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ISSN: 2222-6990

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To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v11-i11/11472> DOI:10.6007/IJARBSS/v11-i11/11472

Received: 12 September 2021, **Revised:** 16 October 2021, **Accepted:** 30 October 2021

Published Online: 25 November 2021

In-Text Citation: (Mustafa & Abdullah, 2021)

To Cite this Article: Mustafa, N. A. binti, & Abdullah, N. C. (2021). Intangible Cultural Heritage as Right to Livelihood. *International Journal of Academic Research in Business and Social Sciences*, 11(11), 2079–2092.

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Vol. 11, No. 11, 2021, Pg. 2079 – 2092

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ISSN: 2222-6990

Intangible Cultural Heritage as Right to Livelihood

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Abstract

Constitutional provisions in Malaysia seem to have given rights to the communities, groups, and individuals (CGIs) to manifest and protect their intangible cultural heritage under the notion of the right to livelihood. However, the rights granted to the people appear to be restricted under the existing legal framework, and this has raised the question of whether a violation of human rights as guaranteed under the Federal Constitution has occurred, in view of the position of Islam as the religion of the Federation. Apart from focusing on the issue of the groups and individuals' right to livelihood in practicing traditional performances in Malaysia, this paper highlights the significant role of the concerned authorities under the relevant intangible cultural heritage-related legislations. The importance of substantial and procedural fairness to enable groups and individuals to practice intangible cultural heritage as their right to livelihood is also highlighted in this paper. The paper concludes with the recommendation that state authorities' control of intangible cultural heritage practices must be exercised with due care and diligence to ensure that the livelihood of the people is not jeopardized, in line with Articles 5 and 8 of the Federal Constitution.

Keywords: National Heritage, Intangible Cultural Heritage, Conventions, Right to Livelihood

Introduction

Malaysia is a country of diverse culture and has always been known for its rich culture embedded within the life of its people. Examples of intangible cultural heritage (ICH) are Makyung and Wayang Kulit which had gained UNESCO recognition. Makyung is a Malay traditional dance theatre combining acting, dance, singing, drama, romance, and comedy in a single presentation. This form of dance theatre is believed to be originated from the old Malay Kingdom - stretching from the Patani region of southern Thailand through Kelantan, a northeastern state of West Malaysia. The art of Makyung performance is handed down through the generations, whose teaching were memorized by a handful of actors, musicians, and comedians. One of the unique features of this dance theatre is that the main characters are all women, and the men play the peripheral characters to add humor and side relief to its intricate web of multiple plots. 'Wayang Kulit' or shadow play is an old cultural entertainment using shadows cast by intricately carved puppets in relaying mythical parables of good versus evil. The Malay culture is a confluence of cultures. As such, the wayang kulit depicts scenes from the Hindu epics such as the Ramayana and the Mahabhrata and merges Kelantanese folklore with elements from the Ramayana.

By using a library-based approach, where the analysis of relevant legislations, decided cases, and journal articles is made, this paper discusses the rights of the communities, groups, and individuals (CGIs) to manifest and protect their intangible cultural heritage under the notion of the right to livelihood under the legal framework in Malaysia in view of the position of Islam as the religion of the Federation. This paper also highlights the significant role of the concerned authorities under the relevant intangible-cultural heritage-related legislations and the importance of substantial and procedural fairness to enable groups and individuals to practice ICH as their right to livelihood.

