

Preservation of Intangible Cultural Heritage under the National Heritage Act 2005 [Act 645] vs UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003)

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Abstract

The Malaysian National Heritage Act 2005 [Act 645] is a statute which intends to protect, conserve, and preserve not only Intangible Cultural Heritage, but tangible, underwater heritage, and natural sites. The enactment of Act 645 is influenced by the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage (ICH Convention). However, Act 645 is general in character compared to the ICH Convention. This paper adopts the qualitative doctrinal approach where the analysis of the provisions both in the ICH Convention and Act 645 are made in order to identify the similarities and differences on the issue of preservation of intangible cultural heritage in Malaysia. This paper suggests for the amendments to the Act 645 in order to better safeguard Malaysian intangible cultural heritage.

Keywords: National Heritage Act 2005, 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, Intangible Cultural Heritage, Law

Introduction

The Malaysian National Heritage Act 2005 [Act 645] is a statute which intends to protect, conserve, and preserve not only Intangible Cultural Heritage, but tangible, underwater heritage, and natural sites. Being in the legal system for seventeen years, in the absence of comprehensive analysis on this statute in relation to its compliance to international obligations and lack of legal discussions on legal protection of intangible cultural heritage, this paper analyses the provisions on the protection of intangible cultural heritage under the National Heritage Act 2005 in comparison with the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage (ICH Convention). Malaysia ratified the 2003 ICH Convention on the 27th July 2013. The court in the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552 held that principles in international treaties are highly persuasive and should provide the guiding light to help interpret the

fundamental liberties in the Malaysian Constitution, taking into consideration of accepted norms of international law and international conventions widely accepted and ratified by countries across the world.

This paper-uncovers a more holistic intangible cultural heritage legal framework within the Malaysian local context by analysing the compliance of the Act 645 with the ICH Convention. The recommendations made in this paper are hoped to be able to ensure the revitalisation of intangible cultural heritage without transgressing the limit provided by the existing laws, the wishes and quality of life of the people.

Literature Review

In general, there are many foreign writings on intangible cultural heritage but there is lack of literature on the benchmarking of the Malaysian National Heritage Act 2005 with the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage.

On the definition of culture, Tylor, in 1871, initially related the meaning to agriculture practices in his work of Primitive Culture. However, Haryati Shafii's work in 2010 revealed that the meaning was restructured by the western anthropologist, sociologist, and ethnologist as a collection of beliefs, knowledge, rules, laws, customs, arts, rituals, and practices among community members. Lincoln, in 1940, defined culture as a way of life, knowledge, behaviour, and practices handed down from one generation to another. Kroeber and Kluckhohn, in 1952, revealed 100 definitions relating to culture. Various works of literature agree that intangible cultural heritage cannot have a single definition that fits all kinds of intangible cultural heritage. However, a working definition is necessary to investigate the best possible solution of legal protection. Janet Blake in 2000 and 2006, Kurin in 2004 and 2007 affirmed the difficulties in defining intangible cultural heritage. The authors provide suggestions to improve national laws to safeguard intangible cultural heritage. Many authors revealed the setbacks of intellectual property rights for the protection of intangible cultural heritage.

Lenzerrini, in 2011 and Urbinati, in 2012 highlighted the role of the bearers of the intangible cultural heritage in the implementation of the 2003 ICH Convention and whether and how the Operational Directives and the practice have developed their role. Urbinati questioned whether the 2003 ICH Convention place the bearers of the intangible cultural heritage at the center of its implementation. Moreover, it will be interesting to verify whether anything has been left to be done to improve the role given to the bearers of the intangible cultural heritage. Urbinati also highlighted that as an intangible cultural heritage has to provide a sense of identity and continuity and to be shared by its bearers, these subjects have to be well delimited and distinguished from the rest of the world.

According to Lixinski in 2013, intangible cultural heritage emerges in human conduct and is founded on the chain structure of people, objects, and skills, but the traditional chain structure has drastically changed and is rapidly collapsing. Lixinski argued that not all heritage should be treated as intangible in international regimes, even though intangible values and aspects must be considered when devising schemes to protect cultural heritage. Lixinski also pointed out that several organisations have adopted regimes that do not look at heritage in light of the 'intangible/tangible' dichotomy but rather as a holistic subject matter, in which tangible and intangible elements have an essential interplay. In safeguarding intangible

cultural heritage, he commented that it is indispensable not only to protect such heritage but also to focus on the mechanism of the chain system and implement countermeasures against its collapse. The mechanism mentioned here may include a legal framework as the support system.

Bronner, in 2016 had highlighted the changing characteristics of folklore in a post-industrial world and how folklorists need to have a specific definition of folklore for disciplinary identity. His efforts at defining folklore have been in the midst of an auspicious time as current social and technological factors at work are similar to those that prompted the definitional discourse around Ben-Amos's theoretical grounding of performance and contextual approaches. Bronner had submitted a practice-centered definition that retains a consideration of context to account for the processes associated with the folkloric expression but focuses attention to the knowledge domain, or cognition, at the basis of the production of tradition. Bronner had invited thinkers to contemplate on the way that the following identifies "arrays of activity" that benefit from analysis as folklore and equally guides the activity's (and the array in which it is a part as well as the human agents for whom it is significant) explanation: "traditional knowledge put into, and drawing from, practice."

