

## Legal and institutional aspects of sustainable cultural heritage: the case for institutional enforcement cooperation

Lennox Trivedi Samamba <sup>1</sup>

<sup>1</sup>The Copperbelt University, School of Humanities and Social Sciences, Faculty of Law, Kitwe, Zambia;  
Email: [triveads2015@gmail.com](mailto:triveads2015@gmail.com)

**ARTICLE HISTORY:** Received 11 August 2023; Accepted 26 December 2023

### ABSTRACT

This article examines the efficacy of the legal and institutional framework which governs the management, use and trade in Intangible Cultural Heritage (ICH)—as an integral part of the environment—in Zambia, in promoting a Sustainable Cultural Heritage (SCH). The central premise of this article is that SCH is a function of Effective Enforcement of General Environmental Violations, and Specific Environmental Violations—the Cultural Violations. The central argument of this article is that effective enforcement of general and specific cultural violations is likely to deter unlawful destruction and trade in ancient heritages and relics, and promote a SCH. The corollary argument is that the quality of enforcement of environmental violations is likely to be enhanced by promoting regulatory cooperation among the Competent Environmental Regulatory Authorities—the Zambia Heritage Conservation Commission, and the Zambia Environmental Management Authority (ZEMA). Driven by the Enforcement Theory of Heritage and Cultural Conservation, the hypothesis of this study is that the lack of security of tenure of the Zambian Heritage Commission Members, the lack of enforcement power on the part of the said Commission, the low fine (K 750) for the destruction and unlawful trade in heritages and relics which are provided under the Heritage Commission Act 1989, the poor enforcement capacity (low staffing levels, poor funding, short geographical reach, insecurity of tenure of the Members of the ZEMA Board, under the EMA 2011), and lack of the statutory power on the part of competent environmental regulatory authorities to cooperate in the enforcement of general and specific (cultural) environmental violations are a constraint on SCH.

**Keywords:** Sustainable Development Use Cultural Heritage Institutions Environmental Management Rights Enforcement Cooperation

## INTRODUCTION

Intangible Cultural Heritage' (ICH) is a multi-faceted phrase which encompasses the various elements of ICH. Thus, it is quite difficult to give a precise or uniform definition of ICH. For this very reason, most of the competing definitions of ICH are more descriptive of its constituent elements than definitive. Having failed to come up with a precise definition of ICH, the United Nations Educational Scientific and Cultural Council (UNESCO) Conference which adopted the Convention for Safeguarding the Intangible Cultural Heritage (hereinafter, UNESCO Convention on ICH), settled for a descriptive definition. Thus for regulatory purposes on the international plane, ICH means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith, which the communities, groups and, in some cases, individuals recognize as part of their cultural heritage [i]. ICH, is a form of intangible property which is transmitted from generation to generation, and is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity [i]. As a form of property, ICH is a social relation which is supported by the environment in which the members of a particular community live [ii].

The environment, itself, is common heritage for the present and future generations [1]. Thus, the environment is open-access common property. Culture is an integral component of the environment [2], and a form of intangible property [3]. The various forms of Cultural Heritage—particularly Intangible Cultural Heritage (ICH), are a kind of public goods [10DB]. Consequently, unlike private goods, ICH is characterised by non-rivalrousness and non-exclusiveness [10DB]. For this reason, ICH can be consumed simultaneously by more than one member of a community and cannot be sequestered

[10A]. That is why, for rational consumers, there is often a tendency to free ride on public goods [10DC]. This phenomenon creates a disincentive to create new public goods—a situation which leads to the tragedy of the commons. In the context of cultural heritage, the free-riding problem may lead to failure or neglect to conserve and preserve ICH. Such a situation is likely to lead to the depletion or complete loss of certain elements of ICH. In the context of depleting natural capital in the natural environment, the conservation and preservation of cultural heritage—particularly ICH, and the promotion of consumption of ICH in the form of cultural tourism is likely to reduce the consumptive pressure on the other elements of the natural environment which are already in decline. Critical to the survival of the environment as a sphere within which both cultural and non-cultural aspects exist are Sustainable Use, and Sustainable Management of the various elements of the natural and built environment.

Against this backdrop, this article examines the efficacy of the legal and institutional framework which governs the management, use and trade in ICH—as an integral part of the environment—in Zambia in promoting a Sustainable Cultural Heritage (SCH). The central premise of this article is that SCH is a function of Effective Enforcement of General Environmental Violations, and Specific Environmental Violations—the Cultural Violations. The central argument of this article is that effective enforcement of general and specific cultural violations is likely to deter unlawful destruction and trade in ancient heritages and relics, and promote a SCH. The corollary argument is that since cultural aspects which are part of the environment under the Environmental Management Act 2011 (EMA 2011) fall under the enforcement jurisdiction of the Zambia Environmental Management Agency (ZEMA) which has power to issue Preventive, Protective, and Restorative Orders, the lack of enforcement power on the part of the Zambian Heritage Conservation Commission could be

mitigated by effective Enforcement Cooperation between the Commission and ZEMA. Driven by the Enforcement Theory of Public Enforcement of Heritage and Cultural Conservation Law, the hypothesis of this study is that the lack of security of tenure of the Zambian Heritage Commission Members, the lack of enforcement power on the part of the said Commission, the low fine (K 750) for the destruction and unlawful trade in heritages and relics which are provided under the Heritage Conservation Commission Act 1989, the poor enforcement capacity (low staffing levels, poor funding, short geographical reach, insecurity of tenure of the Members of the ZEMA Board, under the EMA 2011), and lack of the statutory power on the part of both institutions to cooperate in the enforcement of general and specific (cultural) environmental violations are a constraint on SCH.

## **BACKGROUND TO THE STUDY**

As early as the 1920s [3], and the 1960s when the environmental movement gathered considerable force, there was a misconception that the environment and culture were mutually exclusive. As a consequence of this misconception, the international law and institutions which relate to environmental protection developed as a branch of law which governed all other aspects of the environment than culture. And, the municipal laws and institutions which governed the protection of the environment evolved after the same pattern. Also, due to a misconception that culture was not a form of intellectual property, over the years, the international law and institutions which relate to the protection of intellectual property (IP) have developed without taking into account Intangible Cultural Heritage (ICH)—leaving ICH behind. Likewise, the municipal legal and institutional framework for the protection of IP has developed in a similar manner. This shortcoming in the legal and institutional framework is aggravated by the fact that both at international and domestic level, there is not adequate legal and institutional framework for the protection of both IP and

the environment, and in particular, ICH. This shortcoming has over the years facilitated the advent of climate change, and contributed to the rapid loss of biodiversity [11A]. Consequently, as elsewhere in the world, policy formulation in Zambia is centered on Gross Domestic Product (GDP which focuses on physical capital—plant and machinery, goods and services and income, and does not take into account ICH as a form of capital). Coyle observes that this approach, has, over the years resulted in inequalities and compromised social cohesion [11A]. Coyle also observes that a focus on GDP without due regard to inequality and environmental degradation has also degraded global ecosystems and undermined social cohesion [11A]. Coyle observes further that, natural capital, which includes water, air, soil, minerals, and renewable capital such as forests or marine ecosystems which are prone to system collapse, is generally in decline, and as such deprives future generations of wellbeing [11A]. Accordingly, it is argued in this study (the present study) that although evidence shows that agriculture is poised to serve as the engine and backbone of Africa's economy (domestic, regional and continental) provided there is adequate investment in the energy sector [11AA], climate change and environmental degradation are likely to limit the contribution of agriculture to economic growth (GDP).

It is worth noting, from Coyle's observation, that three dimensions of the environment—soil, water and air, are the bedrock of natural capital. This is why natural capital is so important to measure [11A], and preserve. Thus, in order to protect the interests of the future generations in this form of open-access common property—the environment, sustainable use [11B], sustainable management [11C], and sustainable development [11D] should be promoted by legislators and policy-makers. This view is in accordance with the position of UNESCO that ICH is a mainspring of cultural diversity and [a guarantee] of Sustainable Development [11E]. The argument here is that the identification, by legislators and judicial officers, and policy-makers, of the various

forms of ICH and the establishment of a suitable legal and institutional framework which ensures vertical and horizontal protection of ICH, is likely to ensure consumptive diversification, and promote the consumption of ICH and minimize the exploitation of natural capital (natural resources in the natural environment) in much the same way IP was designed to do. This view is rationalized by the position that ICH is a form of intangible asset which is a non-wasting asset unlike most forms of natural capital—most components of the environment. Provided the other essential factors such as tourism promotion (advertisement, road-shows, concessional fees and charges, et cetera), accessibility of the intangible cultural heritage tourist centres or sites (in terms of road infrastructure) and availability of transport and ICTs are in place, the increased consumption of ICH is likely to promote both domestic and foreign ICH tourism. It is also likely to promote the success of the agricultural industry—provided meaningful investment in energy, transport and technological advancement is made. In turn, ICH and the other essential factors are likely to promote domestic and foreign investment in the tourism sector, and international trade in ICH, and contribute to economic growth [11FFF]. Against this backdrop, this study examines the efficacy of the Zambian legal and institutional framework which governs the management, use and trade in ICH—an integral part of the environment, in promoting a Sustainable Cultural Heritage (SCH).

### **Statement of the Problem**

Against the background to the problem which has been given above, the statement of the problem which is under investigation may be formulated as follows:

To what extent does the Zambian legal and institutional framework which governs the management, use and trade in Cultural Heritage—as an integral part of the environment, provide safeguards and incentives for sustainable use, and

management of Intangible Cultural Heritage (ICH)?

### **Significance of the Study**

In terms of cultural heritage, and cultural diversity, Southern Africa is arguably one of the richest regions in Africa, and the entire world[11G]. The Southern African Region has potential for a vibrant cultural heritage tourism sector which, if harnessed, could provide a foundation for a competitive and vibrant cultural heritage tourism industry, and serve as a major source of revenue to this region[11G]. In particular, ICH is a foundation-stone for cultural diversity, and [a significant contributor] to sustainable development[11E]. Therefore, this study, which simply uses Zambia—a Southern African State, as a case study, is significant for two primary reasons. Firstly, the study fleshes out the constraints which are inherent in the Zambian legal and institutional frameworks which governs the use and management of ICH. Secondly, the proposals for remedial legislative and institutional reform which this study makes, if implemented by legislators and policy makers, are likely to promote sustainable use and management of ICH—a Sustainable Cultural Heritage (SCH).

