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**SAFEGUARDING INTANGIBLE CULTURAL HERITAGE IN
MALAYSIA: A LEGAL ANALYSIS ON THE NATIONAL
HERITAGE ACT 2005**

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Abstract

Generally, there exist three distinct categories of heritage recognised under the law namely, tangible heritage, intangible heritage and natural heritage. The alertness of the unpredictability of the categories and the interconnectedness in heritage is growing. In the light of the scenario, Malaysia introduced National Heritage Act in March 1, 2006 replacing two previous Act which are Treasurer Trove Act 1987 and Relics and Antiquities Act 1976. This Act is based on UNESCO Convention to Safeguard the Intangible Cultural Heritage. Hence, this paper aims to analyse the sufficiency of provision relating to the safeguard of intangible cultural heritage in the National Heritage Act 2005. This article adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources especially the National Heritage Act 2005, other legal and non-legal literatures relating to the intangible cultural heritage in Malaysia. This paper concludes that although the current legal provisions existing in National Heritage Act 2005 are still inadequate and there are still rooms for improvement to better safeguarding the intangible cultural heritage in Malaysia.

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Keywords: Heritage, Intangible Cultural Heritage, National Heritage Act 2005, Malaysia.



1. Introduction

Heritage is most universally taken to denote that which we as humans, value or 'what we wish to pass on to future generations' (Deacon, 2004) that signifies a performative cultural asset (Brown, 2005) which embraces dance, song, language, oral traditions and knowledge systems, monumental constructions, archaeological sites, material culture and ideology. In the last decades of the 20th century, the term "heritage" was pigeon-holed by the growth and semantic transfer, resulting in a generalisation of the use of this word, habitually used in the place of another, such as, monument and cultural property (Vecco, 2010).

Generally, there exist three distinct categories of heritage recognised under the law namely, tangible heritage, intangible heritage and natural heritage. The alertness of the unpredictability of the categories and the interconnectedness in heritage is getting better (Kirshenblatt, 2004). Tangible heritage is well-defined as 'a monument, group of the buildings or site of historical, aesthetic, archaeological, scientific, ethnological or anthropological values; and includes such treasures as Angkor Wat, a vast temple complex surrounding the village of Siem Reap in Cambodia. Natural heritage is demarcated as 'outstanding physical, biological, and geological features; habitats of threatened plants or animal species and areas of value on scientific or aesthetic grounds or from the point of view of conservation' and includes such sites as the Red Sea, and Mount Kenya National Park. Natural heritage initially referred to places with special characteristics, beauty, or some other value, but untouched by human presence, that is, as wilderness, but most places on the natural heritage list. Intangible heritage is defined as all forms of traditional and popular or folk culture i.e. collective works originating in each community and based on tradition. These creations are transmitted orally or by gesture and are modified over a period of time through a progression of collective recreation which includes oral traditions, customs, languages, music, dance, rituals, festivities, traditional medicine and pharmacopoeia, the culinary arts and all kinds of outstanding skills associated with the material characteristics of culture, such as tools and the habitat (UNESCO, 2017).

In Malaysia, National Heritage Act has been introduced in March 1, 2006 to replace two previous Act which are Treasurer Trove Act 1987 and Relics and Antiquities Act 1976. It is an Act to provide for the conservation and preservation of National Heritage, natural heritage, tangible and intangible cultural heritage and treasure trove, underwater cultural heritage and for any related matters. The Act has been introduced not only as an attempt to preserve, protect and conserve Malaysia's cultural heritage but also as a law that can generate research and promotion of various aspects of heritage in Malaysia (Aziz, 2011). This Act is based on UNESCO Convention to Safeguard the Intangible Cultural Heritage. Safeguarding may include an act to protect, identify, maintenance, conservation, restoration, renovation, documentation and revitalization of historic or traditional matter which includes artefact, area and their environment. Duty to preserve the national heritage is a collective responsibility of various parties including the State Government and the Federal Government relating to the Concurrent List, Schedule 9 of the Malaysian Constitution (Rofli & Khoo, 2009).

