

# Conflict of Law in the Safeguarding of Malaysian Intangible Cultural Heritage: A Way Forward

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## ABSTRACT

This paper examines the complex legal and policy landscape governing intangible cultural heritage (ICH) in Malaysia, focusing on the inherent conflicts arising from its unique federal-state constitutional structure. It argues that the current framework, primarily governed by the *National Heritage Act 2005* (Act 645), is insufficient to address jurisdictional disputes, particularly when state religious authorities or local governments exercise power over cultural practices. Through a comparative analysis of Indonesia, Japan, and the Philippines, this study identifies alternative models for effective ICH safeguarding. The paper proposes a series of legal and policy reforms, including statutory amendments to Act 645, a rights-based approach to indigenous cultural rights, and institutional restructuring to create a more coherent and pragmatic framework. The analysis highlights that a way forward for Malaysia requires not just legal amendments, but a fundamental shift towards a decentralized, participatory, and rights-based approach to heritage governance that is sensitive to constitutional realities and political constraints.

## INTRODUCTION

Intangible Cultural Heritage (ICH), as defined by the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* (2003), comprises the practices, representations, expressions, knowledge, and skills that communities, groups, and individuals recognize as integral to their cultural heritage. These include oral traditions, performing arts, social practices, rituals, festive events, and traditional craftsmanship (UNESCO, 2003). In Malaysia, a country characterized by its rich multiculturalism and ethnic diversity, ICH plays a crucial role in shaping national identity and fostering inter-community cohesion (Mustafa & Abdullah, 2022). Beyond its cultural significance, ICH also contributes to local economies through cultural tourism, artisanal industries, and community-based enterprises (Kurin, 2004; Logan & Wijesuriya, 2015).

Despite its importance, the safeguarding of ICH in Malaysia faces persistent challenges stemming from fragmentation and jurisdictional conflicts within the legal system. Disputes between federal and state governments regarding authority over cultural matters, tensions between secular statutory laws and Islamic legal frameworks, and competing policy goals—such as economic development versus heritage preservation—often result in fragmented or inconsistent implementation of protective measures (Mustafa, 2024; Idris, 2019).

This paper aims to address these legal and policy gaps through three core objectives: (1) to identify and analyze legal conflicts that hinder effective safeguarding of ICH; (2) to examine relevant legal instruments at federal, state, and international levels; and (3) to propose a cohesive and harmonized legal framework for more effective governance of Malaysia's intangible cultural heritage.

The study adopts a doctrinal legal methodology supported by comparative analysis and case studies, particularly from Southeast Asian contexts. The manuscript is structured into six sections, beginning with the legal landscape of ICH in Malaysia, followed by an analysis of legal conflicts, comparative insights, proposed reforms, and concluding reflections.

This study employs a comparative legal methodology to analyze the Malaysian framework for ICH. By examining the approaches of Indonesia, Japan, and the Philippines, we seek to identify key lessons and best practices that are both relevant and adaptable to the Malaysian context. This approach is justified by the shared

legal and socio-cultural characteristics of these Southeast and East Asian nations, which provide a rich comparative lens for understanding the challenges and opportunities for ICH governance in Malaysia. This paper argues that while Malaysia's legal challenges are unique, a careful study of regional models can provide a pragmatic way forward.

## METHODOLOGY

### A Comparative Legal Approach

The study's methodology is grounded in a comparative legal approach, which involves a critical analysis of Malaysian law alongside a comparative examination of select jurisdictions. For this analysis, we have chosen Indonesia, Japan, and the Philippines, as each country offers a valuable model for addressing challenges similar to those in Malaysia. Specifically, Indonesia's decentralized framework for cultural heritage is relevant to Malaysia's federal structure, where a crucial balance of power exists between central and regional governments. Japan's "Living National Treasures" system provides a strong example of a state-led, rights-based approach that focuses on the practitioners of intangible cultural heritage. Meanwhile, the Philippines' *Indigenous Peoples Rights Act* (IPRA) of 1997, which legally recognizes the rights of indigenous communities to their cultural heritage, offers a robust model for strengthening Malaysia's legal protections for its own indigenous groups. While other countries like South Korea, Thailand, or indigenous-settler countries such as Canada and New Zealand could offer valuable insights, they were excluded to maintain a focused analysis. For instance, the legal and historical context of indigenous rights in countries like Canada and New Zealand, particularly their treaty-based relationships, differs significantly from the Malaysian context, making a direct comparison less applicable to our core argument.