Vaivade and Wagener, in 2017 commented that the term "intangible cultural heritage" has been accepted, defined/interpreted, and eventually adapted in the context of national histories, be it legal, political, and scholarly. Within scholarly works regarding folklore in the Latvian countries, it can be contended that much academic research has been done to integrate all kinds of folklore within the Latvian communities. The authors highlighted that, while having global attention, intangible cultural heritage which has its local meaning is widely given legal protection under various national laws. The author further stressed the importance of referring to the national laws related to intangible cultural heritage in determining the object of a comparative study.

Jinks in 2018 contended that the 'initial framework for any call for research or action related to intangible cultural heritage practices should start with the basic conceptualisations and implications of modern heritage.' The writer had suggested 'participatory methodologies' that support socially inclusive intangible cultural heritage via 'crowdsourcing heritage projects.'

Petrillo, in 2019 revealed the structured analysis, with a comparative approach, to elaborate some conclusions of the legislative and policy measures adopted both at the central and local level to ensure the due implementation of the 2003 ICH Convention. Petrillo concentrates the investigations toward the effects and perspectives on national legislations after the approval of the UNESCO 2003 multilateral agreement. The framework naturally leads to questioning the existence, of a global legal protection for the intangible cultural heritage.

For safeguarding of intangible cultural heritage, some literature affirms the 2003 ICH Convention on the need to allow the State party to define intangible cultural heritage in their territory. Prott in 2007 and Craig in 2010 are of the view that State parties will act as a filter for the communities' claims as to what their intangible cultural heritage is, with the condition that it does not contravene human rights and gave the example where any community or group to declare some practice or expression as their intangible cultural heritage where the

right is guided by the existing international human rights instruments i.e. Article 2 of the 2003 ICH Convention, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

The literature also revealed that there are general discussions on the general features of Act 645. However, there is absence of literature which discuss comprehensively on suggestions for the improvement of the existing legal framework. Hence, in the absence of literature on the benchmarking of the Malaysian National Heritage Act 2005 with the ICH Convention for the Safeguarding of Intangible Cultural Heritage, this article is to fill the gap.

Research Methodology

This paper is a result of a qualitative research where the authors made references to several provisions in the Federal Constitution as the highest law in Malaysia, i.e., Article 4, Article 73, Article 74, Article 75, Article 76, Article 95A and the Ninth Schedule, with a special focus on Item 9E from List III on the preservation of heritage. Besides the Federal Constitution, this paper investigates to relevant provisions in the National Heritage Act of 2005 (Act 645), which was enacted after the constitutional amendment in 2004. Act 645 is the federal law on the preservation of heritage in Malaysia—the reference law for the safeguarding of intangible cultural heritage. Books and articles from journals are among the secondary sources referred to. Information was also obtained from unpublished reading materials such as seminar papers, conference papers, theses and various other related materials. For the purposes of benchmarking, comparative analysis is being adopted where the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage of 2003 is being scrutinised.

Findings

A Review on National Heritage Act 2005 [Act 645]

The National Heritage Act 2005 [Act 645] was created to preserve Malaysian cultural heritage by the Federal Government. The creation of Act 645 was prompted by the norm of safeguarding intangible cultural heritage through the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention for the Safeguarding of Intangible Cultural Heritage in 2003. The enactment of Act 645 was made before Malaysia ratified the 2003 ICH Convention in July 2013. Before Act 645 was gazetted on Dec 31, 2005, which was then enforced on Mar 1, 2006, there were two primary legislation for the conservation and preservation of heritage at the federal level, i.e., the Malaysian Antiquities Act 1976 [Act 168] and Treasure Trove Act 1957 [Act 542] (Revised 1995). Act 168 was intended to deal only with a treasure trove, monument, and cultural heritage, while Act 542 was designed to discover a treasure trove. Act 645 repealed these two legislations and is the current federal law on cultural heritage.

Before 2005, the implementation of Act 542 fell under the jurisdiction of the state government. Previously known as the Treasure Trove Ordinance 1951, Act 542 was the first statutory law enacted by the Malaysian Government to protect heritage following Malaya's Independence in 1957. Section 2(1) of Act 542 dealt with tangible heritage assets found hidden in, or in anything affixed to, the soil or the bed of a river or the sea. Almost two decades later, the Parliament passed Act 168 to control and preserve ancient and historical monuments, archaeological sites and remains, antiquities, and historical objects in Peninsular Malaysia. The existence of these laws had been for as long as 29 and 48 years, respectively.

Act 542 is still relevant for states that do not adopt part XI of Act 645 on matters relating to the treasure trove (Zaky & Azmi, 2017).