In this regard, heritage item may include any national heritage or heritage object or heritage site or any underwater cultural heritage listed in the Register. Whilst foreign heritage on the other hand means any item protected and designated as such by a foreign country's legislation, and the country is a party to

a treaty on the protection of material or cultural object. The terms object does not includes treasure trove as it only comprise of any tangible cultural heritage or intangible cultural heritage or moveable antiquity and historical object. This is so as a treasure trove does not include any tangible cultural heritage as it is define to include any coin or gold or money or silver or plate or bullion jewellery or precious stone. It also includes any object or article of value found hidden in or in anything affixed to either the soil or the bed of a river or lake or of the sea. The owner of the things must be unknown or cannot be found, Antiquity in other hand can be categories into three types. Firstly it includes any moveable object which is or is reasonably believed to be not more than fifty years old. Secondly the trove may comprise of any part of any such object which has at any future date been re-constructed or added or restored. Lastly, any plant, human, or animal remains which is or is reasonably believed to be not least than one hundred years old.

2. Problem Statement

The attentiveness of the volatility of the categories in heritage and their interconnectedness is growing. However, it is arguable that the law in Malaysia relating to the preservation of the intangible cultural heritage is not satisfactory. Conservation of cultural heritage can only be well-preserved through the control or regulation that has been accepted and passed on with the community accessible within the law relating to the cultural heritage itself (Yusof & Hanafiah, 2015). However, the Act provides a limited definition of intangible cultural heritage, creating ambiguity in certain terminology in terms of definition and scope in intangible heritage. Furthermore, the application of legal provisions relating to intellectual property law is not exhaustive. Inadequate allocation of provisions will prevent a sufficient protection to a related intellectual property work (Hussien,Nor & Manap., 2011).

3. Research Questions

This paper is intended to analyse to what extend the intangible cultural heritage is safeguarded in Malaysia.

4. Purpose of the Study

This paper aims to analyse the sufficiency of provision linking to the safeguard of intangible cultural heritage in the National Heritage Act 2005.

5. Research Methods

In anticipating the sufficiency of provision concerning to the safeguard of intangible cultural heritage in the National Heritage Act 2005, this paper employed a qualitative doctrinal legal research as it intends to discuss in-depth and detailed on the particular matters. By using qualitative methods many new aspects of problem can be identified and thus once they are identified, suggestion would follows resulting in the research result and findings being more beneficial and practical (Yin, 2009). For this purpose, the discussion adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources including statutory provisions as provided by National Heritage Act 2005 and other legal and non-legal literatures concerning to the intangible cultural heritage in Malaysia.

6. Findings

6.1. Intangible Heritage under UNESCO

There is an advent of global dialogue with reference to intangible cultural heritage. Kearney (2008), postulate that the existing legislative engagements are in their infancy and yet to engross satisfactorily with the complexities that interweave distinctions and connections between tangible and intangible cultural heritage to be owned exclusively. Bakka (2016), furthermore hypothesise that the UNESCO's 2003 Convention for the Safeguarding of the Intangible Cultural Heritage is straightforward and clear in its distinction between intangible cultural heritage and tangible cultural heritage. The tendency among many researchers to take the intangible cultural heritage concept apart and discuss one or more of the three words of the concept individually has taken the discussion astray, or at least away from the practicalities and the politics. The Convention proposes five broad 'domains' in which intangible cultural heritage is manifested which are, Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; Performing arts; Social practices, rituals and festive events; Knowledge and practices concerning nature and the universe; and traditional craftsmanship. While the Convention sets out a framework for identifying forms of intangible cultural heritage, the list of domains it provides is intended to be inclusive rather than exclusive; it is not necessarily meant to be 'complete'. States may use a different system of domains. There is already a wide degree of variation, with some countries dividing up the manifestations of intangible cultural heritage differently, while others use broadly similar domains to those of the Convention with alternative names. They may add further domains or new sub-categories to existing domains. This may involve incorporating 'sub-domains' already in use in countries where intangible cultural heritage is recognized, including 'traditional play and games', 'culinary traditions', 'animal husbandry', 'pilgrimage' or 'places of memory' (UNESCO, 2017).

