for a bill of rights, notwithstanding the fact that it also makes provision for a number of claw-back clauses. In other words, the enjoyment of certain rights and freedoms under the constitution is not absolute, but it is subject to legal regulation. The Bill of Rights is found in part three of the first chapter of the Constitution and the fundamental rights and freedom are stipulated in article 12 to 24. Article 25 to 28 imposes duties and obligations on every individual to respect the rights of others and society. Article 29 establishes the obligation of society to every individual. Article 30 of the constitution limits the application of these rights subject to law and under the due process of law, as the case may be.

The Constitution allows any person to challenge any law or act/omission, which contravenes his or her right, or the Constitution.⁴⁷⁹ The legal system of Tanzania also comprises of the Statutes or Acts of Parliament. The Laws Revisions Act of 1994⁴⁸⁰ provides that all legislations previously known as Ordinances, i.e., those

⁴⁷⁸ Ibid. See Nyanduga, B.T., and Manning, C., (note 498).

⁴⁷⁹ Ibid. See Manning, C., and Kasera., (note 500) and Nyanduga, B.T., and Manning, C., (note 501).

⁴⁸⁰ Cap 4 RE 2019.

which were enacted by the pre independence colonial administration, as Orders in Council, are now legally recognised as Acts. These Principal legislation and subsidiary legislation thereto, are published in the Government Gazette and printed by the Tanzania Government Printers.

The legal system further comprises of case law. These are cases from the court of record, that is to say, High Court and Court of Appeal. Such cases are either reported or unreported and are normally used as precedents, and bind subordinate courts thereto. Reported Tanzanian cases are found in the Tanzania Law Reports, High Court Digests and East Africa Law Reports.⁴⁸¹ Most of unreported cases are uploaded and accessed from Tanzania Legal Institute (TANZLII).

Apart from that, the legal system of Tanzania comprises of Received Laws enshrined under Section 2 (3) of the Judicature and Application Laws Act (JALA).⁴⁸² These include: Common Law, and Doctrine of Equity, Statutes of General Application of England, applicable before the 22 of July 1920, which is deemed to be the reception date for English Law in Tanzania.⁴⁸³ It also constitutes the Customary and Islamic Law, which are articulated under section 9 of JALA. Whereas the customary law is in effect only when it does not conflict with statutory law, the Islamic law is applicable to Muslims under the Judicature and Applications of Laws Act, empowering courts to apply Islamic law to matters of succession in communities that generally follow Islamic law in matters of personal status and inheritance.

⁴⁸¹ Tanzania Law Reports from 1981 to 2020.

⁴⁸² Cap 358 RE 2019, commonly known as JALA.

⁴⁸³ Mirindo, F., Administration of Justice in Mainland Tanzania, 2nd Edition, Law Africa Publishing Ltd, Nairobi Kenya, 2022.

Lastly, the legal system comprises International Law which includes Treaties and Conventions. Treaties and Conventions are not self-executing. They are not automatic law rather they become part of Tanzanian law (Municipal law) after being domesticated through the Act of Parliament (dualist). That is to say, they can apply in Tanzania only after ratification process.⁴⁸⁴ In a nutshell, Tanzania inherited the English Legal system which at the first time, appeared in Tanganyika Order in Council, 1920 and subsequently various statutes were enacted based on the English or common law legal system. On the other hand, decrees were enacted by the House of Representatives in Zanzibar.

6.2.2 Laws for Protection of Expressions of Folklore in Tanzania

A number of laws both domestic and international instruments regulate the protection of expressions of folklore in Tanzania. In that regard, part one of this section discusses domestic laws for protecting expressions of folklore in Tanzania while part two discusses international instruments i.e., treaty and convention for protection of expressions of folklore in Tanzania.

6.2.2.1 Domestic Laws

As regard with the domestic laws, the law on the protection of expressions of folklore in Tanzania range from the Constitution and other legislation. First is the Constitution of the United Republic of Tanzania of 1977. Article 24⁴⁸⁵ provides for the right to own property and that every person has the right to the protection of his property. Thus, the protection of various artistic works including expression of folklore is a right which is recognised in our constitution. Apart from that,

⁴⁸⁴ Ibid. See also Manning, C., and Kasera, S., (note 502).

⁴⁸⁵ The Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

expressions of folklore are protected under the Copyright and Neighbouring Rights Act applicable in Mainland Tanzania and the Copyright Act applicable in Tanzania Zanzibar.⁴⁸⁶

At this juncture, it is essential to discuss legislative development of the above two laws. In the first place, in Tanzania (by then Tanganyika), the intellectual property laws were first enacted during the colonial era. The UK Imperial Copyright legislation⁴⁸⁷ remained in force until in 1966 when it was repealed and replaced by a new Copyright Act⁴⁸⁸. Later, this law was developed, either amended or repealed to match with the pace of globalization and liberalization of the economy and hence the Copyright and Neighbouring Rights Act was enacted in 1999.⁴⁸⁹

For clarity, the UK Imperial Copyright Act, 1911 was revised in 1924 as the Copyright Ordinance, Cap 218. It was then repealed and replaced by the Copyright Act, 1966 (Act No. 61 of 1966), again repealed and replaced by the Copyright and Neighbouring Rights Act, 1999 (No. 7 of 1999) which is valid to date.⁴⁹⁰ Copyright protects the original literary and artistic creations of authors such as writers, composers, software developers, web designers, and many others.⁴⁹¹ Copyright is widely defined by different authors, national and international legal instruments and through case law. The Copyright and Neighbouring Rights Act has been amended by the Written Laws (Miscellaneous Amendment) (No.3), Act, 2019 to indicate the

⁴⁸⁶ Cap 218 and Act No.14 of 2003, respectively.

⁴⁸⁷ UK Imperial Copyright Act, 1911 revised in 1924 as the Copyright Ordinance, Cap 218.

⁴⁸⁸ Copyright Act, No.61 of 1966.

⁴⁸⁹ The Copyright and Neighbouring Rights Act 1999, Cap 218 RE 2019. See also Nyariki, D., (note 496).

⁴⁹⁰ Kimaryo, K.J., The Role of Intellectual Property Law in Promoting Economic Growth for Small and Medium Enterprises (SMEs) in Tanzania, LLM Dissertation, the Open University of Tanzania, Tanzania, pp.17-19, available at <http://respository.out.ac.tz/Id/eprint/2966>, (accessed on 3rd May, 2022).

⁴⁹¹ Ibid.

jurisdiction of the court and management of copyright.

On the other hand, during colonial period Zanzibar used English Copyright Act of 1911. The law was operational in Zanzibar through Zanzibar Order in Council of 1924. It was repealed in 1962 by the Zanzibar Order in Council of 1962. This Order and the Universal Copyright Convention and Bern Convention were operationalized to apply in Zanzibar through legal Notice No. 113 of 1963. They operated up to 2003 when the current Copyright Act, No. 14 of 2003 of Zanzibar was enacted.⁴⁹²

From legislative development of copyright law in Tanzania, it is worth noting that Article 23 (2)⁴⁹³ recognises the right to just remuneration that every person is entitled to remuneration commensurate with his work and therefore the authors of expression of folklore are entitled to remunerations for their work. Thus, as the mother law, the constitution recognises the protection of intellectual property and cultural heritage including expression of folklore. Apart from the Constitution, it is essential to discuss how the two laws protect expressions of folklore.

The first law is the Copyright and Neighbouring Rights Act, Cap 218. As delineated earlier, there is no specific law for protection of expressions of folklore in Tanzania. However, its protection is revealed under the Copyright and Neighbouring Rights Act.⁴⁹⁴ The Act is the main legislation in Tanzania for the protection of copyright and neighbouring rights in literary, artistic works and folklore and other related

⁴⁹² Sungura, M.M., The Effectiveness of Intellectual Property Laws in Zanzibar, LLM Dissertation, the Open University of Tanzania, 2013, p.18, available at <http://respository.out.ac.tz/Id/eprint>, (accessed 29th April, 2022).

⁴⁹³ Cap 2.

⁴⁹⁴ Cap 218 as amended in 2019.

matters. In safeguarding expression of folklore, the Copyright Act under part III covers protection of expression of folklore against illicit exploitation.⁴⁹⁵ The law recognises and protects expressions of folklore such as folk tales, folk songs, folk dances, traditional musical instruments, production of folk arts, particular drawings, painting, baskets and others.⁴⁹⁶

In essence, section 2 provides for objectives of the Act.⁴⁹⁷ It, *inter alia*, aims to promote creations of traditional and expressions of folklore. It further aims at protection of expressions of folklore by rendering certain uses thereof subject to authorization and determining offences against lawful interests relating to their integrity and protects lawful interest of performing artists, producers of phonographs and broadcasting organizations relating to their productions, by granting them relevant rights.

Furthermore, section 3 (2) of the Copyright and Neighboring Rights is relevant to the study. It provides that the protection of expressions of folklore applies to expressions of folklore developed and maintained in the United Republic of Tanzania. It does not protect works developed and maintained in other jurisdictions like Rwanda and hence this state of affairs requires harmonisation of law to enhance East African Common Market. Accordingly, section 3 (6) (b) provides for protection of foreign expressions of folklore. Foreign expressions of folklore are protected in Tanzania provided that the country of the community from which such expressions have been

⁴⁹⁵ This is also revealed in the case of *Mic Tanzania Ltd v Hamisi Mwinyijuma and Ambwene Yesaya*, Civil Appeal No.112 of 2019, High Court of Tanzania Dar es Salaam Registry where it was held that to prove ownership of a song one has to establish ownership.

⁴⁹⁶ Section 24 of Cap 218 as amended in 2019.

⁴⁹⁷ Cap 218 as amended in 2019.

derived, grants similar protection to expressions of folklore developed and maintained in the United Republic of Tanzania.

Furthermore, section 3 (6) (c) recognises the application of International Conventions covering the protection of expressions of folklore, performers of expression of folklore, works developed from expressions of folklore, phonogram and broadcasts. In that regard, in 1983, Tanzania assented to Lusaka Agreement on the establishment of ARIPO⁴⁹⁸ but has not yet ratified the Swakopmund Protocol for protection of traditional knowledge and expressions of folklore.⁴⁹⁹

For clarity, since 2015 when the Swakopmund Protocol became operational, Tanzania has not yet assented to it. In a nutshell, the Swakopmund Protocol on the protection of traditional knowledge and expressions of folklore aims to protect the overall traditional knowledge and expressions of folklore. A business plan for the implementation of the protocol was developed with the objective being to enable the Member States of the Organization to maximize the benefits to be derived from this protocol. The plan also provides mechanisms for effective protection of traditional knowledge and expressions of folklore at the national level. It also entails a coordinated approach to the protection of the resources including the mutual recognition and enforcement of rights and obligations among the Member States.⁵⁰⁰

⁴⁹⁸ ARIPO Annual Report of 2019, available at www.aripo.org, (accessed on 20th January, 2022).

⁴⁹⁹ The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore was adopted in 2010. The Protocol entered into force on May 11, 2015, available at <http://www.aripo.org>, (accessed on 29th January, 2021).

⁵⁰⁰ ARIPO Secretariat., Explanatory Guide to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Harare Zimbabwe, 2021, available at www.aripo.org, (accessed on 26th February, 2022).

Furthermore, the Act under section 25 provides for the utilisations of expression of folklore which are subject to authorisation by the competent authority when they are made with gainful intent outside their traditional context. However, section 26 of the Act provides for exceptions which include the use of expression of folklore without authorisation from competent authority where it is for educational purposes, utilisation by way of illustration with fair practices, borrowing expressions of folklore for creating an original work of an author or authors inspired by folklore.

Under section 27, it is articulated that when a person uses an expression of folklore in connection with any communication to the public, one has to acknowledge the source by mentioning the community and geographical place from where the expression of folklore has been derived. For better carrying out the objectives underpinned in the Copyright Act, the Act recognises competent authority. The Competent Authority is the National Arts Council of Tanzania which was established under section 3 of the National Arts Council of Tanzania Act.⁵⁰¹ It is responsible for the authorisation of any expression of folklore, fixing amount of any collection fees from such authorisation.

Also, the Act under section 46 establishes collective administration of copyright and neighbouring rights which is known as The Copyright Society of Tanzania (COSOTA), which, among other issues, it has the function of promoting and protecting the interests of authors, performers, translators and collecting and distributing any royalties or other remunerations accorded to them. It also maintains registered works.

⁵⁰¹ The National Arts Council of Tanzania Act, Cap 204 as amended in 2019.

Critically, it is observed that the Act sets limits for protection of literary works and hence it is inadequate for the protection of the expressions of folklore. Furthermore, the Act confers much of the benefits accruing from the authorisation of expressions of folklore works in the Government on the ground that, the fees collected by the competent Authority (National Arts Council of Tanzania) are used only for the purpose of promoting and safeguarding the national culture, but it is silent on the matters concerning the distribution of benefit accrued from such authorisation. The law also is silent on whether authors of expression of folklore have the right to authorise the use of their artistic works to other persons or to enter into written agreement in assigning the work on their own.

Moreover, the National Arts Council Act, Cap 204 contains themes on the protection of expressions of folklore. This legislation established the National Arts Council. According to the Written Laws (Miscellaneous Amendment) (No. 5) Act, 2019 the Council is, inter alia, responsible for promoting adherence to Tanzania's cultural moral and ethical values among artists and other persons involved in production, performance, distribution or exhibition of artistic works. It is responsible for reviving and promoting the development and production of artistic works including the production and use of indigenous and additional musical instruments, songs, poetry, and traditional dancing with a view to reviving and promoting Tanzanian culture. The Council has also been given the mandate by the Copyright Act under section 29⁵⁰² to provides authorisation for the utilisations of expression of folklore, to fix amount of collection fees from such authorisation for the purpose of promoting

⁵⁰² The Copyright and Neighbouring Rights Act, Cap 218 as amended in 2019.

and safeguarding national culture in Tanzania.