Act 645 is a federal law created from the spirit of item 9E, Concurrent List of the Ninth Schedule on preservation of heritage. Item 9E gives power to the Parliament to implement relevant international conventions pertaining to the preservation of heritage pursuant to Article 74 of the Federal Constitution. These include the 2003 ICH Conventions and its 2016 Edition, the Operational Directives, and Ethical Principles and make them operative domestically. On top of that, Malaysia is the State Party to the 2003 ICH Convention, which manifests the Parliament and the executive body's intention to be relevant in the safeguarding of intangible cultural heritage at both the international and national levels. Malaysia deposited with the Director-General its instrument of ratification of the ICH Convention on 23 July 2013 with a declaration that the application and implementation of the provision of the Convention shall be subject to, and in accordance with, the applicable domestic laws of Malaysia and the applicable administrative and policy measures of the government of Malaysia. According to Article 34, the ICH Convention entered into force with respect to Malaysia three months after the date of the deposit of this instrument, that is to say on 23 October 2013.

Act 645 is general in character and gives a wide discretionary power to the relevant Minister and Commissioner in decision-making (Mustafa & Abdullah, 2012, 2019 and 2021). As a country that adopts dual-federalism, where the State is also given the legislative power to enact law on heritage matter, laws on heritage are varied depending on the willingness of each state to have laws in line with the international laws. Some states retain laws without any amendment even after the existence of the 2003 ICH Convention and ratification of the Convention in 2013.

In the parliamentary debate of the Bill in 2005, the Minister in charge expressed hope that Act 645 might help strengthen the management and the efforts of defining heritage. However, parliamentary debates held on 11th December 2006; 7th December 2005; 16th October 2012; and 3rd December 2018 did not specifically cover the safeguarding of intangible cultural heritage. It appears that the legislators then focused on the safeguarding of tangible cultural heritage rather than intangible cultural heritage. Hence, it is viewed that Act 645 is general in character and need to be improved for better safeguarding intangible cultural heritage.

The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage

As mentioned earlier. Malaysia ratified the 2003 Convention for the Safeguarding of Intangible Cultural Heritage on the 23rd July 2013 with the declaration that the application and implementation of the provision of the Convention shall be subject to, and in accordance with, the applicable domestic laws of Malaysia and the applicable administrative and policy measures of the government of Malaysia. The incorporation of the 2003 Convention for the Safeguarding of Intangible Cultural Heritage is only persuasive compared to the existing law of Act 645.

Basic Texts of the 2003 ICH Convention 2016 Edition provides that within the framework of its safeguarding activities of the ICH, each State Party shall endeavour to ensure the widest possible participation of communities, groups, and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management. Besides the 2003 ICH Convention, Malaysia is one of the State Parties to the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression (2005 Diversity of Cultural Expression Convention). However, Malaysia has not ratified the Convention as at today.

One of the main features of the 2005 Diversity of Cultural Expression Convention is promoting community participation. It was highlighted that the adoption of the 2005 Diversity of Cultural Expression Convention was a milestone in international cultural policy (Mustafa & Abdullah, 2021). Recognizing the sovereign right of States to maintain, adopt and implement policies to protect and promote the diversity of cultural expression, both nationally and internationally, the 2005 Diversity of Cultural Expression Convention supports governments and civil society in finding policy solutions for emerging challenges. Based on human rights and fundamental freedoms, the 2005 Diversity of Cultural Expression Convention ultimately provides a new framework for informed, transparent, and participatory systems of governance for culture. The 2005 Diversity of Cultural Expression Convention state that 'parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions. Parties shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention.' Besides, the 2005 Diversity of Cultural Expression Convention also aims to support the international and national legislation related to human rights and fundamental freedoms to promote artistic freedom and artists' social and economic rights. Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) establishes the right for everyone to take part in the running of the public affairs of his/her country. With this provision, the ICCPR makes clear that State authorities require some sort of democratic legitimacy. Finally, article 27 of the ICCPR recognizes an individual right of members of ethnic, religious, or linguistic minorities to engage in the cultural activities characteristic of such minorities. Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) further recognizes the right of everyone to participate in cultural life, enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material rights to any scientific discovery or artistic work they have created. However, these international conventions and covenants did not elucidate the specific relationship between individuals, communities, and nations. According to Silverman & Ruggles, in 2007, these Conventions did not clarify how conflicts among these three entities could or should be resolved, but it was highlighted by Mustafa & Nuraisyah in 2013 that both national and international communities have active discussions on the rights of people to preserve their intangible cultural heritage. The idea was then formulated in the updated ICH Convention in 2016 when the 2003 ICH Convention, in its Operational Directives, created twelve Ethical Principles that focused on the participation of the communities, groups, and individuals (CGIs) in preserving ICH. Several nations have already amended their laws to give more specific legal protection to ICH and the communities, groups, and individuals (CGIs) in protecting it after the establishment of the 2003 ICH Convention.

