

Bringing Life to Folklore: Problem of Definition

SAFINAZ MOHD HUSSEIN
MAHMUD ZUHDI MOHD NOR
NAZURA ABDUL MANAP

ABSTRACT

Folklore generally refers to the traditions which may include the music, storytelling, popular beliefs and customs practice of a community. These practices have achieved heritage status which needs legal protection. Nevertheless, the protection provided in the existing laws is not without flaws. The ambiguity of certain terminologies and the strict interpretation of legal terms have created hurdle in giving adequate protection to such works. This article aims at highlighting the problem of definition and scope of intangible heritage with special reference to folklore.

Keywords: folklore, definition, intangible cultural heritage, cultural heritage

ABSTRAK

Budaya rakyat biasanya merujuk kepada tradisi termasuk muzik, bercerita, kepercayaan yang masyhur dan adat yang diamalkan oleh komuniti tertentu. Amalan ini telah mencapai status warisan yang memerlukan perlindungan undang-undang. Walau bagaimanapun, perlindungan yang diberi oleh undang-undang sedia ada mempunyai kelemahan tertentu. Kekaburan dalam terminologi tertentu dan interpretasi yang tegas terhadap terma undang-undang menimbulkan halangan dalam menyediakan perlindungan yang cukup kepada hasil karya sebegini. Artikel ini bertujuan menjelaskan masalah definisi dan skop dalam warisan tidak ketara dengan rujukan khusus kepada budaya rakyat.

Kata kunci: budaya rakyat, definisi, warisan kebudayaan tidak ketara, warisan kebudayaan

INTRODUCTION

*Buah cempedak di luar pagar,
Ambil galah tolong jolokkan,
Kami budak baru belajar,
Kalau salah tolong tunjukkan.*

The above *pantun* is one of the most famous and most cited Malay *pantuns*. A *pantun* is a form of folklore, a unique and traditional Malay method of giving advice, seeking help, story telling and in conversation. While the practice of *pantun* is not yet demised, it is no longer a daily occurrence and the practice is now mostly found in certain traditional events (for example, during *kenduri*), literary works, speech, movies and songs. Authors of traditional *pantun* are unknown. Thus the practice of *pantun* is a form of folklore, a peculiar traditional practice in the Malay speaking world. Malaysia, being a multiracial and multicultural nation consisting of the orang asal, Chinese, Indian and others, enjoys a rich corpus of cultural heritage, be it tangible or intangible. Certain cultural expressions of the people of Malaysia may have their origin, arguably, from its Indonesian, Thailand and Philippines (the Malay Archipelago) counterparts, while the Chinese and Indian community may owe cultural origin in China and India respectively.

In fact, there are also other cultural origin in Malaysia such as the Arab and the Portuguese. Heritage objects (of intangible nature) listed under the National Heritage register reflects this multi-racial richness. While certain folklore is deeply shared and practised by Malaysians, it may have its origin in other countries and thus any attempt in determining cultural ownership may become a particularly sensitive issue. There were numerous media based lashing against Malaysia by Indonesian counterparts for alleged 'cultural thefts' involving, most notably, the folk song 'rasa sayang' and the 'batik' clothes in recent years. Thus, there is a greater need for cultural sensitivity especially on the part of the very people working in this area. This body of heritage needs protection for various reasons. One major reason on why protection mechanism is needed is for the retention and sustainability of heritage in the national or even in the global context. Heritage objects, sites, monuments and other intangible heritage are a reflection of a nation's cultural identity. Moreover, protection mechanisms are increasingly becoming the tool to protect commercial value and moral rights. For the purpose of this article, the main objective is to highlight the problems of definition and scope of intangible heritage with special reference to folklore.