### **METHODOLOGY**

This study falls into the qualitative research category. It answers specific questions which relate to the problem which is under investigation by using both primary and secondary data. The research is underpinned by the doctrinal, the non-doctrinal and the comparative approach to examining the effectiveness of the legal and institutional framework which governs the management, use and trade in Intangible Cultural Heritage in Zambia, and across international borders. By the doctrinal approach the author gives a descriptive exposition of the applicable legal rules, and offers a complete statement of the law were applicable [11EE]. By the non-doctrinal approach, the author identifies the legal problem, analyses it and proposes

remedial changes to the regulatory and the institutional framework which governs the use and management of ICH in Zambia [11FF]. By the comparative approach, the author examines how different legal systems and cultures have promoted SCH [11GG]. These three methods were used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law which relate to the subject/problem which is under investigation were used. Secondary sources of information such as journals and other written commentaries on the primary sources were also used. A checklist of documentary sources was used, as well. And, as a possible way of avoiding subjectivity in the selection of documentary sources, the study employed non-probability sampling method—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons. The study fleshes out some shortcomings in the said framework, and makes necessary proposals for remedial reform.

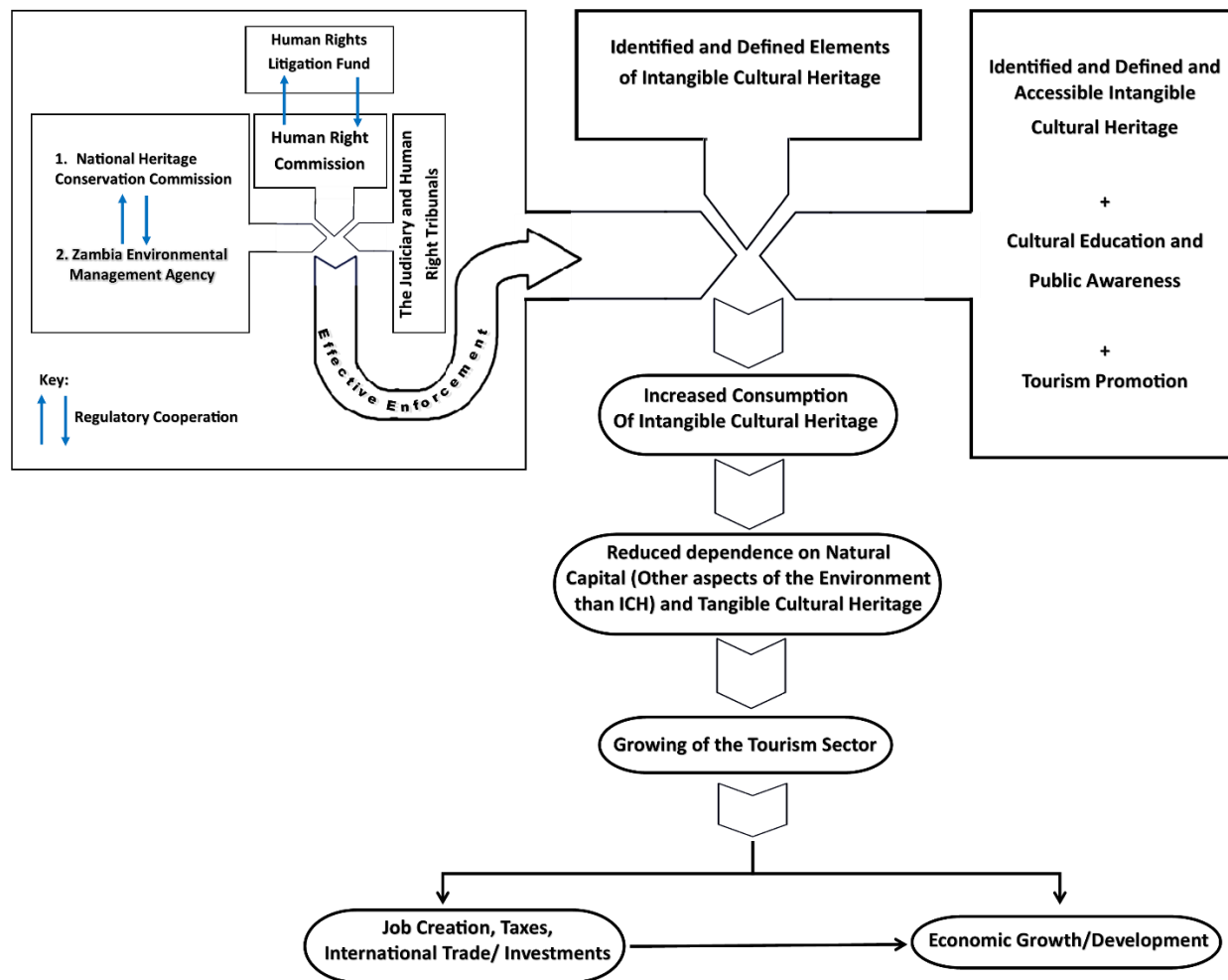
The research questions which were used are:

- a) What is the law and policy on the use and management of Intangible Cultural Heritage in Zambia?
- b) Which institutions are the Competent Managers of use and trade in Intangible Cultural Heritage in Zambia?
- c) To what extent do the Competent Managers of the use and trade in Intangible Cultural Heritage in Zambia have power to:

- i) Act in support with other competent managers of Intangible Cultural Heritage?
  - ii) Conduct Cultural Heritage Education?
- d) What is the Regional Legal and Institutional Framework for the use, trade and management of Intangible Cultural Heritage?
  - e) What is the relationship which exists between Intangible Cultural Heritage and the environment?

### CONCEPTUAL FRAMEWORK

The hypothesis of this study has been conceived in the idea that the identified and defined elements of the various forms of Intangible Cultural Heritage (ICH) which are effectively enforced by an independent National Heritage Conservation Commission whose enforcement functions are supported by related regulatory authorities, and an independent Human Rights Commission are likely to promote Sustainable Cultural Heritage [12AA]. The corollary view is that effective enforcement of general environmental violations, and specific environmental violations—cultural violations, is likely to dis-incentivise illegal consumption of ICH [12AA]. The other related-view is that reduced illegal consumption of ICH, and cultural education and promotion are likely to encourage lawful consumption of ICH, the correct pricing of ICH products and promote Intangible Cultural Heritage Tourism—a phenomenon which is likely to reduce consumptive pressure on non-cultural aspects of the environment and increase government revenue. The other view is that a vibrant and competitive tourism sector is likely to contribute to economic growth [11FFF].



## LITERATURE REVIEW

Burri observes that the relationship which exists between cultural heritage and intellectual property involves a profoundly complex setting which consists of many institutions and actors which often have different or even divergent interests within a fragmented legal framework [10A]. Burri observes further that although intellectual property law has developed sophisticated rules which govern the various forms of intellectual property (IP), these rules are author-centered and mercantilist, and as such, are not suitable for the protection of traditional knowledge and traditional cultural expressions [10A]. Burri proposes possible ways of protecting Intangible Cultural

Heritage (ICH) through the application of the principles of Intellectual Property Law (IPL). The present study argues that IPL is not the appropriate nor effective means of safeguarding ICH. In particular, the present study argues that the privatization of the fundamentally-public goods (ICH) is likely to compromise social cohesion of a people to whom the privatized culture once belonged, and who were bound together by that culture. This view is rationalized by the view that togetherness or a sense of belonging is the essence of cultural heritage. Nyambila, Mutyaendaedza and Zhou, examined the effectiveness on the online strategies which were being used in Southern Africa to promote cultural heritage tourism [11G]. The results of

the said study show that the online tools which are used by the municipal Cultural Heritage Institutions and the Tourism Agencies (such as, websites, facebook, linkedin, and twitter) in promoting cultural heritage tourism were ineffective. The said study recommended the use of cultural education and promotion as a tool for attracting cultural heritage tourists to Southern Africa. The present study also recommends the enhancement of cultural heritage education with the addition of road-shows which show-case Africa's rich Cultural Heritage. The present study makes an original contribution to the existing literature by demonstrating that by identifying and defining the various forms of ICH, and enhancing institutional enforcement capacity, legislators and policy-makers are likely to promote sustainable use and management of ICH—a Sustainable Cultural Heritage.

Boer and Gruber observe that the cultural and natural heritage is an inherent part of the human environment, and, although the area of heritage law is a specialized, it is inherent in, and is a fundamental part of environmental law [11F]. The specialised area of heritage law has therefore necessarily attracted a narrower band of analysts than the broad area of environmental law. Therefore, Boer and Gruber argue, modern heritage law must be understood from the international, national and sub-national level (including states/provinces, and local level), and also as part of international environmental law, with which it can overlap, particularly in the context of world heritage [11F]. From this compelling perspective, the present study argues that effective enforcement of heritage law in Zambia, and other Southern African States is likely to be achieved, if and only if the enforcement of both heritage law and environmental law are enhanced with a special emphasis of regulatory cooperation between/among the competent managers of ICH and the environment.

Vrdoljak examines the various facets of cultural diversity and concludes that cultural diversity is a 'common good' [11GGG]. Vrdoljak also explores the relationship which exists between culture and human rights in international law, and discusses the possible future development of that relationship. She highlights the transformative effects of culture and human rights in their function of dissolving boundaries in international law, and argues that such dissolution is often a barrier to the progressive development of international cultural heritage law [11GGG]. The present study highlights, as Vrdoljak's work does, the view that 'to be culturally diverse' is a human right. The present study also makes an original contribution to the existing literature by arguing that the central role which cultural heritage has assumed in the sustainable development discourse could justify the attachment of a positive state obligation to cultural rights. The proposed positive obligation, the present study argues, would ensure that States assume an immediate obligation to guarantee, protect and promote cultural rights within their jurisdictions—an obligation which, at present, requires them to:

...[t]ake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption legislative measures [10CCC].

Mulenga examines the relationship which exists between non-cultural environmental rights and human rights under the Zambian legal and institutional framework for the management of the environment [11H]. Mulenga argues that there is a close relationship which exists between non-cultural environmental rights and human rights [11H]. Mulenga observes that very

often, purely non-cultural environmental rights are enforced together with human rights—and so, the two are intertwined [11H]. The present study examines the relationship which exists between Intangible Cultural Heritage (ICH), which is a sub-dimension of the cultural dimension of the environment, and the non-cultural dimensions of the environment—land, water and air. The results of the present study show that ICH is an integral component of the environment. The present study argues that ICH is a human right *sui generis*. It is also argued further, in the present study, that Sustainable Cultural Heritage (SCH) could be attained through effective enforcement general environmental violations, and specific environmental violations—the cultural violations. The corollary argument is that effective regulatory cooperation among the competent environmental managers—the National Heritage Conservation Commission, and the Zambia Environmental Management Agency, is likely to ensure effective enforcement and promote SCH.