Literature Review

A number of works of literature have highlighted the society's role as a transmitter of past ICH to the present day and the future. Some authors pointed out that transmitting the ICH through the experience of the local inhabitants may also contribute to the economic growth (Petronela, 2016; Mateja, David, & Primoz, 2015). Some authors found that art, culture, and heritage have a significant influence on revenue of European Union countries, hence improving the livelihood of the local communities (Petronela, 2016; Borza & Manolescu, 2015). Many authors provide findings on the participation of people in the traditional performances in Kelantan regardless of their race and religion (Lim, 2011; Ghani, 2012; Ishiguro, 2018). However, Some authors found that features of values, meanings, customs, and knowledge systems of communities that affirm identity and diversity have been frequently ignored in development planning play (Dascon & Binns, 2009). D'Amato in 1982 highlighted the idea of human rights which is related to the safeguarding of intangible cultural heritage (D'Amato, 1982). However, Silverman & Ruggles (2007) argued that a number of international conventions on human rights did not clarify how conflicts among communities, groups and individuals could or should be resolved (Silverman & Ruggles, 2007). KG Pillay, in 1999 once highlighted that the combined effect of Articles 5(1) and 8(1) of the Malaysian Federal Constitution means that there is a constitutional right to procedural fairness (KG Pillay, 1999). However, there is a lacunae in terms of preserving some of the traditional performances in Malaysia, particularly in Kelantan (Musa & Yunos, 2011; Noor Din, 1990; Ilias, Ahmad & Zubir, 2012). Many authors suggested that the culture of the Malays is reflected in the identity of Malays who should be more adventurous, more willing to take the initiative, take pride in their own achievements and the positive features of their own cultural heritage (Watson, 1996; Vickers, 1997; Barnard, 2004; Russel, 2010). Some authors commented that Article 5 of the Malaysian Constitution and section 60 (1) of Act 645 may include the communities, groups, and individuals rights to be consulted, involved, and make decisions regarding cultural heritage (Zaky & Azmi, 2017) Some authors further explained the application of Islamic perspectives on ICH as rights to livelihood (Omar Din, 2011; Ibrahim & Mohamad, 2018; Mustafa et al., 2020) while Lim, S.L. in 2011, found that the Kelantan State Government which adopted Shariah oriented policy gives some flexibility to the non-Muslim Kelantanese to perform traditional performances depending on who the audiences are, although this is clearly prohibited under the Kelantan Enactment no. 8 of 1998 (Lim, 2011). In the absence of a discussion of human rights legislation in relation to the livelihood of people practicing ICH in Malaysia, this paper aims to fill the gap.

Finding

Connection of Intangible Cultural Heritage with Livelihood

Intangible cultural heritage (ICH) refers to the wealth of knowledge and skills transmitted from one generation to the next. It creates bridges between past, present, and future; they make continuity and change the structure of the society with experiences like transition and transcendence (Petronela, 2016). ICH is experienced and enjoyed by tourists and local inhabitants, which can cause positive economic and social growth (Mateja, David & Primoz, 2015). The economic value can be determined by measuring the gross added value, the multiplier effects on the economy, tourist visits, and their consumption, whereas the social value can be determined by measuring social cohesion, community empowerment, skill, and development learning. Their specific and unique intangible resources more often determine the competitiveness of countries in attracting foreign investors. A study in 2015 illustrates the significant influence of art, culture and heritage on revenue of European Union countries, and hence improving the livelihood of the local communities (Petronela, 2016; Borza & Manolescu, 2015). There is a complementary relationship between the direct effects of ICH, such as through increases in income and employment in the local community, and indirect effects, such as through the development of tourism. It is important to safeguard the ICH to increase the revenue of the country, attract tourists to visit different cultural products, and create jobs (Borza & Manolescu, 2015).

In Malaysia, Makyung and Wayang Kulit are among the many ICH that gained international recognition, including UNESCO (Hardwick, 2020). In the case of Makyung in Kelantan, the practitioners are Malays and Siamese, whereas the Chinese also participate in Wayang Kulit apart from the Malay communities (Lim, 2011; Ghani, D. B. A., 2012; Ishiguro, 2018).

Re-visit the Concept of Livelihood

The International Labor Organization (ILO), with which ILAB works closely, has gone from having a solely rights-based emphasis as expressed in the 1998 Declaration on Fundamental Principles and Rights at Work to a rights-based and livelihoods-oriented perspective as expressed in the 2008 Declaration on Social Justice for a Fair Globalization (International Labor Conference, 2008). Definitions for "livelihood" can be viewed as spanning a spectrum between narrow (focused or basic) and broad (complex and/or comprehensive).

The narrow definitions reflect common understanding, such as from the Merriam-Webster Dictionary (online 2011), which defines a livelihood as "a means of support or subsistence" where subsistence is defined as "the minimum (as of food and shelter) necessary to support life." Similarly, the Oxford English Dictionary (online 2011) defines livelihood as "a means of securing the necessities of life." A livelihood comprises the capabilities, assets (stores, resources, claims, and access), and activities required for a means of living.