### The Legal Landscape of Intangible Cultural Heritage in Malaysia

Malaysia is home to an exceptionally rich tapestry of intangible cultural heritage (ICH) rooted in the customs and traditions of its diverse communities. Practices such as *Mak Yong* in Kelantan, *Dondang Sayang* in Melaka, *Wau* (kite-making) along the east coast, and the intricate oral traditions of the Orang Asli and indigenous peoples of Sabah and Sarawak exemplify the country's breadth of ICH (Mustafa & Abdullah, 2022). Far from being historical relics, these living traditions continue to shape community identities, and in 2007, Malaysia's ratification of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage underlined its international commitment to protect and promote them (UNESCO, 2003). As a state party, Malaysia is obligated to inventory ICH elements, implement safeguarding measures, and ensure community participation. However, bridging these obligations with domestic legal structures has proved challenging (Mustafa, 2024).

The primary heritage law, the *National Heritage Act 2005* (Act 645), provides for the registration and preservation of both tangible and intangible heritage. However, critics point to the Act's centralized approach, inadequate community involvement, and weak enforcement provisions (Mustafa, 2022). The Act also lacks precise definitions of diverse ICH types and fails to tailor safeguards to reflect Malaysia's multi-ethnic and state-specific cultural contexts (Mustafa & Abdullah, 2022). This is further complicated by the Federal Constitution, which places matters of culture, heritage, and local customs under the Concurrent List of the Ninth Schedule, allowing both federal and state governments to legislate. In practice, this often results in jurisdictional ambiguities and inconsistent policy implementation, as some states have enacted their own heritage laws that vary significantly in scope and effectiveness (Idris, 2019; Mustafa, 2024).

This legal landscape is further complicated by the diverse legal traditions that operate alongside formal law. Customary law governing indigenous identity, for example, remains largely unwritten and inconsistently recognized in statutory frameworks. While the *Aboriginal Peoples Act 1954* affords limited protection to the Orang Asli, it omits explicit provisions for cultural rights. In Sabah and Sarawak, native customary laws are more formally integrated into their legal systems, but marginalization persists due to weak integration with federal mechanisms (Mustafa & Abdullah, 2022). Furthermore, international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provide a normative foundation for a rights-based ICH approach, emphasizing principles like cultural autonomy and Free, Prior, and Informed Consent (FPIC), even though Malaysia has not ratified ILO Convention No. 169 (United Nations, 2007).

From an Islamic legal standpoint, a growing interest exists in using *maqasid al-shariah*—particularly the protection of intellect (*al-‘aql*), religion (*al-din*), and customary traditions (*al-‘urf*)—to support heritage preservation. Certain practices with Islamic origins, such as Quranic recitation and Islamic calligraphy, can be protected using *fiqh*-based frameworks. However, clashes arise when cultural expressions are judged to contravene religious norms, a conflict exemplified by the *Mak Yong* ban in Kelantan despite its UNESCO recognition (Abdullah, 2020; Mustafa, 2024).

### The *Mak Yong* Conflict: State Religious Authority and Legal Pluralism

The conflict surrounding the Kelantan state ban on the traditional dance-drama *Mak Yong* serves as a critical case study of the legal tensions in Malaysian heritage governance. While the federal government, through the Department of National Heritage, has recognized *Mak Yong* as a National Heritage, the Kelantan state government banned its public performance in 1998, citing a state enactment that deemed it as conflicting with Islamic teachings. The ban highlights a fundamental constitutional and legal conflict: the federal government's authority to safeguard heritage versus the state's power to legislate on matters related to the religion of Islam.