The Copyright Act, 2003⁵⁰³ is another main legislation in Tanzania for the protection of copyright and neighbouring rights in literary, artistic works and folklore and other related matters. It is operational in Tanzania Zanzibar. In safeguarding expression of folklore, the Copyright Act under part IV, covers protection of expression of folklore against illicit exploitation. The law recognises and protects expression of folklore such as folk tales, folk songs, folk dances, traditional musical instruments, production of folk arts, particular drawings, painting, baskets and others.⁵⁰³

The Act establishes the Copyright Society of Zanzibar responsible for promoting and protecting the rights of authors of literary works and maintaining registers of works of authors. However, this law is inadequate for protection of expressions of folklore. Nevertheless, it recognises the law protecting industrial property. The Industrial Property law⁵⁰⁴ normally protects the works for a specified duration. This is not a case for expressions of folklore. Such expressions are everlastingly protected on account that they pass from one generation to another. Furthermore, as it has already been revealed expressions of folklore are protected as part of copyright and under the Copyright Act. However, protection of expression of folklore under the copyright is not sufficient for the reason that it is internationally argued that copyright Act is not good law for protection of expressions of folklore. Based on the characteristics of expressions of folklore, it is paramount that a model law or a sui generis law be designed by each state as an approach to adequately protect expressions of folklore.

⁵⁰³ The Copyright Act, 2003, ss 27 to 33.

⁵⁰⁴ The Copyright Act, 2003, s 33(2) is relevant here.

Such approach is also for reasons that Copyright Law provides some aspects of protection of expressions of folklore and protection of traditional arts, however, they do not provide comprehensive mechanisms for protection of expressions of folklore.⁵⁰⁵

Apart from that, section 30 of the Act⁵⁰⁶ categorically envisages that the protection of expressions of folklore in Tanzania shall be in line with the law protecting industrial property or any other law or international treaty to which the United Republic of Tanzania is a party. It shall also be in line with any other forms of protection provided for the safeguarding and preserving of folklore. The protection shall not hinder the normal use, maintaining and development of expressions of folklore.⁵⁰⁷

As it has already been revealed, protecting expression of folklore under the law protecting industrial property is not sufficient. This is because, industrial property rights are protected for a limited duration while this is not the case for expressions of folklore. Nevertheless, the second part reveals international instruments which Tanzania observes when protecting expressions of folklore. Such instruments were made part and parcel of Tanzanian law following their ratification and hence Tanzania became member responsible to implement the undertakings articulated under the ratified treaties and conventions.

⁵⁰⁵ Georges S.S., National Policies and Legal Frameworks Governing Traditional Knowledge and Effective Intellectual Property Systems in Southern and Eastern Africa: The Case of Traditional Healers in Tanzania, the African Technology Policy Studies Network, Research Paper No.17, 2012, available at www.wipo.int, (accessed on 25th February, 2022).

⁵⁰⁶ Cap 218 as amended in 2019.

⁵⁰⁷ Cap 218 as amended in 2019, s 30(1) and (2).

6.2.2.2 Ratified International Legal Instruments

Section 44 (2) of the Copyright Act⁵⁰⁸ recognises the application of International Conventions or other international agreement on protection of expressions of folklore to which the United Republic of Tanzania is a party. Despite the fact that the United Republic of Tanzania is a number of international agreements like Lusaka Agreement yet, as it has been indicated earlier, it has not domesticated the Swakopmund Protocol on the Traditional Knowledge and protection of expressions of folklore.⁵⁰⁹

From the above provision, with regard to convention and treaties; Tanzania is a member of the Berne Convention for the Protection of Literary and Artistic Works of 1886. An attempt to protect expressions of folklore by means of copyright law has also been undertaken at the international level in the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention. The Berne Convention provides for the principles of copyright laws which have been reflected in various national jurisdictions including Tanzania that is the member and a signatory to the Convention since July 1994.⁵¹⁰ The convention under article 2 provides for Literary and artistic works deserving protection, the requirements and the obligation of countries to protect the literary and artistic works of authors in the union.

Furthermore, article 15 (4) (a) (b) of the Berne Convention provides to the effect that in the case of unpublished works where the author is unknown, but there is reasonable ground to presume that they are citizens of the country concerned of the

⁵⁰⁸ The Law of Tanzania Zanzibar.

⁵⁰⁹ ARIPO Report of 2019, available at www.aripo.org, (accessed on 20th January, 2022) is relevant here.

⁵¹⁰ See https://www.wipo.int/treaties/en/notification/berne/treaty_berne_156.html.

Union, then it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. Therefore, this article of the Berne Convention, according to the intention of revision conference, implies the possibility of granting protection for expression of folklore.⁵¹¹ However, the convention protects literary works under limited time. Expressions of folklore pass from one generation to another and thus, based on their characteristics, expressions of folklore have to be protected in their own scheme.

Further to that, Tanzania is a signatory of the Convention on the Protection of the Diversity of Cultural Expressions, 2005. Article 1 of the Convention⁵¹² aims at strengthening international cooperation and solidarity in a spirit of partnership with a view, in particular to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions. It also gives recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meanings.

The article reaffirms the Sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on the territory. Furthermore, it promotes respect for diversity of cultural expressions and raise awareness of the value at the local, national and international levels. In particular, it protects and promotes the

⁵¹¹ See Kuti, T.N., Towards Effective Multilateral Protection of Traditional Knowledge within the Global Intellectual Property Framework, LLM Thesis, University of Western Cape, South Africa, 2017, p.58.

⁵¹² UNESCO Convention of 2005 which came into force on 18th March, 2007.

diversity of cultural expressions.

In addition, article 8 requires member States to take all appropriate measures to protect and preserve cultural expressions in a manner consistent with the provisions of the Convention. Tanzania is one of the members required to take appropriate measures to protect and preserve cultural expressions. This is for the reason that pursuant to article 26 of the Convention, Tanzania ratified the Convention on 18th October, 2011.

Tanzania is not part of the Model Provisions for National Laws on the Protection of Expressions of folklore against Illicit Exploitation and other prejudicial actions of 1985. This model was designed by UNESCO and WIPO as a *sui generis* model law to be adopted and applied by various nations for protection of expressions of folklore in their respective nations. The Model Law provides that expressions of folklore represent an important part of the living cultural heritage of the nation, developed and maintained by the Communities within the nation, or by individuals reflecting the expectations of those Communities.

It is further provided in the above *sui generis* model law that dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation. It also provides that expressions of folklore constitute manifestations of intellectual creativity which deserve to be protected in a manner inspired by the protection provided for intellectual production. In particular, it provides that protection of expressions of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those

expressions, both within and outside the country without prejudice to related legitimate interests.⁵¹³ Despite its importance, Tanzania has not yet adopted the Model Law or designed a specific law for protection of expressions of folklore.

6.3 Protection of Expressions of Folklore in Tanzania

In Tanzania, there is no specific law for protecting expressions of folklore. However, expressions of folklore are protected under Copyright and Neighbouring Rights Act and Copyright Act, 2003⁵¹⁴ Part III and Part IV of the two Acts provide for protection of expressions of folklore against illicit exploitation. In analysis, section 24⁵¹⁵ provides for a list of the expressions of folklore which are subject to protection. Expressions of folklore which are protected includes: folk tales, folk poetry, riddles; folk songs and instrumental folk music; folk dances, plays and artistic forms of rituals; production of folk art, in particular drawings, mosaic, wood work, metal ware, jewelery, baskets, costumes; and traditional musical instruments.

Most important, section 25 prescribes the competent authority responsible for authorising utilisation of the expressions of folklore either for gainful intent or outside their traditional or customary context. Such utilisation includes reproduction and distribution of copies of expressions of folklore; communication to public, including recitation, performance, broadcasting or distribution by cable, of expressions of folklore. On the other hand, section 26 prescribes instances of fair use where authorization from a competent authority is not required. Such instances include: utilisation for the purpose of education; utilisation by way of illustration in

⁵¹³ These objectives of the model law are underpinned in the preamble.

⁵¹⁴ Cap 218 of Mainland Tanzania and the Copyright Act, 2003 of Zanzibar.

⁵¹⁵ Cap 218.

an original work of an author or authors, provided that the extent of such utilisation is compatible with fair practice; borrowing expressions of folklore for creating an original work of an author or authors inspired by folklore.

It further include incidental utilisation of an expressions of folklore, in particular, utilisation of an expressions of folklore that can be seen or heard in the course of a current event for the purposes of reporting on the current event by means of photography, broadcasting or sound or virtual recording, provided that the extent of such utilisation is justified by the informatory purpose; and utilization of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public, if the utilisation consists including their image in a photograph, in a film or in a television broadcasting.

In particular, section 27 covers moral rights of expressions of folklore that is acknowledgement of source. It provides that in all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilised has been derived. However, the provision does not cover borrowing expressions of folklore for creating an original work of the author or authors inspired by folklore, utilisation of an expressions of folklore that can be seen or heard in the course of a current event for the purposes of reporting on the current event by means of photography, broadcasting or sound or virtual recording, provided that the extent of such utilisation is justified by the informatory purpose and utilisation of objects containing the expressions of folklore which are permanently located in a place

where they can be viewed by the public, if the utilisation consists of their image in a photograph, in a film or in a television broadcasting.

In terms of section 28 and 29, the National Arts Council of Tanzania established under section 3 of the National Arts Council of Tanzania Act,⁵¹⁶ is a competent authority responsible for authorisation of any utilisation of expressions of folklore. Application for individual or blanket authorization of any utilisation of expressions of folklore shall be made in writing to the competent authority.⁵¹⁷ The competent authority is entitled to grant the application and may fix the amount of any collection fees corresponding to a tariff approved by the supervisory authority i.e. the Minister responsible for copyright and Neighbouring rights.⁵¹⁸

What is worth noting is that the collected fees shall be used for the purpose of promoting or safeguarding national culture. Upon any refusal to grant the application for the utilisation of expressions of folklore, appeal against the decisions of the competent authority shall be by the persons applying for the authorisation or the representative of the interested community and shall be with the supervisory authority.⁵¹⁹ In the same footing, sections 27 to 33 of the Copyright Act⁵²⁰ clearly indicate protection and utilisation of expressions of folklore in Tanzania Zanzibar. For instance, and as revealed earlier, the sections indicate that Zanzibar Arts and Music Council established under the Zanzibar Arts and Music Council Act is a competent authoriser of the use of expressions of folklore in Zanzibar.

⁵¹⁶ Cap 204 as amended in 2019.

⁵¹⁷ Cap 218, s 28(a).

⁵¹⁸ Cap 218, s 28(b).

⁵¹⁹ Cap 218, s 28(c).

⁵²⁰ Copyright Act, 2003.

The Copyright and Neighbouring Rights Act⁵²¹ covers the protection of expression of folklore in Tanzania Mainland, it contains various loopholes and faintness, such as the law is silent in recognising direct benefit of the economic rights to the community and individuals that develop and maintain expression of folklore. Under section 28 (2)⁵²² of The Copyright Act, National Arts Council of Tanzania as the competent authority has been entrusted with power to collect fees accrued from the authorisation and use of such fees to promote and safeguard national culture but the law is silent on the matter concerning the distribution of the benefit accrued from such authorisation. Thus, the provision seems to confer much of the benefits accrue from the authorisation of expression of folklore works in the hands of Government.

Besides, section 25⁵²³ of the Act requires only authorisation when it has to be used with intent to gain economic benefits but the law does not address on equitable benefit sharing accrued from such authorisation to the responsible community. Furthermore, the law is silent on prior fulfilment of other requirement when authorising such as prior informed consent from expressions of folklore owners. Thus, the failure of the law to solve this problem makes the continuance of the right of various expressions of folklore holders to be infringed.

Additionally, the law does not address the effective modes of enforcement in case the expressions of folklore originated from a certain community or individuals has been misused, sections 24, 26 and 28⁵²⁴ are meant to protect expression of folklore, however, they do not provide the modes of enforcement in case of non-compliance

⁵²¹ Cap 218.

⁵²² Ibid.

⁵²³ The Copyright and Neighbouring Rights Act, Cap 218 as amended in 2019.

⁵²⁴ The National Arts Council Act, Cap 204 as amended in 2019.

of the law. What is worth noting here is that no any reported case law addressing issues of expressions of folklore in Tanzania. Nevertheless, this does not mean that, there is no infringement of expressions of folklore in Tanzania.

Under section 4⁵²⁵ expression of folklore is defined to mean production consisting of characteristic elements of the traditional artistic heritage developed and maintained over generations by a community or by individuals reflecting the traditional artistic expectations of their community. Nevertheless, Part III of the Act⁵²⁶ provides to the protection of folklore in Tanzania, yet the problem of commercial exploitation and misuse of expressions of folklore are predominant in Tanzania.

On the other hand, section 2 of the Copyright Act, 2003⁵²⁷ expressly provides that expressions of folklore means a group-oriented and traditional based creation of groups or individuals reflecting the expectations of the Zanzibarian Community as an adequate expression of its cultural and social identity in standards and values as transmitted orally, by imitation or by other means, including: folk songs and instrumental folk music, folk dances and folk plays, production of folk arts in particular, drawings, paintings, carvings, sculptures, wood work jewellery, handicrafts and indigenous textiles.⁵²⁸ Such expressions of folklore are community oriented and normally pass from one generation to another and therefore their protection are in adequate on account that they are protected in the Law which set time limit within which literary works are protected. Like in Mainland Tanzania, authorisation to use expressions of folklore in Tanzania Zanzibar is vested to a

⁵²⁵ The Copyright and Neighbouring Rights Act, Cap 218 as amended in 2019.

⁵²⁶ Ibid.