TERMS AND CONCEPTS

Intangible Heritage

'Cultural heritage' includes tangible and intangible form of cultural property, structure or artefact and may include a heritage matter, object, item, artefact, formation, structure, performance, dance, song, music that is pertinent to the historical or contemporary way of life of Malaysians, on or in land or underwater cultural heritage of tangible form but excluding natural heritage.² The Malaysian National Heritage Act 2005 defines '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.³ ICH is something that is closely related, if not the same, to folklore. Intangible cultural heritage (ICH) encompasses living expressions and the traditions that countless groups and communities worldwide have inherited from their ancestors and transmit to their descendants, in most cases orally. The need to protect them stems from the fact that lucrative international trade and commercial exploitations of cultural heritage were blooming. However, the people or community which were the sources and preservers of the heritage receive little economic benefit out of it. On the international level, the 2003 UNESCO Convention for the safeguarding of intangible cultural heritage in Article 2 defines intangible cultural heritage as 'the practices, representations, expressions, knowledge, skill as well as the instruments, objects, artefacts and cultural spaces associated therewith.' To this effect and more important, are their transmission, constant recreation (in response to environment and interaction with nature) and history which identify these traditions to a particular group or community or individuals.⁴

Folklore

The term 'folklore' is difficult to define and discussions on its protection rarely refer to a particular unanimously accepted definition. Defining it in accordance to the instruments that provide for its protection is also a challenging task because the definition offered, or the lack of it, by each instrument depends on the scope of protection and objects of the instruments concerned.⁵ However, this is not a problem uncommon under the law of treaty and to compound the matter, it is widely accepted that 'culture', which includes folklore, is susceptible to subjective interpretation.

Literally, 'folklore' means 'the traditional beliefs, myths, tales, legends, customs (practices of people),

transmitted orally; a body of widely accepted but usually specious notions about a place, group or institution.' The word 'folk' refers to people in general but specifically it refers to the common people of a society or region especially as the originators or carriers of the customs, beliefs and arts that make up a distinctive culture.' The word 'lore' refers to "accumulated facts, traditions or beliefs about a particular subject or knowledge acquired through education or experience."⁶ It refers to the body of knowledge of people in general. Thus, the term folklore commands a wide coverage. The Model provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (hereinafter the 'Model Provisions') by WIPO and UNESCO in 1985 divided 'expressions of folklore' into two categories. One category covers tangible expressions and the other includes in it verbal expression (such as folk tales, folk poetry, and riddles), musical expression (such as folk songs and instrumental music), and expression by action (such as folk dances, plays and artistic forms or rituals). Tangible expression, under the Model Provisions, includes production of folk art like paintings, drawings, pottery and textiles; musical instruments and architectural forms.⁷ In addition, the term 'traditional cultural expressions' (TCE) has also been employed by WIPO when referring to 'expressions of folklore' (EF).⁸

Thus, it can be concluded at this juncture that folklore, ICH, EF or TCE are terms which refer to a body of knowledge consists of traditional expressions communicated through the generations in various forms which include verbal, musical, art, musical instrument and architectural designs. It is not limited to its intangible form but may include tangible forms of these expression.

As mentioned earlier, the term 'cultural heritage' includes tangible or intangible form of cultural property, structure or artefact and may include a heritage matter, object, item, artefact, formation structure, performance, dance, song, music that is pertinent to the historical or contemporary way of life of Malaysians, on or in land or underwater cultural heritage of tangible form but excluding natural heritage.⁹ Technically speaking, the terms intangible heritage and cultural heritage as used under NHA 2005, sufficiently cover folklore as discussed above. Whether it was a matter of intentional omission on the part of the drafter of the new law is anyone's guess. As far as the intellectual property regime involving folklore is concerned, this position is also in line with the practice under Berne Convention, which does not define folklore, and of which Malaysia is a party to.

According to literal definition of the word folklore it is limited to oral transmission of knowledge of a particular group through education or experience. Literal definition of cultural heritage is a socially transmitted human work and thought a group which is inherited.

Comparing the literal definition of these two terms, it can be concluded that the difference between the two is the element of oral transmission. Hence, folklore can be said not to include tangible items of a culture and heritage. Therefore cultural heritage is of a wider scope. However, if difference between the two is taken from the legal interpretations by the various international organizations above, expressions of folklore includes tangible expressions like architectural designs and instruments. However, the Malaysian National Heritage Act 2005 do not define the word 'folklore' and as opposed to UNESCO's definition of intangible cultural heritage, the National Heritage Act 2005 do not include tangible items of cultural heritage in its definition. Hence, analogous to the literal definition of folklore.