## FINDINGS

Research Question	Research Finding(s)
1.What is the law and policy on the use and management of Intangible Cultural Heritage in Zambia?	Zambian Constitution 2016; National Heritage Conservation Commission Act; Environmental Management Act 2011.
2.Which institutions are the Competent Managers of use and trade in Intangible Cultural Heritage in Zambia?	The Heritage Conservation Commission, and the Environmental Management Agency
3.To what extent do the Competent Managers of the use and trade in Intangible Cultural	

Heritage in Zambia have power to:	
a)Act in support with other competent managers of Intangible Cultural Heritage?	Both Environmental Managers have no statutory power to act in support of each other
b) Conduct Cultural Heritage Education	Both Environmental Managers do not have statutory power to conduct cultural heritage education.
4.What is the Regional Legal and Institutional Framework for the use, trade and management of Intangible Cultural Heritage?	There is no regional and institutional framework for the management of cultural heritage as a component of the environment
5.What is the relationship which exists between Intangible Cultural Heritage and the environment?	Intangible Cultural Heritage is an integral component of the environment in which it exists

## DISCUSSION

This section discusses the findings of the study in the light of the legal and institutional framework which governs the use and management of ICH, and the economic and sociological theories which underpin the said framework. The said discussion is driven by the theory of public enforcement of law. Accordingly, the following subsection examines the legal and economic underpinnings of the theory of public enforcement of law.

### **The Legal and Economic Underpinnings of the Theory of Public Enforcement of Law**

Effective enforcement of regulatory rules requires an effective and efficient legal and institutional framework which allocates the enforcement mandate to the competent



regulatory authority which can enforce a particular violation or some aspects if it the quickest, at the lowest cost, and most effectively [11I]. Thus, an effective legal and institutional framework allocates the enforcement mandate to the regulatory institution which has the most Enforcement Comparative Advantage (ECA). As a means of ensuring effective performance of the allocated enforcement mandate, an effective legal and institutional framework makes the allocated-enforcement-mandate binding on the relevant regulatory authority, and actionable against it. In other words, the beneficiaries of the regulatory mandate should have a present right to apply for judicial orders which compel the regulatory authority to perform its mandate in the event that it neglects or fails to perform it. As a corollary to the foregoing, an effective legal and institutional framework should also provide a mechanism which ensures that the relevant regulatory authority enforces the violation which has been called into question or some aspects of it, the quickest, at the lowest cost and most effectively.

The preceding paragraph makes a case for public enforcement of law without explaining why public enforcement should be preferred to private enforcement. This exposes our case for public enforcement of law to challenge. Polinsky and Shavell observe that for public enforcement to be preferred in such circumstances as the problem which is under investigation, one still needs to explain why society cannot rely on rewards of some type which are available to private parties other than the victims (such as friends of violators or entrepreneurial private enforcers) to supply information and otherwise help in detecting violators [11J]. A difficulty which arises from reliance on private enforcement of this sort, Polinsky and Shavell observe further, is that if a reward is available to everyone, there might be wasteful effort which is devoted to finding violators (akin to excessive effort to catch fish from a common pool) [11J]. Eventually, the free-riding problem is likely to discourage private enforcement at all—a situation which might incentivize and encourage the violation of the regulatory rules on account of the

perceived laxity in the enforcement of the regulatory rules.

As the Group of Twenty Countries (G-20) observes [11K]:

Achieving the objectives of the regulatory framework requires not only sound regulation but also effective enforcement. No matter how sound the rules are for regulating the conduct of market participants, if the system of enforcement is ineffective – or is perceived to be ineffective – the ability of the system to achieve the desired outcome is undermined. It is thus essential that participants are appropriately monitored, that offenders are vigorously prosecuted and that adequate penalties are imposed when rules are broken. A regulatory framework with strong monitoring, prosecution, and application of penalties provides the incentives for firms [the target-group] to follow the rules. This, in the end, adds to the framework’s credibility.

Another problem which is associated with private enforcement is that private parties may find it hard to capture fully, the benefits of developing expensive, but socially worthwhile, information systems to aid enforcement (such as computerized databases of fingerprint records) [11J]. Such an undertaking could only be rationalized by a monopoly of the use and of the benefits which flow from the system—even for a limited period only as is the case with Intellectual property. Unrestricted access to the information system and use by other members of the public would make the information system a ‘public good’ as opposed to a ‘private good’—a situation which is likely to lead to the tragedy of the commons [11L]. An additional obstacle to private enforcement is the requirement of force to enforce court orders which are directed at violators or their property which contains certain information. Where the violator has more capacity to mobilize more force than the private enforcer (the litigant), enforcement may be hindered. For this very reason, quite often, the enforcement of court orders by force is left to

the State. For the preceding reasons, and the availability of public funding, public enforcement is often preferred to private enforcement particularly when force is required to identify and apprehend violators. The preference of public enforcement to private enforcement does not mean that public enforcement has no socioeconomic challenges. It only means that public enforcement has more Enforcement Comparative Advantage (ECA) than private enforcement. The problem of public enforcement is often associated with the maximization of social welfare [11J]. Polinsky and Shavell observe that:

By social welfare, we refer to the benefits that individuals obtain from their behavior, less the costs that they incur to avoid causing harm, the harm that they do cause, the cost of catching violators, and the costs of imposing sanctions on them (including any costs associated with risk aversion) [11J].

The following subsections examine whether or not the legal and institutional framework which governs the management, use and trade in Intangible Cultural Heritage on the international and domestic planes, is effective.

### **International Legal and Institutional Framework for the Protection of Intangible Cultural Heritage**

On the International Plane, the first International Heritage Law instrument to be enacted was the World Heritage Convention (WHC 1972). The WHC is formerly the Convention Concerning the Protection of the World Cultural and Natural Heritage, and is an international treaty which was signed on 23 November 1972. This treaty created the World Heritage Sites [7A]. Its underlying objective is the conservation of nature, and the preservation of cultural properties [7B]. The WHC 1972 establishes a solid framework, for all States Parties, for working together to recognise, sustain and protect the world's universally significant and outstanding value of cultural diversity and natural wealth [7C].

Zambia is a state party to the WHC 1972 [7CC]. Zambia ratified the WHC 1972 on the 4<sup>th</sup> day of June, 1984 [7CC]. In 1989, Zambia demonstrated her commitment to the realization of the obligations she had assumed by ratifying the WHC 1972 by enacting the National Heritage Conservation Commission Act 1989 (the NHCCA 1989) [7CCA]. By enacting the NHCCA 1989, the Zambia successfully:

- established the National Heritage Conservation Commission (NHCC), and defined its functions and powers.
- provided for the conservation of ancient, cultural and natural heritage, relics and other objects of aesthetic, historical, prehistorical, archaeological or scientific interest.
- provided for the regulation of archaeological excavations and export of relics.

Chiefly, the NHCCA 1989 established the Manager of the cultural aspects of the Zambian environment—the NHCC, whose main objective is to conserve the historical, natural and cultural heritage of Zambia by preservation, restoration, rehabilitation, reconstruction, adaptive use, good management, or any other means.

Despite the numerous teething challenges such as lack of adequate funding, staffing, non-involvement of traditional leaders, and its centralized establishment, the NHCC has been gradually gaining its place and recognition as the manager of the cultural aspects of the environment in Zambia.

A shortcoming of the WHC 1972 is that it is a non-binding instrument which has a general focus on 'cultural heritage' without a concentration on Intangible Cultural Heritage. Under the WHC framework, the competent regulatory institution is the UNESCO's Intergovernmental Committee for the Protection of World Cultural and Natural Heritage [7D]. The failure to gather critical mass and acceleration in the conservation of cultural heritage on the international plane during the WHC era could, in part, be attributed to the lack of the binding force on the part of the WHC. Thus, towards the

attainment of focused-protection of Intangible Cultural Heritage, the States Members of the United Nations negotiated and signed the UNESCO Convention on Intangible Cultural Heritage 2003, as a binding international instrument. It is therefore a milestone in the development of International Heritage Law (IHL). Since the UNESCO Convention on Intangible Cultural Heritage 2003 entered into force in 2006, the global movement for the conservation and promotion of cultural heritage has gathered critical mass and acceleration.

One of the major achievements of the UNESCO Conferences on the UNESCO Convention on Intangible Cultural Heritage was the agreement on the universal definition of 'Intangible Cultural Heritage'. The definition of Intangible Cultural Heritage (ICH) was one of the most contentious issues during the negotiations of the United Nations Educational Scientific and Cultural Organisation Convention on Intangible Cultural Heritage 2003 (UNESCO Convention on Intangible Cultural Heritage 2003) [10B]. Despite that challenge in the initial stages of the conference proceedings and deliberations, the UNESCO Conference ultimately adopted a quite-broad definition of intangible cultural heritage. Thus the UNESCO Convention on Intangible Cultural Heritage defines ICH as including "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage" [10C]. Broad as this definition may be, we have at least consensus on what elements of culture are imported into the phrase 'intangible cultural heritage'. For the purpose of coordinating the safeguarding of ICH in the States Parties' territories, the Intergovernmental Committee on the protection of ICH was created within UNESCO [7E].

### ***The Competent International Organisation for the Conservation of Cultural Heritage***

The United Nations Educational Scientific and Cultural Organisation (UNESCO) is a specialised agency of the United Nations which is tasked with the promotion of peace and security through international cooperation in education, arts, science and culture [10CA]. For the purpose of accelerating effective safeguarding of Intangible Cultural Heritage around the globe, there is now established, within UNESCO, the Inter-Governmental Committee whose functions include the coordination of the identification and definition of ICH which is present in the States Parties, the provision of guidance on best practices, and recommending measures for the safeguarding of the intangible cultural heritage [10CB].

### **Sustainable Cultural Heritage as a Human Right**

In 1966, the members of the Global Community adopted the International Covenant on Economic Social and Cultural Rights (ICESCR 1966). The ICESCR 1966 guarantees the right to take part in cultural life [10BB]. This right—the right to take part in cultural life, requires the States Parties to the ICESCR 1966 to:

...[t]ake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant—the International Covenant on Economic, Social and Cultural Rights 1966—by all appropriate means, including particularly the adoption of legislative measures [10CCC].

In order to achieve full realization of the right to culture, States Parties to the ICESCR 1966 are required to take necessary steps which promote the conservation of cultural heritage in their territories [10DDD]. In the light of the obligation to adopt the enabling legislative framework, the required necessary steps

would involve the fulfilment of the obligation which is imposed on the States Parties by article 11 of the UNESCO Convention on Intangible Cultural Heritage 2003 [10EEE]. In view of the significant and central role which cultural heritage has assumed in the Sustainable Use Discourse, Sustainable Management Discourse, and Sustainable Development Discourse, the present study argues that, the present treaty obligation of the States Parties to the ICESCR 1966 which requires them to attain the full realization of cultural rights progressively, should be recalibrated to an immediate obligation which requires the States to guarantee, protect and promote cultural rights within their jurisdictions. As observed earlier, such an immediate obligation would involve the identification and definition of the various elements of the available ICH, and the enactment and establishment of the enabling legislative and institutional framework.