⁵²⁷ Of Tanzania Zanzibar.

⁵²⁸ This is also reflected under section 27 of the Copyright Act, 2003 of Tanzania Zanzibar.

competent authority called the Zanzibar Arts and Music Council.⁵²⁹ Furthermore, the law, *inter alia*, aims at safeguarding and preserving expressions of folklore in Tanzania Zanzibar.⁵³⁰ However, they are protected for a specific time. After coming into public domain, they become accessible to anybody.

6.3.1 Expressions of Folklore Rights in Tanzania

As vindicated above, the folklore owners also have the rights over their expression of folklore both economic and moral rights. Part III of The Copyright and Neighbouring Rights Act⁵³¹ and Part IV of the Copyright Act⁵³² do not specifically provide for protection of both economic and moral rights. This is different from regional and international model laws⁵³³ on the protection of expressions of folklore.

6.3.2 Owners of Expressions of Folklore Rights in Tanzania

The owner of the rights in expression of folklore includes the custodians of a particular expression of folklore; in particular, individual or community that has developed maintained and used the expression of folklore as a characteristic of their traditional artistic heritage. Legal definition of expression of folklore under section 4 of the Copyright Act⁵³⁴ underscores the importance of communal and individual rights to expressions of folklore, as it defines it to mean production consisting of characteristic element of the traditional artistic heritage maintained and developed by the community or by the individuals reflecting traditional artistic expectations of their community. This is equally reflected under section 2 of the Copyright Act,

⁵²⁹ The Copyright Act, 2003 of Tanzania Zanzibar, ss 28, 31 and 23.

⁵³⁰ The Copyright Act, 2003 of Tanzania Zanzibar, s 3 (2).

⁵³¹ The Copyright and Neighbouring Rights Act, Cap 218 as amended in 2019.

⁵³² The Copyright Act, 2003.

⁵³³ For instance, Swakopmund Protocol on Protection of Traditional Knowledge and Expressions of Folklore.

⁵³⁴ *Ibid.* See also Nwauche, S.E., (note 459).

2003.⁵³⁵

The owner is mandated to authorise the use of expressions of folklore. Authorisation of expression of folklore can be referred to as the act of giving permission to the utilisation of expression of folklore. Under section 25 of the Copyright and Neighbouring Rights Act⁵³⁶ and section 28 of the Copyright Act⁵³⁷ expressions of folklore are subject to authorisation when they are made both with gainful intent and are not allowed to be used outside their traditional or customary context.

The authorisation can be for publication, reproduction, distribution of copies of expression of folklore, public recitation of performance, transmission by wireless means or by wire and other form of communication to the public. Thus, one cannot use expression of folklore other than those statutorily authorised. The Copyright Act protects expressions of folklore against reproduction, communication to the public by performance, broadcasting, or distribution by cable. In addition, section 27⁵³⁸ prevents the failure to acknowledge the source when expression of folklore is being utilised whether in printed publications or in communications to the public, the law requires identification of the source of the expression of folklore by reference to the community or place from where the expression of folklore is derived. The right to authorise any of the aforementioned acts is vested in the competent authority, the National Arts Council of Tanzania.

⁵³⁵ Law of Tanzania Zanzibar.

⁵³⁶ Ibid.

⁵³⁷ The Copyright Act, 2003, the Law of Tanzania Zanzibar.

⁵³⁸ Cap 218.

However, expression of folklore may be used without authorisation for educational purposes, as well as for illustrative purposes in other original works as per section 26 of the Copyright and Neighbouring Rights Act.⁵³⁹ On the other hand, the Copyright Act and Neighbouring Rights Act⁵⁴⁰ is silent on other important arrangement in case of authorisation of expression of folklore such as the prior informed consent of the community or individual who owns such expression. Thus, this is an obstacle towards the rights of the owner of expression of folklore as they are not participating as part of the agreement on authorisation of their expression of folklore.

This is also the same position under section 28⁵⁴¹ which is on authorisation to use expressions of folklore in Zanzibar. The section clearly articulates that reproduction and distribution of copies of expressions of folklore is upon application to the competent authority.⁵⁴² However, such authorisation or application for authorisation is not required where expressions of folklore are used for education purposes and illustrations in an original works of an author.⁵⁴³ Issue of prior informed consent from the Community where expressions of folklore are rooted is not covered.

Another important aspect is equitable benefit sharing. The principle of equitable benefit sharing in the protection of the expression of folklore requires that individuals and community who are the owners of the right of expression of folklore share benefit accruing from the utilisation of their expression. It requires equitable distribution of monetary and non-monetary benefits arising from the use of their

⁵³⁹ The Copyright and Neighbouring Rights Act, Cap 218 as amended in 2019.

⁵⁴⁰ Ibid.

⁵⁴¹ The Copyright Act, 2003 of Tanzania Zanzibar.

⁵⁴² The Copyright Act, 2003 of Tanzania Zanzibar.

⁵⁴³ The Copyright Act, 2003 of Tanzania Zanzibar, s 29.

expression of folklore. The equitable benefit sharing enables the community to extract compensation from third parties who use their expression of folklore⁵⁴⁴ therefore if the expression of folklore is to be used for a commercial purpose, the agreement must contain a benefit-sharing arrangement providing for equitable monetary or non-monetary compensation to the expressions of folklore owners.

However, the Copyright and Neighbouring Rights Act,⁵⁴⁵ provides the requirement to the competent authority for authorisation of utilisation of expression of folklore with gainful intent and after granting such authorisation to fix the amount of collected fees from such authorisation and the fees collected to be used for the purpose of promoting and safeguarding national culture, thus the law does not afford the mandatory scheme for the benefit sharing of such benefit accruing from such authorisation. This resembles the position in Tanzania Zanzibar where fees collected are used for promotion and preservation of expressions of folklore but not for the benefit to the community where they are rooted.

6.3.3 Mechanism for Protection of Expression of Folklore in Tanzania

Part V of the Act⁵⁴⁶ provides for sanctions against infringement or exploitation of folklore. The sanctions include civil remedies and criminal sanctions. Section 36 stipulates that any person whose rights are in imminent danger of being infringed or have been infringed, may institute proceedings in the United Republic of Tanzania for an injunction to prevent the infringement or to prohibit the continuation of the

⁵⁴⁴ Nwauche, S.E., *The Sui Generis and Intellectual Property Protection of Expressions of Folklore in Africa*, PhD Thesis, North West University, South Africa, 2016, available at <http://repostory.nwu.ac.za>, (accessed on 15th April, 2021).

⁵⁴⁵ Cap 218.

⁵⁴⁶ Cap 218 as amended by the Written Laws (Miscellaneous Amendments) (No.5) Act, 2019.

infringement; and payment of any damages suffered in consequence of infringement, including any profits enjoyed by the infringing person that are attributable to the infringement. It is further provided that any object which was made in violation of this Act and any receipts of the person violating it and resulting from such violations, shall be subject to seizure.⁵⁴⁷

Additionally, section 48 provides for fees, royalties etc. It provides that for the better performance of its functions, the Society shall, subject to this Act, have power to determine the minimum rates of royalties to be levied in respect of uses to be made of works registered by it; to levy fees upon registering works and association; to acquire, hire and dispose of property; to borrow money whether by way of loan, overdraft or otherwise on the security of its assets; to accept and administer any trusts or donations; to join regional and international associations having similar objectives and functions; to perform such other functions as may be assigned to it by Board; and to train and sensitise its members, institutions and other members of the Public on Copyright matters.⁵⁴⁸

In addition, section 51 covers the composition of the Society. It provides that the composition, proceedings and other matters of the Society shall be in accordance with the provisions of the Schedule to this Act. Rule 1 to the Schedule provides that the Society shall consist of the following Board Members appointed by the Minister each of whom representing the following: the Commission of Culture; the National Arts Council; the office dealing with Industrial Property; firm Makers Association;

⁵⁴⁷ Cap 2018, S.36 (1) and (2).

⁵⁴⁸ Cap 218 as amended by the Written Laws (Miscellaneous Amendments) (No.5) Act, 2019.

National Museum of Tanzania, Faculty of Law of the University of Dar es Salaam; the Attorney Generals Chambers; the Tanzania Authors' Association; the Tanzania Broadcasting Commission; and the Customs Department.⁵⁴⁹

On the other hand, section 43 covers conservatory and provisional measures. It provides that the court having jurisdiction of a civil action and arising under this Act, or Criminal Procedure Act shall have the authority, subject to (the relevant provisions of the Act and the Civil Procedure Code) and on such terms as it may deem reasonable to grant injunctions to prohibit the committing, or continuation of committing, of infringement of any right protected under this Act; to order the impounding of copies of works or sound recordings suspected of being made or imported without the authorisation of the owner of any right protected under this Act where the making or importation of copies is subject to such an authorisation, as well as the impounding of the packaging of, the documents, accounts or business papers referring to, such copies.⁵⁵⁰

In respect of criminalization of prejudicial actions, section 42 covers for offences and legal sanctions. It provides that any person who knowingly violates, or causes to be violated, the rights protected under this Act, shall be liable to a fine not exceeding more than five million shillings or to imprisonment for a term not exceeding three years or to both, for the first offence if the infringement was on a commercial basis; and a fine not exceeding more than ten million shillings or to imprisonment for a term not exceeding five years or both, for each subsequent offence if the infringement was on a commercial basis.

⁵⁴⁹ Ibid.

⁵⁵⁰ Cap 218, s 43 (1).

Likewise, section 38 provides for right of destruction and similar measures. It stipulates that the injured party may require the destruction of all copies that have been unlawfully manufactured or unlawfully distributed or which are intended or unlawful distribution. The injured party may further require that the equipment such as moulds, plates, engraving stones, blocks, stencils and negatives which were destined exclusively for the unlawful production of copies be rendered unusable, or if this is not practicable, destroyed. The measures may be executed only after ownership has been legally confirmed.⁵⁵¹

Besides, section 3 (6) (b) is on similar protection. Expressions of foreign folklore are protected provided that the country of the community from which such expressions have been derived, grants similar protection to expressions of folklore developed and maintained in the United Republic of Tanzania. Section 3 (6) (c) recognises the application of International Conventions covering the protection of expressions of folklore, performers of expression of folklore, works developed from expressions of folklore, phonogram and broadcasts.

The protection of expression of folklore is entrusted to the National Art Council (BASATA) under section 29⁵⁵² as the competent Authority. The Authority has been given power to authorize the utilisations of expression of folklore, to fix amount of collection fees from such authorisation for the purpose of promoting and safeguarding national culture. Also, another institution is the Copyright Society of Tanzania (COSOTA)⁵⁵³ as a statutory body established under section 46, some of its

⁵⁵¹ Cap 218, s 38(1), (2), (3) and (4).

⁵⁵² The Copyright and Neighbouring Rights Act, Cap 218 as amended in 2019.

⁵⁵³ Ibid.

specific roles include promoting and protecting the interest of authors, to maintain registered work and to collect and distribute royalties accruing from the author in respect of their rights.

However, it appears that these institutions lack the infrastructure to engage in administrative oversight of expression of folklore. Instead, they mostly considered other kinds of intellectual property works such as modern musical works, film industry, more important than protection of expression of folklore. This is because, neither regulation nor mechanism has been set specific on protection of expression of folklore by these institutions.⁵⁵⁴

Addressing the issue of effectiveness of BASATA on protecting the expression of folklore, Jane noted that, the National Art Council of Tanzania does not sufficiently protect the expressions of folklore although it has been given power by the copyright Act as the competent authority under section 29 but the Act⁵⁵⁵ which govern the National Art Council of Tanzania (BASATA) speak directly under section 2(b)⁵⁵⁶ on the protection of folk music and but leaves behind other works surrounding expression of folklore such as folk tales, folk poetry, drawings and traditional music.⁵⁵⁷

She further added that the importance of folklore will be lost in absence of proper protection mechanism at the national level. Institutions governing intellectual

⁵⁵⁴ Ngeta, J., Protection on Expressions of Folklore in Tanzania: Legal and Institutional Framework Efficacy, LLB Dissertation, the University of Dodoma, Tanzania, 2020.

⁵⁵⁵ The National Arts Council Act, Cap 2004 as amended in 2019.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ngeta, J., Protection on Expressions of Folklore in Tanzania: Legal and Institutional Framework Efficacy, LLB Dissertation, the University of Dodoma, Tanzania, 2020.

property rights do not provide suitable mechanism for protection of expression of folklore. Therefore, the protection can be difficult to be achieved due to a number of reasons, such as the institutions do not specify the actual procedures or mechanisms for authorisation of expression of folklore. Likewise, the competent authority does not include the community in authorisation arrangements. For instance, the competent authority under section 25⁵⁵⁸ has the mandate to authorise for utilisation of expression of folklore.

However, there is no provision that requires BASATA when authorizing, it should consult community that is, get the prior informed consent of the holder or author of folklore before making such authorisation. This makes it a very important requirement as the absence of it will leave outside the great interest of the community. Worth to note is that BASATA has not explored suitable mechanisms that would enable the authors of expressions of folklore to get benefit of their folklore work and be able to pay fees required by section 28 (2).⁵⁵⁹ On the other hand, the Copyright Act provides the same mechanisms for protection of expressions of folklore.

However, it only provides for positive protection and not defensive protection.⁵⁶⁰ From the analysis above, it is worth noting that protecting expressions under copyright law is no longer viable. This position of law has been discussed in chapter three of this thesis. The said chapter has revealed that the copyright law has inherent

⁵⁵⁸ The Copyright and Neighbouring Rights Act, Cap 218 as amended in 2019.

⁵⁵⁹ Ibid.

⁵⁶⁰ The Copyright Act, 2003 of Tanzania Zanzibar.

deficiencies in protecting expressions of folklore. Therefore, there are inappropriate mechanisms for protecting expressions of folklore in Tanzania.

