

## **Preservation Of Cultural Heritage In Malaysia: An Insight Of The National Heritage Act 2005**

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*The National Heritage Act 2005, the only specific statute on the preservation of cultural heritage is seen to have given a narrow definition and scope of cultural heritage; unlike the broad scope of cultural heritage given by authors. The differentiation between 'Heritage' and 'National Heritage' in the National Heritage Act 2005 is provided in the Act and due to limited literatures on the legal aspects of the administration of cultural heritage it is timely that the administration of cultural heritage is disclosed. Apart from focusing on the issue of scope of cultural heritage in Malaysia, this paper highlights the significant role of the Commissioner of Cultural Heritage in the Act and emphasises that it should be properly exercised. The absence of archaeological impact assessment and the kind of protection provided to the listed item or objects in the Register are also points highlighted in this paper. The paper concludes with the recommendation that Malaysia should move towards a more active participation in various international conventions relating to preservation of cultural heritage.*

**Key words:** cultural heritage, national heritage, intangible cultural heritage, conventions

### **Introduction**

During the Eighth Malaysian Plan period, the development of culture was promoted to enhance national identity while strengthening national unity, harmony and integration. Besides, various aspects of culture were developed to offer a myriad of products and services that supported the growth of the tourism industry. Greater emphasis was given to the development of culture, arts and heritage when the Ministry of Information, Communications and Culture was set up in 2004. The Ministry has a role to consolidate policy and programmes that further promote Malaysia's culture, arts and heritage as well as to formulate new strategies to make the arts more accessible to the masses. Cultural heritage have been promoted as a source of economic growth. In the Ninth Malaysian Plan, the National Heritage Act 2005 (hereinafter referred to as the NHA 2005) was enacted to give protection and preserve various tangible and intangible cultural heritage and has been promoted for the tourism industry. RM442.2 million was allocated for culture, arts and heritage programmes, where 63 percent was used for the preservation and conservation of cultural heritage.

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## **Overview of National Heritage Act 2005**

Preservation of heritage came under a joint jurisdiction between Federal and State Government. This is pursuant to an amendment made in the Parliamentary Session of January 2005 where the Ninth Schedule of the Federal Constitution was amended to include the preservation of heritage in the Concurrent List. The effect is that, either the Parliament or the State Legislative Assembly may make law relating to heritage.

The prevailing law passed by the Parliament relating to heritage is the NHA. Before the NHA was gazetted on 31st of December 2005 and came into effect on 1st of March 2006, only the Antiquities Act 1976 (Act 168) was adopted for the conservation and preservation of National Heritage relating to treasure trove, monuments and cultural heritage in Malaysia. The Treasure Trove Act (Act 542) is also related to the discovery of treasure trove but its implementation fell under the jurisdiction of the State Government. The NHA covers various matters on heritage that include but not limited to intangible cultural heritage.

## **Scope of Cultural Heritage**

Definition of cultural heritage varies from writers to writers. One defines it as a corpus of a material signs, either artistic or symbolic which is handed on by the past to each culture.[1] Others view that cultures are diverse throughout nations and it is seemingly differs from one state law to another. It may be composed not only those elements with most impact being declared as items of cultural interest, but also of all those items which possess the cultural values determined by the law.[2] The Canadian law further provides that heritage is a reality, a possession of the community, and a rich inheritance that may be passed on, which invites recognition and participation from the public.[3] Moreover, UNESCO defines intangible cultural heritage as the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.[4] 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.[5]

Although cultural heritage is recognized under section 2 of the NHA, unlike various definitions of cultural heritage discussed above, cultural heritage under the NHA is confined to heritage sites, heritage objects, underwater cultural heritage and intangible cultural heritage which are confined to forms of expressions, sounds and music, dances and performances. It would appear that the wider scope of cultural heritage discussed earlier is not covered in the NHA. The Minister under the NHA may, by order published in the Gazette, declare any heritage site, heritage object, underwater cultural heritage listed in the Register or any living person as a National Heritage [section 67(1)] and the minister has declared living heritage treasures under the NHA.