This idea has been a basis for establishing the 2003 ICH Convention and some updates in the Operational Directives to meet the expectations of the humans (communities, groups, and individuals) to preserve their rights over their inherited intangible cultural heritage. The Operational Directives complement the implementation of the 2003 ICH Convention, and national legislative frameworks, 12 Ethical Principles were created and intended to serve as the basis for developing specific codes of ethics and tools adapted to local and sectoral conditions. The first ethical principle is 'communities, groups and, where applicable, individuals should have the primary role in safeguarding their intangible cultural heritage.' The issue of who are communities, groups, and individuals were decided in a meeting organized by the Intangible Heritage Section of UNESCO (ACCU) in Tokyo, March 2006 (ACCU, 2006).

Scope of Intangible Cultural Heritage

There is an absence of comprehensive scope of intangible cultural heritage in Malaysia, which is to be protected under Act 645. There are conflicting opinions on whether the traditional performances heritage inherited from one generation to another or the new modified version of traditional performances that have developed over time are protected under Act 645.

Under the 2003 ICH Convention, the term 'cultural heritage' includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge, and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts. Article 2 (1) of the 2003 ICH Convention defines intangible cultural heritage as 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 recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their 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. For the purposes of the 2003 Convention, Article 2 (1) provides that consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups, and individuals, and of sustainable development. Paragraph (2) further classified intangible cultural heritage into five (5) domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals, and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship. The UNESCO further elaborates the meaning of intangible cultural heritage as; traditional, contemporary, and living at the same time (Intangible cultural heritage does not only represent inherited traditions from the past but also contemporary rural and urban practices in which diverse cultural groups take part); Inclusive (We may share expressions of intangible cultural heritage that are similar to those practised by others. Whether they are from the neighbouring village, from a city on the opposite side of the world, or have been adapted by peoples who have migrated and settled in a different region, they all are intangible cultural heritage: they have been passed from one generation to another, have evolved in response to their environments and they contribute to giving us a sense of identity and continuity, providing a link from our past, through the present, and into our future. Intangible cultural heritage does not give rise to questions of whether or not certain practices are specific to a

culture. It contributes to social cohesion, encouraging a sense of identity and responsibility which helps individuals to feel part of one or different communities and to feel part of society at large); Representative (Intangible cultural heritage is not merely valued as a cultural good, on a comparative basis, for its exclusivity or its exceptional value. It thrives on its basis in communities and depends on those whose knowledge of traditions, skills and customs are passed on to the rest of the community, from generation to generation, or to other communities.); and 'Community-based' (Intangible cultural heritage can only be heritage when it is recognized as such by the communities, groups or individuals that create, maintain and transmit it – without their recognition, nobody else can decide for them that a given expression or practice is their heritage).

Hence, in Malaysia, the scope of intangible cultural heritage is wide and this depends on how state laws or local laws define intangible cultural heritage. In terms of scope, Act 645 may have not fully adopted provisions from the international law of the 2003 ICH Convention and it opens a wide discretionary power to the Minister and the Commissioner.

Revitalisation of Intangible Cultural Heritage

The issue of the revitalisation of intangible cultural heritage is related to the issue of the scope of intangible cultural heritage discussed earlier. Article 1(a) of the 2003 ICH Convention highlighted one of its primary purposes is to safeguard intangible cultural heritage; Article 3 further emphasised on safeguarding aspect where it provides that "Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, mainly through formal and non-formal education, as well as the revitalisation of the various aspects of such heritage. According to the Operational Directives (OD) in Chapter VI of the 2003 ICH Convention, to effectively implement the Convention, States Parties shall endeavour, by all appropriate means, to recognise the importance and strengthen the role of intangible cultural heritage as a driver and guarantee of sustainable development, as well as fully integrate the safeguarding of intangible cultural heritage into their development plans, policies, and programmes at all levels. While recognising the interdependence between the safeguarding of intangible cultural heritage and sustainable development, States Parties shall strive to maintain a balance between the three dimensions of sustainable development (the economic, social, and environmental) and their interdependence with peace and security in their safeguarding efforts. They shall, to this end, facilitate cooperation with relevant experts, cultural brokers, and mediators through a participatory approach. States Parties shall acknowledge intangible cultural heritage's dynamic nature in urban and rural contexts. They shall direct their safeguarding efforts solely on such intangible cultural heritage compatible with existing international human rights instruments and the requirements of mutual respect among communities, groups, and individuals and sustainable development as provides in Article 170 of the 2003 ICH

Revitalisations of intangible cultural heritage under Act 645 in Malaysia seems to be depending on the discretion of the Commissioner. Section 2 of Act 645 defines "safeguarding" as the identification, protection, conservation, restoration, renovation, maintenance, documentation and revitalization of historic or traditional matter, artefact, area and their environment. Section 6 (h) of Act 645 further provides for the function of the Commissioner to advise and co-ordinate with the local planning authority, the Council and other bodies and

entities at all levels for the purpose of safeguarding, promoting and dealing with any heritage. Section 53 (1) further provides on the discovery of any object having cultural heritage significance, where, the Commissioner shall be entitled to the custody and possession of the same on behalf of the Federal Government and shall be responsible for its safeguarding and safekeeping. The term 'object' in section 53 (1) may also refer to intangible cultural heritage in line with its definition in section 2(1) of Act 645.