6.3.4 Enforcement of Expression of Folklore in Tanzania

Section 38 provides for the right of destruction and similar measures. It stipulates that the injured party may require the destruction of all copies that have been unlawfully manufactured or unlawfully distributed or which are intended or unlawful distribution. The injured party may further require that the equipment such as moulds, plates, engraving stones, blocks, stencils and negatives which were destined exclusively for the unlawful production of copies be rendered unusable, or if this is not practicable, destroyed. The measures may be executed only after ownership has been legally confirmed.⁵⁶¹

The Act further provides that if, in the event of infringement of a right protected under this Act, the demands of the injured party for any injunction, for the destruction or rendering the work unusable or the delivery are asserted against a person whose acts of infringement were neither intentional nor negligent, such person may simply indemnify in money to the injured party if execution of the aforesaid demands would produce for him a serious and disproportionate injury and if it may be assumed that, the injured party could accept redress in cash. The damages payable as aforesaid shall be such an amount as would have constituted as equitable remuneration had the right been granted by contract.⁵⁶²

⁵⁶¹ Cap 218, s 38 (1), (2), (3) and (4). See also ABC Attorneys., *Intellectual Property Law in Tanzania*, an article available at www.abccattorneys.co.tz discussing civil and criminal remedies for infringement of IP rights.

⁵⁶² Cap 218 as amended in 2019, s 37.

6.3.5 Dispute Settlement Mechanisms

Section 37 provides that the injured party may bring an action in court for injunctive relief⁵⁶³ requiring the wrongdoer to cease and desist if there is a danger of repetition of the acts or infringement was intentional or the result of negligence. In lieu of damages, the injured party may recover the profits derived by the infringer from the acts of infringement together with a detailed accounting reflecting such profits. Authors, persons having rights in scientific editions, photographers and performers may, if the infringement was intentional or the result of negligence, recover, as justice may require, a monetary indemnity for the injury caused to them even if no pecuniary loss has occurred.⁵⁶⁴ Rights arising from other legal provisions shall not be affected.⁵⁶⁵

Furthermore, section 38 provides for right of destruction and similar measures. It stipulates that the injured party may require the destruction of all copies that have been unlawfully manufactured or unlawfully distributed or which are intended for unlawful distribution. The injured party may further require that the equipment such as moulds, plates, engraving stones, blocks, stencils and negatives which were destined exclusively for the unlawful production of copies be rendered unusable, or if this is not practicable, destroyed. Nevertheless, the measures may be executed only after ownership has been legally confirmed.⁵⁶⁶

An action for a right of delivery may be initiated. This is covered under section 39 which stipulates that the injured party may require that the copies and equipment be

⁵⁶³ Issues of injunctive relief and jurisdiction of the Court were addressed in the case of *Hamisi Mwinyijuma and Ambwene Yesaya v Tigo Company Ltd*, Civil Case No.38 of 2011, High Court of Tanzania (Unreported).

⁵⁶⁴ Cap 218, s 37.

⁵⁶⁵ Cap 218, s 37 (3).

⁵⁶⁶ Cap 218, s 38 (1), (2), (3) and (4).

delivered to him, in whole or in part for an equitable price which shall not exceed the production costs. Section 40 provides for responsibility of the proprietor of an enterprise. It stipulates that if a right protectable has been infringed by an employee or agent of an enterprise in the course of his duties to such enterprise, the injured party may also assert the rights provided in sections 37 to 38, with the exception of the right to damages, as against the proprietor of such enterprise.

The Act further provides that if, in the event of infringement of a right protected under this Act, the demands of the injured party for any injunction, for destruction or rendering the work unusable or the delivery are asserted against a person whose acts of infringement were neither intentional nor negligent, such person may simply indemnify in money to the injured party if execution of the aforesaid demands would produce for him a serious and disproportionate injury and if it may be assumed that the injured party, could accept redress in cash. The damages payable as aforesaid, shall be such an amount as would have constituted as equitable remuneration had the right been granted by contract.⁵⁶⁷

In addition, section 42 covers for offences and legal sanctions. It provides that any person who knowingly violates, or causes to be violated, the rights protected under this Act, shall be liable to a fine of not exceeding more than five million shillings or to imprisonment for a term not exceeding three years or to both, for the first offence if the infringement was on a commercial basis; and a fine of not exceeding ten million shillings or to imprisonment for a term not exceeding five years or both, for each subsequent offence if the infringement was on a commercial basis.

⁵⁶⁷ Cap 218, s 41.

In the first place, it categorically indicates that any person who, without the authorisation of the competent authority imports or distributes copies of expressions of folklore derived from the United Republic of Tanzania or copies of translations, adaptations, arrangement or other transformations or such expressions of folklore, made abroad without the authorisation of the said authority, is guilty of an offence and liable to a fine not exceeding ten million shillings or imprisonment for a term not exceeding ten years.⁵⁶⁸

Secondly, it provides that any person who willfully or negligently does not comply with the provisions of this Act is liable to a fine not exceeding three million shillings or imprisonment for a term not exceeding one year.⁵⁶⁹ Furthermore, any person who, without the authorisation of the competent authority willfully or negligently utilises an expression of folklore in violation of the provisions of this Act is liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years.⁵⁷⁰ It is also the position of law that any person willfully deceiving others in respect of the source of artifacts or subject matters of performances or recitations made available to the public by him in any direct or indirect manners, presenting such artifacts or subject matters as expressions of folklore or a certain community is punishable by a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years.⁵⁷¹ On the other hand, any person who publicly uses, in any direct or indirect manner expressions of folklore willfully distorting the same in a way prejudicial to the cultural interests of the community concerned is

⁵⁶⁸ Cap 218, s 42 (2).

⁵⁶⁹ Cap 218, s 42(3).

⁵⁷⁰ Cap 218, s 42(4).

⁵⁷¹ Cap 218, s 42 (5).

punishable by a fine of not exceeding five million shillings or to imprisonment for a term not exceeding three years.⁵⁷²

Further to that, a person who gives authorisation on behalf of performers without being a duly appointed representative, or person who knowingly proceeds under such an unlawful authorization is guilty of a criminal offence punishable by a fine of not exceeding five million shillings or to imprisonment for a term not exceeding three years.⁵⁷³ Therefore, for any other criminal offence under copyright infringement, the penalty is a fine of not more than four million shillings or to imprisonment of up to three years for the first offence; a fine of not more than eight million shillings or to imprisonment of up to two years for each subsequent offence.⁵⁷⁴

Likewise, section 43 covers conservatory and provisional measures. It provides that the court having jurisdiction of a civil action and arising under this Act, or Criminal Procedure Act shall have the authority, subject to (the relevant provisions of the Act and the Civil Procedure Code) and on such terms as it may deem reasonable to grant injunctions to prohibit the committing, or continuation of committing, of infringement of any right protected under this Act; to order the impounding of copies of works or sound recordings suspected of being made or imported without the authorisation of the owner of any right protected under this Act where the making or importation of copies is subject to such an authorisation, as well as the impounding

⁵⁷² Cap 218, s 42 (6).

⁵⁷³ Cap 218, s 42(7).

⁵⁷⁴ Cap 218, s 42 (9).

of the packaging of, the documents, accounts or business papers referring to, such copies.⁵⁷⁵

Worth noting is that the provisions of the Civil Procedure Code, 1966 as amended several times and the Criminal Procedure Act, 1987 as amended several times dealing with search and seizure shall apply to infringements of rights under this Act. Also, the provisions of Tanzania Revenue Authority Act, 1995 dealing with suspension of the release of suspected illegal goods shall apply to articles and implements protected under this Act.⁵⁷⁶ Besides, Part VI deals with measures, remedies and sanctions against abuses in respect of technical means of protection and rights management information. In particular, it prohibits infringements of technical means of protection and rights management information.⁵⁷⁷

Moreover, section 45 requires the Minister to make regulations. It stipulates that the Minister may make regulations prescribing such matters as are required or permitted by this Act to be prescribed or as necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Act. On the other hand, section 46 is on establishment of the Copyright Society of Tanzania. The Society is responsible for collective administration of copyright and neighbouring rights. In a nutshell the provisions reads, there is hereby established an organization to be known as the Copyright Society of Tanzania which shall be a body corporate having perpetual succession and a common seal; under that name be capable of suing and being sued and of purchasing, or otherwise acquiring, holding and alienating

⁵⁷⁵ Cap 218, s 43 (1).

⁵⁷⁶ Cap 218, s 43 (2) and (3) read together with Acts No.49 of 1966, No.9 of 1987 and No.11 of 1995.

⁵⁷⁷ Cap 218, s 44(2).

movable or immovable property; and subject to the provisions of this Act be capable of doing or performing all such acts or things as bodies corporate may by law do or perform.⁵⁷⁸

Apart from that section 47 covers the functions of the society. It provides that the functions of the society shall be to promote and protect the interests of authors, performers, translators, producers of sound recordings, broadcasters, publishers, and, in particular, to collect and distribute any royalties or other remuneration accorded to them in respect of their rights provided for in this Act; to maintain registers of works, productions and associations of authors, performers, translators, producers of sound recordings, broadcasters and publishers; to search for, identify and publicize the rights of owners and give evidence of the ownership of these where is a dispute or an infringement; to print, publish, issue or circulate any information, report, periodical, books, pamphlet, leaflet or any other material relating to copyright and rights of performers, producers of recordings and broadcasters and to advise the Minister on all matters under this Act.

Important to note is that section 4 defines a court to mean the district court established under the Magistrates Courts Act, 1984. However, in 2019, the provision was amended to mean the Court with competent jurisdiction to settle disputes.⁵⁷⁹ Thus, it is a court responsible for dispute settlement emanating from infringement of expressions of folklore. The effective modes of enforcement have not been explained in the Copyright Act apart from the fact that section 24, 26 and 28 of the copyright

⁵⁷⁸ Cap 218, s 46.

⁵⁷⁹ The Written Laws (Miscellaneous Amendment) (No.3), Act No.9 of 2019, S.12.

Act are meant to protect expression of folklore and to create offences by mentioning expression of folklore works to be protected, how to get authorisation and exception to it. However, the Act is silent on modes of enforcement in case these sections are not being complied.

It is viewed that the legal aspect in protection of expression of folklore in particular the National Art Council Act does not provide enforcement mechanism of expression of folklore and that the law is there as the promoter not as controller and that BASATA is supposed to be the controlling authority.⁵⁸⁰ It is further viewed that it is an omission which operates against the right of the owner of folklore to enforce their right when it has been misused. Thus, the law must clearly cover this issue despite the fact that there are no major cases involving litigation for the protection of the expressions of folklore in Tanzania.

Nevertheless, there are incidents on the question of control of the use of expressions of folklore works abroad especially when those works are also common in the community. The good example is Maasai cloth which is produced by Maasai tribe found in Tanzania and Kenya is highly used abroad by various companies and this can be evidenced in the most familiar case between Maasai people of East Africa through the group known as Maasai Intellectual Property Initiative (MIPI) under the leadership of Isaac Ole Tialolo against Louis Vuitton in 2012,⁵⁸¹ where Louis Vuitton spring and Summer men's collection which include hats, shirts and scarves inspired by the Maasai shuka, were taken to task because, despite the fact that they

⁵⁸⁰ Ngeta, J., Protection on Expressions of Folklore in Tanzania: Legal and Institutional Framework Efficacy, LLB Dissertation, the University of Dodoma, Tanzania, 2020.

⁵⁸¹ See <https://www.bbc.com/news/magazine-2261/7001>, accessed on 4th September, 2019).

were selling and earning billions of money, the Maasai people were not compensated for anything. Therefore, MIPI aimed at forcing the companies obtain licences from Maasai and that reasonable fund be distributed to the people in order for Maasai to protect their traditional designs.⁵⁸²

6.4 Institutions Involved in Protecting Expression of Folklore in Tanzania

As it has already been indicated, a number of institutions are involved in protection of expressions of folklore in Tanzania. Such institutions include the National Art Council of Tanzania, COSOTA, COSOZA and the Ministry of Sports and Culture. The first institution is the National Art Council of Tanzania (BASATA). BASATA is the National Arts Council of Mainland Tanzania. It is an organisation established under the National Art Council.⁵⁸³ The functions of the Council include: reviving and promoting the development and production of artistic works in Tanzania, carrying out research on the development production and marketing of artistic works, providing advisory services and technical assistance for the development of artistic enterprises, planning and co-ordinate artistic activities.

Others are to advise the government on all matters relating to the development and production of artistic works and to prepare regulations for registration of people and organizations involved in the arts.⁵⁸⁴ The core values of National Art Council are to promote and develop an authentic Tanzanian art tradition, uphold professionalism and excellence and promote creativity and attentiveness in the art.⁵⁸⁵ These functions

⁵⁸²See <https://www.independent.co.uk/life-style/Fashion/maasai-people-cultural-appropriation-luxury-fashion-retailer-louis-vuitton-east-africa-intellectual-a7553701.html>, (accessed on 4th September, 2019).

⁵⁸³ The National Arts Council Act, Cap 204 RE 2019. See also Breakthrough Attorneys' Paper discussing the duties of COSOTA available at www.breakthrough.co.tz.

⁵⁸⁴See <https://www.tanzaniazalendo.org/organizations-involved-in-cultural-activities>, accessed on 20th August, 2019).

⁵⁸⁵See <https://www.misicinafrica.net/dicteonary/national-arts-council-tanzania-basata>, (accessed on 20th August,

are equally performed by the Zanzibar Art and Music Council.