It would seem that social practices, for example, rituals and festive are not really the protected cultural heritage under this NHA. This explains why the living heritage, for instance villages which as a whole having heritage value would not qualify listed items of heritage under the NHA.

## **Administration of Cultural Heritage**

The NHA vests powers in the authorities to conserve Malaysian built and natural heritage, tangible and intangible cultural heritage, and traditional, arts and culture and other manifestations such as heritage food and heritage persons. The Minister is responsible for the policies needed for the conservation and preservation of heritage. Besides the policies, the Minister is responsible for any statement or directives with regard to the same in respect of any matter, business, strategy or conduct. However, it should be noted that the Minister shall not interfere with the matter if it falls under the power or jurisdiction of a State unless the relevant State Authority has been consulted.[6]

The name of the Ministry gradually changes from time to time. The current Ministry of Information, Communications and Culture was previously known as the Ministry of Culture, Art and Heritage. The current Minister has made a lot of contributions in bringing forward Malaysia's cultural heritage into the UNESCO listings especially after the coming of the NHA. Malaysia has become one of the World Heritage Committee since then. As a deputy Chairman of the Committee, the Minister suggested that it is time for Malaysia to become a signatory to several conventions such as the 1972 Convention.

Section 4 of the NHA also recognises the establishment of Commissioner for Heritage. The Commissioner is also known as the Director General for Heritage of the Department of Heritage under the Ministry of Information, Communications and Culture. Section 6 of the NHA lays down various functions of the Commissioner including but not limited to Malaysia's cultural heritage.

Firstly, the Commissioner has to determine the designation of sites, registration of objects and underwater cultural heritage. The success of the Commissioner is evident in the designation of Lenggong Valley as a result of discovery and preservation of Perak Man in 1991. Secondly, the Commissioner establishes and maintains the Register and to determine and specify the categories of heritage to be listed in the Register. In this aspect, the Commissioner is to advise the Minister in deciding 'National Heritage' and 'Heritage' under the NHA. 'National heritage' is subscribed by the Minister and 'Heritage' is subscribed by the Commissioner. Section 67(3) of the NHA provides for grounds that the Minister may consider in determining certain object as National Heritage.

The Minister may inscribe a particular cultural heritage as 'National Heritage' on several grounds.[7] They are historical importance, association with or relationship to Malaysian history, involving social or cultural associations, having potential to educate, illustrate or provide further scientific investigation in relation to Malaysian cultural heritage, important to exhibit a richness, diversity or unusual integration of features, rarity or uniqueness of the natural heritage, tangible or intangible cultural heritage or any other matter which is relevant to determination of cultural heritage significance. The Commissioner also supervises and oversees the conservation, preservation, restoration, maintenance, promotion, exhibition and accessibility of heritage.

The Commissioner also maintains documents relating to any excavation, exploration, finding or search for heritage pursuant to the same section. The Commissioner also establishes and maintains liaison and co-operation with the State Authority in respect of conservation and preservation of heritage matters. One example is that after the Lenggong Valley is listed as one of the World Heritage Site, the Department of National Heritage works with the Perak State Authority to ensure

continuous development of the valley to attract tourist, thus, brings economic returns to the country.

The Commissioner advises and co-ordinates with the local planning authority, the Council and other bodies and entities at all levels for the purpose of safeguarding, promoting and dealing with heritage. An example is when the Commissioner conducts workshops, exhibitions, programmes and activities for Malaysian people about Malaysian heritage such as the performance in the Puteri Saadong theatre have inculcate youngsters interest in the story of Puteri Saadong. The tasks of the Commissioner extends to promote and regulate the best standards and practices are applied in the conservation and preservation of heritage. These standards have to be met because maintenance is always one of the hardest tasks. The Commissioner also bears the responsibility to advise the Minister with regard to any matter in respect of conservation and preservation of heritage. Section 6 also provides that the Commissioner shall perform such other functions under the NHA as the Minister may assign from time to time and to do all such things as may be incidental to or consequential upon the discharge of his powers and functions.