The ban was not an arbitrary act but was rooted in the Kelantan State Council of Islamic Religion and Malay Customs Enactment (1994) and subsequent legal instruments. While specific judicial reasoning or *fatwa* council deliberations on the matter are not publicly detailed, the legal basis for the ban lies in the state's constitutional power to legislate on Islamic matters, which has been consistently interpreted to supersede federal directives in this specific domain. This demonstrates that state religious authority can, and has, overridden international obligations and federal heritage policies. The case shows that a mere declaration of heritage status at the federal level is insufficient to protect ICH if it is not supported by a harmonious legal framework that respects both federal and state jurisdictions. In sum, the legal landscape for ICH in Malaysia is pluralistic yet deeply fragmented. Formal laws at both levels often operate in isolation and lack integration with customary and Islamic legal traditions, highlighting an urgent need for legal reform and institutional coordination to effectively safeguard Malaysia's living cultural heritage.

### Conflict of Laws in the Safeguarding of ICH

#### Federal vs State Jurisdiction

One of the most persistent challenges in the safeguarding of intangible cultural heritage (ICH) in Malaysia lies in the complex interplay between federal and state jurisdictions. The Federal Constitution of Malaysia structures legislative authority through three lists in the **Ninth Schedule**: the **Federal List**, the **State List**, and the **Concurrent List**. Matters related to culture, local government, land, and religion are either under the **State List** or **Concurrent List**, resulting in overlapping and sometimes competing powers between federal and state authorities.

**Culture and heritage** generally fall under the Concurrent List, allowing both federal and state governments to legislate. However, **land and local government**, which are integral to the physical and spatial contexts of cultural practices, are exclusively under **state jurisdiction**. Similarly, **religion**, particularly Islam as the religion of the Federation (Article 3), falls under **state authority**, with each state having its own religious council. This constitutional arrangement complicates the uniform implementation of heritage policies, particularly when cultural practices intersect with religious or land matters.

A prominent example is the case of *Mak Yong*, a traditional dance-drama form rooted in Kelantanese Malay culture and recognized by UNESCO as an element of intangible cultural heritage. Despite its global recognition and its deep historical and artistic value, *Mak Yong* performances were officially banned by the Kelantan state government in 1991 on the grounds that they conflicted with Islamic values. The federal government, through the Department of National Heritage, has since attempted to revive and safeguard *Mak Yong*, but state-level resistance continues to hinder these efforts. This illustrates how cultural expressions may be suppressed or excluded from state-sanctioned heritage lists due to religious or political considerations, despite federal-level efforts to protect them.

Such jurisdictional fragmentation has significant implications for the **administration, funding, and enforcement** of ICH protection. Federal agencies, including the Ministry of Tourism, Arts and Culture (MOTAC) and the Department of National Heritage, often lack the authority to enforce cultural safeguarding policies in states that assert exclusive control over cultural or religious matters. Funding for ICH initiatives may be unevenly distributed, with some states more willing to collaborate with federal agencies than others. Furthermore, inconsistencies in state-level heritage legislation or the absence of such laws altogether create legal vacuums where traditional practices receive little to no protection.

This federal-state tension not only undermines the constitutional ideal of cooperative federalism but also weakens Malaysia's ability to fulfil its international obligations under the UNESCO 2003 Convention. Without a harmonised framework or a mechanism for resolving jurisdictional disputes, the safeguarding of ICH remains fragmented and vulnerable to politicisation.

### Customary and Indigenous Law vs Statutory Law

The safeguarding of indigenous and customary intangible cultural heritage (ICH) in Malaysia presents a distinctive legal challenge due to the limited recognition of customary laws and the fragmented integration of indigenous worldviews within statutory legal mechanisms. The *Orang Asli* of Peninsular Malaysia, the *Dayak* communities of Sarawak, and the various indigenous peoples of Sabah possess unique and complex cultural traditions—ranging from oral histories, ritual performances, healing practices, and traditional ecological knowledge—that form vital components of Malaysia's living heritage. However, their legal protection remains inconsistent and largely inadequate.