#### ***The Obligation to Fulfil Versus the Obligation to Realize Progressively***

Generally speaking, the obligation to fulfil a treaty obligation requires the State to adopt appropriate legislative, administrative and other measures towards the full realization of human rights [6D]. The implication is of the foregoing is that the realization of human rights must become the object of a policy framework which is aimed at improving the quality of human rights [6D]. Human rights, therefore, require appropriate policies and mechanisms which facilitate the fulfilment the treaty obligation, and to measure the progress which is made [6D]. An effective Human Rights Policy which is used to fulfil a treaty obligation provides an effective mechanism for the promotion and protection of human rights. In particular, an effective Human Rights Policy should provide a mechanism for horizontal and vertical enforcement of human rights violations [6E].

However, when a state assumes an obligation to realize the objectives of a treaty progressively, it may postpone the fulfilment of the otherwise immediate obligation provided there is evidence which shows that

the available economic resources, and the technical and financial assistance which it would get from other states cannot support the immediate fulfilment of a particular obligation. Thus, the concept of “progressive realization” which is embodied in clause 1 of article 2 of the ICESCR 1966 is premised on the understanding that the full realization of economic, social and cultural rights “will generally not be able to be achieved in a short period of time” [6F]. This position reflects the realities of the real world and the difficulties which any country encounters in ensuring full realization of human rights” [6F]. Although this limitation has often been used to justify States’ failure to fulfil or realize their human rights treaty obligations, the United Nations Committee on Economic, social and Cultural Rights has clarified that progressivity “should not be misinterpreted so as to empty the obligation of all meaningful content” [6F]. In the light of the “overall objective, and the *raison d’être*” of the ICESCR 1966, the Committee clarifies that article 2(1) “imposes an obligation to move as expeditiously and effectively as possible” towards the full realization of Covenant rights [6F]. Therefore, the Committee observed, the States should not remain inactive and must not defer to another time the design and implementation of steps that aim at the full realization of Economic, Social and Cultural Rights. Such steps, the Committee emphasized, should be deliberate, concrete and targeted, as clearly as possible, towards meeting the obligations which have been assumed under the Covenant [6G].

In the context of Cultural Rights which are intrinsically environmental rights, the postponement of their fulfilment for any reason is strongly condemned in Environmental Law. Environmental rights must be protected even where the evidence of the damage to the environment is not sufficient to establish a material threat. This view is a reflection of the Precautionary Principle which prefers prevention to remediation [6H]. That is why the concept of progressive realization of human rights does not apply to Environmental Rights, and by extension—cultural rights which are

intrinsically environmental rights. The other reason why the said principle does not apply to cultural Rights is because the ICESCR 1966 which imposes the progressive obligation to fulfil cultural rights is but a general treaty while the UNESCO Convention on ICH 2003 which imposes an immediate obligation to fulfil cultural rights is a specific treaty. Now we know that where the provisions of two same-subject treaties seem to conflict, the provisions of the later treaty prevail to the extent to which the earlier treaty conflicts with the subsequent treaty [6I]. Thus, the ‘immediate fulfilment’ obligation which is imposed by the UNSECO Convention on ICH 2003 should prevail over the ‘progressive obligation which is imposed by the ICESCR 1966. For these reasons, the concept of progressive realization of human rights should not apply to environmental rights (and the intrinsic cultural rights).

### **Sustainable Cultural Heritage as an International Treaty Obligation**

United Nations Member States which are States Parties to the UNESCO Convention Intangible Cultural Heritage, and the Member States which have acceded to the UNESCO Convention on Intangible Cultural Heritage [10CC], have assumed an obligation to implement the said Convention in their territories. In particular, the said States Parties have assumed an obligation to put in place an appropriate legal and institutional framework which will safeguard the ICH which is present in their territory [10DD]. More particularly, each Member State or the Acceding State has assumed the following general and specific treaty obligations, namely [10DD]:

- to safeguard the intangible cultural heritage present in its territory by taking the necessary measures;
- with the participation of communities, groups and relevant non-governmental organizations, to identify and define the various elements of the intangible cultural heritage which is present in its territory.
- to draw up one or more inventories of the intangible cultural heritage which

is present in its territory, which inventories shall be regularly updated.

- to periodically submit the relevant information on its inventory through a report which is made to the UNESCO Intangible Cultural Heritage Committee, in accordance with Article 29 of the UNESCO Convention on Intangible Cultural Heritage 2003.
- to adopt a general policy which is aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes.
- to designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory.

Recall here that a State assumes international obligations towards other States when she consents to be bound by a treaty [10EE]. The consent of a State to be bound by a treaty is expressed by signature, exchange of instruments which constitute a treaty, ratification, acceptance, approval or accession [10EE]. Consent to be bound by a treaty can also be given by other means which may be agreed by the State Parties [10EE]. Consent to be bound by the UNESCO Convention on ICH 2003 is given by ratifying, accepting or approving the Convention in accordance with the constitutional procedures of the States Parties [10FF]. Zambia ratified the UNESCO Convention on ICH by depositing the instruments of ratification with the Director-General of UNESCO in accordance with clause 2 of article 32 of the said Convention. On the 20<sup>th</sup> day of April 2006, the UNESCO Convention on ICH entered into force [10GG]. Consequently, Zambia is expected to perform in good faith the obligations which are imposed by articles 11, 12 and 13 of the UNESCO Convention on ICH 2003 [10HH]. In the negative sense, by ‘good faith’, we mean that a state party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation [10II]. In the positive sense, ‘good faith’ means that Zambia, as a State Party to the UNESCO Convention on ICH 2003, should enact and establish the appropriate legal and

institutional framework which ensures effective protection of the Intangible Cultural Heritage which is present in her territory.

The duty or obligation on the part of Zambia to amend or repeal internal law so as to give full effect to provisions of the UNESCO Convention on Intangible Cultural Heritage 2003 does not need a fresh bilateral or multilateral treaty to enforce it. This view is rationalized by the view that such an agreement, if it were concluded at all, would merely reflect the established principle of Public International Law that a State Party to an international agreement must accommodate the provisions of the agreement by making the necessary modifications to the internal legislative and institutional framework. Referring to article 18 of the Treaty of Laussane 1923, by which the parties undertook to introduce in their laws such modifications as may be necessary with a view to ensuring the execution of the present Convention," the Permanent Court of International Justice stated:

[T]his clause merely lays stress on a principle which is self-evident according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken [10JJ].

### ***The Implication of the International Treaty Obligation for the Domestic Legal and Institutional Framework for the Protection of Intangible Cultural Heritage***

In order to perform the provisions of the UNESCO Convention on Intangible Cultural Heritage 2003, Zambia should, in part, do the following:

- Amend the National Heritage Conservation Commission Act 1989 and incorporate the salient provisions of the UNESCO Convention on Intangible Cultural Heritage 2003 especially those which define intangible cultural heritage

and enjoin the Member States to implement the Convention by performing specific tasks. Domestication of the Convention is one tacit way of ensuring the participation of the citizenry and the particular communities in the process of identifying and defining specific intangible cultural heritages. This will be in line with the requirement of the Convention that the communities, at municipal level, participate in the identification and definition of the intangible cultural heritage which is present in their territories.

- Increase the fine which is imposed on those who engage in illegal use or trade in Intangible Cultural Heritage—from K 750 to a more deterrent one.
- Ensure the functional and financial independence of the Zambia National Heritage Conservation Commission.
- Ensure institutional and personnel capacity-building through the acquisition of modern working equipment, and technical skills and expertise of the workforce at Zambia National Heritage Conservation Commission.
- Clothe the Heritage Conservation Commission and the related-regulatory-authority—the Zambia Environmental Management Agency, with express statutory power to cooperate with each other in the management of the use and exploitation of intangible cultural heritage. Also, promote the signing of Memoranda of Understanding among the said related-regulatory-authorities.
- Incorporate Cultural Studies in the School Curriculum especially at General Education Level.
- Ensure public awareness on the role which cultural heritage plays in fostering social cohesion and sustainable development.

***Domestic Legal Framework for the Protection of Intangible Cultural Heritage***  
Under the Zambian legal and institutional framework, "cultural heritage" means [10D]—

a) any area of land which is of archaeological, traditional or historical interest or contains objects of such interest;

b) any old building or group of buildings of historical or architectural interest;

c) any relic, national monument or ancient heritage;

d) any other object constructed by man, other than a relic, of aesthetic, archaeological, historical or scientific value or interest.

A relic is any of the following, namely:

(a) a fossil of any kind;

(b) any drawing, painting, petroglyph or carving on stone commonly believed to have been executed in Zambia before 1st January, 1924;

(c) any object of historical, scientific, anthropological, archaeological, aesthetic or cultural value made or used in Zambia before 1st January, 1924;

(d) any object of ethnological interest;

(e) any ethnographical material associated with traditional beliefs such as witchcraft, sorcery, exorcism, rituals or other rites;

(f) any object associated with a person or an event prominent in Zambian history;

(g) any product of archaeological excavation (whether regular or clandestine) or of archaeological discoveries;

(h) any anthropological, historical or archaeological contents of any ancient heritage; or

(i) any other object of historical, scientific, anthropological, archaeological, aesthetic or cultural value declared a relic by the Minister under section *thirty-two*. Of the Zambian National Heritage Conservation Commission Act.

By paragraphs (b) and (d) above, it is apparently clear that a relic can exist in the natural environment as well as the built environment. The common strand which runs through the definitions of a 'relic' which have been given above is the 'cultural characteristic' of a relic. Thus, a relic is a form of ICH as is envisaged by the definition of 'Intangible Cultural Heritage' (ICH) in article 2 of the UNESCO Convention on Intangible Cultural Heritage 2003. The terra, aquatic and aero spaces which are associated with

ICH within the definition 'Intangible Cultural Heritage' in article 2 of the UNESCO Convention on Intangible Cultural Heritage 2003 were pre-conceived by the Zambian Heritage Conservation Law in paragraph (a) of the definition of 'relic', as read in the light of paragraph (g) of clause 1 of article 253 of the Zambian Constitution 2016.

#### *Declaration of Relics and Ancient Heritages*

An object which previously was not a relic may be declared to be a relic by the Minister of Cultural Affairs if the National Heritage Conservation Commission considers the object to be of historical, scientific, anthropological, aesthetic or cultural value [4]. And, any person, who discovers what appears to be an ancient heritage or relic has a statutory obligation to [4A]:

- report the discovery to the National Heritage Conservation Commission within fourteen (14) days;
- suspend his operations in the immediate vicinity of his discovery until thirty days after the delivery of his/her/its report, unless the National Heritage Conservation Commission authorises the continuance of the operations; and
- deliver to the National Heritage Conservation Commission as soon as practicable, or request the Commission to examine and remove, any object which is, or appears to be, a relic.