Another institution is the Copyright Society of Tanzania (COSOTA). COSOTA is an organisation established by the Copyright and Neighbouring Rights Act.⁵⁸⁶ Under section 46 of the Act COSOTA have a number of functions. Such functions include: to promote and protect the interests of authors, performers, translators, producers of sound recordings, broadcasters, publishers and to collect and distribute any royalties or other remuneration accorded to them. Also, COSOTA is empowered to maintain registers of works, productions and association of authors, performers, translators, producers of sound recordings, broadcasters and publishers. COSOTA has been playing a potential role in implementing an important area of Intellectual Property Rights in Tanzania.

Thus, based on its function, COSOTA is both a copyright office and a collective society. As a copyright office, COSOTA has overall mandate to oversee and enforce the Act whereas as collecting society, it has the mandate to grant licences for public performance of copyrighted works on behalf of the artists, collect and distribute royalties and take legal action against infringement.⁵⁸⁷ Section 48 empowers COSOTA to collect fees, royalties etc.

It provides that for the better performance of its functions, the Society shall, subject to this Act, have power to determine the minimum rates of royalties to be levied in respect of uses to be made of works registered by it; to levy fees upon registering

2019).

⁵⁸⁶ The Copyright and Neighbouring Rights Act, Cap 218 RE 2019.

⁵⁸⁷ Makulilo, A., P. Boshe *Looks like Copyright licence but Really It Is Not- COSOTA and Enforcement of Copyright in Tanzania*, Open University Law Journal, 2013.

works and association; to acquire, hire and dispose of property; to borrow money whether by way of loan, overdraft or otherwise on the security of its assets; to accept and administer any trusts or donations; to join regional and international associations having similar objectives and functions; to perform such other functions as may be assigned to it by the Board; and to train and sensitise its members, institutions and other members of the Public on Copyright matters.

Section 51 covers the composition of the Society. It provides that the composition, proceedings and other matters of the Society shall be in accordance with the provisions of the Schedule to this Act. Rule 1 to the Schedule provides the composition of the Society to include Board Members appointed from the Commission of Culture; the National Arts Council; the office dealing with Industrial Property; film Makers Association; National Museum of Tanzania, Faculty of Law of the University of Dar es Salaam; the Attorney Generals Chambers; the Tanzania Authors Association; the Tanzania Broadcasting Commission; and the Customs Department. In addition, rule 8 covers the appointment of Copyright Administrator and his duties. The Copyright Administrator shall be the Secretary to the Board and subject to any general or specific directions of the Board, the Copyright Administrator shall be the Chief Executive Officer of the Board and as such, he shall be responsible to the Board for the administration and management of its affairs, including the supervisions of other staff of the Society.

Moreover, the Copyright Society of Zanzibar (COSOZA) is also another institution responsible for protection of expressions of folklore. This Society was established under section 38 of the Copyright Act. It is responsible for promoting and protecting

the interest of authors, performers, producers of sound recordings, broadcasters, publishers, and in particular, collecting and distributing any royalties or other remuneration accorded to them. It is also responsible for maintaining registers of works, productions and association of authors, performers, producers of sound recording broadcasters and publishers. It is further responsible for publicising the rights of owners and giving evidence of the ownership of these rights where there is a dispute or an infringement.⁵⁸⁸

The society is also responsible for advising the Minister on all matters under the Act including strategies on promotion and protection of expressions of folklore. Despite such duty, expressions of folklore which are of its own kind are still protected under Copyright Act of which its protection is limited to a certain duration. The Society has a duty to determine the minimum rates of royalties to be levied in respect of uses to be made of works registered by it.⁵⁸⁹

Finally, the Ministries of Sports and Culture of Tanzania Mainland and Zanzibar are responsible for preserving and promoting national heritage i.e., traditional cultural expressions. The Ministers responsible for arts, sports and culture are supervisory authorities. They supervise COSOTA, COSOZA, National Arts Council and Zanzibar Art and Music Council responsible for overseeing the preservation and protection of expressions of folklore.⁵⁹⁰ The Ministers are also responsible for settling disputes evolving on misappropriation of expressions of folklore at appeal

⁵⁸⁸ The Copyright Act of Tanzania Zanzibar, s 39.

⁵⁸⁹ The Copyright Act, 2003 of Tanzania Zanzibar, s 40.

⁵⁹⁰ The Copyright Act, 2003, s 32 is relevant here.

level.⁵⁹¹

6.5 Conclusion

In Tanzania, the expressions of folklore are protected under the Copyright and Neighbouring Rights Act⁵⁹² and the Copyright Act.⁵⁹³ Such Laws establish institutions responsible for overseeing the protection of expression folklore in Tanzania. Such institutions include COSOTA, COSOZA, BASATA and Zanzibar Art and Music Council. The laws contain provisions on the mechanisms for production of expressions of folklore. They further permit Tanzania to ratify and adopt international conventions, treaties and regional treaties and protocol on the protection of expressions of folklore. However, to date, Tanzania has neither ratified the Swakopmund Protocol on the Protection of Traditional Knowledge and expressions of folklore nor adopted Model Provisions for National Laws on the Protection of Expressions of folklore against Illicit Exploitation and other prejudicial actions 1985. Unlike Rwanda, Tanzania has no specific law or a sui generis law for protection of the expressions of folklore. Thus, expressions of folklore are inadequately protected in Tanzania compared to Rwanda.

⁵⁹¹ The Copyright Act, 2003, s 31 (3) is relevant here.

⁵⁹² Cap 218.

⁵⁹³ Act, 2013 the Law of Tanzania Zanzibar.

CHAPTER SEVEN

COMPARATIVE DISCUSSION AND CONCLUSION

7.1 Introduction

The research underlined the law on the protection of expressions of folklore in the East African Community and at international level. In particular, Rwanda and Tanzania were selected as countries of study and thus doctrinal legal research and comparative legal research were used to explore the findings. The main objective of the study was to examine the extent of harmonisation of municipal laws on protection and promotion of expressions of folklore within the East African Community.

The specific objectives were: to examine harmonisation of municipal laws on protection and promotion of expressions of folklore in Rwanda and Tanzania and to identify appropriate mechanisms for adequately protecting and promoting expressions of folklore in Rwanda and Tanzania. Therefore, the study intended to find out to what extent Rwanda and Tanzania have harmonised their municipal laws for protecting and promoting expressions of folklore within the East African Community. Second, what are appropriate mechanisms for adequately protecting and promoting expressions of folklore in Rwanda and Tanzania. From the study, the discussion below reveals a comparative analysis and the key findings.

7.2 Comparative Discussion and Key Findings

From the outset, chapter one of this study reveals that the objective of the study could be answered through analysing various instruments on the protection of expressions of folklore and comparing the municipal laws of Rwanda and Tanzania.

Chapter one under item 1.8 is also clear that illustrations from the European Community, the Pacific Community and the Caribbean Community would be used in order to assess how such communities have addressed the issue of harmonisation of municipal laws for protecting expressions of folklore against prejudicial actions.⁵⁹⁴

In that regard, the reviewed literature clearly discloses that, a number of directives and regulations were issued in European Community to harmonise Copyright law for eliminating disparities and differences among European Community State Members.⁵⁹⁵ Specifically, article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

This article is like article 119 of the East African Community Treaty which aims at promoting and protecting expressions of folklore in East African Community. However, unlike European Community, the East African Community has not issued any directive setting out the threshold mechanisms for protecting cultural property in

⁵⁹⁴ For instance, Legall, S., Protecting Traditional Knowledge and Folklore/Traditional Cultural Expressions Policy and Legal Challenges for Caribbean Countries, A paper presented at the Regional Expert Meeting on the Establishment of a Caribbean Framework for the Protection of Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources, Kingston, Jamaica, 18th March, 2008 discussed the remedies against misappropriation of expressions of folklore.

⁵⁹⁵ According to the European Treaty which is available at <http://eur-lex.europa.eu> and accessed on 26th April, 2022. European Community is comprised about 27 Members which are the Republic of Belgians, the Republic of Denmark, the Federal Republic of Germany, The Ireland, the Republic of Hellenic, Spain, the Republic of French, The Republic of Italian, The Grand Duke of Luxembourg, The Netherlands, the Republic of Portuguese, the United Kingdom of Great Britain and Northern Ireland, the Republic of Bulgaria, the Czech Republic of Estonia, the Republic of Croatia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden.

the East African Community.⁵⁹⁶

To elucidate, the European Council issued Directive 93/7EEC⁵⁹⁷ to regulate the return of cultural objects unlawfully removed from the territory of Member State. The Directive contains nineteen articles addressing various subject matter. Article 2 of the Directive clearly reveals that cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive. Furthermore, the Directive introduced the procedure of cooperation between Member States in returning cultural products. The aim is mutual recognition of the relevant national laws so that internal market may be widened. The Directives also introduced a community system to protect Member States' cultural goods.⁵⁹⁸

Besides, it is also provided in the preamble of the Directive that whereas the date by which Member States have to comply with this Directive has to be as close as possible to the date of entry into force of that Regulation and having regard to the nature of their legal systems and the scope of the changes to their legislation necessary to implement the Directive, some Member States will need a longer period. This mechanism or procedure is not canvassed in the East African Community. The EAC Common Market Protocol reveals that the East African

⁵⁹⁶ See also Mazziotti, G., EU Digital Copyright Law and the End-User, PhD Thesis, European University Institute, Florence, 2007, p.65 discussing European harmonization of National Copyright law in digital environment.

⁵⁹⁷ The Directive was issued on 15th March 1993, it is available at <http://europa.eu> (accessed on 26th April, 2022).

⁵⁹⁸ The Preamble to the Directive No.93/7EEC. Another good example is Directive 2006/123/EC on services in the internal market requires European Member States to eliminate restrictions on cross-border provision of services and hence enhance internal market available in official Journal of the European Union.

Community Council will issue directives for harmonising the laws but to date no any directive has been issued as far as protection of expressions of folklore or traditional cultural goods is concerned.

Article 16 of the said Directives clearly shows that Member States are required to submit to the Commission every three years, a report on the application of the Directive. On the other hand, the information gathered from EAC reports as revealed under chapter four of this thesis; portrays that each East African Members States is required to submit reports to the EAC Council showing the status of harmonisation of her respective municipal laws. Despite the fact that the reports were submitted, still the EAC Council raised critics over the submitted reports to contain inadequate information on account that they do not disclose full information. Thus, from the reports, one could not ascertain as to whether the States have complied with the requirement of harmonisation of municipal laws underpinned in the East African Treaty and the Common Market Protocol.

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society is another directive which indicates that European Community employ directives for harmonising member states laws over the subject matter.⁵⁹⁹ This is clearly revealed under article 1 which elucidates that the Directive concerns with the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society. Essentially, the introduction of the Directive i.e., Directive 2001/29/EC is justified by its long title which clearly indicates that the proposed harmonisation will

⁵⁹⁹ The Directive was issued by European Council on 22nd May, 2001.

help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law regulating intellectual property, freedom of expression and the public interest.⁶⁰⁰

In addition, the Directive provides that a harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation in the European Community.

The directives also provides that without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result insignificant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased trans border exploitation of intellectual property. This development will

⁶⁰⁰ See the long title of the Directive. Also see the Commission of the European Communities., Explanatory Memorandum to Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 1997 disclosing that the Directive aims to provide a harmonized and appropriate legal framework for copyright and related rights and hence ensure smooth functioning of the Internal market.

and should further increase significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.⁶⁰¹

Essentially, the Directives indicates that the Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.⁶⁰²

Comparatively, the information gathered and analysed in chapter four of this thesis indicates that since the establishment of the East African Common market the provisions of article 43 and 47 addressing the issue of harmonisation of municipal laws have not been implemented. The East African Council has not issued the directives for eliminating legal uncertainties or disparities existing in municipal laws to adequately protect the expressions of folklore against misappropriation. Therefore, the employment of directive by European Community in harmonisation of municipal laws is a lesson to the East African Community and thus, the same can be employed

⁶⁰¹ This is also reflected from Article 1 to 15 of the Directive.

⁶⁰² Ibid.

as underpinned in the East Africa Community Treaty and East Africa Common Market Protocol.

Moreover, article 8 of the Directive⁶⁰³ requires Member States to provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in the Directive and take all necessary measures to ensure that those sanctions and remedies are applied. On the other hand, the East African Community have no any directive which set threshold on how misappropriation of expressions of folklore can be cubed through judicial action. In other words, the East African Community have no any directive which articulates necessary measures or remedies against misappropriation of expressions of folklore and other prejudicial action.⁶⁰⁴

Apart from that, the European Community also issued another directive to regulate collective management of copyright and related rights.⁶⁰⁵ The aims of the Directive are to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework. In the East African Community each State has its own Collective management organisations. For instance, in Tanzania, there is the Copyright Society of Mainland Tanzania (COSOTA), Tanzania Zanzibar (COSOZA) and the National Arts Council (BASATA) which specifically mandated to promote and safeguard cultural heritage while in Rwanda is Rwanda Development Board (RDB). These organisations play

⁶⁰³ Ibid.

⁶⁰⁴ See also EUCD Best Practice Guide: Implementing the EU Copyright Directive in the Digital Age Report, 2006, available at <http://ssrn.com/abstract=952561>. The report provides a set of recommendations for transposing the European Union Copyright Directive into the national copyright framework of accession states.

⁶⁰⁵ The Directive 2014/26/EU was issued on 26th February, 2014.

key role in promoting and safeguarding cultural diversity. However, the East African Community has not issued any directive to enable member states to have coordinated mechanisms for operating the organisations.

Further to that, regulation is another harmonising instrument in the European Community. A good example is Regulation No. 2019/880⁶⁰⁶ on the introduction and the import of cultural goods. The Regulation contains sixteen (16) articles which, inter alia, provide that cultural goods are part of cultural heritage and are often of major cultural, artistic, historical and scientific importance. Cultural heritage constitutes one of the basic elements of civilisation having, inter alia, symbolic value, and forming part of the cultural memory of humankind. It enriches the cultural life of all peoples and unites people through shared memory, knowledge and development of civilisation. It should therefore be protected from unlawful appropriation and pillage.