While Malaysia is a multicultural nation, its legal framework remains heavily centralised and primarily oriented around statutory law. The **Aboriginal Peoples Act 1954** governs the affairs of the *Orang Asli*, but this Act is primarily administrative in nature, offering minimal substantive protection for cultural rights or heritage preservation. It does not include provisions to safeguard intangible cultural expressions or ensure community participation in heritage governance. Likewise, while Sabah and Sarawak enjoy greater autonomy under the Malaysia Agreement 1963 (MA63) and their respective state constitutions, customary laws (*adat*) and native courts often operate in parallel with statutory systems, with limited formal integration into national heritage policy.

The central issue lies in the **conflict between native customary rights and statutory protection mechanisms**. Customary law in indigenous communities is based on oral transmission, communal ownership, and collective memory. In contrast, statutory regimes—such as the **National Heritage Act 2005**—require registration, documentation, and top-down administrative procedures, which may be culturally alien or practically inaccessible to indigenous communities. This legal mismatch often leads to the marginalisation of indigenous ICH, particularly when community custodians are not recognised as “owners” under statutory criteria or when their practices are not considered “significant” by federal authorities.

Moreover, land rights and cultural rights are deeply interlinked for indigenous groups. For instance, ritual practices and traditional knowledge are often site-specific, rooted in ancestral land and sacred geography. However, conflicts frequently arise when statutory frameworks fail to recognise these relationships. Cases such as *Sagong Tasi & Ors v Kerajaan Negeri Selangor* (2002) and the *Madeli Salleh* case in Sarawak reflect the courts' increasing willingness to acknowledge **native customary rights (NCR)** to land, yet similar judicial recognition has not consistently extended to intangible cultural elements.

The absence of a comprehensive legal framework that explicitly incorporates customary legal systems into ICH protection mechanisms contributes to further legal uncertainty. This is exacerbated by Malaysia's non-ratification of key international instruments such as **ILO Convention No. 169**, which mandates the protection of indigenous peoples' cultural and spiritual practices. Although Malaysia voted in favour of the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**, its principles—particularly those relating to cultural autonomy and self-determination—are yet to be fully realised in domestic law.



To address these tensions, a pluralistic approach is necessary—one that gives legal standing to indigenous customary practices, integrates native authorities into decision-making processes, and ensures that federal and state heritage frameworks reflect the lived realities of Malaysia's indigenous communities. Without such reform, the cultural heritage of these groups remains at risk of erasure under the pressures of legal uniformity and administrative centralisation.

### Secular Law vs Islamic Law

The intersection between secular legal frameworks and Islamic legal norms presents another significant area of conflict in the safeguarding of intangible cultural heritage (ICH) in Malaysia. As a country where Islam is constitutionally recognised as the religion of the Federation (Federal Constitution, Article 3(1)), yet where secular laws remain dominant in civil governance, tensions often arise when cultural practices rooted in religious or spiritual traditions do not align neatly with either legal paradigm (Harding, 2012; Faruqi, 2014).

Many elements of Malaysian ICH are closely intertwined with Islamic heritage. Examples include *Nasyid* (Islamic devotional music), traditional Quranic recitation (*tilawah*), Islamic calligraphy, *marhaban* ceremonies, and traditional healing rituals informed by Islamic metaphysics (Mustafa, 2021; Sani, 2015). While these practices are generally respected and occasionally promoted within official religious frameworks, their protection as intangible cultural heritage under secular statutory law is limited. The **National Heritage Act 2005** makes no specific provision for religiously rooted cultural practices, and the lack of coordination between the Department of National Heritage and state Islamic councils further complicates efforts to safeguard such practices under a unified national framework (Jabatan Warisan Negara, 2019).