PROTECTING FOLKLORE AS NATIONAL HERITAGE IN MALAYSIA

Within the international law regime, Malaysia is a party to certain international instruments relating to natural and cultural heritage protection.¹⁰ The main international convention on cultural heritage of which Malaysia is a party is the 1972 UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage, which was designed to 'mobilise international cooperation' in areas involving 'the protection of the cultural and natural heritage of mankind' but its coverage leans towards the tangible aspect of cultural heritage protection. The other more recent international instrument on cultural heritage is the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, of which Malaysia is not yet a party.¹¹ This Convention is important as it calls upon State parties 'to ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory' and this is achieved by adopting "appropriate legal, technical, administrative and financial measures aimed at ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage."¹² Despite being a non-member to various international treaties and legal development on heritage conservation, Malaysia has to a certain degree been influenced by international legal development on the subject. In the legal regime protecting underwater cultural heritage, there is also a clear influence of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage on the formulation of NHA 2005 definition's of the subject matter even though Malaysia is yet a party to this Convention. Such global influence reflects the universal need to protect heritage. Indeed, prior to rising global understanding of cultural heritage and its associated terms, 'cultural heritage' was neither in the Federal or State list under the Federal Constitution. Today, cultural heritage is placed in the concurrent list. Thus, a matter both for the Federal government and the State governments to legislate.¹³

The Commissioner of Heritage, who heads the Department of Heritage, implements and enforces the NHA 2005. The Department, which is placed under the Ministry of Information, Communication and Culture, is responsible for the overall administration of heritage issues throughout the Federation. Her duties under the Act are numerous.¹⁴ The Commissioner is also supported by National Heritage Council, whose principal duty is to advice both the Minister and the Commissioner 'on all matters relating to heritage' as well as 'any matter referred to it by the Minister or the Commissioner.' The Mak Yong Theatre was proclaimed as the Masterpieces of Oral and Intangible Heritage of Humanity in 2005.¹⁵ This signifies an international recognition and a milestone for the Department of Heritage¹⁶ and the people who have worked to achieve that. To date, various heritage objects (which include the intangible heritage) have been nominated and listed in National Register.¹⁷

QUESTION OF OWNERSHIP AND INACCURATE USE OF THE TERM 'HERITAGE OBJECTS'

To carve an exhaustive list of intangible heritage in the form of folklore here would be impossible for want of space. Not only because the term 'heritage' may be susceptible to subjective interpretation, it is an ongoing task shouldered by the Department of Heritage. The Commissioner for Heritage plays an important role in determining whether an 'object' of folklore is of 'cultural heritage significance'. The process involves, as provided under National Heritage Act 2005, registration of such objects and listing them 'as a heritage object in the Register'.¹⁸ As for the question of ownership of heritage objects, the National Heritage Act 2005 provides that "any objects discovered after the date of the coming into operation of this Act shall be the absolute property of the Federal Government provided that where the object is discovered on an alienated land, compensation may be paid to the owner of the land."¹⁹ Oddly, this provision seems to refer to tangible property for it contains reference to 'object' found on land and this refers to properties whose owners are not known,²⁰ and those located on the bed of river or sea.²¹ In addition, in dealing with the question of compensation reference is made to tangible property located on land.²² However, since the definition of 'object' as discussed earlier also refers to the intangibles, it could be presumed that the intention of the drafter here should be that the determination of proprietary rights in heritage objects includes the intangibles. Plausible conclusion at this juncture is that this is a legislative error. For one, it is questionable whether the term 'object' or 'heritage objects' could sustain a suitable generic use in order to include the intangible. If they are indeed accurately used, one could also question whether all those provisions relating to proprietary rights, dealings and offences relating to

'heritage object', 'object' and 'national heritage', were also designed to deal with the intangibles. All relevant provisions are reproduced below:

(a) Section 113 on certain offences relating to 'heritage object' reads:

any person who destroys, damages, disfigures, disposes or alters a tangible cultural heritage, without a permit issued by the Commissioner, commits an offence and shall on conviction be liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding fifty thousand ringgit or to both.