In particular, article 1 of the Regulation provides that the Regulation sets out the conditions for the introduction of cultural goods and the conditions and procedures for the import of cultural goods for the purpose of safeguarding humanity's cultural heritage and preventing the illicit trade in cultural goods, in particular, where such illicit trade could contribute to terrorist financing. It is also stated in the Regulation that the Union should accordingly prohibit the introduction into the customs territory of the Union of cultural goods unlawfully exported from third countries, with particular emphasis on cultural goods from third countries affected by armed

⁶⁰⁶ The Regulation was issued by European Council on 17th April, 2019 and it is available at <http://op.europa.eu> a gateway to the official journal of European Union, legislation, case law, national transposition measures and other legal documents and information.

conflict, in particular where such cultural goods have been illicitly traded by terrorist or other criminal organisations.⁶⁰⁷

Lastly, the Regulation provides that in view of different rules applying in Member States regarding the import of cultural goods into the customs territory of the Union, measures should be taken in particular to ensure that certain imports of cultural goods are subject to uniform controls upon their entry into the customs territory of the Union, on the basis of existing processes, procedures and administrative tools aiming to achieve a uniform implementation of Regulation (EU) No 952/2013 of the European Parliament and of the Council.⁶⁰⁸ Comparatively, article 119 of the Treaty establishing the East African Community clearly indicates that the members agreed to promote and safeguard cultural heritage. In 2009, the Community went a step further to establish a common market. However, unlike European Community till to date, the East African Community has not issued regulations setting out the procedure and conditions of importing and exporting cultural goods in/out the community.

Likewise, unlike the East African Community; the Pacific Community⁶⁰⁹ has a regional framework for protecting traditional knowledge and expressions of folklore.⁶¹⁰ The Pacific Regional Framework comprises Model Law and Explanatory Memorandum developed to assist Pacific Island countries and territories wishing to

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid.

⁶⁰⁹ According to the Canberra Agreement which established Pacific Community, the Pacific Community comprises about 22 countries which include Australia, France, New Zealand, the United Kingdom, United of America, American Samoa, Federated States of Micronesia, Fiji, France, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, Wallis and Futuna.

⁶¹⁰ The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, available at <http://wipolex.wipo.int/ar/text/186437>, (accessed on 28th April, 2022).

legally protect its traditional knowledge and expressions of culture. The framework is developed in response to calls from the region, in the face of increasing exploitation and inappropriate expressions of folklore.⁶¹¹

Worth noting is that, the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture is a model law establishing a new range of statutory rights for traditional owners of traditional knowledge and expressions of culture. The model law provides a basis for Pacific Island countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture.⁶¹² Thus, if an individual country wishes to enact the model law, it is free to adopt and/or adapt the provisions as it sees fit in accordance with national needs, the wishes of its traditional communities, legal drafting traditions and so on.

Matters of detail or implementation are left to be determined by national laws and systems. For instance, the rights created in the model law are termed ‘traditional cultural rights’ but enacting countries may choose another term to describe the rights, as they consider appropriate. The model law also indicates other legal and policy issues an enacting country might want to consider if enacting the model law.⁶¹³

In a nutshell, the Pacific Community model law comprises eight parts with thirty-nine articles covering various aspects including mechanisms for protecting expressions of folklore. Such articles address a number of issues including policy

⁶¹¹ Ibid.

⁶¹² Background on the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, available at <http://www.sprep.org>, (accessed on 28th April, 2022).

⁶¹³ Explanatory Memorandum for the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, available at <http://www.cambridge.org>, (accessed on 28th April, 2022).

objective of the model, prior informed consent and judicial action. The policy objective of the model law is to protect the rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior and informed consent and benefit-sharing.⁶¹⁴

The model law also reflects the policy that it should complement and not undermine intellectual property rights. The model law covers elements of a *sui generis* system for the protection of traditional knowledge created by the World Intellectual Property Organisation for consideration by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.⁶¹⁵ It further addresses these questions: what is the policy objective of the protection? What is the subject matter? Who owns the rights? What are the rights? How are the rights administered and enforced? How are the rights lost or how do they expire. These questions are relevant to the development of any effective legal system for the protection of property rights, and not just to the particular approach taken in this model law and may guide the East African Community in developing the East African Regional Framework for protecting expressions of folklore.⁶¹⁶

The approach taken in the model law is to create new rights in traditional knowledge and expressions of culture which previously might have been regarded, for the purposes of intellectual property law, as part of the public domain. The rights created by the model law essentially fall into two categories: traditional cultural rights and

⁶¹⁴ See the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002.

⁶¹⁵ Ibid.

⁶¹⁶ Ibid.

moral rights. Unlike intellectual property law systems, the existence of these rights do not depend upon registration or other formalities.⁶¹⁷

In addition, the model law establishes procedures whereby consent can be obtained for the non-customary use of traditional knowledge and cultural expressions, including the making of derivative works. If a derivative work is created, the intellectual property rights in the work vest in the creator, or as otherwise provided for by intellectual property rights. In other words, intellectual property rights are fully respected, and the model makes it clear that the rights it creates are in addition to and do not affect intellectual property rights. However, should a derivative work or traditional knowledge and cultural expressions be used for commercial purposes, the user must share benefits with the traditional owners, provide acknowledgement of the source of the traditional knowledge or expressions of culture and respect the traditional owners' moral rights.⁶¹⁸

The model law provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners for the use of the traditional knowledge or expressions of culture. These avenues are: applying to a 'Cultural Authority' which has functions in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners; or dealing directly with the traditional owners.⁶¹⁹

⁶¹⁷ Ibid.

⁶¹⁸ The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2022, available at <http://wipolex.wipo.int/ar/text/186437>, (accessed on 28th April, 2022).

⁶¹⁹ Ibid.

Lastly, the prior and informed consent of the traditional owners is to be evidenced by an authorised user agreement. The Cultural Authority has a role in providing advice to traditional owners about the terms and conditions of authorised user agreements and maintaining a record of finalised authorised user agreements. Finally, the model law also creates offences and civil actions for contraventions of traditional cultural rights and moral rights.⁶²⁰ In comparison, this is a lesson to the East African Community in the sense that the Pacific Community took initiatives and promulgated the model law for protecting expressions of folklore in Pacific Community.

Next, is experience from the Caribbean community. The Caribbean Community is governed the Revised Treaty of Chaguaramas.⁶²¹ Article 66 of the treaty provides that Council for Trade and Economic Development is mandated to promote the protection of intellectual property rights within the Community, inter alia, by establishing mechanisms to ensure the preservation of indigenous Caribbean culture; and the legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community.

To appreciate its content, the full text of Article 66 is hereby reproduced:

“Council for Trade and Economic Development shall promote the protection of intellectual property rights within the Community by, inter alia:

a) The strengthening of regimes for the protection of intellectual property

⁶²⁰ Ibid.

⁶²¹ See the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy. The Caribbean Community comprises about 18 members such as Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago, available at <http://caricom.org>, (accessed on 26th April, 2022).

rights and the simplification of registration procedures in Member States;

- b) The establishment of a regional administration for intellectual property rights except copyright;
- c) The identification and establishment, by Member States of mechanisms to ensure:
 - i. The use of protected works for the enhanced benefit of Member States;
 - ii. The preservation of indigenous Caribbean culture;
 - iii. The legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community;
- d) Increased dissemination and use of patent documentation as a source of technological information;
- e) Public education;
- f) Measures to prevent the abuse of intellectual property rights by rights-holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and
- g) Participation by Member States in international regimes for the protection of intellectual property rights.”

In Comparison, the above reproduced article is crafted like article 119 of the East African Community Treaty which encourages the EAC Members States to set up mechanisms for promoting and protecting expressions of folklore within the East

African Community. However, unlike the East African Community; the Caribbean Community went a step further towards implementing the policy articulated in article 66 of the Chaguaramas treaty. The step was taken at the WIPO Ministerial-Level Meeting on Intellectual Property for Caribbean Countries which was held in Barbados in 2006 where a resolution was passed requesting WIPO's assistance in developing the appropriate frameworks of protection for traditional knowledge. The resolution is hereby reproduced as follows:

Whereas the sixth Ministerial-Level Meeting on Intellectual Property for Caribbean Countries, held on November 2 and 3, 2006, in Bridgetown, recognizes the importance of establishing legal and other regimes for the protection of traditional knowledge, folklore, genetic resources, indigenous Caribbean culture and national heritage, particularly of indigenous populations in Caribbean countries, as reflected in Article 66 of the Revised Treaty of Chaguaramas. Be it resolved that the Ministers request WIPO's assistance in developing appropriate frameworks for protection thereof.⁶²²

The above resolution elucidates efforts for designing a Caribbean Framework for the Protection of Traditional Knowledge, Folklore, and Genetic Resources. Such efforts are traced from 2006⁶²³ when Regional Expert Meeting on the establishment of a Caribbean Framework for the Protection of Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources was held. Prior to this meeting, a "Draft Concept Note" was circulated to presenters for their guidance and consideration. The note alluded to a resolution by Caribbean Ministers that the

⁶²² See WIPO/GRTK/KIN/08, available at www.wipo.int, accessed on 29th April, 2022).

⁶²³ Sharon, L., Protecting Traditional Knowledge and Folklore/Traditional Cultural Expressions Policy and Legal Challenges for Caribbean Countries, 2008, available at www.wipo.int, (accessed on 28th April, 2022).

World Intellectual Property Organisation (WIPO) assist in developing appropriate frameworks (including regional frameworks) for the protection of traditional knowledge and traditional cultural expressions.⁶²⁴

In so far as the substance or content of protection is concerned, the Note describes a range of key concepts, principles and options relevant to the relationship between IP and TK and TCEs. It examines the role of existing IP rights, sui generis adaptations of IP rights systems, and distinct sui generis rights, as well as defensive protection against illegitimate IP rights, and the implications of documenting, recording and digitizing TK and/or TCEs through inventories, databases, publications and audio and/or audiovisual recordings. It considers policymaking options and practical programs at four levels: local or community, national, regional and international.

It is noted from the concept note that IP protection is not a stand-alone solution for the needs and expectations of TK holders and TCE practitioners. The development and use of IP mechanisms has to recognise and work with various non-IP areas of law and policy, such as laws and programs for the safeguarding of intangible cultural heritage, the promotion of cultural diversity, the conservation of biodiversity and access and benefit-sharing regimes for genetic resources and associated TK. The draft Concept Note seeks to clarify how IP approaches may complement and work with other policy and legal approaches, although its main focus is on IP.

The draft Concept Note has been developed pursuant to the Resolution quoted earlier, in particular the request to WIPO to assist in the development of appropriate

⁶²⁴ See “Concept Note-Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, p.1, available at www.wipo.int, accessed on 28th April, 2022).

frameworks for the protection of TK and TCEs. The draft Note does not seek to preempt policy choices which are for the countries concerned to make. The draft Note seeks rather to structure and guide the deliberations and consultations of Caribbean countries on protecting expressions of folklore. The draft Note has been prepared as an initial draft by the WIPO Secretariat with the intention that it be developed further and improved upon by Caribbean countries.⁶²⁵

Worth noting is that, the Working Group was established at a Regional Expert Meeting that took place in March 2008 in Kingston, Jamaica and plays a critical role in responding to a Resolution adopted by the Ministers responsible for IP in the Caribbean.⁶²⁶ This Resolution called for the establishment of a regional framework on TK, TCEs and GRs and for WIPO's assistance. The Working Group is currently undertaking research, fact finding and consultations (with local and indigenous communities, government officials, non-governmental organizations, users and other relevant stake-holders) and developing the harmonised framework for review by Caribbean Member States.⁶²⁷

In addition, it is important to note that the WIPO Secretariat is facilitating an ongoing Member State-led process aimed at the development of a regional instrument on genetic resources, traditional knowledge and traditional cultural expressions. As it has already been indicated, this process was initiated at the WIPO Regional Ministerial-Level Meeting on Intellectual Property for Caribbean Countries in 2006

⁶²⁵ See WIPO/GNTKIN/08/1, available at <http://www.wipo.int>, (accessed on 28th April, 2022).

⁶²⁶ See also WIPO., Protection of Traditional Knowledge, Traditional Cultural/Expressions of Folklore and Related Resources SELA'S Approach: Regional Meeting on the Protection of Traditional Knowledge, Folklore Expressions and Genetic Resources in Latin America and the Caribbean, 28th to 29th May, 2009, SP/RR-PCTEFRG-ALC/DT/No,2-09.

⁶²⁷ See http://www.wipo.int/edocs/mdocs/tk/en/wipogrkkino8/wipo_grtk_kin_08caribbeanbrochure.pdf

where the Ministers requested the assistance of WIPO in developing an appropriate framework for the protection of TK, TCEs and GRs in the region. They recognized the importance of establishing mechanisms to preserve indigenous Caribbean culture and to protect expressions of folklore and other traditional knowledge as reflected in the Caribbean Community's Revised Treaty of Chaguaramas.⁶²⁸

Furthermore, in pursuance of the Ministers' request for assistance in developing an appropriate framework for the protection of TK, TCEs and GRs, WIPO convened a regional expert meeting in Jamaica in March 2008. During the meeting, a Working Group was established, and entrusted with the tasks of undertaking research, raising awareness, and conducting fact-finding missions and consultations with governments, indigenous and local communities, NGOs, regional organizations and other private and public stakeholders in the Caribbean region. Consultants were subsequently hired to draft policy papers on TK, TCEs and GRs, as well as a document containing elements of a possible regional framework for the protection of TK, TCEs and GRs, for consideration by countries of the Caribbean region at the 2014 WIPO Ministerial-Level Meeting on Intellectual Property for Caribbean Countries.