More contentious, however, are cases where traditional cultural expressions are seen to conflict with prevailing interpretations of Islamic law. The banning of *Mak Yong* in Kelantan exemplifies this conflict. Despite its recognition by UNESCO as a Masterpiece of Oral and Intangible Heritage of Humanity (UNESCO, 2005), the Kelantan State Religious Authority deemed *Mak Yong* performances un-Islamic due to their pre-Islamic spiritual elements, female performers, and ritualistic components (Tan, 2010; Maznah, 2008). This prohibition reflects the authority of state religious councils over Islamic affairs and highlights the broader challenge of balancing heritage preservation with religious sensitivities (Harding, 2012).

Such tensions are not isolated. Traditional healing ceremonies, trance dances, and local Islamic mysticism (*tasawwuf*) practices often face scrutiny or rejection from religious authorities who view them as inconsistent with Islamic orthodoxy. In many cases, these practices are stripped of their cultural significance and dismissed as superstitious or deviant, effectively excluding them from heritage discourse and protection (Mustafa, 2022; Ibrahim, 2017). The result is a narrowing of acceptable cultural expression, especially in states with stricter interpretations of Islamic law.

This conflict is exacerbated by the dual legal system in Malaysia, where **Syariah** law operates alongside civil law but is limited in scope to Muslims and certain subject matters such as family, inheritance, and religious observance (Faruqi, 2014). Because ICH is not specifically enumerated as a Syariah matter, and due to the lack of express legal instruments addressing culturally Islamic practices as heritage, a jurisdictional vacuum often emerges. Neither the secular heritage authorities nor the Syariah courts possess clear or consistent authority to regulate or protect Islamic-inflected cultural heritage (Harding, 2012).

Moreover, the absence of a coherent policy framework to integrate Islamic jurisprudence (*fiqh*) with heritage protection leaves space for inconsistent treatment. While the principles of *maqasid al-shariah*—especially the protection of religion (*hifz al-din*), intellect (*hifz al-'aql*), and tradition (*al-'urf*)—could support the preservation of Islamic ICH, such principles are rarely operationalised within civil heritage legislation or religious administrative frameworks (Mustafa, 2023; Hasan, 2019).

To address these challenges, there is a need for legal and policy dialogue between federal cultural institutions, state Islamic authorities, and local communities. A collaborative model that recognises the cultural value of Islamic traditions—while remaining sensitive to doctrinal concerns—would enable a more inclusive and nuanced approach to safeguarding ICH in Malaysia. Such a model must ensure that the classification of a practice

as religious or cultural does not result in its exclusion from protection but rather strengthens its legitimacy and continuity within the Malaysian plural legal system (Mustafa, 2023; Tan, 2010).

### Conflict Between Development Laws and Heritage Laws

The tension between economic development priorities and the safeguarding of intangible cultural heritage (ICH) is a persistent source of legal and policy conflict in Malaysia. As the nation continues to pursue rapid urbanisation, infrastructure expansion, and economic growth—especially under national development plans such as the **Malaysia Plan series** and various state-led projects—ICH safeguarding often becomes secondary or entirely overlooked (Mustafa, 2022; Ismail & Yaakop, 2019). This is particularly problematic when land acquisition and urban development activities disrupt or displace the spatial, communal, and ritual dimensions that are essential to living heritage practices (UNESCO, 2011; Tan, 2013).

Many forms of ICH are closely tied to specific localities—whether sacred groves, river systems, ancestral lands, or traditional communal spaces. For example, **Orang Asli** communities may depend on particular forest zones for their medicinal knowledge systems and spiritual rites (Nicholas, 2010). Similarly, local artisans and performers often operate in historically rooted districts that have evolved around traditional marketplaces, rivers, or community halls (Mustafa, 2021). When these spaces are rezoned, privatised, or earmarked for development without meaningful consultation, the intangible dimensions of heritage are disrupted, and entire traditions may face extinction (Tan & Logan, 2016).

The **Land Acquisition Act 1960**, which allows the federal and state governments to compulsorily acquire land for “public purpose” or “economic development,” does not explicitly consider the cultural or intangible significance of land to affected communities (Sufian, 2012). As a result, land critical to the performance, transmission, or sacred value of ICH can be legally acquired without cultural impact assessments. The absence of specific legal safeguards for cultural rights within development and planning laws compounds the vulnerability of ICH (Mustafa, 2023).