Based on Act 645 on safeguarding, the Commissioner (the executive) is given the discretionary power to identify, protect, conserve, restore, renovate, maintain, document and revitalise of historic or traditional matter, area and their environment which may include intangible cultural heritage in various forms. The law gives the authority to the Commissioner to advise and co-ordinate with the local planning authority, the Council and other bodies and entities at all levels on this matter which shows that Commissioner is in control of all stakeholders participating in the safeguarding process.

Compared to the 2003 ICH Convention that requires the States Parties to acknowledge intangible cultural heritage's dynamic nature in urban and rural contexts, the above provisions in Act 645 seems to meet the requirement. On whether Act 645 direct their safeguarding efforts solely on such intangible cultural heritage compatible with existing international human rights instruments and the requirements of mutual respect among communities, groups, and individuals and sustainable development in line with Article 170 of the 2003 ICH Convention, Malaysia gives priority to the position of Islam pursuant to Article 3 and 74(2) of the Federal Constitution.

Roles of People

Act 645 in Malaysia does not specify who is given the authority to preserve intangible cultural heritage, although sections 47 and 60 use the terms 'any person' to include anyone by using the words 'owners' and 'custodians'. Section 47 (1) for instance provides that any person who discovers any object which he has reason to believe has cultural heritage significance shall immediately notify the Commissioner, any authorized officer or the District Officer of the district where the object was discovered, and where practicable, deliver the object to the Commissioner, authorized officer or the District Officer who shall give a written acknowledgement thereof. Section 60 (1) further provides that the owner or custodian of a heritage object in the form of an intangible cultural heritage shall take all necessary steps to develop, identify, transmit, cause to be performed and facilitate the research on the intangible cultural heritage according to the guidelines and procedures as may be prescribed. Paragraph (2) further provides that the Commissioner may enter into any arrangements with the owner or custodian of the intangible cultural heritage for the compliance with the guidelines and procedures as prescribed.

Moreover, section 49 (2) of Act 645 provides that before making the declaration of any object (including intangible cultural heritage) under subsection (1), the consent of the owner of such object shall be obtained, and for that purpose, the Commissioner may furnish the owner such prior opportunity for representation or submission regarding the proposed declaration as may be practicable in the circumstances and such manner as may be prescribed.

According to UNESCO, safeguarding measures must constantly be developed and applied with the consent and involvement of the community itself. According to the principle that intangible heritage does not exist independently from the people who create and enact it and who identify with it, the 2003 ICH Convention places communities at its heart. Any activity concerning intangible cultural heritage should therefore take place with the fullest possible participation and the free, prior and informed consent of the communities, groups and individuals concerned. In the context of the increasing concern over the commercialisation of intangible cultural heritage (which would include the commercial use of data or recordings without permission, and/or not providing rights and finances) States Parties expressed the need to provide guidelines on ethical approaches to the safeguarding of intangible cultural heritage in order to underpin the implementation of the 2003 Convention.

In some instances, public intervention to safeguard a community's heritage may be undesirable since it may distort the value such heritage has for its community. Moreover, safeguarding measures must always respect the customary practices governing access to specific aspects of such heritage, such as sacred intangible cultural heritage manifestations or those considered secrets. To this date, no regulations under Act 645 are made in line with Article 15 of the 2003 ICH Convention which provides on participation of communities, groups and individuals: Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

The 12 Ethical Principles of the same 2003 ICH Convention detailed out its focus on peoples' participation which are as follows: 1. Communities, groups and, where applicable, individuals should have the primary role in safeguarding their own intangible cultural heritage. 2. The right of communities, groups and, where applicable, individuals to continue the practices, representations, expressions, knowledge and skills necessary to ensure the viability of the intangible cultural heritage should be recognized and respected. 3. Mutual respect as well as a respect for and mutual appreciation of intangible cultural heritage, should prevail in interactions between States and between communities, groups and, where applicable, individuals. 4. All interactions with the communities, groups and, where applicable, individuals who create, safeguard, maintain and transmit intangible cultural heritage should be characterized by transparent collaboration, dialogue, negotiation and consultation, and contingent upon their free, prior, sustained and informed consent. 5. Access of communities, groups and individuals to the instruments, objects, artefacts, cultural and natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage should be ensured, including in situations of armed conflict. Customary practices governing access to intangible cultural heritage should be fully respected, even where these may limit broader public access. 6. Each community, group or individual should assess the value of its own intangible cultural heritage and this intangible cultural heritage should not be subject to external judgements of value or worth. 7. The communities, groups and individuals who create intangible cultural heritage should benefit from the protection of the moral and material interests resulting from such heritage, and particularly from its use, research, documentation, promotion or adaptation by members of the communities or others. 8. The dynamic and living nature of intangible cultural heritage should be continuously respected. Authenticity and exclusivity should not constitute concerns and obstacles in the safeguarding