Administration of heritage in Malaysia also involves the establishment of the National Heritage Council. Part IV of the NHA provides for the establishment of the National Heritage Council pursuant to section 8. The functions of the Council are firstly, to advise the Minister and the Commissioner on all matters relating to heritage, and due administration and enforcement of laws relating to heritage; and to advise the Minister and the Commissioner on any matter referred to it by the Minister or the Commissioner. However, it should be noted that paragraph 2 of section 9 does not make it compulsory for the Minister and the Commissioner to act upon the advice of the Council.

Members of the Council consists of a Chairman who is appointed by the Minister, Secretary General of the Ministry of Information, Communications and Culture or his representative, the Director General of Town and Country Planning or his representative, the Director General of the Museums and Antiquity Department or his representative, the Commissioner and not more than six other members. Of all the committees involved in the conservation and preservation of cultural heritage, the Commissioner seems to have the most significant roles.

### **Selection Process Of Cultural Heritage**

The NHA provides that the Commissioner has the responsibility to declare any object as having a cultural heritage significant.[8] The Commissioner is given the power to declare in the gazette any heritage object having cultural heritage significance. The Commissioner is given the power to register any heritage object having cultural heritage significance in the Register.[9] The Commissioner is also given the power to cause it to be published in the Gazette and local newspaper. The Commissioner under the NHA has the jurisdiction in this matter except that consent must be given by the owner of that particular object.[10] It should be emphasized that the wide discretion of the Commissioner should not be misused.

It is viewed that not all cultural heritage of Malaysia are listed in the Register unless the Commissioner and the public is actively involved in identifying certain objects as having cultural heritage significance. It is also viewed that the NHA, in particular section 49 is vague as to the roles of the community to inform or propose to the Commissioner about heritage objects. Besides, the NHA is silent as to the criteria of listing an object as of having cultural heritage significance as compared to those

being listed as National Heritage. The Commissioner is also required to discuss with the State Authority on what is a 'Heritage' if it involves both federal and state jurisdiction.

### **Public Participation**

Community members can immediately notify the Commissioner or other relevant officers of the district where the object was discovered, and deliver the object to the Commissioner or other relevant officers.[11] This provision discusses the role of the community members that is to identify items that have cultural heritage significance and inform the Commissioner for further action.

The public has a role in preserving Malaysia's cultural. If a person is recognised that a person is the owner or in possession of the cultural heritage object including the intangible cultural heritage, this person must work together with the relevant bodies to develop, inter alia, research on it with the help from the Commissioner for Heritage.[12]

As mentioned earlier, the Minister may inscribe any object to be a National heritage pursuant to section 67. Here, the public has a role to participate in nominating any object having cultural heritage significant to be declared as a National Heritage.[13] However, these provisions are only a persuasive provision as the NHA is silent as to the obligatory duty of the public to safeguard cultural heritage. Hence, the public may choose not to nominate certain heritage which is important to the nation. This is a disadvantage to Malaysia's progress in promoting and preserving its cultural heritage at a macro and international level. It is suggested that there is a provision to make it obligatory for the public to participate in the preservation of cultural heritage. The obligation provision should also include the public participation regarding the discovery of Underwater Cultural Heritage.[14]

It is also suggested that other matters that need to be included in the NHA are detailed provisions regarding the qualification of the Members of the Council for Heritage, the Commissioner, members of the National Heritage Department and any other person or body who are having a direct involvement in safeguarding Malaysia's cultural heritage. This would ensure that preservation of cultural heritage is under the jurisdiction of qualified persons.