Furthermore, **Malaysia’s Town and Country Planning Act 1976**, **Environmental Quality Act 1974**, and various state-level planning enactments operate largely in isolation from heritage protection statutes (Yusoff, 2020). Although environmental impact assessments (EIAs) are required for certain categories of development, cultural impact assessments—particularly those that address ICH—are not mandated in any binding legal framework (ICOMOS, 2011). Even where heritage considerations are included, the focus tends to be on tangible cultural property (such as buildings, monuments, or sites), rather than on intangible practices, oral traditions, or ritual spaces (Logan, 2007; Mustafa, 2021).

This lack of legal integration and inter-agency coordination has led to several cases where ICH has been unintentionally harmed. For instance, urban renewal projects in heritage zones—such as **George Town, Penang**—have occasionally displaced traditional craftspeople or altered long-standing community dynamics, undermining the viability of living traditions even while preserving the physical façades of heritage buildings (Khoo, 2010; Logan & Reeves, 2009). Similarly, highway expansions and resource extraction projects in indigenous areas have severed access to sacred sites or eroded the environmental contexts needed for certain traditional ceremonies to be performed (Nicholas, 2010; Mustafa, 2022).

The fundamental issue lies in the absence of a cross-sectoral framework that reconciles development planning with heritage protection. Malaysia’s current legal system compartmentalises land use, environment, and cultural policy, failing to recognise that ICH operates holistically within these domains (Mustafa, 2023). A more integrated approach is needed—one that mandates cultural impact assessments for all major developments, incorporates ICH considerations into urban planning processes, and ensures that both federal and state planning authorities consult meaningfully with local communities and heritage custodians (UNESCO, 2011; ICOMOS, 2011).

Without such legal integration, the country risks eroding its intangible cultural fabric in pursuit of short-term economic gains. Safeguarding ICH must therefore be repositioned as a strategic component of sustainable development—not an obstacle to it (Mustafa, 2023).

## Comparative Insights

International experience demonstrates that legal and institutional approaches to safeguarding intangible cultural heritage (ICH) vary widely depending on governance structures, cultural diversity, and legal traditions. A comparative analysis of selected countries—namely Indonesia, Japan, and the Philippines—offers valuable insights into how legal pluralism, decentralisation, and community participation can be harnessed to enhance the protection of ICH (UNESCO, 2011; Hafstein, 2012). These models may provide instructive pathways for Malaysia, especially in light of its multi-ethnic composition, federal structure, and dual legal system (Mustafa, 2022).

### Indonesia: Decentralised ICH Protection Framework

Indonesia presents a robust example of decentralised cultural heritage governance. Following its reformasi period in the early 2000s, Indonesia enacted **Law No. 5 of 2017 on the Advancement of Culture**, which recognises ICH as part of a broader national cultural strategy (Ministry of Education and Culture of Indonesia, 2017). The law mandates inventorying at the village, district, provincial, and national levels, with responsibilities distributed across local and regional governments. Crucially, the law frames cultural safeguarding as a right of communities and encourages community-led documentation and revitalisation of ICH elements (Yuliawati, 2020).

This model is especially relevant to Malaysia, where state autonomy—especially in Sabah and Sarawak—and local cultural variation necessitate flexible and participatory approaches (Mustafa, 2021). Indonesia's emphasis on decentralisation ensures that safeguarding strategies reflect local values, languages, and religious norms, while still adhering to national goals and international commitments under the UNESCO Convention (UNESCO, 2003).

### Japan: Integrated Approach to Living Human Treasures

Japan is internationally recognised for its pioneering model of protecting ICH through the **Living National Treasures** system, established under the **Law for the Protection of Cultural Properties (1950)** (Agency for Cultural Affairs, Japan, 2020). This law explicitly recognises both tangible and intangible heritage and institutionalises state support for individuals or groups identified as bearers of traditional knowledge and craftsmanship. These “holders” receive financial assistance, training support, and national recognition, fostering the intergenerational transmission of heritage practices (Saito, 2006).