of intangible cultural heritage. 9. Communities, groups, local, national and transnational organizations and individuals should carefully assess the direct and indirect, short-term and long-term, potential and definitive impact of any action that may affect the viability of intangible cultural heritage or the communities who practise it. 10. Communities, groups and, where applicable, individuals should play a significant role in determining what constitutes threats to their intangible cultural heritage including the decontextualisation, commodification, and misrepresentation of it and in deciding how to prevent and mitigate such threats. 11. Cultural diversity and the identities of communities, groups, and individuals should be fully respected. In the respect of values recognized by communities, groups and individuals and sensitivity to cultural norms, specific attention to gender equality, youth involvement and respect for ethnic identities should be included in the design and implementation of safeguarding measures. 12. The safeguarding of intangible cultural heritage is of general interest to humanity and should, therefore, be undertaken through cooperation among bilateral, sub-regional, regional and international parties; nevertheless, communities, groups and, where applicable, individuals should never be alienated from their own intangible cultural heritage.

Article 2.1 of the 2003 ICH Convention provides the recognition of the intangible cultural heritage by the communities, groups, and, when appropriate, individuals; Article 11 requires their participation in identifying and defining their intangible cultural heritage; Article 12 of the 2003 ICH Convention links the identification and the inventorying of intangible cultural heritage; Article 13 of the 2003 ICH Convention encourages States Parties to ensure access to intangible cultural heritage while respecting customary practices; Article 15 of the 2003 ICH Convention calls upon States Parties to ensure the widest possible participation of communities, groups and, when appropriate, individuals in safeguarding their intangible cultural heritage.

In a Report of the 2005 Expert Meeting (Report of the Expert Meeting on Criteria for Inscription on the Lists Established by the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, in Paris and Report of the 2006 Expert Meeting (Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention, held in Tokyo, experts recommended free, prior, and informed consent of the bearers of the intangible cultural element in order to ensure their active participation. Several States supported this criterion during the negotiations recalling that ensuring the participation of communities, groups, and individuals was necessary for the implementation of the 2003 ICH Convention.

The Preamble and Article 2(1) of the 2003 ICH Convention recognise that communities, groups, and, in some cases, individuals play an important role in the production, safeguarding, maintenance, transmission, and re-creation of the intangible cultural heritage.

The Malaysian laws have yet to specify the rights of respective communities, groups, and individuals to protect intangible cultural heritage except for the general provisions mentioned earlier in sections 47 and 60 of Act 645 (Mustafa & Abdullah, 2021)

Roles of Custodians

In Malaysia, Section 60(2) of Act 645 provides that the owner or custodian of a heritage object in the form of an intangible cultural heritage shall take all necessary steps to develop, identify, transmit, cause to be performed and facilitate the research on the intangible cultural heritage according to the guidelines and procedures as may be prescribed. The similar provision further provides that the Commissioner may enter into any arrangements with the owner or custodian of the intangible cultural heritage for the compliance with the guidelines and procedures as prescribed. However, Act 645 is silent on the definition of custodian. The Penang Enactment is also silent on the definition of custodian.

Custodians and inheritors of heritage may be defined differently. According to Schauer in 2012, "These civil servants, many of whom were amateur scholars, saw themselves as the protectors of ancient Malay history and culture, which they saw as having become degraded due to the influence of Islam. Custodians of Heritage argues that Malay cultural heritage and imperial ethnology were utilised by the governments of British Malaya and the Netherlands Indies to inform policies of imperial education that were used to foster ideas concerning gender, social, cultural, economic and political status among the Malay peoples." Sani & Ahmad in 2017 defines custodians as cultural practitioners of intangible cultural heritage inheritors within the context of Malaysian's living human treasure system. Custodians may include non-inheritors such as Mr Eyo Hock Seng (the Kelantanese Dalang of Wayang Kulit Kelantan). Inheritors, on the other hand, is the one who inherits such performances from their fore-fathers until the next generation.

The 2003 ICH Convention is also silent on the term custodian but stresses the terms communities, groups and individuals as provided in Article 11 when it provides on the roles of state parties to require the people's participation in the identification and definition of their intangible cultural heritage. Among the safeguarding measures enumerated in the Convention, research and documentation are likely to be among the first strategies that States will consider in order to understand 'what is there', 'who does it' and 'why they do it'. Article 1 (b) of the 2003 ICH Convention highlights the second purpose of the Convention, which is to ensure respect for the intangible cultural heritage of the communities, groups, and individuals concerned.

Decision-Making on ICH Status

Previous discussions have highlighted a wide discretionary power of the Minister and the Commissioner in defining and selecting intangible cultural heritage within the Malaysian context. In fact, this wide discretionary power has led to some challenges in determining who has the right to give opinions and suggestions on which intangible cultural heritage should be protected. Indeed, the terms 'any person', 'owner', and 'custodians' are mentioned in Act 645, but it is unclear about whose opinion should be given priority; individual custodians, groups, or the minority or the majority.