Cultural expressions such as music and poetry are powerful sources of strength in moments of crisis. They can be a ray of light in the darkness, helping to increase people's resilience when their rights are violated. Considerable attention has been directed recently towards the role of culture in sustainable community development. Individuals and communities have their own values, meanings, customs, and knowledge systems that affirm identity and diversity and play a key role in sustaining livelihood. However, such features have been frequently ignored in development planning (Dascon & Binns, 2009).

Rights to Livelihood in International Law

The protection and promotion of culture is a human rights imperative. The right to take part in cultural life guarantees the right of everyone to access, participate in and enjoy culture, cultural heritage, and cultural expressions. A human-centered approach to development based on mutual respect and open dialogue among cultures is key to safeguarding heritage, strengthening creative industries, and encouraging cultural pluralism. The full realization of this right depends on concrete steps for the conservation, development, and diffusion of culture. The idea of human rights has been the subject of burgeoning jurisprudential literature, including literature on ICH safeguarding (D'Amato, 1982). Article 27 of the 1948 Universal Declaration of Human Rights (UDHR) states explicitly, *"Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."* It was proposed that culture was an aspect of human rights.

Based on this human rights jurisprudence and since the signing of the United Nations Charter, the virtual equivalent of a new academic discipline has emerged to champion the idea that international law gives individuals rights against the State (D'Amato, 1982). This idea has been a basis for establishing the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (ICH Convention) and some updates in the Operational Directives to meet the expectations of the humans (communities, groups, and individuals) to preserve their rights over their inherited ICH.

The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression (2005 Diversity of Cultural Expression Convention) also aim to support, among other things, the National policies and measures to promote the creation, production, distribution, and access with regard to diverse cultural goods and services and contribute to informed, transparent and participatory systems of governance for culture. Besides, the 2005 Diversity of Cultural Expression Convention also aims to support the international and national legislation related to human rights and fundamental freedoms to promote artistic freedom and artists' social and economic rights.

Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) establishes the right for everyone to take part in the running of the public affairs of his/her country. With this provision, the ICCPR makes clear that State authorities require some sort of democratic legitimacy. Finally, article 27 of the ICCPR recognizes an individual right of members of ethnic, religious, or linguistic minorities to engage in the cultural activities characteristic of such minorities. Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) further recognizes the right of everyone to participate in cultural life, enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material rights to any scientific discovery or artistic work they have created.

However, these international conventions and covenants did not elucidate the specific relationship between individuals, communities, and nations. They did not clarify how conflicts among these three entities could or should be resolved (Silverman & Ruggles, 2007). Both national and international communities have active discussions on the rights of people to preserve their ICH (Mustafa N. A., 2013, February). The idea was then formulated in the updated ICH Convention in 2016 when the ICH Convention, in its Operational Directives, created twelve Ethical Principles that focused on the participation of the communities, groups, and individuals (CGIs) in preserving ICH. Several nations have already amended their laws to give more specific legal protection to ICH and the communities, groups, and individuals (CGIs) in protecting it after the establishment of the ICH Convention.

Rights of Practising ICH under the Federal Constitution and Related Statutes

Article 4(1) of the Federal Constitution guarantees that the Constitution is the supreme law of the land. All other laws must be in line with the Federal Constitution. The basic rights of the people are provided in Articles 5-13 of the Federal Constitution. According to Shad Saleeq Faruqi, human rights jurisprudence in Malaysia is in its infancy. Far from enforcing human rights in international charters, Malaysia is slow at giving life to its own charter on human rights in Articles 5-13 of the Federal Constitution. In relation to the right to practice ones' ICH, it would be necessary to analyze whether such right has been guaranteed in the Constitution.