Japan's model is notable for integrating legal recognition, material support, and community prestige into a cohesive safeguarding strategy. The Japanese government's collaboration with local governments and craft guilds ensures alignment with community structures, which helps maintain the authenticity and viability of ICH (Yoshida, 2004). For Malaysia, this model suggests the potential for a national recognition system that rewards and empowers heritage practitioners, especially in regions where state governments may lack sufficient resources or legal clarity to offer support (Mustafa, 2023).

### Philippines: Indigenous Peoples Rights Act (IPRA) and Community Involvement

The Philippines' **Indigenous Peoples Rights Act (IPRA) of 1997** offers a strong rights-based model for cultural heritage protection. IPRA recognises the collective rights of indigenous communities to their ancestral domains, cultural expressions, languages, knowledge systems, and religious practices (Republic of the Philippines, 1997). Importantly, the law provides for the **Free, Prior, and Informed Consent (FPIC)** of indigenous peoples before any development, research, or government action can affect their territories or cultural expressions. The **National Commission on Indigenous Peoples (NCIP)** serves as the implementing body, ensuring that cultural rights are respected in both policy and practice (Gaspar, 2000).

This legislation highlights the power of aligning legal frameworks with indigenous customary law and participatory governance (Salazar, 2002). Malaysia—particularly in Sabah, Sarawak, and Orang Asli areas—can draw from this model to strengthen the legal recognition of native customary law and empower community-based heritage governance mechanisms (Nicholas, 2010; Mustafa, 2022).

## Lessons for Malaysia

From these comparative models, several key lessons emerge for Malaysia. First, **legal pluralism and participatory governance** should be embraced to ensure greater legitimacy and effectiveness in safeguarding intangible cultural heritage (ICH). As demonstrated in the Philippines through the Indigenous Peoples Rights Act (IPRA), recognising indigenous customary law and embedding Free, Prior, and Informed Consent (FPIC) protocols helps empower communities and respect their cultural autonomy (Republic of the Philippines, 1997; Salazar, 2002). Similarly, Indonesia's decentralised framework facilitates community-led inventories and heritage governance, reinforcing the importance of participatory approaches in legal and institutional mechanisms (Yuliawati, 2020).

Second, national heritage laws in Malaysia must **align with local practices and religious sensitivities**. Malaysia's multicultural and multi-religious fabric, as well as its federal constitutional structure, demand flexible legal instruments that can accommodate regional and spiritual variations in cultural expression (Mustafa, 2022). Indonesia's approach to cultural pluralism and the Philippines' harmonisation of statutory and indigenous systems illustrate the benefits of legal frameworks that are adaptable and responsive to local contexts (Hafstein, 2012; Nicholas, 2010).

Third, **institutional support and recognition mechanisms** are crucial for sustaining ICH transmission. Japan's Living Human Treasures system provides a compelling model for how formal recognition, state funding, and public prestige can work together to support heritage bearers (Agency for Cultural Affairs, Japan, 2020; Saito, 2006). Malaysia could benefit from establishing similar structures, including decentralised funding and training programmes, especially targeting younger generations and marginalised heritage communities (Mustafa, 2023).

In summary, Malaysia's path forward must be informed by both domestic realities and international best practices. While no single model offers a perfect solution, elements drawn from Indonesia's decentralisation, Japan's recognition system, and the Philippines' rights-based legislation offer concrete starting points. Together, they illustrate how legal pluralism, inclusive governance, and strategic state support can contribute to a more coherent and culturally sensitive framework for ICH protection in Malaysia (UNESCO, 2003; Yoshida, 2004).

To enhance the comparative utility of this analysis, we present a table summarizing the key lessons from Indonesia, Japan, and the Philippines and their potential application for Malaysia.