The Commission has power to examine and remove the relic or ancient heritage [4B]. And, in the event that the ownership of a relic cannot be ascertained, the relic is deemed to belong to the Commission [4C]. The author argues here that such positive features in the legal and institutional framework for the use and management of ICH are likely to promote Sustainable Cultural Heritage in Zambia, and should be promoted and enhanced.

#### *Constraints relating to the Low Fine for Illegal Excavation, Use or Trade in a Relic or Ancient Heritage*

It is a criminal offence for any person to excavate, collect or export, as the case may be, any ancient heritage, any relic or part thereof, or alter, destroy, damage or remove from its

original site any ancient heritage, national monument or relic contrary to sections 39 of the National Heritage Conservation Commission Act [4D]. Any person who is convicted of the said offence is liable to a fine which does not exceed two thousand five hundred penalty units, or to imprisonment for a term which does not exceed four years, or to both [4E]. Two-Thousand Penalty Unites (2000 PUs, translates to a paltry K 750) [4EE]. Assuming that the value of the illegally acquired and disposed of relic or ancient heritage is K 200, 000, 000, the convict will have an incentive to conceal it and serve the prison term—a condition which is unlikely to promote sustainable management, use and trade in ICH in Zambia, and across international boundaries. As a possible way of promoting sustainable management, use and trade in relics and ancient heritages, it is proposed that the K 750 fine be revised upwards with special focus on the estimated value of the relic or ancient heritage. In hearing and determining the said offences, the High Court has the power, in addition to imposing fines or imprisonment, to order the convict to pay to the Commission such sum as the court may determine for the repair of any damage which may have been caused to the relic or ancient heritage, as the case may be [4F]. Where the illegally acquired relic or ancient heritage is in the possession of the convict, the Court has the power to order its return [4G]. These two positive features in the law are likely to promote the conservation and preservation of relics and ancient heritages—ICH, and should be retained, enhanced and promoted.

#### ***Constraints Relating to the Limited Protective Scope of Intellectual Property Law***

Intellectual Property (IP), is a general term that refers to a variety of legal mechanisms that protect intangible property rights [10DA]. Unlike real property, which can be protected by certain physical means, intellectual property which exists only in the intendment of the law, is mainly protected by sets of horizontally-enforceable rights. The legal institutionalization of intellectual property is predicated on the nature of public goods

[10DB]. Burri argues that creative artefacts resemble public goods which possess the specific features of being non-rivalrous and non-exclusive—in sharp contrast to private goods. Thus, Burri argues further that, as a form of public goods, artefacts can be consumed by more than one person simultaneously and cannot be sequestered. Thus, for rational consumers, there is then a tendency to free-ride on public goods [10DC]. As a consequence, there may be no incentives to create these public goods—a situation which may lead to the undersupply of these goods in a society. As a possible way of avoiding the tragedy of the commons, Intellectual Property Law (IPL), particularly in the domain of patent and copyright, permits the acquisition of property rights in creative artefacts by a person. However, the holder of the proprietary rights which are so acquired enjoys monopoly for a temporary and limited period only so that within that period they can reap the benefits of that exclusive right and be incentivized to create new works [10A]. The acquisition of proprietary rights in IP ensures both horizontal and vertical enforcement [10AA]. This in itself enhances protection of IP. Although the various forms of ICH are a creation of the mind (Intellectual Property) the owner-centered principles of IPL are not suited for the protection of ICH since the latter is a public good which is susceptible to the tragedy of the commons. The monopolization of cultural rights by an individual or a group of individuals would be contrary to the fundamental character of ICH—as open-access common property. Consequently, as noted earlier, effective protection of ICH would depend on effective public enforcement—effective enforcement of general environmental violation, and specific environmental violations—the cultural violations (the ICH violations), as opposed to private enforcement—horizontal enforcement of IP violations.

#### ***Sustainable Cultural Heritage as a Sustainable Development Goal***

Under the Sustainable Development Goal Framework, cultural aspects are covered by Sustainable Development Goal No. 11. The said Goal enjoins the Members of the United



Nations to build [inclusive] cities and settlements which are safe, resilient and sustainable. Target No. 11.4 which lays down the strategy for attaining, in part, SDG No. 11 requires the United Nations Member States to strengthen their efforts and protect and safeguard world's cultural and natural heritage. Therefore, the proposals for remedial legislative and institutional reform which have been made in this study, if implemented, are designed to contribute, in a small-way, to the realization of this SDG.

### **Cultural Heritage as an Integral Component of the Environment**

Cultural Heritage is an integral part of the environment within which it exists. The United Nations Educational Scientific and Cultural Organisation (UNESCO) observes that there is a deep-seated inter-dependency between ICH and Tangible Cultural and Natural Heritage [10KK]. This observation implies a deep-seated inter-dependency between ICH and the environment since natural heritage is found in the soil, the water and the air—the three primary dimensions of the natural environment. To this very effect, Boer and Gruber observe that:

The cultural and natural heritage is an inherent part of the human environment, and consequently the area of heritage law is a specialised but inherent and fundamental part of environmental law. The specialised area of heritage law has therefore necessarily attracted a narrower band of analysts than the broad area of environmental law. Modern heritage law must be understood from the international, national and sub-national level (including states/provinces, and local level), and also as part of international environmental law, with which it can overlap, particularly in the context of world heritage [11F].

Therefore, for regulatory purposes, the argument is that sustainable use and management of ICH partly depends on

effective enforcement of both Cultural Heritage Law, and Environmental Law, and effective regulatory cooperation between the managers of cultural heritage and the environment. In this spectrum, enforcement of environmental violation is the general enforcement, while the enforcement of cultural violations is the specific enforcement—both aspects being public enforcement of law.

### ***The Domestic Legal Framework on the Inter-Connectivity and Inter-Dependency of Cultural Heritage and the Environment***

The Constitution of Zambia is the primary source of the regulatory principles which govern the tenure, use and management of land as an integral component of the environment. In particular, the Zambian Constitution states that land should be held, used and managed in a manner which ensures that culturally-sensitive areas (terra or aquatic) are accessible, not fenced or leased or sold off [11G]. Culturally-sensitive areas should also be used for conservatory and preservatory activities [11G]. This makes cultural heritage as an open-access public good—a form of common property [11H]. This positive feature in the legal and institutional framework, the author argues, is likely to promote cultural heritage tourism and enhance government revenue.

### ***The Competent Managers (Regulatory Authorities) for Cultural Heritage***

There are two competent managers of cultural heritage namely the National Heritage Conservation Commission, and the Zambia Environmental Management Agency (ZEMA). The following subsection examines these managers in brief.

### ***The Zambia National Heritage Conservation Commission as the Competent Cultural Heritage***

The Zambia National Heritage Conservation Commission was originally established as a Commission for the Preservation of Natural and Historical Monuments and Relics under the Natural and Historical Monuments and Relics Act 1971 [12]. It was renamed as the National Heritage Conservation Commission and

continued as such under the National Heritage Conservation Commission Act 1989 [12]. The primary function of the Commission is to conserve the historical, natural and cultural heritage of Zambia by preservation, restoration, rehabilitation, reconstruction, adaptive use, good management, or any other means [12A].

#### ***Constraints Relating to the Lack of the Power to Pray for Preventive Orders***

As noted earlier, in performing its statutory function, the Zambia National Heritage Commission has power to examine an object which appears to be a relic or an ancient heritage when the excavation works lead to the discovery as such an object [12B]. The Commission may also, through the appropriate prosecutorial body, require a person who illegally removes a relic or trades in it to return it to the Commission or indeed foot the cost of restoring the relic or potential relic [12C]. This power, restorative as it is, cannot be used, for example, to prevent an imminent trespass or destruction of a relic or an ancient heritage. Since litigation can be quite lengthy and protracted, it is proposed that the Commission be empowered to obtain preventive orders which prevent the destruction, trespass to, and illegal disposal of a relic or ancient heritage. Such a power, it is argued here, is likely to promote a sustainable cultural heritage.

#### ***Constraints relating to Lack of Power to Conduct Cultural Heritage Education***

Cultural Heritage Education (CHE) and availability of information on the various elements of ICH are key to the appreciation of one's culture. It is also crucial to the pricing of cultural products for tourism purposes. Towards this very end, the UNESCO Convention on Intangible Cultural Heritage enjoins the States Parties to [12D]:

- a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society through:
  - educational, awareness-raising and information programmes which are aimed at the general public, and in particular, the young people;

- conduct specific educational and training programmes within the communities and groups which are concerned;
  - undertake capacity-building activities for the purposes of safeguarding the intangible cultural heritage, and in particular, the safeguarding of management and scientific research; and
  - identify non-formal means of transmitting cultural knowledge;
- b) keep the public informed of the actual and potential threats on cultural heritage, and of the activities which are carried out in pursuance of this UNESCO Convention on Intangible Cultural Heritage 2003;
  - c) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage.

Since Zambia has assumed a treaty obligation to give full effect to the object of the UNESCO Convention on Intangible Cultural Heritage, she has also assumed an implied obligation to amend the National Heritage Conservation Act by conferring a power on the Commission to conduct cultural heritage education in line with her treaty obligation [12E]. The introduction of a power on the part of the National Heritage Conservation Commission to provide cultural education to the general public, especially the young, is likely to create awareness and promote cultural heritage tourism and provide governments in the Southern African Region with a sustainable source of revenue. Such a condition is likely to ease consumptive pressure on the natural heritage which is found in the natural environment.

#### ***Constraints relating to the Lack of Financial and Functional Independence of the Commissioner of the National Heritage Conservation Commission***

The Commissioners of the National Heritage Conservation Commission merely serve on terminable three-year contracts of service [5]. Since a contract of service is terminable either by effluxion of time or notice of termination by either party, such contracts of service may be

terminated by the Minister of Culture—the appointing authority, for any reason or none at all in the *Kamayoyo* sense [6].

In the author’s view, *Kamayoyo* represents the law on the termination of contracts by employers notwithstanding that the Employment Code Act 2019 (the ECA 2019) imposes a statutory duty on an employer to terminate a contract of employment in the manner which is stipulated in the contract [6A] [6A]. The ECA 2019 provides further safeguards to employees by stating that an employer shall not terminate a contract of employment on the ground of [6B]:

- a) union membership;
- b) seeking certain office;
- c) filing a complaint against an employer;
- d) temporary absence from work due to leave or injury;
- e) discrimination on the basis of—
  - i) colour;
  - ii) nationality;
  - iii) tribe;
  - iv) place of origin;
  - v) race;
  - vi) language;
  - vii) social origin;
  - viii) gender;
  - ix) sex;
  - x) marital status;
  - xi) ethnicity;
  - xii) family responsibility;
  - xiii) disability;
  - xiv) status;
  - xv) health;
  - xvi) culture; and
  - xvii) economic grounds: ZECA 2019, ss 52(4), 5.