Indeed, the efforts of establishing the Caribbean Regional Framework for protection of Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources vindicates that Caribbean community are implementing her treaty. In contrast, this is not the case in East African Community. This is because a task force

⁶²⁸ See Article 66 and 74 of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy. The Caribbean Community comprises the following countries: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

was established to trace harmonisation of municipal laws in line with requirements of article 119 of the East African Treaty, however, the task force was not given model law or guidelines on how such harmonisation can be traced and achieved.

More so, it is pertinent to reiterate that the case study covered Rwanda and Tanzania. In that regard, both chapter five on the protection of expressions of folklore in Rwanda and chapter six on the protection of expressions of folklore in Tanzania clearly provide that Rwanda has a specific law for protecting expressions of folklore. She also domesticated the Swakopmund Protocol articulating appropriate mechanisms for protecting expressions of folklore such as the use of prior informed consent, positive and defensive mechanisms. This is contrary to Tanzania where by the copyright law that is protecting the expressions of folklore does not contain such mechanisms. Therefore, such states of affairs cause inconsistency and disparities in protecting expressions of folklore in Rwanda and Tanzania. Hence, contravenes the objectives of harmonisation underpinned in the East African Community law.

Therefore, from the above comparative discussion and illustrations made from other communities, a number of findings are drawn. Likewise, the findings are drawn from previous chapters of this thesis and are in line with the research objectives, research questions, the methodology employed and analysis of literatures. The findings are explained in detail below.

Firstly, the study found that harmonisation of municipal laws for protection of expressions of Folklore in the EAC had not been achieved. This finding was arrived at after analysing the information collected from a number of reports. The reports

indicate that in a bid to harmonise municipal laws in East African Community, a number of measures were employed by East Africa Member States. These measures included formation of the Task Force to receive and consider the National Reports on the harmonisation of national laws in the EAC context. The Task Force was required to consider approaches for harmonisation. Further to that it was tasked to identify priority laws to be harmonised in line with the 5th EAC Development Strategy and common Market Protocol.

The Task Force prepared a roadmap for harmonisation of national laws in the EAC context. The roadmap ranged from the year 2018 to 2021.⁶²⁹ The Task Force further agreed that the approach to be used should be developed depending on the area of the laws to be harmonised. The Task Force recommended to the sub-committee on harmonisation of laws in the EAC context to consider and approve the above approaches. Further to that, the Task Force recommended to the sectoral Council on legal and Judicial Affairs to direct that all harmonisation processes should be undertaken in collaboration with the sub-committee to increase efficiency and avoid duplication. It is not clear from the examined report if such approval has been granted.

A part from the Task Force, the Sectoral Council on legal and judicial Affairs issued a number of directives. These directives included Council directive on security exchanges, Council directive on central securities depositories, Council directive on corporate Governance for listed companies, Council directive on real estate

⁶²⁹ EAC, A Report on Harmonisation of National Laws in the EAC Context in 2008, EAC Partner States formed the Task Force on Harmonisation of the National Laws in the EAC context.

investment trusts, Council directive on regulated activities and Council directive on credit rating agencies. However, the study found that implementation of such directives was difficult on account that the community does not have a standard practice or template for the development of principles or legislative instruments. Finally, the study found that the objective of harmonising the law for adequate protection of expressions of folklore against misappropriation in East African Community had not yet been achieved. Given this fact, the harmonisation process in the East African Community has remained an unaddressed concern.

Further to that, the study found that a number of challenges were affecting the harmonisation of municipal law in the EAC. Despite the efforts made, the process of harmonisation of municipal laws in the East African Community was noted to have been encountered by a number of challenges. The challenges noted by the Task Force included inadequate collaboration between the sectors and the sub-committee which might lead to lack of efficiency and duplication of efforts. Further to that, the Partner States' Reports on the status of harmonisation of national laws did not have adequate information on the implementation of the previous sub-committee's recommendations to enable the Task Force implement the road map on harmonisation of municipal laws.

It was established under chapter four and chapter seven that in the East African Community there is no comprehensive Regional Legal framework guiding on how harmonisation of municipal laws would be achieved. In that respect, illustrations were drawn from the Pacific Community to demonstrate that comprehensive Regional legal framework is essential in legal reform. It was also found that all the

seven Partner States incorporated the Treaty in their respective municipal laws. However, they lack sustenance of political will to implement the Treaty.⁶³⁰

Further to that, the funding challenge has been affecting the entire process of harmonising the municipal laws for protection of expression of folklore in the EAC. This is because the Council for Legal and Judicial Affairs, the Subcommittee on approximation and harmonisation of municipal laws and the Task Force for harmonisation are not equipped enough to carry out the task effectively and efficiently. In addition, the study found that disparities were existing in the laws for protecting expressions of folklore in the EAC. It was observed during the study that Rwanda had a merged legal system. She was operating in both inquisitorial and adversarial systems. This is not a case in Tanzania. Tanzania is a follower of common law legal system. This seems a challenge to achieve harmonisation of municipal law, inter alia, to protect expressions of folklore against misappropriation within the East African Community.

Furthermore, Rwanda has a specific law protecting expressions of folklore.⁶³¹ This is not a case in Tanzania where expressions of folklore are protected under Part III of Copyright and Neighbouring Rights Act and Part IV of the Copyright Act.⁶³² These laws set lifespan for protecting works including literary works. Therefore, expressions of folklore are protected in Tanzania as part of literary works. This is not a case in Rwanda where its protection is from one generation to another generation.

⁶³⁰ EAC, Report of the Meeting of the Task Force on Harmonisation of National Laws in the EAC Context, 31st January to 3rd February 2018, EAC/TF/SLCJA/20/2018.

⁶³¹ That is Law No.28/2016 on the Preservation of Cultural heritage and Traditional Knowledge gazette on 15th August, 2016.

⁶³² Cap 218 of the Mainland Tanzania and Act No. 14/2013 of Tanzania Zanzibar.

Therefore, despite the intention to harmonise the national legislation for protection of expressions in East African community, yet some members like Tanzania and Rwanda their laws differ in terms of duration for protection of expressions of folklore.

The study found that at both international and regional level, there was a struggle for the best mechanism on protecting the expressions of folklore in the EAC. The study revealed that efforts had been made both at international level and East Africa level for protection of expressions of folklore against misappropriation and other prejudicial actions. In that regard, it was noted that a number of mechanisms had been designed for protecting the expressions of folklore. These include: positive protection approach, defensive protection approach and designing a *sui generis* system as benchmarked from the Pacific Community and the European Community. It also includes application of customary law which has been repeatedly cited as one of the potential elements of holistic approach for protection of expressions of folklore.⁶³³ Despite such efforts, the study found that UNESCO and WIPO were still aspiring to put in place the best mechanisms for protection of expressions of folklore.

Lastly, the study found that there were inadequate mechanisms for protection of expressions of folklore in Tanzania. In comparison with Rwanda, Tanzania has a limited number of mechanisms for adequate protection of expressions of folklore. Such mechanisms include reciprocity principle covered under the Berne Convention of which Tanzania is a signatory. However, based on the unique nature of

⁶³³ Underpinned in the case of *New Zealand Maori Council v Attorney General* (1987) 1 NZLR 641.

expressions of folklore; Tanzania has no sui generis law on protection of expressions of folklore.⁶³⁴ She has been protecting the expressions of folklore under the copyright law while Rwanda has been protecting the expressions of folklore under a specific law i.e., Law no.28/2016 and the Swakopmund Protocol which Rwanda ratified and hence became part of her laws.

7.3 Conclusion

There has been a struggle for adequate protection of expressions of folklore at the global level and regional level. In East Africa, such efforts include harmonisation of municipal law. However, such harmonisation has been facing a number of challenges including lack of regional model law on the protection of expressions of folklore and inadequate funding to implement the treaty establishing the Common Market Protocol.

Apart from that, some East Africa Partner States have specific law on the protection of expressions of folklore while others do not have a specific law for the protection of the subject matter. It is therefore hereby concluded that the East African Community lacks the comprehensive legal framework for protection of expressions of folklore and harmonisation of municipal laws have not been achieved. Finally, in this contribution it has been clearly explained that expressions of folklore are valuable assets and that legal reforms have been carried out both at international and regional level to adequately protect the same against misappropriation and other prejudicial matters. The protection of expressions of folklore is possible under a

⁶³⁴ While this is not a case in Rwanda where Law No.28/2016 on the Preservation of Cultural Heritage and Traditional Knowledge of Rwanda is applicable.

specific law called as *sui generis* law meaning that the law its own kind.

7.4 Recommendations

Firstly, efforts should be made to harmonise the EAC municipal laws. It is recommended that efforts should be made to harmonise municipal laws and to have a unique or comprehensive legal framework for protection of expressions of folklore in the East African Community. Despite the fact that the EAC have its own social economic structure, the model laws from the Pacific Community, the European Community and the Caribbean Community on protection of expressions of folklore which have been discussed in chapter seven of this thesis, can be used as a benchmark. This will help to eliminate discrepancies existing in the national laws of the East African Community. Secondly, it is recommended that Tanzania think of having a specific law regulating expressions of folklore. Rwanda and other countries like Kenya and Zambia⁶³⁵ have a specific law on the protection of expressions of folklore. Therefore, it is recommended that Tanzania which protects expressions of folklore under copyright law think of designing a specific law or a *sui generis* law that suits the characteristics of expressions of folklore. This should cut across to all the East African Community Member States who protect expressions of folklore under copyright Law.

Thirdly, it is recommended that Tanzania should adopt the Swakopmund Protocol. In order to adequately protect expressions of folklore, it is recommended that Tanzania should ratify or domesticate the Swakopmund Protocol on the protection of

⁶³⁵ The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, 2016, the Law of Zambia.

Traditional Knowledge and expressions of folklore. This is a *sui generis* approach for protection of expressions of folklore. It is one of the approaches used by Rwanda which is a signatory of the Swakopmund Protocol on protection of expressions of folklore.

Fourthly, it is recommended that the expressions of folklore should be one of priorities for protection in the EAC. In a bid to harmonise the municipal laws, it is recommended that the East African Community prioritise harmonisation of laws on the protection of expressions of folklore by setting up threshold to curb misappropriation of expression of folklore within East African Community. Like the European Community, apart from designing model law, the EAC Council can also use directives to guide how the harmonisation of municipal laws on protection of expressions of folklore can be achieved.

Fifth, with regard to accession to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions by the EAC, it was discussed in chapter three that, East African Community has not been utilising article 27 (3) of the convention to protect expressions of folklore. Thus, like the European Union, it is recommended that the East African Community should utilise article 27 (3) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions for accessions of the said Convention.

7.5 Future Research Agenda

Based on the common market protocol and since some the East African Community Members ratified the Swakopmund Protocol on the protection of Traditional

Knowledge and Expressions of folklore, then it is high time to conduct research assessing the extent to how such protocol has been applied in the East African Community Member States.

BIBLIOGRAPHY

- Abdallah, A. (2017). Regulation of Mobile Money Service in Tanzania, PhD Thesis, the Open University of Tanzania, Dar es Salaam, Tanzania.
- Abolarin, E. E. (2021). Sustainable Development and the Rights of Indigenous People of the Niger Delta People: Towards A legal Framework, LLD Thesis, University of South Africa, South Africa.
- African Intellectual Property organization, (2016). Guidelines for the ARIPO Members States in domestication of the Marrakesh Treaty, Harare Zimbabwe.
- African Regional Intellectual Property Organisation, (2015). A paper on Traditional Knowledge and Expression of Folklore, ARIPO.
- Annette, K. & Thomas, D. (2013). *European Intellectual Property Law, Text, Cases and Materials*. London: Edward Elgar Publishing Limited.
- Ayoyemi, A. (2009). A continental Approach to Protecting Traditional Knowledge Systems and Related Resources in Africa, *SSRN Electronic Journal*, 258.
- Beer, J. & Oguamanam, C. (2014). Innovation and Intellectual Property: Collaborative Dynamics in Africa, UCT Press, South Africa,
- Berkman Center for Internet and Society, (2012). *Copyright for Librarians the Essential Handbook*, Elfl, Netherland.
- Bertrand, G. (2005). *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials*, Martinus Nijhoff Publishers, the Netherlands, 2005.
- Bishanga, J. (2022). Protection of Expressions of Folklore: An Appraisal of East African Community Law, *the Official Magazine of the EAC*, Issue No.35.

- Brad, S. & Lionel, B. (2003). *The Making of Modern Intellectual Property Law: The British Experience*, London: Cambridge University Press.
- Brendan M. T. (2013). Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights, *Law, Environment and Development Journal*, 2013.
- Carlos. M. C. (2010). *Research Handbook on the Protection of Intellectual Property under WTO Rules*, London: Edward Elgar Publishing Limited.
- Christoph B. G. (2008). Intellectual Property and Traditional Cultural Expressions in a Digital Environment, London: Edward Elgar Publishing Limited.
- Christoph, B. G. (2008). *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*. London: Edward Elgar Publishing, Inc.
- Christopher, H. & Sanders, A. K. (2005). Studies in Industrial Property and Copyright Law, Hart Publishing in North America, 2005.
- Collins, S. (2015). The Commoditisation of Culture: Folklore, Playwriting and Copyright in Ghana, PhD Thesis, University of Glasgow, UK, 2015.
- Costantine, J. (2022). The Swakopmund Protocol for the Protection of Expressions of Folklore: a review of implementation in Rwanda and Tanzania, *Journal of Intellectual Property Law and Practice*,
- David, B. (2018). *Intellectual Property*, 10th Edition, England: Pearson Education Limited.
- EAC, (2016). East Africa Common Market Scorecard: Tracking EAC Compliance in the movement of Capital, Services and Goods, EAC.
- Ezekiel R. B. (2021). Harmonisation of Social Security Laws in East African Community: A myth or reality, *African Journal of Law and Practice*, 1(1), 1-

63.