Article 5 of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with the law. The courts interpreted the word 'life' in Article 5 to include the right to livelihood. In *Nor Anak Nyawai v Borneo Pulp [2001] 6 MLJ 241*, it was held that native customary rights could be considered as 'right to livelihood.' Another facet of personal liberty guaranteed by Article 5(1) is the liberty of an aggrieved person to go to court to seek judicial relief as illustrated in the case of *Sugumar Balakrishnan v Pengarah Imgiresen Negeri Sabah [1998] 3 MLJ 289*. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 AMR 1469, [1996] 1 MLJ 261* and *Sugumar Balakrishnan*, the Court of Appeal supplied the constitutional basis for a doctrine of substantive fairness. Non-arbitrariness and reasonableness in decision-making and proportionality in the choice of punishments are the essence of the rule of equality before the law in Article 8. This is approved by the Federal Court in *Rama Chandran* and by the Supreme Court in *Kumpulan Perangsang* and also referred to by the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imgiresen Negeri Sabah [1998] 3 MLJ 289*.

In *Sugumar Balakrishnan*, the court held that the combined effect of Articles 5(1) and 8(1) is to demand fairness in procedure and substance whenever a public law decision has an adverse effect on any of the facets of a person's life. Other relevant cases on this matter include *Hong Leong Equipment v Liew Fook Chuan [1996] 1 MLJ 145* and *R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 14*. In *Tan Tek Seng*, the Court of Appeal provided the foundation for the requirement of procedural fairness. It held that the expression 'law' in Articles 5(1) and 8(1) covers substantive law and incorporates procedural law. Secondly, the term 'equality' in Article 8(1) includes fairness. The combined effect of these two articles is that there is a constitutional right to procedural fairness (Sudha d/o C KG Pillay, 1999).

Besides the provisions on fundamental liberties, the Ninth Schedule of the Federal Constitution provides concurrent power of the Parliament and State Legislative Assembly to make law on heritage, but pursuant to Article 75 of the Federal Constitution, when there is a conflict between the Federal and State Law, Federal Law shall prevail.

As mentioned earlier, the Makyung and Wayang Kulit are practiced in majority by the Malay community. Article 160 (1) of the Federal Constitution defines a "Malay" as a person who professes the religion of Islam, habitually speaks the Malay language, and conforms to Malay custom (Barnard, 2004). They should also be a person who is (a) born before Merdeka Day in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) the issue of such a person (Harding, 2012). This constitutional provision has a direct influence on whether the Malays have the right to practice rituals which, are against their religion of Islam. Rituals and beliefs are related that there would be no rituals if there is no belief in supernatural things. Works of literature have described the features of all these

traditional performances to include believing in the unseen things. Main Teri, for instance, is a healing ritual combining performances with this kind of belief (Musa & Yunus, 2011). The same goes for Makyung, and its original version contains rituals that involve believing the unseen (Din, 1990). Besides that, Menora is a folklore that remains among the Siamese community and performs today at Bukit Yong Village, Pasir Puteh, Kelantan (Ilias, Ahmad, & Zubir, 2012). Clearly, 'rituals are belief in action.' As for Muslims (as per the Malays under the Federal Constitution), their belief must only rest in the monotheism of Allah SWT, and it is forbidden for the Malays to get involved in traditional rituals of these traditional performances, although Article 5 and 8 of the Federal Constitution provides the general idea of the right to 'livelihood' and equality among the citizen.

Generally, it can be concluded that it is legally right under the existing law for the groups and individuals to enjoy their cultural manifestations of ICH except with some reservations for Malays who are constitutionally Muslims. Indeed, the Federal Government under the Ministry of Tourism, Arts, and Culture (MOTAC) makes continuous efforts to safeguard ICH in line with the spirit of the Malaysian National Cultural Policy of 1971 and the ICH Convention. The culture of the Malays is reflected in the identity of Malays who, many authors commented that they should be more adventurous, more willing to take the initiative, take pride in their own achievements and the positive features of their own cultural heritage (Watson, 1996; Vickers, 1997; Barnard, 2004; Russel, 2010). Putting aside political struggle on the protection of the Malays identity, the Malays have the right to protect their cultural heritage to the extent that it is in line with the Shariah. As a Muslim, it is divinely wrong to associate anything with Allah when that element is present in traditional performance rituals.