(b) Similarly with reference to 'national heritage', section 114 provides:

(1) No person shall, without the written approval of the Commissioner, transfer, demolish, remove, alter, renovate, export, add to or deal with any National Heritage except in case of urgent and immediate necessity for the safety of persons or property.

(2) Any person who contravenes subsection (1) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.

It is not difficult to conclude that the creation of the abovementioned offences is clearly one which is designed for the protection of tangible cultural property absent those concerning intangible cultural heritage. Certainly, there is certain need to clarify and strengthened safeguard measures relating to ICH under the Act. Thus, the main provision which specifically deals with intangible heritage is laid down in section 60 which provides, thinly, on the conservation of intangible cultural heritage. It reads:

(1) The owner or custodian of a heritage object in the form of 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.

(2) 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.

Until 'special guidelines' on the protection of ICH under NHA 2005 is made, no thorough analysis can be offered on section 60. What is clear on the wordings of this provision that it is now a 'duty' on the part of the owner or the custodian of ICH to take all the 'necessary steps...' mentioned above but sophistication of the provisions are not ones to be compared to the more

established protection of tangible cultural heritage, which is the more visible domain covered under NHA 2005 with its extensive rules and related nuances.

CONCLUSION

It is a reality that the law, whose purpose includes the protection of individual's rights may at times do exactly the opposite. In the case of protection of folklore it can be argued to a certain extent that this is exactly the general picture and the problem seems to start from the basics as to what is folklore. Does it cover tangible items of cultural heritage or just its other sibling, the intangibles. The Malaysian National Heritage Act 2005 seems to suggest that ICH covers oral transmission only, however, this does not correspond to the explanation of expressions of folklore by WIPO and UNESCO. On the other hand, the same statute offers somewhat confusing application of the term heritage objects. While a heritage object may include an intangible cultural heritage, the rules and offences provision under the National Heritage Act 2005 seem rather fashioned for the protection of tangible cultural heritage, not its intangible aspect despite the existence of some provisions on ICH. Registering an 'object' of ICH nature under the Act is, though some argue that it is a kind of measure for protection, is hardly effective if erudite protection mechanism which address its own concerns are absent. Assumptions may be made that this is error of an overlook or perhaps more time is needed to consider suitable methods of protection for ICH and folklore. For one, whether folklore should be protected under intellectual property laws or heritage laws, clearly an issue not addressed by NHA 2005. To conclude, it is therefore of no wonder that there has been a constant debate on how should folklore be protected because the interpretation of what is folklore is still a debatable.

NOTES

¹ Malay wedding ceremony.

² Section 2, National Heritage Act 2005.

³ Section 2, National Heritage Act 2005.

⁴ UNESCO, Convention for the Safeguarding of Intangible Cultural Heritage, Paris, 17 October 2003, available at <http://www.unesco.org/culture/ich/index.php?pg=00006> (12 April 2010).

⁵ For example; 1886 Berne Convention on the Protection of Literary and Artistic Works, 1972 UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage, 1972, 1989 UNESCO Recommendation on the safeguarding of Traditional Cultural Expressions and the 2003 UNESCO Convention on the Safeguarding of Traditional Culture and Folklore. See also; The 1985 Model provisions for National Laws on the Protection of Expressions of Folklore

against Illicit Exploitation and Other Prejudicial Actions. For more discussion and approach on issues of definition; Blake, J., *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration*, UNESCO, Paris, 2002, Irini Stamatoudi, The protection of intangible property by means of the UNESCO Convention on the safeguarding of intangible heritage and intellectual property law, 57 (2004) RHD1 149; Weerawit Weeraworawit, Formulating an international legal protection for genetic resources, traditional knowledge and folklore: Challenges for the intellectual property system, Cardozo J. of Int'l Comp. Law, Vol 11, p 769.

⁶ *The American Heritage College Dictionary*, 4th Edition, Houghton Mifflin Company, Boston, New York 2007.

⁷ Section 2, Model provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, (WIPO & UNESCO), 1985.

⁸ Revised Provisions for the Protection of Traditional Cultural Expression/Expressions of Folklore, WIPO website at <http://wipo.int/tk/en/folklore/index.html> (12 April 2010).

