

Preservation of Intangible Cultural Heritage: A Legal Comparison between Malaysian Act 645 and Japan 1950 Cultural Property Law

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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. However, Act 645 is general in character compared to the Japan 1950 Cultural Property Law (Japan LPCP of 1950). The non-existence of a specific chapter on intangible cultural heritage portrays the incomprehensiveness of the law on intangible cultural heritage in Malaysia. The Japan LPCP of 1950 has often been signalled as one of the most sophisticated and comprehensive efforts of its kind, where observers have referenced the effort as a persuasive model for a cultural legislation of other countries. This paper adopts the qualitative doctrinal approach where comparative study between the position of the Malaysian Act 645 and of the Japan LPCP of 1950 is made. This paper suggests for the amendments to the Act 645 to better safeguard Malaysian intangible cultural heritage. It also suggests for a specific and comprehensive chapter on intangible cultural heritage in Act 645 that would better uphold the intangible cultural heritage. This paper provides significant findings and contributes to the advancement of literature in the field of intangible cultural heritage law. This promotes the betterment of a legal framework, hence, securing the better survival of intangible cultural heritage in a society with diverse cultural backgrounds.

Keywords: intangible cultural heritage, revitalisation, conservation, preservation, laws

INTRODUCTION

Malaysia and Japan are both state parties in the UNESCO 2003 Convention for the Safeguarding of Intangible Cultural Heritage (therein referred as ICH Convention) which proposes five broad 'domains' in which intangible cultural heritage is manifested: 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; traditional craftsmanship (UNESCO, 2003). Japan accepted the ICH Convention on 15th June 2004 but the Japan's Law for the Protection of Cultural Properties originally promulgated on 30th May 1950, which was enforced on 29th August 1950 (Scott, 2003). According to the Japan 1950 Cultural Property Law (hereinafter referred to as the Japan LPCP of 1950), the purpose of the Law is to preserve and utilize cultural properties, so that the culture of the Japanese people may be furthered and a contribution be made to the evolution of world culture. Scott (2003) stated that the Japan LPCP of 1950 has often been signalled as one of the most sophisticated and comprehensive efforts of its kind. Observers have referenced the effort as a persuasive model for a cultural legislation of other countries (Niec, 1976; Scott, 2003).

On the contrary, the ratification of the ICH Convention for Malaysia was reported on the 23rd July 2013. In the Ninth Malaysian Plan, a national legislation was gazetted on the 31st December 2005 as the National Heritage Act 2005 (hereinafter referred to as Act 645). Section 2 of Act provides for the conservation and preservation of National Heritage, natural heritage, tangible and intangible cultural heritage, underwater cultural heritage, treasure trove and for related matters. Preservation of Malaysia's cultural heritage falls under the jurisdiction of both Federal and State Government following the Federal Constitution Amendment in January 2005, vesting the

joint powers to make laws on matters relating to heritage (Mustafa & Nuraisyah, 2013). Act 645 was enacted, repealing the previous Treasure Trove Act 1957 and the Antiquities Act 1976 (Hashim, 2017).

The Malaysian law on the conservation of intangible cultural heritage under Act 645 falls within the management of cultural heritage object which is unsuitable to the term 'intangible' itself. The non-existence of a specific chapter on intangible cultural heritage portrays the incomprehensiveness of the law on intangible cultural heritage in Malaysia. This is contrary to many laws in other selected countries including the Japan 1950 Cultural Property Law (with a number of amendments), which have specific chapters or even a stand-alone law on intangible cultural heritage. This paper focuses on the purpose of the law relating to intangible cultural heritage, which, according to the Japan law is to revitalise intangible cultural heritage. Unlike Japan, Act 645 uses general terms such as 'conservation' and 'preservation' which denote different meaning from the term 'revitalisation'. This paper also focuses on provisions related to the management or administrative aspect of intangible cultural heritage in Japan in comparison with Malaysia.

LITERATURE REVIEW

Benefits of heritage are discussed in various literatures i.e., heritage offers identity to a country and culture sustains development, promotes cultural values which locals and tourists can enjoy, unites people, and promotes economic growth and social value.

In defining intangible cultural heritage, Blake, in 2000, is one of the earliest scholars that highlight the importance of defining intangible cultural heritage and the difficulty of having an exact definition of intangible cultural heritage. Her well-articulation is well received by later scholars and has become a source of reference up to this date. A lengthy analysis of the intangible cultural heritage definition was provided by Blake in 2000, Van Zanten in 2004, Kurin in 2007, Scovazzi in 2012, and also Lenzerrini in 2013, which also laid down the developmental chronology of the international documents pertaining to intangible cultural heritage. These literatures suggested that the very term 'intangible cultural heritage' represents a 'loose English translation' of the Japanese expression *mukei bunkazai*. Yukinobu in 2006 proposed that intangible cultural heritage is the crystallisation of living knowledge and wisdom of mankind that has been obtained and accumulated through their interaction with nature and provides inspiring suggestions to the issues that modern civilisation faces. According to him, this is why the significance of intangible cultural heritage has gained global attention, and its safeguarding has become a subject of considerable discussion.