Ezekiel, R. B. (2018). Equality of Treatment in Social Security: Case of Migrant Workers in the East African Community, PhD Thesis, The Open University of Tanzania, Dar es Salaam, Tanzania.

Farley, C. (1997). Protecting Folklore of Indigenous People: Is Intellectual Property the Answer? *Connecticut Law Review*, 30(1), 29-35,

Frankel, S. (2015). A seminar on the Cross-Border Protection of Intellectual Property and its Relevance for the Protection of Traditional knowledge, Traditional Cultural Expressions and Genetic Resources, WIPO in Geneva, Swiss.

Gary, L. (2003). Region and American Culture, Library of Congress, USA.

Graham, D. (2003). Literature survey on Intellectual Property Rights and Sustainable Human Development, UNCTAD.

Hiranras, N. (2015). The Intellectual Property and Alternative Legal Protection for Thai Cultural Heritage Properties, Traditional Knowledge and Products, PhD Thesis, Durham University, UK.

Innis, A. A. (2021). Review of the book the protection of Traditional Cultural Expressions in Africa, by Enyinna Nwauche, *Journal of Social Behavioral and Health science*, 15, 104–106.

Jane E. A. (2009). *Law, Knowledge Culture: The Production of Indigenous Knowledge in Intellectual Property Law*. London: Edward Elgar Publishing Limited.

Jankle, T. (2009). True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self-Determination into Practice, PhD Thesis, the

Australia National University, Australia.

Jeremy, D., Chris, A., Chidi, O. & Tobias, S. (2014). *Innovation and Intellectual Property: Collaborative Dynamics in Africa*. Cape Town: UCT Press in association with the IP Unit, Faculty of Law, University of Cape Town (UCT) and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), South Africa.

Kaushal, N. (2019), *Traditional Knowledge in the Manacles of Intellectual Property: A Study of Indian Indigenous Communities Rights and Claims*, LLM Thesis, University of Toronto, Canada.

Kazoba, K. G. (2014). *Protection of Consumers and A Guide against Counterfeit and Substandard Pharmaceutical in Tanzania: Examining National, Regional and International Legal and Institutional Framework*, PhD Thesis, Tanzania German Centre for Eastern African Legal Studies, Dar es Salaam, Tanzania.

Kiunsi, B. H. (2017). *Transfer Pricing in East Africa: Tanzania and Kenya in Comparative Perspective*, PhD Thesis, The Open University of Tanzania, Tanzania.

Kuruk, P. (1999). *Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual in Africa and the United States of America*, *American University Law Review*, 48(4), 769-808.

Kuruk, P. (2020). *Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property A Global Primer*. New York: Edward Elgar.

Linda, S. (2004). *Soft Law in European Community Law*, Oxford: Hart Publishing.

Lindahl, F. (2011). *Commercial and tax law (intellectual property law): Intellectual property rights-harmonisation and unification instead of inconsistencies?*

Bachelor Dissertation, Jönköping University, Sweden.

Maalim, M. J. (2014). The United Republic of Tanzania in the East African Community: Legal Challenges in integrating Zanzibar, PhD Thesis, Tanzania German Centre for Eastern African legal studies, Tanzania.

Magogo, T. D. B. (2013). Harmonisation of Copyright within the East African Community: An Analysis of the Kenya and Tanzanian Copyright Legislation LL.M Mini Thesis, University of Western Cape, South Africa.

Makulilo A. B. (2012). Protection of Personal Data in Sub-Saharan Africa, PhD Thesis, University of Bremen, German.

Masoud, B. S. (2012). Legal Challenges of Cross-Border Insolvencies in Sub-Saharan Africa with References to Tanzania and Kenya: A Framework for Legislation and Policies, PhD Thesis, University of Nottingham Trent, UK.

Mazziotti, G. (2007). EU Digital Copyright Law and End-User, PhD Thesis, European University Institute, Florence.

Mireille, E. P. (2002). Harmonising European Copyright Law: The challenges of Better Lawmaking, Kluwer Law International, the Netherlands.

Mirindo, F. (2022). Administration of Justice in Mainland Tanzania, 2nd Edition, Law Africa Publishing Ltd, Nairobi Kenya.

Moni, W. & Ben, S. (2009). Intellectual Property Rights in Kenya, Konrad Adenauer Stiftung, Nairobi, Kenya.

Mwamlangala, F. D. (2020). Privacy and Security in Cloud: Tanzania and South Africa in Comparative Perspective, PhD Thesis, The Open University of Tanzania, Tanzania.

Nahayo, A. (2014). East African Community Tax Harmonisation: A Critical

- Assessment of its viability for Income Tax Laws, PhD Thesis, Tanzania German Centre for Eastern Legal studies, Tanzania.
- Narciso, A. (2007). The Legal Protection of Folklore: Can Copyright Assist or Sui generis Right Necessary? PhD Thesis, University of Leeds, UK.
- Ngeta, J. (2020). Protection of Expressions of folklore in Tanzania: Legal and Institutional Framework Efficacy, LLB Dissertation, The University of Dodoma, Tanzania.
- Nwauche, E. S. (2016). The Sui Generis and Intellectual property Protection of Expressions of folklore in Africa, PhD Thesis, North-West University, South Africa.
- Oguamanam, C. (2020). Understanding African and like-minded countries' position at WIPO- Intergovernmental Committee on TKGRF, *The Law Review of the Franklin Pierce Center for Intellectual Property*, 60(2), 386- 459.
- Ogwezzy, M. C. (2012). Protection of Indigenous or Intellectual Property Law: An Examination of the Efficacy of the Copyright Law, Trade Secret and Sui Generis Rights, *International and Comparative Law Review*, 12(1), 1-37.
- Okoro, H. C. (2021). Promoting Creative Economies in Nigeria and South Africa through Commercial and Collaborative Intellectual Property Rights, Strategies, PhD Thesis, University of Cape Town, South Africa.
- Paul, F. K. (2009). Traditional Intellectual Property Protection in Tanzania: The Case of Traditional Medicinal Knowledge, PhD Thesis, The Open University of Tanzania.
- Peter, T. S. (2009). *WTO-Trade-Related Aspects of Intellectual Property rights*, 7, Boston: Nijhoff Publishers.

- Prazmowska, K. (2020). Misappropriation of Indigenous Cultural Heritage- Intellectual Property Rights in the Digital Era, *Stander Art and Culture Law Review*, 30(1), 12.
- Richard A. S. & Herman T. T. (2005). *Intellectual Property Rights in a Networked World: Theory and Practice*. London: Information Science Publishing.
- Roger, O. K. (2006). *The Protection of Cultural Property in Armed Conflict*, Cambridge: Cambridge University Press.
- SAARC, (2013). *Regional seminar on Traditional Knowledge and Traditional Cultural expressions in South Asia*. Sri Lanka: Neo Graphics (Pvt) Ltd, Nugegoda.
- Sand, S. (2003). Sui Generis Laws for the Protection of Indigenous Expressions of Culture and Traditional Knowledge, *University of Queensland Law Journal*, 22(2), 188-198.
- Secretariat of the International Bureau, (2005). A proposal by the United Kingdom on harmonization of patent law presented at Inter-sessional Intergovernmental meeting on a development Agent for WIPO, Geneva.
- Secretariat of the Pacific Community, (2006). Guidelines for developing National Legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Law 2002, Noumea, New Caledonia.
- Secretariats of UNESCO and WIPO, (1985. Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions with a Commentary, UNESCO and WIPO, Geneva.
- Steven, S. F. (2011). *Intellectual Property Basics*, New York: Dorsey and Whitroy

LLP.

Telephory, D. B. (2013). Harmoniation of Copyright within the East African Community: An Analysis of Kenyan and Tanzania Copyright Legislation, LLMDissertation, University of the Western Cape, South Africa.

Tharani, A. (2017). Harmonization in EAC, in Ugirashebuja, E., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Boston: Brill Nijhoff,

Torkornoo, G. (2012). Creating Capital from Culture-Re-thinking the Provisions of Expressions of Folklore in Ghana's Copyright Law, *Annual Survey of International and Comparative Law*, 18,

Ugirashebuja, E. (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Boston: Brill Nijhoff.

Vivien, I. (2005). *Intellectual Property Rights for Engineers*, 2nd Edition, London: The Institution of Engineering and Technology.

WIPO, (2003). Background Paper No. 1 on consolidated analysis of the legal protection of Traditional cultural Expressions/Expressions of folklore, WIPO.

WIPO, (2003). Consolidated Analysis of the legal protection of Traditional Cultural Expressions/Expressions of folklore, WIPO, Geneva.

WIPO, (2014). *Intellectual Property Handbook*, 2nd Edition, Geneva: WIPO.

WIPO, (2017). Protection and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous People and Local Communities, WIPO, Geneva, Switzerland.

Zografos, D. (2008). Origin Related Intellectual Property Rights as Best Policy Options for the Protection of Traditional Cultural Expressions, PhD Thesis, Queen Mary University of London, United Kingdom, UK.

APPENDICES

Research Clearance Letters

THE OPEN UNIVERSITY OF TANZANIA

DIRECTORATE OF POSTGRADUATE STUDIES

P.O. Box 23409
Dar es Salaam, Tanzania
<http://www.openuniversity.ac.tz>



Tel: 255-22-2668992/2668445
ext.2101
Fax: 255-22-2668759
E-mail: dpgs@out.ac.tz

Our Ref: PG201705008

Date: June, 10th 2019

COSOTA
P.O.Box
Dar es Salaam

RE: RESEARCH CLEARANCE

The Open University of Tanzania was established by an Act of Parliament No. 17 of 1992, which became operational on the 1st March 1993 by public notice No. 55 in the official Gazette. The Act was however replaced by the Open University of Tanzania charter of 2005, which became operational on 1st January 2007. In line with the later, the Open University mission is to generate and apply knowledge through research.

To facilitate and to simplify research process therefore, the Act empowers the Vice Chancellor of the Open University of Tanzania to issue research clearance, on behalf of the Government of Tanzania and Tanzania Commission for Science and Technology, to both its staff and students who are doing research in Tanzania. With this brief background, the purpose of this letter is to introduce to you **COSTANTINE, Jovine** Reg No: PG201705008 pursuing **Doctor of Philosophy (PhD)**. We here by grant this clearance to conduct a research titled *"Harmonisation of municipal laws for protection of expressions of folklore in Rwanda and Tanzania."* He will collect his data at COSOTA District Office in Kinondoni from June, 2019 to September, 2019.

In case you need any further information, kindly do not hesitate to contact the Deputy Vice Chancellor (Academic) of the Open University of Tanzania, P.O. Box 23409, Dar es Salaam. Tel: 022-2-2668820. We lastly thank you in advance for your assumed cooperation and facilitation of this research academic activity.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Hossea Rwegoshora'.

Prof. Hossea Rwegoshora
For: VICE CHANCELLOR
THE OPEN UNIVERSITY OF TANZANIA

High Court of Tanzania,
Tanga Zone,
P.O.BOX 97, Tanga.

10.08.2019

To,
The General Secretary,
East Africa Community,
Arusha.

Dear Sir/Madam

**Re: Request for Reports and other Documents on harmonization of National
Laws of East Africa Partner States.**

Reference is made to the above heading.

I am a PhD candidate of the Open University of Tanzania searching on harmonisation of Municipal Laws for protection of folklore in Rwanda and Tanzania. A letter from the Vice Chancellor of the Open University of Tanzania is annexed for your quick reference.

In that regard, I kindly request reports of the Sub- committee or East Africa task force established to set up roadmap and monitor compliance of harmonisation of laws in East Africa context. Apart from reports, I eager to get any document, law and relevant materials including articles addressing the subject matter in East Africa context.

I remain obliged


Jovine Costantine
PhD Candidate and A Resident Magistrate in the Judiciary of Tanzania

DIRECTORATE OF POSTGRADUATE STUDIES

P.O. Box 23409
Dar es Salaam, Tanzania
<http://www.openuniversity.ac.tz>



Tel: 255-22-2668992/2668445
ext.2101
Fax: 255-22-2668759
E-mail: dpgs@out.ac.tz

Our Ref: PG201705008

Date: June, 10th 2019

East Africa Community
P.O.Box
Arusha

RE: RESEARCH CLEARANCE

The Open University of Tanzania was established by an Act of Parliament No. 17 of 1992, which became operational on the 1st March 1993 by public notice No. 55 in the official Gazette. The Act was however replaced by the Open University of Tanzania charter of 2005, which became operational on 1st January 2007. In line with the later, the Open University mission is to generate and apply knowledge through research.

To facilitate and to simplify research process therefore, the Act empowers the Vice Chancellor of the Open University of Tanzania to issue research clearance, on behalf of the Government of Tanzania and Tanzania Commission for Science and Technology, to both its staff and students who are doing research in Tanzania. With this brief background, the purpose of this letter is to introduce to you **COSTANTINE, Jovine Reg No: PG201705008** pursuing **Doctor of Philosophy (PhD)**. We here by grant this clearance to conduct a research titled *"Harmonisation of municipal laws for protection of expressions of folklore in Rwanda and Tanzania."* He will collect his data at East Africa Community District Office in Arusha from June, 2019 to September, 2019.

In case you need any further information, kindly do not hesitate to contact the Deputy Vice Chancellor (Academic) of the Open University of Tanzania, P.O. Box 23409, Dar es Salaam. Tel: 022-2-2668820. We lastly thank you in advance for your assumed cooperation and facilitation of this research academic activity.

Yours sincerely,

Prof. Hossea Rwegoshora
For: VICE CHANCELLOR
THE OPEN UNIVERSITY OF TANZANIA