⁹ Section 2 NHA 2005.

¹⁰ Agreement on the Importation of Educational, Scientific and Cultural Materials, with Annexes A to E and Protocol annexed. Florence, 17 June 1950; Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954; Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972; Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971; International Convention against Doping in Sports, Paris, 19 October 2005.

¹¹ As a matter of practice, Malaysia would only ratify or accept a particular Convention when efforts have been made to ensure that domestic laws are in conformity with the objectives and principles underpinning a particular Convention.

¹² Article 13(d) of the 2003. See also the Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, available at <http://www.unesco.org/culture/ich/doc/src/00410-EN.pdf> (10 April 2010).

¹³ There is a number of state-level legislation on cultural heritage protection in Malaysia. However, for the purpose of this paper, attention goes to the NHA 2005 which came into force on 30 March 2006. This Act repealed the Antiquities Act 1976. There are two other Federal legislation that relate to heritage issues; i.e., the National Library Act 1972 (Amendment) 1987 as well as the National Archive Act 2003, will be excluded from discussion for they deal with issues beyond the concerns of this paper.

¹⁴ The main functions of the Commissioner is outlined under the Act are:

(a) To determine the designation of sites, registration of objects and underwater cultural heritage;

(b) To establish and maintain the Register and to determine and specify the categories of heritage to be listed in the Register;

(c) To supervise and oversee the conservation, preservation, restoration, maintenance, promotion, exhibition and accessibility of heritage;

(d) To promote and facilitate any research relating to heritage;

(e) To authorize, monitor and supervise excavations for heritage purposes;

(f) To maintain documents relating to any excavation, exploration, finding or research for heritage;

(g) To establish and maintain liaison and co-operation with the State Authority in respect of conservation and preservation of heritage matters;

(h) 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;

(i) To promote and regulate that best standards and practices are applied in the conservation and preservation of heritage;

(j) To advise the Minister with regard to any matter in respect of conservation and preservation of heritage;

(k) To perform such other functions under this Act as the Minister may assign from time to time; and

(l) To do all such things as may be incidental to or consequential upon the discharge of his powers and functions.

¹⁵ Mak Yong is an ancient theatre practiced by Malaysian's Malay communities in the State of Kelantan involving 'acting, vocal and instrumental music, gestures and elaborate costumes.' Specific to the villages of Kelantan in northwest Malaysia, where the tradition originated, Mak Yong is performed mainly as entertainment or for ritual purposes related to healing practices.

¹⁶ The department was established soon after the coming into force of NHA 2005.

¹⁷ Department of Heritage website at; <http://www.warisan.gov.my>

¹⁸ However, 'where the application involves intangible cultural heritage in which copyright subsists, the consent of the copyright owner shall be obtained before the application is approved.'

¹⁹ NHA 2005, Section 48(1) Ownership of the underwater cultural heritage for instance is subject to certain other rules under the Act.

²⁰ Section 48(3): 'Every object which before the date of the coming into operation of this Act is not owned by any person or the control of which is not vested in any person as a trustee or manager, shall be deemed to be the absolute property of the Federal Government.'

²¹ Section 48(4): 'All undiscovered objects whether lying or hidden beneath the surface of the ground or in any

river or in the sea, shall be deemed to be the absolute property of the Federal Government but if the said object is at a later date found to be discovered on or in an alienated land the provisions of subsections (1) and (2) shall apply.'

²² See also on the determination of "value" of property, subsection (2) provides that 'a competent heritage valuer may be appointed by the Commissioner to decide on the value of the object for the purposes of ascertaining the amount of compensation, and the decision of the competent heritage valuer shall be final.' This valuation refers to issue of compensation of tangible property situated on 'alienated land', which is privately owned.

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Dr. Safinaz Mohd Hussein
Associate Professor
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi
Selangor.
Email: finaz@ukm.my

Dr. Mahmud Zuhdi Mohd Nor
Senior Lecturer
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi
Selangor.
Email: zuhdi@ukm.my

Dr. Nazura Abdul Manap
Associate Professor
Faculty of Law
Universiti Kebangsaan Malaysia
43600 UKM Bangi
Selangor.
Email: nazura@ukm.my