Article 2.1 of the 2003 ICH Convention calls for the recognition of the intangible cultural heritage by communities, groups and, where appropriate, individuals; Article 11 requires their participation in the identification and definition of their intangible cultural heritage.

Comprehensive Intangible Cultural Heritage Registration Process

In Malaysia, section 52 (1) of Act 645 provides that the Commissioner of Heritage may issue a certificate of registration to the owner of heritage objects, which include intangible cultural heritage, approved under section 51. Upon the heritage object being ceased to be registered as a heritage object, the owner of the object must surrender the certificate of registration to the Commissioner within three months from the date of such cessation.

Under the international law, the 2003 ICH Convention provides a specific chapter on safeguarding intangible cultural heritage at the national level, and the role of states is one of the matters highlighted. Article 15 on participation of communities, groups and individuals provides that each State Party shall endeavour to ensure the widest possible participation of communities, groups, and, where appropriate, individuals that create, maintain and transmit such heritage and to involve them actively in its management. To ensure identification with a view to safeguarding, defined in Article 2(3), each State Party shall draw up, in a manner geared to its situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated, pursuant to Article 12(1). When each State Party periodically submits its report to the Committee, under Article 29, it shall provide relevant information on such inventories.

Role of Local Authorities in Preservation of Intangible Cultural Heritage

Article 95A of the Malaysian Federal Constitution provides for the establishment of NCLG. The function of the NCLG to safeguard intangible cultural heritage is, however, not evident in Act 645 or state enactments. Act 645 does not explicitly detail the roles and responsibilities of local authorities. Part III (Article 11 – 15) of the 2003 ICH Convention provides for the roles of state parties within their territories to take the necessary measures at all levels to safeguard intangible cultural heritage. The involvement may also include local authorities because Article 15 highlights the involvement of communities, groups, and individuals in this matter. Local authorities play a significant part in safeguarding intangible cultural heritage. Laws in the selected countries are evident in this matter, which has adopted the spirit of the 2003 ICH Convention. In Malaysia, however, Act 645 includes local authorities' participation in heritage sites pursuant to section 32. but is silent on intangible cultural heritage matters. State of Penang law, on the other hand, clarifies this matter where their local authorities play an essential part in safeguarding intangible cultural heritage.

Budget for Preservation of Intangible Cultural Heritage

In Malaysia, the Minister and the Commissioner have the wide discretionary power in deciding financial assistance for the preservation of intangible cultural heritage, which includes the exclusion of rightful candidates from financial assistance due to formalities in the application and unguided process of selection of rightful candidate. Section 46(1) of Act 645 provides that the Commissioner shall come out with a conservation plan to promote schemes for the education of, or for practical and financial assistance to, owners and occupiers and for community involvement in decision-making.

According to Article 13 (d) of the 2003 ICH Convention, to ensure the safeguarding, development, and promotion of the intangible cultural heritage present in its territory, each State Party shall, among others, endeavour to adopt appropriate legal, technical, administrative, and financial measures aimed at (i) fostering the creation or strengthening of

institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof; (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage; (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them. Other measures are: (a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes; (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory; (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger.

Article 21 (g) of the 2003 ICH Convention also provides for international assistance, which include other forms of financial and technical assistance, including, where appropriate, the granting of low-interest loans and donation. There is also 'Intangible Cultural Heritage Fund' established under Article 25(1) for the Safeguarding of the intangible cultural heritage. Paragraph (2) further provides that it shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO. Article 36 (3) further provides that denunciation of the 2003 ICH Convention shall in no way affect the financial obligations of the denouncing State Party until the date on which the withdrawal takes effect.

Responsibilities to Publicise and Educate

In Malaysia, the mass media is less active than the other countries to promote intangible cultural heritage. The more popular medium is social media and YouTube, which are promoted by groups and individuals. Act 645 itself does not have a specific provision on the publicity of intangible cultural heritage. In Malaysia, there is a lack of publicity from the local authority, associations, and universities.

The 2003 ICH Convention is quite clear on the need for awareness-raising through various mechanisms and channels, including via education, training, and non-formal means of transmitting knowledge. Article 14 (3) of the 2003 ICH Convention provides that each State Party shall endeavour, by all appropriate means, to (a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society, in particular through (i) educational, awareness-raising and information programmes, aimed at the general public, in particular, young people; (ii) specific educational and training programmes within the communities and groups concerned; (iii) capacity-building activities for the safeguarding of the intangible cultural heritage, in particular management and scientific research; and (iv) non-formal means of transmitting knowledge; (b) keep the public informed of the dangers threatening such heritage, and of the activities carried out in pursuance of this Convention; (c) promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage. Some countries have adopted this provision into their national laws, according to the 2003 ICH Convention.

The Malaysian Act 645, sections 49 and 67, only provides for the declaration and recognition of intangible cultural heritage but is silent on the termination of the designated intangible cultural heritage. However, Section 67 (8) of Act 645 states that any living person who wishes to make an objection to the declaration made by the Minister, the application can be made may submit an objection in writing to the Minister within three months of its publication and may apply to the Minister for the revocation of the order. However, Section 67(9) provides that the Minister may, after having been advised by the NHC, revoke or refuse to revoke the order, and such decision shall be final.