The present scenario proves that the fundamental right of equality outlined in Article 5 of the Federal Constitution is not absolute but restricted to religion. Generally, National Heritage Act 2005 [Act 645] is the federal law that gives rights to anyone to nominate ICH. In these laws, rights are given to 'any person /anyone' in line with section 60 (1) of Act 645, which may include the communities, groups, and individuals to be consulted, involved, and make decisions regarding cultural heritage (Zaky & Azmi, 2017). This indirectly implies that Act 645 acknowledges the ICH as part of the livelihood of the people. Various State Enactments provide the rights to anyone to nominate ICH, including State of Penang Heritage Enactment 2011 [Enactment no. 14 of 2011]. Section 4 (b) of the Enactment no. 14 of 2011 states that ICH may be declared as one only when communities and groups continuously recreate it as a response to their environment, interaction with nature and history, and give them a sense of identity and continuity. Section 4 (c) of Penang Enactment no. 14 of 2011, for instance, impose several criteria, including the promotion of respect for cultural diversity and creativity of the human beings— a sign of acknowledgment of the importance of ICH which is connected to the livelihood of the people, when the diversity and creativity of the people are acknowledged. Most importantly, Section 9 of the Penang Enactment no. 14 of 2011 clarifies that the guideline for conservation and preservation of the ICH shall be consistent with the 2003 ICH Convention. Apart from Penang, Sabah also have similar preservation ICH enactments, which is the Heritage Enactment 2017 [Enactment No. 7 of 2017] of Sabah. There are a few provisions in Enactment No. 7 of 2017 that literally use the words "any person" in Section 41 (1), and section 44 (1), "owner" in section 46 (1), and "owner or custodian" as in section 54 (1). These sections explain the general features of any person involved in safeguarding ICH similar to Act 645. However, Enactment No. 7 of 2017] of Sabah does not contain any provision requiring the lawmaker to prepare guidelines in line with the ICH

Convention. In other words, States can choose whether to absolutely adopt the ICH Convention or adopt it with some reservations. Based on a declaration made in 2013, States are not obligated to absolutely adopt the ICH Convention. Instead, the application and implementation of the provision of this Convention shall be subject to, and in accordance with, the applicable domestic laws of Malaysia and the applicable administrative and policy measures of the government of Malaysia.

Islamic Perspective on ICH as Right to Livelihood

Islam is a way of life. Preservation of belief is the most important aim of Islamic Law. Hence, two steps must be implemented in ensuring the sustainability of preservation of religion (*hifz al-din*) according to *maqasid al-syari'ah* (the purpose of the Shariah) which is: firstly, ensuring the existence and survival of Islam through religious practice, the implementation of all Islamic teachings through *da'wah* (proselytizing or preaching of Islam) work and *tazkirah* (advise); and secondly, curbing pollution of Islamic faith through *amar makruf nahi munkar* (to bid the good, to forbid the evil), eliminating *bid'ah* (innovation in religious matter), prevent apostates and strive in the way of Allah SWT. This idea explains why the preservation of culture in Malaysia is controlled in some way and the Malay practitioners were asked to modify their performance before they are allowed to be staged. One of the grounds of restrictions is Islamic precepts on the Muslim beliefs. According to Professor Emeritus Mahmood Zuhdi in 2019, Makyung and Wayang Kulit are not originally religious practices, but today, these two performances are modified to as is becoming 'tools for *dakwah*'.

Although Malaysia is not an Islamic State and Islamic Law is not the written source of federal law, Islam has a higher position than any other religion pursuant to Article 3 (1), 11 (4), and 12 (2) of the Federal Constitution. The case of *Lina Joy v Majlis Agama Islam Wilayah & Anor [2004] 2 MLJ* illustrates this fact. However, this position does not make Islamic law (the al-Quran and as-Sunnah, Ijma, and opinion of Muslim jurists) the main sources of reference at the federal level. Moreover, even though Item 1 of the Ninth Schedule gives the State Legislative Assembly the jurisdiction to make law on Islam, this power is also very limited.