Miyata in 2004 and Cang in 2007, for instance, provide findings on the Japanese intangible cultural heritage with the purpose of highlighting the meaning of intangible cultural heritage within the local context for better management. Goto, in 2013 further highlighted the meaning of intangible cultural heritage closely related to creativity, and this meaning has been moulded in Japanese law and policy.

More emphasis on the discussion about the Japanese intangible cultural heritage is found in Foster and Gilman in 2015. Foster, in 2015 had specifically moved on to focus his discussion on intangible cultural heritage within the context of one specific island in Japan, which illustrates the unique meaning of intangible cultural heritage within one locality. Akagawa and Smith, in 2018 further highlighted the latest analysis on the scope of the Japanese intangible cultural heritage with special focus on the strategies and politics of safeguarding intangible cultural heritage. Teeuwen, in 2021 among others also highlighted that one of the Japanese intangible cultural heritages – Gion Festival in Kyoto, Japan is an example, that becomes the national government focus to its safeguarding.

Zemaska, in 2021 clarify that the name of law does not necessarily imply the meaning of intangible cultural heritage by giving example of the Japan LPCP (1950). The author highlighted that despite the name of the Japan LPCP (1950) suggesting focus on the provisions regarding items falling under the category of Cultural Properties, preservation measures regulated in the law also concern other instances of tangible and intangible cultural heritage in separate categories. The author, who make special reference to Miyata in 2005 and Kakiuchi in 2014, further highlighted that, out of the three categories of Cultural Properties (other being Tangible Cultural Properties and Monuments) laid down with the introduction of the Japan LPCP in 1950, the concept of Intangible Cultural Properties was the only one to be established for the first time in the history of Japan's cultural heritage

protection system.

With an in-depth appreciation of the intangible cultural heritage, Yukinobu and other authors commented that the existing legal framework in Japan allows for vast opportunities in safeguarding measures. Zemska, in 2021 is also in consensus with earlier literatures when he confirms that intangible cultural heritage under the Japanese LPCP of 1950 refers to ‘important Intangible Cultural Properties’, where it is divided into three categories: Individual Recognition of Holders, Collective Recognition of Holders and Recognition of Holding Groups.

Within Malaysia’s legal framework, Mustafa and Nuraisyah, in 2013 and Hussein, Noor and Manap in 2011 have confirmed that Act 645 is general while giving the Minister and the Commissioner vast power to define and identify an intangible cultural heritage for preservation. However, Mohd Nor, in 2016, contended that Act 645 has already provided a more comprehensive definition in line with the existing international conventions and previous laws on intangible cultural heritage in Malaysia.

RESEARCH METHODOLOGY

For the purpose of benchmarking, the type of comparative study being used in analytical and law in context where the law Japan is selected for comparative study. This country represents the legal framework that established more specific national law provisions on intangible cultural heritage. Most importantly, Japan is chosen as a country for comparative study because its laws on intangible cultural heritage are referred to in many countries as well as an example to the establishment of the international norm. The study critically analyses legislations in Japan for their long history of safeguarding intangible cultural heritage, as well as their leading roles in the formulation and implementation of the 2003 ICH Convention.

Comparative approach in this study helps in comparing the ability of different legal solutions in heritage matters to solve similar legal problems and spur similar degrees of progress in the betterment of law in context in the protection of heritage. The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.

The Japan Law on intangible cultural properties, which is referred to as the Law for the Protection of Cultural Property [Law No. 214, May 30, 1950] (hereinafter referred to as the Japan LPCP of 1950), and the related amendments are being comprehensively analysed. An analysis is made to the Japan LPCP of 1950, which has been amended a number of times to meet the legal standards, including the preservation of intangible cultural heritage. An analysis is made to the Japan LPCP of 1950, which is still in force, and all the amendments and additional laws that secure the better survival of intangible cultural heritage.

FINDINGS

Overview of National Legislations in Japan

In the mid-20th century, Japan became the first ~~countries~~ country in the world to take legislative action in this arena: Japan passed the ground-breaking Law for the Protection of Cultural Properties in 1950 (hereinafter referred to as the Japan LPCP of 1950). The Japan LPCP of 1950 has become a benchmark for the establishment of other national legislations such as the Korean Cultural Heritage Protection Act in 1962 which provides for the designation of Intangible Cultural Properties as well as the holders of these craft and performance traditions, known informally as Living National Treasures (Jongsung, 2003).