However, Kurin (2004) orated that not all human cultural activity is defined as intangible cultural heritage in the Convention as its purviews forms of experience that are aesthetically or conceptually expounded and communal within and metaphorically identified with a cultural community and traditional in that it is socially conveyed from one generation to the next. Safeguarding of intangible cultural heritage is defined as living process, a socially articulated and consciously manipulated heritage in the Convention is quite diverse from previously circulated ideas of folklore and cultural tradition (Aikawa, 2004). Blake (2000) posit that the prevailing definitions of intangible heritage smidgen their roots to earlier incarnations of non-physical heritage and folklore. Prior to the Convention, folklore and cultural tradition were viewed as somewhat alienable expressions of an unreflective populace, 'naturally practiced customs that could be abstracted from other aspects of life, and perhaps best preserved in the documentary records of scholars or in the collections of museum (Kurin, 2007).

6.2. The Legal Framework of Intangible Heritage in Malaysia

In Malaysian context, National Heritage Act 2005, defined heritage to means any heritage object or heritage site or underwater cultural heritage or any living individual declared as National Heritage (section 67 National Heritage Act 2005)." Under section 2, heritage definably into two categories. The first category is the cultural heritage which includes any intangible or tangible form of cultural property, structure or artefact. It may include natural heritage or a heritage matter, item, object, artefact, music that

is pertinent to the historical or contemporary way of Malaysians, performance, dance, song, and formation structure, on or in land or underwater cultural heritage of intangible form. The second category is natural heritage which includes any natural feature of any area in Malaysia which may consist of biological formation or earthly physical or group of such formations, geological or physiographical features, rock formation, sea shore, mountains, river, stream or any natural sites of outstanding value from the point of view of nature or natural beauty including flora and fauna of Malaysia, science, history or conservation.

Hence, it can be said that cultural heritage is divided by the National Heritage Act 2005 into two aspects which is tangible and intangible form of cultural property. Tangible heritage includes “area, monument and buildings. Intangible heritage includes any heritage that may have exist or existed in connection to the heritage of Malaysia in a form of expression, languages, performance, dance, song, music or martial arts. (Harun, 2011). Understandable cultural heritage is a subjective, legacy created through the experience, ideas and inspiration of a person that is occurring in their lives and can be divided according to human activities such as oral tradition, performing arts, music, acting, singing and painting (Yusof, 2015; 2016).

Policies, statements or directives on heritage are issued under the responsibility of the Federal Minister in charge of Heritage, excluding the matter concerning the jurisdiction or power of a State authority unless the appropriate State Authority has been informed or consulted. The administration comes under the Commissioner of Heritage. It includes designation of sites; registration of objects; maintenance of the Heritage Register; control, maintenance and operation of the Heritage Fund; specification of categories of heritage to be listed; supervision of conservation activities; authorisation of excavations; maintenance of related documents; liaison and co-operation with State Authority in respect of conservation and preservation of heritage matters; advice and co-ordination with local planning bodies; promotion/regulation of best standards and practices in conservation and preservation of heritage.