ICH, for instance, involves a matter of belief. Worshipping other than Allah is one of the sinful acts in Islam, and this important principle is included in all of State Enactments in Malaysia, such as in Section 4 (1) of the Syariah Criminal Offences (Selangor) Enactment 1995 (Enactment No. 9 of 1995). Shariah-oriented policy or *siyasah syar'iyah* was adopted by the State Government of Kelantan, prohibiting Makyung and Wayang Kulit before lifting the bans in 2019 and 2017 (Ibrahim & Mohamad, 2018).

Efforts to suppress the practice of *khurafat* (superstitious) and shirk in traditional practices are part of the role and duty of the state government in safeguarding religion and people's interest (*maslahah*) from practices that can damage the faith of the ummah (the whole community of Muslims bound together by ties of religion) and Islam. This action was based on a hadith of the Prophet (Peace Be Upon Him) which reads:

Whoever sees any of you is evil, let him know that he should prevent it by hand if he is unable (with power) then shall prevent it with a tongue (advice) and if he cannot afford it, so he should prevent it with the heart. Such is the weakest of faith (al-Nawawi, 2005).

To control non-Syariah compliance practices in the fields of culture, entertainment, and arts, the Kelantan government enacted the Control Entertainment and Place of

Entertainment Enactment of 1998 (Enactment No. 8 of 1998) or also known as Kelantan Entertainment Enactment of 1998 - Kelantan Cultural Policy of 1998. This law applies to all Kelantanese, including the Muslims and the non-Muslim, but, as far as human rights are concerned, this law must be read together with Article 3 and 11 (1) of the Federal Constitution on freedom of religion. Hence, non-Muslims are allowed to practice traditional manifestations of ICH in Malaysia under the existing legal framework. The Kelantan Cultural Policy of 1998 is built on concepts *'to bid the good' and 'forbid the evil'* applies only to Muslims, particularly the Muslim leaders, by prioritizing public interest (*maslahah*) and eliminating harm (*mafsadah*) (Din, 2011) .

Ultimately, Allah states that it is His will whether non-Muslims accept Islam or otherwise. Thus, freedom of religion has been consistently enunciated as a norm of the Shariah regardless of considerations of time and circumstance (Kamali, 1994). It is understood here that Islam has a concept of *syumuliyah* (comprehensive) which covers all aspects of human life. This means that Muslims should be prepared to perform the religion in its totality.

However, Islam does not prohibit practices of the non-Muslims which are non-Syariah compliance as the Muslims are required to respect their belief in Al-Quran, verses Surah Al-Kaafirun 109: 1-6. Verse 1: Say, "O disbelievers." Verse 2: "I do not worship what you worship." Verse 4: "Nor will I be a worshipper of what you worship." Verse 5: "Nor will you be worshippers of what I worship." Verse 6: "For you is your religion, and for me is my religion." A notable quote from Surah Kafirun is: "For you is your religion, and for me is my religion."

The first approach to freedom of religion is clear in verse al-Baqarah 2: 256 that Islam gives the right to all people to choose their beliefs without any force. Islam takes this libertarian attitude because religion depends upon faith, will, and commitment, not compulsion. Forced faith is no faith at all. Allah states that if He had willed, He could have made all the people believers. However, had that been the case, the faith of the believers would not have been tested, as Allah says in verse Yunus 10: 99,

"If it had been thy Lord's Will, they should all have believed, all who are on earth!

Wilt thou then compel mankind, against their will, to believe!"

Within the context of practicing prohibited rituals or elements by a non-Muslim, Islam advised the Muslims to respect it because such practice is not prohibited by his or her religion. According to S. Abdul Ghani (2001), freedom of religion in Islam includes the principle that there is no force in embracing Islam. Not forcing anyone to believe in Islam protects Islam from being mocked.

Based on verse an-Nahl 16: 22, al-Ankabut 29: 46, and al-Baqarah 2: 111, Islam promotes the freedom of an individual to spread their religion through comprehensive reasoning and argumentation. Within the context of preserving ICH having prohibited elements according to Islam, the government (federal or state) must therefore give ways to non-Muslims in exercising their rights as non-Muslim by virtue of Article 3 (1) and 11 (1) of the Federal Constitution.