Although, the ECA 2019 provides the said safeguards against wrongful termination of contracts of employment, it does not provide that terminating a contract of employment contrary to those safeguards is *null and void* [6C]. All the said piece of legislation does is criminalize such acts [6C]. The author argues that in the absence of a ‘*null and void*’ stipulation, the said safeguards only serve as grounds upon which an award for damages may be based. Similarly, the ZECA 2019 does not stipulate the consequence of failure by the employer to give reasons for terminating a contract of employment [6C]. Again here, the

author argues as argued earlier elsewhere, that in the absence of a ‘*null and void*’ provision, failure by the employer to give reasons for terminating a contract of employment only serves as a basis upon which a suit and an award for damages may be based [6C]. As argued earlier elsewhere, the author argues further that this essentially leaves the employer with the right to terminate a contract of employment “for any reason or none at all—a position that takes us back to *Kamayoyo* [6C].

Thus, the inherent insecurity of tenure of the office of Commissioner of the Human Rights Heritage Conservation Commission compromises the functional independence of the Commission. A possible way of enhancing security of tenure of office of the Commissioners of the National Heritage Conservation Commission is to ensure that they serve on the same terms and conditions as the Judges of the Superior Courts [7]. The argument here is that the lack of functional and financial independence of the National Heritage Conservation Commission makes it practically impossible for it to investigate and report on the environmental rights and cultural rights violations which are committed by the officials of the Government of the day, and the friends of the ruling party.

#### ***Constraints relating to the Short Geographical Reach of the National Heritage Conservation Commission***

The National Heritage Conservation Commission is headquartered in Lusaka. Its presence is not devolved<sup>3</sup> to the other nine provinces of the Republic of Zambia. This central location has partly contributed to low publicity of its existence and the functions it performs—functions of conserving and preserving the cultural heritage of Zambia. As a possible way of ensuring a SCH in Zambia, it is proposed that a definite devolution plan be made and funded by the State. Such an exercise would be crucial to the fulfilment of the UNESCO Treaty Obligation which requires Zambia and other States Parties to identify and define the various elements of the ICH which is present in their territories. Such an exercise can only succeed with the decentralization of the operations of the

Heritage Conservation Commission, and the active participation of the members of the communities to whom a particular ICH belongs [8].

### ***Constraints relating to the Poor Funding of the National Heritage Conservation Commission***

The funds of the National Heritage Conservation Commission consist of [9]:

- Parliamentary appropriations;
- Monies which are paid to the Commission by way of grants or donations; and
- Monies or other assets which may vest in or accrue to the Commission.

Poor funding here does not mean erratic or total lack of funds at all but the delayed remittance of the Parliamentary Appropriations. The proposal here is that the State should ensure the timely release of the monies so that the operations of the Commission are funded. The other proposal is that considering the significant and central role which Cultural Heritage now occupies in the Sustainable Development Discourse [10], it would be profitable if the amount of funding were adjusted upwards.

### ***The Zambia Environmental Management Authority as the Competent Manager of Cultural Heritage***

The Zambia Environmental Management Authority (ZEMA) was initially established as the Environmental Council of Zambia under the Environmental Protection and Pollution Control Act 1990. It was renamed as the Zambia Environmental Management Authority (ZEMA) and has continued to exist as such under sub-section 1 if section 7 of the Environmental Management Act 2011. The fundamental function of ZEMA is to do all such things as are necessary to ensure the sustainable management of natural resources and protection of the environment, and the prevention and control of pollution [13]. The regulatory philosophy which lies at the core of the Environmental Management Act 2011 is Integrated Environmental Management (IEM). By this philosophy, the participation of other competent regulatory authorities in enforcement is crucial. Also, the participation of other stakeholders in decision-making is

paramount. IEM is predicated on the view that the environment is a complete sphere (a whole) which consists of various components and dimensions and sub-components and sub-dimensions whose management is the preserve of other competent regulatory authorities. One of those dimensions is the Cultural Dimension. To this very effect, sub-section 2 of section 4 of the Environmental Management Act 2011 states that “the right to a clean, safe and healthy environment includes the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes”. The argument here is that ZEMA is, besides the National Heritage Conservation Commission, a competent manager of the cultural aspects of the environment be they located in or on land, water or indeed the air.

### ***Constraints Relating to Lack of Statutory Power to Act in Support of Related-Environmental Managers***

Both ZEMA and the National Heritage Conservation Commission do not have express or implied statutory power to act in support of each other or indeed other regulatory authorities whose function may or might overlap with theirs. This, in the author’s view, is likely to compromise the quality of enforcement of the general environmental violations, and the specific environmental violations—the cultural violations.

Coase, an economist whose theorem is central to the understanding of law and economics states that the end of all law is allocative efficiency [13A]. Allocative Efficiency is the ability of the current legal and institutional framework to allocate, to the regulatory authority which can best minimize it, the regulatory cost or the cost of enforcing the regulatory rules against the violators. To this very end, in the context of economic exchanges, Coase observes that [13A]:

[I]f a rule has the effect of minimizing transaction costs, or ensuring that such costs are borne by the person who can best

minimize them, it is said to be efficient. However, if it unnecessarily increases or provides for the choice of sub-optimal exchange, it is inefficient.

Therefore, our call for regulatory and enforcement cooperation is predicated on the idea that in some instances it may be economically advantageous for a particular regulatory authority or authorities to prosecute a particular violation of the regulatory rules or a particular aspect of it. In other words, some regulatory authority may have Enforcement Comparative Advantage (ECA) in policing and prosecuting a particular infringement than the related regulatory authorities. The ECA could consist in the experience, skills, expertise and experience of the enforcement team and short time and lower cost of enforcement which the applicable legal framework allocates to it. For example, it is likely to be much quicker for the ZEMA to prepare and serve a preventive order on a potential or actual offender than it would the Heritage Conservation Commission in obtaining a restraining order (a negative injunction) from the High Court. Thus, the efficient application of regulatory cooperation would point to ZEMA as the appropriate enforcer on account of the ECA it possesses.

#### ***The Orders through which ZEMA Possesses Enforcement Comparative Advantage Over the National Heritage Conservation Commission***

In the performance of its managerial function, ZEMA has power to make preventive, protective, restorative orders.

#### ***The Preventive Order***

Recall here that the National Heritage Conservation Commission has no power to pray for preventive or injunctive orders in its quest to recover the cost of repair of the damage which may have been caused to a relic or an ancient heritage which was previously taken or acquired illegally. However, where the Director-General of ZEMA has reasonable ground to believe that a person is, or will be,

conducting an activity, or is or will be in possession or control of a substance or thing that may result in an adverse effect to the environment, the Director-General may serve a Prevention Order (PrevO) on that person [14]. 'Adverse effect' is any harmful or detrimental effect on the environment, whether actual or potential which impairs, or is likely to impair, human health, and result in, or is likely to result in an impairment of the ability of people and communities to provide for their health, safety, cultural and economic wellbeing [15]. The argument here is that the illegal acquisition or disposal of a relic or ancient heritage, to the extent that it deprives a particular community of the cultural benefits of the relic or ancient heritage, falls within the scope of section 103 of the Environmental Management 2011, and as such, could be the subject of a PrevO. Although a PrevO is akin to a Judicial Interim Injunctive Order (JIIO), the fundamental difference lies in the administration of the two reliefs. The similarity between the two reliefs is that they both need only a *prima facie* case to administer or obtain. However, it takes much longer to obtain and serve a JIIO on the defendant than it does the PrevO on the trespasser or would-be trespasser of a relic or ancient heritage [16]. It also costs a little more to obtain a JIIO from the courts than it does preparing a caveat or a PrevO administratively [16].

In the event that regulatory or managerial cooperation is established and promoted between ZEMA and the National Heritage Commission, ZEMA would prepare and serve a PrevO on the trespasser or would be trespasser in support of the Commission's enforcement efforts. The Commission would be saved from the trouble of having to wait for the conclusion of cumbersome and costly judicial processes of obtaining an interim injunction. Such managerial cooperation between the ZEMA and the Commission, in the author's view, is likely to promote enforcement allocative efficiency and ensure sustainable cultural heritage.

### ***The Protective Order***

Unlike the PrevOs, the Protective Orders (ProtOs) are conservatory and preservatory—that is, non-injunctive. Thus, where the Director-General considers that it is necessary to conserve, protect and enhance the environment and natural resources in an area, the Director-General may serve a ProtO on the owner, manager or person who is in occupation or control of the premises, vehicle, vessel, aircraft or equipment where the activity is occurring or will occur [17]. The ProtO may be served on the person who caused or permitted the activity [18]. Thus, where an actual or potential relic or ancient heritage is located on private space, its existence and state may be preserved through a ProtO. Once ZEMA issues a ProtO, the Heritage Conservation Commission could use its power to enter upon private land or other space and conduct a survey and ascertain whether or not the threatened object is a relic or an ancient heritage at all [18A] In the author's view, these positive feature of the legal and institutional framework for environmental management is likely to promote sustainable cultural heritage provided managerial cooperation between the Commission and the ZEMA is established and promoted.

### ***The Restorative Order***

Recall here that in the event that a person is convicted of illegal trade (domestic and international) in a relic or an ancient heritage, the Commission may pray for an order which compels the convict to pay for the cost of repair of the damage which may have been caused to the relic or ancient heritage [19]. The court, in such proceedings, has also the power to order the surrender of a relic or ancient heritage which is still in the possession of the convict or another person [19]. These are restorative features of the regulatory framework. Likewise, in the spirit of ensuring the restoration of relics and ancient heritages, the Director-General through the Inspectors, is empowered to serve Restorative Orders (RestOs) on a person whose act or omission has caused adverse effect to the environment. In particular, the RestO will enjoin the offender to, on their own

account, restore the affected part of the environment to its original state [20]. Since, the administrative orders are much quicker to prepare and serve on the perpetrator of environmental degradation, it is proposed that the RestOs be preferred to the Judicial Restorative Orders. This proposal points to the establishment and enhancement of managerial cooperation between the National Heritage Conservation Commission and the ZEMA, as a means of ensuring and promoting sustainable cultural heritage.