In Japan, Intangible Cultural Properties or known as *mukei bunkazai* are cultural products of high historical or artistic value, such as drama, music, and craft techniques. Items of particular importance can be designated as Important Intangible Cultural Properties. Recognition is also given to the ‘holders’ of the necessary techniques, to encourage their transmission. There are three types of recognition: individual recognition, collective recognition, and group recognition. Special grants of two million yen a year are given to individual holders (the so-called National Living Treasures) to help protect these properties. The government also contributes part of the expenses incurred either by the holder of the Intangible Cultural Property during the training of his successor

or by a recognised group for public performances.

The law governing Japan's intangible cultural properties is the Law for the Protection of Cultural Property [Law No. 214, May 30, 1950]. The Law has been amended a few times to meet the legal standards, including the preservation of intangible cultural heritage. Since 2008, up to 2020, Japan has listed twenty-two (22) intangible cultural heritage on the Representative List, which includes Kabuki Theatre, Ningyo Johruri Bunraku Puppet Theatre, Nogaku Theatre, Traditional Ainu Dance, Kumiodori a traditional Okinawan Musical Theatre, and Nachi no Dengaku a religious performing art held at the Nachi Fire Festival. One ongoing nomination is Furodori, ritual dances imbued with peoples' hopes and prayers.

Comparative Study between Malaysian Law and the Japan Law for the Protection of Cultural Properties in 1950

Definition of Intangible Cultural Heritage

In defining the term 'Intangible Cultural Heritage' itself can be subjective and diverse in nature. In broader context, Article 2 of the UNESCO 2003 ICH Convention have defined '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 recognize 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.

The convention also provides guidelines on the domains that may be considered as an element of intangible cultural heritage, which will not be discussed comprehensively in this paper. However, it is imperative to fully understand the definition of intangible cultural heritage as it provides the framework for legislative to enact law on matters related to the subject matter. By referring to Act 645 and the Japan Law for the Protection of Cultural Properties in 1950 (herein referred to as the Japan LPCP of 1950), the definition of intangible cultural heritage differs, which may give different conception and guidelines for the legislation.

In Japan LPCP of 1950, the term "cultural properties" have multiple meanings in the law. Article 2 of the Japan LPCP of 1950 delivers a comprehensive definition of the term "cultural properties" as stated in the name of the law as it implies different types of cultural properties and comprehensive approach on cultural heritage matters. Article 2(2) of the Japan LPCP of 1950 specifically provides a clear definition of intangible cultural properties as "Art and skill employed in drama, music and applied arts, and other intangible cultural products, which possess a high historical and/or artistic value in and for the country". This definition is aligned with UNESCO 2003 ICH Convention's definition of intangible cultural heritage that it is comprehensive enough for the Japan LPCP of 1950 detailed a stand-alone chapter that governs intangible cultural properties. This connotation is evident in Article 56-2 until Article 56-9, that specifically provide guidelines in protecting intangible cultural heritage in Japan.

In Malaysia, Article 2(1) of Act 645 defined intangible cultural heritage as "Any form of expressions, languages, lingual utterances, sayings, musically produced tunes, notes, audible lyrics, songs, folksongs, oral traditions, poetry, music, dances as produced by the performing arts, theatrical plays, audible compositions of sounds and music, martial arts, that may have existed or exist in relation to the heritage of Malaysia or any part of Malaysia or in relation to the heritage of a Malaysian community". Same as Japan, this definition is on par with UNESCO's 2003 ICH Convention. In fact, Act 645 is more detailed and specific in defining intangible cultural heritage. Despite that, Act 645 does not have a stand-alone chapter that governs matter relating to intangible cultural heritage. Section 60 of Act 645 merely provides the roles of custodians and the Commissioner in conserving the intangible cultural heritage as prescribed.