Statutory Restrictions of Right to Practice ICH

The State of Penang Heritage Enactment 2011 [Enactment no. 14 of 2011], the State Enactment 2017 of Sabah [Enactment No. 7 of 2017], and the latest update so far is Sarawak Heritage Ordinance of 2019 with the inclusion of chapter 77 where the aim of making better provisions for the preservation and conservation of antiquities, monuments and sites of cultural, archaeological, architectural, artistic, religious or traditional, historical, tangible and intangible interest or value and bio-anthropological, geographical and natural history items,

for the benefit of the State and as a heritage of the people and for matters connected therewith or incidental thereto.

Among efforts to control and eliminate conflicting practices against Islam is worshiping spirits, *jinn*s, and *khurafat* as present in Main Puteri, Makyung, and Wayang Kulit. Efforts to suppress the practice of *khurafat* and shirk in traditional practices are part of the role and duty of the state government in safeguarding religion and peoples' interest (*masalahah*) from activities that can damage the faith of the ummah and Islam. The Kelantan government has banned Makyung, Menora, Main Teri, Pelaga Ayam, and Tomoi because they involved the Malay individuals under Article 160 of the Federal Constitution. Ultimately, it was allowed firstly in the case of Wayang Kulit because the Dalangs were willing and agreed to change the lyrics into a form of advice and uphold the Kelantan Cultural Policy of 1998, whereby the performance will be Syariah compliance. In Kelantan, many other ICH in the form of traditional performances is religiously neutral and not contradictory with Islam. Among the examples is *Dikir Barat*. *Dikir Barat* is not considered as against Islam. (Ibrahim & Mohamad, 2018). As a matter of fact, *Dikir Barat* has become a tool for dakwah with the establishment of a group of performers called the Dikir Barat Sri Halaqat. This group is frequently invited to perform both in Kelantan and in other states. Today, Makyung is allowed when the Kelantan State Government lifted the ban in 25th September 2019 with the condition that the practitioners remove all un-Islamic elements from the performance.

For example, various states in Malaysia have made improvements in the State Laws, in line with the current trends of ICH preservation norms around the world, but not in Kelantan. The Kelantan Enactment No. 8 of 1998 does not contain the term 'intangible cultural heritage'; or 'cultural heritage'; or 'cultural properties'; or 'living heritage' or any other word that refers to the immaterial culture including traditional performances because the international norm of preserving ICH has not become a trend back then and the law was created on the basis of power given by the concurrent power in List III, Ninth Schedule of the Malaysian Federal Constitution, allowing a State to create its own law on heritage matter. Significant changes under section 37 (1) of Enactment No. 8 of 1998 have repealed the old law, Theatres and Places of Public Amusement Enactment of 1936, where there were provisions for managing traditional performances. Even though types of traditional performances are not expressly mentioned in the Kelantan Enactment No.8 of 1998, Section 36 (1) and (2) (a) provide that the State Authority may make regulations *inter alia* for the purpose of prohibiting or regulating any type of entertainment or the use of any type of appliance or equipment or device at any place of entertainment; regulating the conduct of actors, singers, and other entertainers, the scripts, performances, customs and props used in any entertainment; securing the decent and orderly behaviour of persons visiting any place of entertainment. Indeed, the parent law has further detailed the rules and regulations vide 2003 Entertainment Control Guidelines created under the State of Kelantan General Circular no. 4 of 2003. This is the source of regulations, rules, and circulars created by the state legislature to control traditional performances. 2003 Entertainment Control Guidelines created under the State of Kelantan General Circular no. 4 of 2003 is the main source of law on the legal position of traditional performances in Kelantan and the conditions to be complied with. General Circular No. 4 of 2003 categorized the name, type, and class of prohibited and controlled (regulated) entertainment to be showcased in the State of Kelantan. Guideline 2.4 specifically divides entertainment into two, which are controlled and prohibited. Prohibited entertainments are stipulated in Guideline 3.1, where Makyung, Wayang Kulit, Menora, and Main Teri are specifically mentioned as "Prohibited

Entertainments (*Hiburan Terarang*).¹¹ In contrast, entertainments other than expressly stated under Guideline 3.1 of the General Circular No. 4/2003 are regulated and controlled. They must be governed by a number of rules stipulated in Guideline 3.2 of the General Circular No. 4/2003. These include, among other things, no involvement of women who have reached the age of puberty and acting the opposite gender; mixing of men and women, and no exposure of the women protected parts of their body according to Islamic principles; does not contain any belief, expressions, readings and acts that associate Allah with anything (*shirk*) etc. which are against the Islamic belief system and Muslim behaviour.