### **Absence of Archaeological Impact Assessment Provisions**

The inclusion of archaeological impact assessment (AIA) study has yet to be made mandatory in all planning projects in Malaysia. Absence of such criteria has caused lost of archaeological objects and sites as evident in the formation of *Tasik Kenyir*, Terengganu. Before the creation of the *Tasik Kenyir*, there were probably several caves accessible and some were of archaeological importance which could contribute to the tourism industry. However when the area was flooded, most of the caves were lost underwater and among others, *Batu Tok Bidan cave* in *Gunung Bewah* was one of those.

Unfortunately, the preservation of cultural heritage is questioned as there is absence of archaeological impact assessment as a criterion in the development of projects as can be seen in the practices in many development projects even after the introduction of the NHA. It should be noted that the NHA is also silent on the criteria of AIA.

## **Effect of Listing of Cultural Heritage**

Various departments, agencies, associations and non-governmental organizations are already putting their effort to inculcate the value or at least to inform the very existence of intangible cultural heritage among Malaysians and take the initiative to promote it through various medium to ensure it will last forever.

The NHA illustrates the involvement of various authorities in the conservation management plan.[15] The conservation management plan is prepared by the Commissioner with due consultation from the Council for Heritage. This plan must be submitted to the State Authority or the relevant local planning authority. The Commissioner must give advice and coordinate with the relevant authority in implementing the Conservation management plan.

However, the law is silent as to the kind of protection provided to the listed item or objects in the Register. It is viewed that, it is important that the NHA make it mandatory for the relevant authorities to take further steps or initiatives to sustain the listed item or objects in whatever mechanisms possible.

## **International Participation**

The current Minister has been appointed as the Deputy Chairman to the World Heritage Committee from 2011 until 2015. This shows an openness of Malaysia to be actively involved in preserving and promoting cultural heritage at world level. On the 7<sup>th</sup> December 1988, Malaysia ratified the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (the 1972 Convention) which is also known as World Heritage Convention. Malaysia has become one of the State Parties since then. State Parties are countries which have adhered to the 1972 Convention. Hence, Malaysia agrees to identify and nominate properties on its national territory to be considered for inscription on the World Heritage List. UNESCO provides that when a State Party nominates a property, it gives details of how a property is protected and provides a management plan for its upkeep. States Parties are also expected to protect the World Heritage values of the properties inscribed and are encouraged to report periodically on their condition. This convention only focuses on the tangible heritage. It is viewed that intangible cultural heritage has no place in the 1972 Convention. It should be noted that Malaysia is yet to ratify other international conventions for example the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, the Safeguarding of Traditional Culture and Folklore Convention 1989, and the Universal Declaration on Cultural Diversity of 2001.

## **Conclusion**

Though the enactment of NHA is a good sign of preservation of cultural heritage in Malaysia, however, there issues highlighted in this paper clearly indicate that, it is timely that the NHA be revised. Through the adoption of various guidelines in various conventions regarding the preservation of cultural heritage, it is believed that the NHA can be upgraded towards achieving the goal of preservation of cultural heritage. Hence, Malaysia should move towards a more active participation in various international conventions relating to preservation of cultural heritage.

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## **Notes**

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- [4] Article 2 of the 2003, UNESCO Convention (Intangible Cultural Heritage). Convention for the Safeguarding of the Intangible Cultural Heritage. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.
- [5] Article 2 of the 2003, UNESCO Convention (Intangible Cultural Heritage). Convention for the Safeguarding of the Intangible Cultural Heritage. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.
- [6] Section 3 of the NHA
- [7] Section 67 of the NHA
- [8] Section 49 (1) of the NHA. It should be noted that ‘object’ includes intangible cultural heritage defined in section 2 of the NHA.
- [9] Section 49 of the NHA
- [10] Section 49 (2) of the NHA
- [11] Section 47 of the NHA
- [12] Section 60 of the NHA
- [13] Section 68 of the NHA
- [14] Section 61 of the NHA
- [15] Section 46 of the NHA