### **CONCLUSION**

This study has examined the legal and institutional framework which governs the management, use and trade in Intangible Cultural Heritage (ICH) in Zambia so as to establish whether or not the said framework provides sufficient incentives and safeguards for the promotion of Sustainable Cultural Heritage. The general conclusion which has been reached in this study is that the said framework does not sufficiently provide the incentives and safeguards which are required for sustainable management, use and trade in ICH. This conclusion is rationalized by the finding that Zambia has not embarked on the exercise of identifying and defining the various elements of the ICH which are present in her territory contrary to her treaty obligation to do so. In particular, it was noted that the National Heritage Conservation Commission lack the necessary financial support, and functional independence which features are crucial to the effective performance of its primary function—the conservation of Zambia's Cultural Heritage. It was argued that unless, the Commissioners of the National Heritage Commission are given security of tenure of office, they are unlikely to operate effectively.

It was also noted that the legal and institutional framework for the conservation of ICH provides a very low fine for illegal trade or possession of a relic or an ancient heritage—a fine of K 750. It was argued that unless the fine is revised upwards, it is likely to incentivize illegal trade and possession of ICH, and trigger the race to the bottom—

unsustainable cultural heritage. It was noted that although the Commission could recover the cost of repairing the physical damage which may have been caused to a relic or an ancient heritage, it has no power to pray for injunctive remedies—the remedy being only restorative. It was argued that since the Zambia Environmental Agency (ZEMA) has power to issue Preventive Orders, this power could be exercised in support of the enforcement efforts of the Commission. It was argued further that since the Preventive Orders, the Protective Orders and the Restorative Orders which are available to the ZEMA could be obtained much quicker and cheaper than the Judicial Positive and Negative Injunctions, the ZEMA Orders should be preferred to the Judicial Orders as a way of promoting effective enforcement, and a sustainable cultural heritage. Centrally, it was argued that effective enforcement of general environmental violation, and specific environmental violations—the cultural violations, through effective environmental managerial cooperation between the National Heritage Conservation Commission and the ZEMA is likely to ensure effective enforcement and promote a sustainable cultural heritage.

## RECOMMENDATIONS

As a possible way of enhancing the efficacy of the legal and institutional framework for the management, use and trade in Intangible Cultural Heritage, the following recommendations are made for legislators and policy-makers in Southern Africa, namely:

- Amend the National Heritage Law (in Zambia, the National Heritage Conservation Commission Act 1989) and incorporate the salient provisions of the UNESCO Convention on Intangible Cultural Heritage 2003 especially those which define intangible cultural heritage and enjoin the Member States to implement the Convention by performing specific tasks. Domestication of the Convention would be a way of ensuring the participation of the citizenry and the particular communities in the process of identifying and defining specific intangible cultural heritages. This will be in line with

the requirement of the Convention that the communities, at municipal level, participate in the identification and definition of the intangible cultural heritage which is present in their territories.

- Define and promote the role of the Institution of Chiefs in the identification, definition and safeguarding of Intangible Cultural Heritage which is present in their territories.
- Increase the fine which is imposed on those who engage in illegal use or trade in Intangible Cultural Heritage—from K 750 to a more deterrent one.
- Ensure the functional and financial independence of the Zambia National Heritage Conservation Commission.
- Ensure institutional and personnel capacity-building through the acquisition of modern working equipment, and technical skills and expertise of the workforce at Zambia National Heritage Conservation Commission.
- Clothe the Heritage Conservation Commission and the related-regulatory-authority—the Zambia Environmental Management Agency, with express statutory power to cooperate with each other in the management of the use and exploitation of intangible cultural heritage. Also, promote the signing of Memoranda of Understanding among the said related-regulatory-authorities.
- Incorporate Cultural Studies in the School Curriculum especially at General Education Level.
- Ensure public awareness on the role which cultural heritage plays in fostering social cohesion and sustainable development.
- Embark or intensify tourism promotion.
- Promote investment in the tourism sector.
- Promote cross-border trade in Intangible Cultural Heritage in the Southern African Region.

## REFERENCES

- [i] UNESCO Convention on Safeguarding the Intangible Cultural Heritage 2003, art 2

(Definition of the Phrase 'Intangible Cultural Heritage')

[ii] Vatn, states that property is a social relation: See, Vatn, A. 2007. Environmental Resources, Property Regimes, and Efficiency. In N Mercurio. 2007. Law and Economics. Routledge, 128-147, at 129. It is this social character of Intangible Cultural Heritage (ICH) which binds together the people to whom a particular culture relates.

[1] Environmental Management Act 2011, s 6(a), *Zam*

[2] Culture is one of the various dimensions of the environment and as such, is an integral part of the environment. The other dimensions of the environment are the spiritual realm, the educational and informational realm, the economy, health and recreation realm: Environmental Management Act 2011, s 4(1)(2), *Zam*. For seminal works on the interconnectivity which exists between culture and the environment, see, Bernard, L.L. 1930. Culture and Environment: The Unity of the Environment, Social Forces, VIII: 2, 327-334; Boer, B. & Gruber, S. 2022. Cultural Heritage and Environmental Law. <file:///C:/Users/hp/Downloads/Boer-and-Gruber-Heritage-essential-readings.pdf> ACCESSED 12 November 2023

[3] Intangible Cultural Heritage (ICH) whether consisting in objects (relics) or artefacts (paintings, drawings, mosaics, sculptures, et cetera) and the spaces which relate to them are the subject of commercial trade, and the object of theft, and as such, are a form of property—intangible property to the extent that they possess intrinsic cultural value. Cultural value is also intrinsic in natural resources: See, *Zambian Constitution 2016*, Art 253(a)

[4] See, National Heritage Conservation Commission Act, s 32(1)(2)

[4A] See, National Heritage Conservation Commission Act, s 42, *Zam*

[4B] See, National Heritage Conservation Commission Act, s 43, *Zam*

[4C] See, National Heritage Conservation Commission Act, s 43, *Zam*

[4D] See, National Heritage Conservation Commission Act, s 40(1), *Zam*

[4E] See, National Heritage Conservation Commission Act, s 40(2), *Zam*

[4EE] 2, 500 penalty units multiplied by 0.30 (the multiplier): see Regulation 3 of the Fees and Fines (Fees and Penalty Units Value) Regulations of 2014 as amended by Statutory Instrument No. 41 of 2015; Regulations made under the Fees and Fines Act, Chapter 45 of the Laws of Zambia.

[5] See, National Heritage Conservation Commission Act, ss 5(1)(2)(3), 6(1)

[6] In *Contract Haulage Limited vs Mumbuwa Kamayoyo* [1982] ZR 13, the *Zambian Supreme* held that in a pure master and servant relationship, a master can terminate his contract with his servant at [any time] and for any reason or none at all. Also, at general contract law, any contract may be terminated by giving the contractual notice or in the absence of a contractual stipulation as to the requisite notice, by giving reasonable notice. This view was expressed by the *Zambian Supreme Court* in the case of *BP Zambia PLC vs Interland Motors Ltd* [2001] ZR 37, at 41, in the following terms:

[A]ll we can say is that there can be no such thing as an interminable licence agreement. As with any other contract, it can be terminated whether for good cause or for bad cause; whether in keeping with the termination clause (if any) even in breach in which event damages would be payable.

[6A] Also, a contract may be terminated in any manner which, under the *Employment Code 2019*, is deemed to terminate a contract: *Zambian Employment Code Act 2019*, s 52(1)

[6B] *Zambian Employment Code Act 2019*, ss 52(4), 5

[6C] See, Samamba, L.T. 2020. Legal and Institutional Aspects of Cross-border Trade in Securities: The Case of Eastern and Southern Africa. PhD Thesis, University of Lusaka, pp. 316-318

[6D] Robertson, R.E. 1994. Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights. Human



Rights Quarterly, 16:4, 703-713; See also, O De Schutter. 2010. International Human Rights: Cases, Materials, Commentary. Cambridge University Press. Pp. 416-512

[6E] Horizontal Enforcement is the enforcement of human rights violations by private persons against the State and its agencies, and fellow private person. By Vertical Enforcement of human rights violations, we mean public enforcement of law whereby a state agency like the Human Rights Commission enforces human rights violation for and on behalf of private persons who neglect or fail to take legal action against such violations.

[6F] United Nations Committee on Economic, Social and Cultural Rights, General Comments No. 12, Para 9

[6G] United Nations Committee on Economic, Social and Cultural Rights, General Comments No. 12, Para 2

[6H] The Precautionary Principle” is a regulatory principle of Environmental Law which states that, the lack of scientific certainty should not be used as a reason to postpone measures to prevent environmental degradation, or possible environmental degradation, where there is a threat of serious or irreversible environmental damage, because of the threat: Environmental Management Act 2011, s 2 (Definition of the Phrase ‘Precautionary Principle’). This Principle stresses the important of the environment and all its dimension such culture and educational aspects. For a detailed discussion of the Precautionary Principle, see, Mulenga, C. 2023. Precaution over Remediation: Killing the Polluter-Pays Principle under the Zambian Mining Regime. Int’l J. Res. Sci., VII:I, 106-129

[6I] See, Vienna Convention on the Law of Treaties 1969, art 30(3)

[7] For the appointment, tenure of office and removal from office of judge, see, Zambian Constitution 2016, Arts 140, 141, 142, 143, 144, and 145.

[7A] World Heritage Convention 1972, Arts 4, 5, 6

[7B] World Heritage Convention 1972, Preamble

[7C] United Nations. 2021. Declaration of the Principles to Promote International Solidarity and Cooperation to Preserve World Heritage. General Assembly Resolution 22 GA 10, <file:///C:/Users/hp/Downloads/session-23ga-21.pdf> ACCESSED 15 November 2023

[7CC] United Nations Educational and Scientific Council. 2023. World Heritage Convention,

<https://whc.unesco.org/en/statesparties> ACCESSED 10 January 2024

[7CCA] Chapter 173 of the Laws of Zambia

[7D] World Heritage Convention 1972, Arts 8, 9, 10

[7E] UNESCO Convention on Intangible Cultural Heritage 2003, Arts 5, 6, 7

[8] See, UNESCO Treaty on Intangible Cultural Heritage 2003, Arts 11, 12, 13

[9] National Heritage Conservation Commission, s 21(1)(a)(b)(c)

[10] See, Bennett Institute for Public Policy. 2021. The Wealth Economy Project on Natural and Social Capital, Interim Report for LetterOne, 1-23; Agarwala, M. 2021. Climate Change and Fiscal Responsibility: Risks and Opportunities. Bennett Institute for Public Policy, Cambridge University, 1-21

[10A] Burri, M. 2020. Cultural Heritage and Intellectual Property Law. Oxford University Press, 459-482.

[10AA] On the horizontal plane, for example, copyright infringement is enforceable by the copyright owner against the infringer: Copyright and Performance Rights Act, s 25, *Zam*. On the vertical plane, for example, it is a criminal offence to infringe copyright: Copyright and Performance Rights Act, 28, *Zam*

[10B] See, Francioni, F. 2001. The Specificity of Intangible Heritage as an Object of International Protection. Paper presented at the UNESCO International Round Table “Intangible Cultural Heritage – Working Definitions”, Turin, 14-17 March 2001; UNESCO, Final Report, International Round Table on “Intangible Cultural Heritage – Working Definitions”, Turin, 14-17 March 2001.