6.3. Legal Analysis on National Heritage Act 2005

There are several gaps that had been identified concerning to the safeguard of intangible cultural heritage in Malaysia in National Heritage Act 2005. Firstly, there is ambiguity in the definition of the intangible cultural heritage in the Act. Despite some previous studies stated that the National Heritage Act 2005 has greatly assisted the protection of intangible cultural heritage, especially traditional performing arts and food (Yusof, 2016; Yusof, Dolah & Kechot, 2011; Yusof, Dolah & Kechot, 2013; Bachek, Zainudin & Haron, 2014), it is arguable that there is a blatant definition in which section 2 of the National Heritage Act has no clear provision for the existence of national food heritage in Malaysia. This argument is intertwined with the opinion of Hussien, Nor & Manap (2011) where the authors conclude in their article that the National Heritage Act 2005 suggests that intangible cultural heritage is merely covering oral transmissions such as songs produced through music, not, lyric lyrics, songs, folk songs, oral traditions, or poems and so on which not in line with the definition provided by UNESCO and the World Intellectual Property Organization (WIPO) and is yet to be final and open to debate. While Mustafa and Abdullah (2012) also believed that the National Heritage Act 2005 has provided a narrow definition and limited scope for intangible cultural heritage in Malaysia.

Secondly, the application of legal provisions relating to intellectual property law is not exhaustive. Intellectual property laws comprise of copyright law, trademark law, geographical indication law, patent law, industrial design law and integrated circuit layout design law. The National Heritage Act 2005 only applies copyright protection under section 51 (3) and section 67 (5), whereas the list of intangible cultural heritage also provides legacies relating to food and clothing in which they are also protected under other branches of intellectual property such as geographical indication law. For instance, section 51 (3) of the Act provides that the consent of the copyright owner shall be obtained before the application is approved in a case where the application involves intangible cultural heritage in which copyright subsists. Similarly, section 67(5) of the Act provides that the consent of the copyright owner shall be obtained before any declaration is made where the declaration under subsection (1) implicates an intangible cultural heritage and copyright still subsists in such works. If we consider the list of intangible cultural heritage, it also provides legacies related to geographical indicators such as food and clothing.

For example, the Pahang woven cloth registered under the National Heritage List 2015 (National Heritage Department, 2017) has also been registered under the Geographical Indications Act 2000 by Tunku Azizah Aminah Maimunah Iskandariah Binti Almutawakkil 'alallah Sultan Iskandar on behalf of the Royal Pahang Weaving Advisory Board In 2014 (Aziz & Noor, 2014). Among other products that fall under clothing that have been registered under geographical indications are *Tenunan Iranun Kota Belud*, *Kasut Manik Melaka*, *Kebaya Nyonya Melaka*, *Terengganu Songket*, *Kain Songket Melaka*, *Sabah Batik* and *Batik Terengganu*. Moreover, the list of products that fall under food are also enormous which includes *Dodol Melaka*, *Kacang Goreng Sempalit*, *Biskut Dan San Sungai Lembing*, *Asam Pedas Melaka*, *Belacan Bintulu*, *Langkawi Cheese*, *Kuih Cincin Kampung Melugus Papar* and *Kuih Lidah Kampung Berundong Papar*. (Intellectual Property Corporation of Malaysia, 2017).

Thirdly, the insufficiency in the penal provision in the Act. The National Heritage Act 2005 does not specifically elaborate on offenses related to intangible cultural heritage. Section 113 has narrowed the scope when it specifically delivers its application to tangible cultural heritage. The provision stipulates that without a permit issued by the Commissioner, an individual who disfigures, disposes, destroys, damages or alters a tangible cultural heritage, may commits an offence and shall on conviction be liable to imprisonment for a term not least than five years or to a fine not more than fifty thousand ringgits or to both. It is submitted that no other provision there exists in the National Heritage Act 2005 which refers to offenses relating to intangible cultural heritage.

7. Conclusion

Based on the above discussion, this paper concludes that although the current legal provisions existing in National Heritage Act 2005 are still inadequate and there are still rooms for improvement to better safeguarding the intangible cultural heritage in Malaysia. Among other consideration that need to be include in the Act are a clear definition of the terms such as tangible and intangible cultural heritage, the relevant position effecting heritage law in intellectual property such as geographical indication and trademark and penal provision that can be used to further protect the intangible heritage in Malaysia. However, this paper acknowledged that the introduction of the Act is such a good attempt to introduce a safeguard to the intangible cultural heritage in Malaysia.

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