Revitalisation

An example of the promotion of revitalisation of intangible cultural heritage can be illustrated in the Japan LPCP

of 1950, whereby the purpose of the law is to enhance the cultural quality of the nation, hence contributing to the evolution of world culture (Articles 1), rather than to conserve the existing intangible cultural heritage. Hence, the spirit of revitalisation is illustrated in the folkloric dance in Japan, *Gujo Odori*. In promoting Japanese intangible cultural heritage amongst tourists and the younger generation, a new version of *Gujo Odori* was created known as *Bon Odori*; whereby in line with the changes in the modern Japanese community, *Bon Odori* was introduced, and it is a popular Japanese dance which contains no spiritual/religious elements compared to *Gujo Odori*. It aimed to attract younger generations of the Japanese and non-Japanese to participate in the dance, thus learning and appreciating the Japanese intangible cultural heritage (Cang, 2007; Lixinski, 2013). Unlike Japan, Act 645 as discussed earlier uses general terms such as ‘conservation’ and ‘preservation’ which denote different meaning from the term ‘revitalization’. 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 2 further defines ‘preservation’ as aiming to halt further deterioration, decay or a state of dilapidation and providing structural safety and well-being but does not contemplate significant rebuilding and includes— (a) techniques of arresting or slowing the process of deterioration, decay or state of dilapidation of an item or structure; (b) improvement of structural conditions to make a structure safe, habitable, or otherwise useful; and (c) normal maintenance and minor repairs that do not change or adversely affect the fabric or historic appearance of a structure. Section 2 also defines ‘conservation’ to include preservation, restoration, reconstruction, rehabilitation and adaptation or any combination.

Registration and 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. Under section 49(2), 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. Sub-section (3) 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.

The Japan LPCP of 1950 provide for the registration process known as the designation system. There are specific provisions for revision, review procedures, supplementary recognition, and revocation of intangible cultural heritage.

In Japan, Article 71 provides for the designation intangible cultural property as ‘important intangible cultural property. Clause 4 also provides for supplementary recognition even after performing the designation under paragraph 1 of Article 71 if there is still a person or body eligible to be recognised as a bearer or the bearing body of the said element. Clause 1 of the same section further provides that if the important intangible cultural property has lost its value, the cultural heritage-related Minister may annul the designation. As provided by Clause (4), the same goes for a bearer who has died or a bearing body that has been dissolved. Pursuant to Clause (3), the annulment for both designation and recognition shall be announced in the official gazette, and the bearer or bearing body of the said element of ‘important intangible cultural heritage property’ shall be informed.

Article 72 of the Japan LPCP of 1950 also gives power to the minister of education, culture, sports, science, and technology (hereinafter referred to as Japan heritage-related Minister) to annul any designation of an ‘important intangible cultural property’ element if it is found that the element of ‘intangible cultural property’ has lost its value or there is any special reason for an annulment. This power also extends to situations where the minister finds that the bearer has become 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. In these circumstances, Paragraph 2 of Article 72 provides that the minister may annul the recognition thereof. Paragraph 3 of the same Article provides that the annulment for both designation and recognition shall be announced in the official gazette, and the bearer or bearing body of the said element of ‘important intangible cultural heritage property’ shall be informed. The annulment may also be due to the death of a bearer, or a bearing body has been dissolved. In these circumstances, the minister shall annul the recognition of the bearer or the bearing body. If

all the bearers have died and all the bearing bodies have been dissolved, then the minister shall annul the designation of the ‘important intangible cultural property’ element. Pursuant to Paragraph 4 of Article 72, the minister shall announce this in the official gazette.

In Malaysia, Act 645 does not provide for a detailed procedure regarding revocation of the intangible cultural heritage. It only 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.’

CONCLUSION

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 suggested two recommendations to better improve the existing laws for the safeguarding of intangible cultural heritage in Malaysia. The first recommendation is to have a specific chapter on the safeguarding of intangible cultural heritage in the national law (Act 645), and the second recommendation is to have a stand-alone law, specifically on the preservation of intangible cultural heritage as illustrated by the national laws in the selected countries as discussed above.

The Japan 1950 Cultural Property Law (with a number of amendments), which clearly mentioned about the intention or the philosophy of the law to revitalise intangible cultural heritage, instead of conserving is an example of law for the betterment of the Malaysian laws in respect of revitalising intangible cultural heritage. On top of that, the Japan 1950 law and its amendments provide good examples on the registration and annulment of intangible cultural heritage which can be adopted for the betterment of the Malaysian intangible cultural heritage management and administration.

Hence, this paper suggested a few amendments to Act 646 which clarify the purpose of the Act either to conserve or to revitalise intangible cultural heritage. Secondly, it is also suggested that the Act is amended to include a provision for the registration and annulment of intangible cultural heritage. The amendments suggested here would contribute to the betterment of the Malaysian law to safeguard intangible cultural heritage. On top of that, this paper suggests for a specific chapter in Act 645 that covers the area of intangible cultural heritage only.

This paper provides significant findings and contributes to the advancement of literature in the field of intangible cultural heritage law. This promotes the betterment of a legal framework in line with the existing constitutional provisions, hence, securing the better survival of intangible cultural heritage in a society with diverse cultural backgrounds.

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