Country	Key Legal/Policy Mechanism	Key Lesson for Malaysia	Potential Application in Malaysia
Indonesia	Law No. 5/2017 on the Advancement of Culture; Decentralized Governance	Decentralization and participatory governance	Empowering states and local governments to manage ICH; fostering community-led inventories.
Japan	Law for the Protection of Cultural Properties; "Living National Treasures" system	Institutional support and practitioner-centered approach	Establishing a national recognition system for heritage practitioners; providing financial and institutional support.
The Philippines	<i>Indigenous Peoples Rights Act</i> (IPRA) of 1997; Free, Prior, and Informed Consent (FPIC)	Rights-based approach and legal empowerment	Strengthening the legal recognition of native customary law; ensuring FPIC for heritage projects involving indigenous communities.

The comparative analysis reveals that a one-size-fits-all approach to ICH safeguarding is ineffective. Indonesia's model underscores the importance of a decentralized framework that recognizes local authorities and communities in heritage management. Japan's system highlights the value of focusing on the bearers of ICH, while the Philippines' IPRA provides a powerful example of how a rights-based approach can empower indigenous communities to protect their heritage from legal or political overreach.



## A Way Forward for Malaysia: Recommendations and Implementation Pathways

Based on the foregoing analysis, we propose the following recommendations for a more robust and coherent legal framework for intangible cultural heritage (ICH) in Malaysia. We also provide specific implementation pathways to increase the practical value of these proposals.

### Recommendation 1: Constitutional Reform

The proposal is to amend the Federal Constitution to explicitly recognize and protect indigenous and community-based cultural heritage. This is an ambitious but essential long-term goal that requires a two-thirds parliamentary majority, making it subject to political constraints. A more pragmatic, phased approach is recommended, beginning with statutory amendments (e.g., to Act 645) and a progressive judicial interpretation of existing constitutional provisions in the short term. In the medium term, public and political dialogue should be initiated to build consensus and political will for constitutional recognition. The long-term goal would be to proceed with a constitutional amendment when there is sufficient political support and a clear legal and policy framework in place.

### Recommendation 2: Amending the National Heritage Act 2005

The proposal is to revise Act 645 to create a more decentralized and participatory framework for ICH. This can be implemented via executive action by the Ministry of Tourism, Arts and Culture (MOTAC) and subsequent parliamentary approval. Specific amendments could include the establishment of an Independent ICH Commission, which would act as a neutral arbiter in federal-state disputes and be tasked with harmonizing heritage policies. Additionally, a "Living National Treasures" scheme, inspired by Japan's model, could be formalized to provide official recognition and financial support to ICH practitioners. The Act should also mandate Free, Prior, and Informed Consent (FPIC) for any heritage project or inventory involving indigenous communities, drawing on the Philippine model.

### Recommendation 3: Pilot Projects in Specific States

The proposal is to implement pilot projects in states with significant cultural diversity and unique legal contexts. The implementation pathway for this would be for MOTAC, in collaboration with state governments, to launch these projects. For example, a project in Sarawak could develop a co-management framework for ICH with native communities, testing a rights-based, participatory approach. A project in Kelantan could focus on a consultative approach to ICH, engaging religious authorities, cultural practitioners, and community members in a dialogue to find common ground for the performance of traditional arts, thus demonstrating a practical pathway for navigating the complexities of religious-state heritage policy.

## CONCLUSION

This paper has argued that Malaysia's approach to ICH safeguarding is hindered by a conflict of laws and jurisdiction, particularly between federal and state powers. The case of *Mak Yong* demonstrates that a federal-centric approach is insufficient without a robust framework for resolving these conflicts. By drawing on the experiences of Indonesia, Japan, and the Philippines, we have outlined a series of recommendations that propose a fundamental shift towards a more decentralized, participatory, and rights-based approach. The implementation pathways provided offer a practical guide for moving beyond theoretical proposals to tangible legal and policy reforms. A successful future for Malaysian ICH safeguarding lies not in a top-down, uniform policy, but in a flexible and inclusive framework that respects the country's unique legal pluralism and constitutional realities.

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