Registration/Annulment of Intangible Cultural Heritage

Regarding the conservation (preservation) of intangible cultural heritage in Malaysia, under section 60 of Act 645, the Commissioner is given the power to declare an object (including intangible cultural heritage) as heritage. The Commissioner may declare in the Gazette any object which has cultural heritage significance to be a heritage object and shall cause it to be listed in the Register pursuant to Section 49 (2). Paragraph (3) further provides that the Commissioner may, in the same manner as in subsection (1), amend or revoke the Gazette, and in each case of such amendment or revocation, he shall substantiate his action with the necessary background and reason. However, the provisions are silent as to the revision, review procedures, supplementary recognition and revocation of intangible cultural heritage. Besides, Section 71 of Act 645 provides that any heritage items that have been declared as National Heritage must be registered under the National Heritage Register. This register is to be maintained by the Commissioner pursuant to Section 23 of the Act, and this will also include the list of intangible cultural heritage.

Article 16 (1) of the 2003 ICH Convention provides that in order to ensure better visibility of the intangible cultural heritage and awareness of its significance and to encourage dialogue that respects cultural diversity, the Committee, upon the proposal of the States Parties concerned, shall establish, keep up to date and publish a Representative List of the Intangible Cultural Heritage of Humanity. Paragraph (2) further provides that the Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating, and publication of this Representative List. Article 17 (1) also provides that with a view to taking appropriate safeguarding measures, the Committee shall establish, keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding and shall inscribe such heritage on the List at the request of the State Party concerned. Article 17 (2) further provides that the Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating, and publication of the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (Urgent Safeguarding List).

In Malaysia, the revocation of an object, be it intangible cultural heritage or otherwise, Act 645 does not provide for a detailed procedure upon revocation of the intangible cultural heritage. The only provision in this matter is section 49(4) where it provides that upon the object being listed in the Register, the object shall be a heritage object starting from the date of its registration and shall cease to be a heritage object when the Commissioner revokes registration. Act 645 does not explain the probable factors for cancellation and the next step after it is annulled. Unlike the LPCP 1950 that clearly mentions the factor for annulment – ‘inadequate by mental or physical reason, or a bearing body has become inadequate to act due to change of its constituent members, or where there are special reasons.’

Special Committee

In Malaysia, section 18 of Act 645 provides for the role of the National Heritage Council (NHC) to establish a committee/committees consisting of members of the Council or persons who are not members of the Council or a combination of both to advise or assist the Council on such matters concerning its functions as it may consider necessary in performing its functions under this Act. However, members of the National Heritage Council may not have expertise in all intangible cultural heritage, such as Makyung and Wayang Kulit. Therefore, a committee must be set up to decide about the status of each and every intangible cultural heritage such as traditional performances of Makyung and Wayang Kulit at the local councils pursuant to section 28 of the Local Government Act 1976 [Act 171]. Section 28 of Act 171 provides that every local authority may from time to time appoint Committees, either of a general or special nature, consisting of a Chairman and such number of Councillors and such other persons as the local authority may think fit, for the purpose of examining and reporting upon any matter or performing any act which in the opinion of the local authority would be more conveniently performed by means of a Committee, and may delegate to any Committee such powers, other than the power to raise money by rates or loans, as it may think fit, and may fix the quorum of any such Committee.

Article 5(1) of the 2003 ICH Convention provides for the establishment of an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, where it shall be composed of representatives of 18 States Parties, elected by the States Parties meeting in the General Assembly. The number of States Members of the Committee shall be increased to 24 once the number of the States Parties to the Convention reaches 50.

Conclusion

Based on the 2003 ICH Conventions there are a number of legal provisions and measures that Malaysia can adopt to improve the existing legal framework for a better administration and management of intangible cultural heritage in Malaysia. This paper contributes to a number of possible recommendations to better improve the existing laws for the safeguarding of intangible cultural heritage in Malaysia by referring to the 2003 ICH Convention of 2003. This include a review to the existing Act 645, to revise the scope of intangible cultural heritage under the existing laws, to give legal recognition to communities, groups and individuals on intangible cultural heritage matter including custodian (Adiguru), to highlight the rights of Adiguru under the law, to give legal recognition to practitioners and the people in decision-making (other than the Minister and the Commissioner and the existing members of the National Heritage Council, and the National Council for local government), to allocate special budget for the purpose of safeguarding intangible cultural heritage, to publicise and educate people on intangible cultural heritage, to revise on the registration procedures and annulment of intangible cultural heritage and to have a special committee at the federal, state and local level for the purpose of taking measures for the safeguarding of intangible cultural heritage.

This paper also contributes to the existing literature on intangible cultural heritage-related laws and safeguarding of intangible cultural heritage practices in Malaysia in comparison with the 2003 ICH Convention.

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