[10BB] International Covenant on Economic Social and Cultural Rights 1966, Art 15(1)(a)

[10C] UNESCO Convention for Safeguarding Intangible Cultural Heritage 2003, Art 2(1),

Signed 17 October 2003, entered into force 20 April 2006.

[10CA] UNESCO is not a Principal Organ of the United Nations. Rather, it is a Specialised Agency of the UN. As such, it operates hand-in-hand with the Social and Economic Council which is the principal organ which is responsible to fostering peace and security through international cooperation in economic, social and cultural affairs: See, United Nations Charter 1945, Arts 7, 61, 62

[10CB] See, UNESCO Convention on Intangible Cultural Heritage 2003, Arts 5, 7

[10CC] The UNESCO Convention on Intangible Cultural Heritage 2003 is open to accession by all States which are not Members of UNESCO that are invited by the General Conference of UNESCO to accede to it: UNESCO Convention on Intangible Cultural Heritage 2003, Art 33(1). The Convention is also open to accession by the territories which enjoy full internal self-government and are recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV), and which have

competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters: UNESCO Convention on Intangible Cultural Heritage 2003, Art 33(2).

[10CCC] International Covenant on Economic Social and Cultural Rights 1966, Art 2(1)

[10DDD] International Covenant on Economic Social and Cultural Rights 1966, Art 15(2)

[10EEE] The States Parties to the UNESCO Convention on Intangible Cultural Heritage 2003 have an obligation to identify and define the various elements of the intangible cultural heritage which is present in their territories: UNESCO Convention on Intangible Cultural Heritage 2003, Art 11(1)(2)

[10DD] UNESCO Convention on Intangible Cultural Heritage 2003, Arts 11, 12, 13.

[10D] National Heritage Conservation Commission Act, s 2 (Definition of the Phrase 'Cultural Heritage'), *Zam*

[10DA] Cornish, W., Llewelyn, D. & Tanya Aplin, T. 2013. Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights. Sweet and Maxwell; Abbott, F.M., Thomas, C. & Gurry, F. 2015. International Intellectual

Property in an Integrated World Economy, 3rd edn. Wolters Kluwer, 2015

[10DB] The utilitarian theory is not the only one in intellectual property rights doctrine. There are many others that relate for instance to author's rights, the author's labour, or the broader idea of social welfare: Burri, M. 2020. Cultural Heritage and Intellectual Property Law. Oxford University Press, 459-482. Drahos, P. 1996. A Philosophy of Intellectual Property. Ashgate; Coombe, R. 1998. The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law. Duke University Press; James Boyle, J. 2008. The Public Domain: Enclosing the Commons of the Mind. Yale University Press; Robert P. Merges, R.P. 2011. Justifying Intellectual Property. Harvard University Press.

[10DC] See, Lemley, M. 2005. Property, Intellectual Property, and Free Riding. *Texas Law Review*, 83, 1031-1075.

[10EE] See, Vienna Convention on the Law of Treaties 1969, Art 11

[10FF] UNESCO Convention on Intangible Cultural Heritage 2003, Art 32(1)(2)

[10GG] The UNESCO Convention on Intangible Cultural Heritage was required to enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States that have deposited their respective instruments of ratification, acceptance, approval or accession on or before that date: UNESCO Convention on Intangible Cultural Heritage 2003, Art 34

[10HH] Vienna Convention on the Law of Treaties 1969, Art 26

[10II] Vienna Convention on the Law of Treaties 1969, Art 27

[10JJ] Advisory Opinion, P.C.I.J., Reports, Series B, No. 10, p. 20 (1925)

[10KK] See, UNESCO Convention on Intangible Cultural Heritage 2003, Preamble, Para 3

[11A] Coyle, D. 2020. Measuring wealth, delivering prosperity. Bennett Institute for Public Policy, Cambridge. 5-8

[11AA] Africa Development Bank. 2018. Africa AgriBusiness, a USD 1Trillion Business by 2030, <https://www.afdb.org/en/news-and-events/africa-agribusiness-a-us-1-trillion->

[business-by-2030-18678](https://www.weforum.org/agenda/2023/03/how-africa-s-free-trade-area-will-turbocharge-the-continent-s-agriculture-industry/) ACCESSED 14 November 2023; Africa Development Bank. 2023. How the New Trade Area will Turbocharge the Continent's Agricultural Industry, <https://www.weforum.org/agenda/2023/03/how-africa-s-free-trade-area-will-turbocharge-the-continent-s-agriculture-industry/> ACCESSED 12 November 2023.

[11B] "Sustainable use" is the use of the environment in a manner which does not compromise the ability to use the environment by future generations or degrade the capacity of the supporting ecosystems: Environmental Management Act 2011, s 2 (Definition of the Phrase 'Sustainable Use'), *Zam*

[11C] "Sustainable management" is the protection and management of the use of the environment, in a manner that, while enabling human beings to provide for their health, safety, social, cultural and economic well-being—

(a) safeguards the life-supporting capacity of air, water, soil and ecosystems;

(b) maintains the life-supporting capacity and quality of air, water, soil and ecosystems, including living organisms, to enable future generations to meet their reasonably foreseeable needs; and

(c) avoids the creation of adverse effects, wherever practicable, and where adverse effects cannot be avoided, mitigates and remedies the adverse effects as far as is practicable: Environmental Management Act 2011, s 2 (Definition of the phrase 'Sustainable Management'), *Zam*

[11D] "Sustainable development" is development that meets the needs and aspirations of the present generation without causing deterioration or compromising the ability to meet the needs of future generations: Environmental Management Act 2011, s 2 (Definition of the phrase 'Sustainable Development'), *Zam*

[11E] UNESCO Convention on Intangible Cultural Heritage 2003, Preamble, Para 2

[11F] Boer, B. & Gruber, S. 2022. Cultural Heritage and Environmental Law. <file:///C:/Users/hp/Downloads/Boer-and-Gruber-Heritage-essential-readings.pdf> ACCESSED 12 November 2023

[11EE] For a detailed discussion of this approach, see, Salter, M. & Mason, J. 2007. Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research. Essex. Pearson Education Limited.

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[11G] Nyambila, H., Mutyandaedza, B. & Zhou, T. 2022. Southern Africa and Cultural Heritage: An Assessment of Online Promotion Strategies. *Journal of Heritage Management*, 7(1), 1-20.

[11H] Mulenga, C. 2019. Judicial Mandate in Safeguarding Environmental Rights from Adverse Effects of Mining Activities in Zambia. *Potchefstroom Electronic Law Journal*. 22.

[11I] Although by ‘Legal Framework’, we mean both the ‘Regulatory Legal Rules’ and “Non-Regulatory (Substantive and Procedural Rules) Legal Rules, the focus of this study is on ‘Regulatory Rules’.

[11J] Polinsky, A.M. 2007. The Theory of Public Enforcement of Law, In Polinsky, A.M. & Shavell, S. (eds). 2007. *Handbook of Economics and Law*, I, Elsevier

[11K] G-20 Working Group 1, ‘Enhancing Sound Regulation and Strengthening Transparency Final Report,’ 25<sup>th</sup> March, 2009, at 45, [www.g20.org/Documents/g20\\_wg1\\_010409.pdf](http://www.g20.org/Documents/g20_wg1_010409.pdf). Accessed 22 March 2023.

[11L] The Tragedy of the Commons is the idea that the lack of privatization or public regulation of open-access common property or goods is likely to lead to the depletion or extinction of the property or goods. This idea which is widely applied in science and economics was originally mooted by Hardin: Hardin, G. 1968. The Tragedy of the Commons. *Science*, 1, [https://www.garretthardinsociety.org/article/s/art tragedy of the commons.html](https://www.garretthardinsociety.org/article/s/art%20tragedy%20of%20the%20commons.html) , ACCESSED 4 December 2023.

[12] See, National Heritage Conservation Commission Act, s 8(1)

[12A] See, National Heritage Conservation Commission Act, ss 42, 43

[12AA] Suppose that an individual (or a firm) chooses whether to commit an act that causes harm with certainty. If he commits the act, he obtains some gain and also faces the risk of being caught, found liable, and sanctioned. The rule of liability could be either strict — under which the individual is definitely sanctioned — or fault-based — under which

he is sanctioned only if his behavior fell below a fault standard. The sanction that s/he suffers could be a monetary fine, a prison term, or a combination of the two. Whether an individual commits a harmful act is determined by an expected utility calculation. In this mix, effective enforcement tends to lower the expected utility of committing a breach of the regulatory standard. The argument is that effective enforcement deters the breach of the regulatory standard, and lowers the cost of future enforcement: Polinsky, A.M. 2007. The Theory of Public Enforcement of Law, In Polinsky, A.M. & Shavell, S. (eds). 2007. *Handbook of Economics and Law*, I, Elsevier; See also, Cameron, C. 2023. *Evolving Heritage Conservation Practice in Twenty-Five in Twenty-First Century*. Creativity, Heritage and the City, 5, [http://doi.org/10.1007/978-981-99-2123\\_1](http://doi.org/10.1007/978-981-99-2123_1);

[12B] See, National Heritage Conservation Commission Act, ss 42, 43

[12C] See, National Heritage Conservation Commission Act, s 40(1)(2)(3)(a)(b)

[12D] See, UNESCO Convention on Intangible Cultural Heritage 2003, Art 14

[12E] See, UNESCO Convention on Intangible Cultural Heritage 2003, Arts 11, 12, 13

[13] Environmental Management Act 2011, s 9(1), *Zam*

[13A] Coase, R.H. 1960. The Problem of Social Cost. *Journal of Law and Economics*, 3, 1-44; See also, Polinsky, A.M. 2007. The Theory of Public Enforcement of Law, In Polinsky, A.M. & Shavell, S. (eds). 2007. *Handbook of Economics and Law*, I, Elsevier. For a detailed analysis of the Coase Theorem, see, Polinsky, A.M. 2018. *An Introduction to Law and Economics*. 5 edn, Aspen Publishing

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[15] Environmental Management Act 2011, s 2 (Definition of the phrase ‘adverse effect’)

[16] See, Samamba, L.T., Kauert, U. & Phiri, S. 2023. Protecting Interests in Land which is Situated in Statutory and Improvement Areas in Zambia: Some Gaps in the Law. VII(III), 730-748.

[17] Environmental Management Act 2011, s 104(1)(a), *Zam*

[18] Environmental Management Act 2011, s 104(1)(b), *Zam*

[18A] See, National Heritage Conservation Commission, s 28

[19] See, National Heritage Conservation Commission Act, s 40(1)(2)(3)(a)(b)