Hence, traditional performances in Kelantan are strictly prohibited at the early implementation of the Kelantan Enactment No. 8 of 1998 with the regulation of Entertainment Control Guidelines created under the State of Kelantan General Circular no. 4 of 2003. Guideline 2.4, 3.1, and 3.2. specifically mentions that "the names, types and entertainment classes that are prohibited are Makyung, Menora, Wayang Kulit (traditional), Main Puteri, Siamese Boxing (Tomoi) and Pelaga Binatang. The ban covers all stages of the show that have elements or features of the entertainment" (Mustafa, Abdullah, & Dian, 2020). Based on Guideline 4.2., licensing officers are given the power to issue a license for controlled entertainment only and within the discretion of the licensing officer by virtue of specified conditions. A license may only be issued together with the approval of the places of entertainment from the state local authority. In other words, the licensing officer is not allowed to issue a license for these traditional performances (Mustafa, Abdullah, & Dian, 2020). It was highlighted that this legal position had been the cause for the slow diminishing of traditional performances in Kelantan. This status has been slowly changed when the State of Kelantan lifted the ban on Wayang Kulit in 2017 and Makyung in 2019, allowing in the name of "Syariah Compliant Wayang Kulit" and "Syariah Compliant Makyung." It was proposed that Malaysia's ratification of the 2003 ICH Convention with the inclusion of 12 Ethical Principles promoting communities, groups and individuals to preserve ICH, the amendment of the Malaysian Federal Constitution, the establishment of Act 645, and other safeguarding measures by the Federal Government have influences the change in the legal status of Kelantan traditional performances (Mustafa, Abdullah, & Dian, 2020).

Although this law is meant for the Kelantan community in general, the State Authority allows practices from non-Muslim. Kelantanese Muslims have been banned from performing traditional wayang by the government of Kelantan State by the 1998 law but not the modified Syariah-compliance version. Interestingly, a Buddhist-Chinese-Kelantanese *dalang*, *Dalang Eyo Hock Seng*, a well-known *dalang* performing traditional Wayang Kulit Kelantan, retains some of the opening rituals prohibited under the 1998 Law. As discussed before, non-Muslims are allowed to practice on the ground of freedom of belief (religion) protected under Articles 3 and 11(1) of the Federal Constitution.

This means the Malays can always preserve the modified (Syariah compliance) version of Wayang Kulit. In a case study by Lim in 2011, in practice, the Kelantan State Government gives some flexibility to the non-Muslim Kelantanese to perform depending on who the audiences are, although this is clearly prohibited under the 1998 law.

Even though the allowance is indirectly given by the authority to non-Muslims to perform their ICH in Kelantan, this appears to be contrary to the legal provisions of Enactment No. 8 of 1998. Hence, to enhance the livelihood of non-Muslims, ICH practitioners in Kelantan, clear provisions must be included to enable them to practice their ICH.

Conclusion

In the absence of comprehensive existing literatures on the legal discussion on legal aspects of the performances of Makyung and Wayang Kulit, this article exposes the Malaysia's existing legal framework which provides that the Malays are legitimatedly constraint to preserve and practice certain traditional performances, which has elements of non-Syariah compliance. It is important to note that this article emphasized on the illegitimate practice of prohibiting the non-Muslims to preserve their ICH livelihood. Hence, this paper uphold the State's rights to make law on heritage matters which are guaranteed under the Federal Constitution as illustrated by various State Laws for ICH preservation. However, this article stressed the importance of the diverse identity of practitioners of ICH which must be considered in the formulation of the legal provisions related to the preservation (or, if need be, control) of ICH, as discussed above. Thus, state authorities' control of ICH practices must be exercised with due care and diligence to ensure that the livelihood of the people is not jeopardized, in line with Articles 5 and 8 of the Federal Constitution.

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