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Human Rights-Based Approach and Challenges in Malaysia's Built Heritage Preservation

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Abstract

Many developed countries recognise the importance of heritage conservation and the destruction of heritage sites as a human right infringement. Uncontrolled development has led to the demolition of heritage sites. This article explores the extent of the right to heritage through the spectrum of international instruments in identifying practical approaches in the designation and conservation process. This article is essential to highlight the best practice of heritage management in Malaysia. This study applied the qualitative method using library-based doctrinal research. Reference to Malaysian legislation in relation to heritage conservation, such as the Federal Constitution, the National Heritage Act 2005, and the Town and Country Planning Act 1976 was made. Besides, international legal instruments, such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights were also analysed. For case reports, full courts' judgements were obtained from CLJ Law and Lexis Nexis. Secondary sources such as journal articles, conference papers, and websites were accessed online. This study found that while human rights features are present in the local legislation, their application is scarce and very limited. In the decision-making for the designation and management of heritage sites, there is a lack of recognition of human rights. The involvement of members of the public in the process is also limited. This article concludes that a human-rights-based approach should be emphasised to foster greater public participation in heritage designation and management. This article recommends that future research focus on reviewing the current legislation to embed human-right elements explicitly in their provisions.

Keywords: Sustainability, Human Rights, Heritage Conservation, Heritage Management, Cultural Heritage

Introduction

In recent years, much debate has been stirred to acknowledge that any unlawful acts of destruction of cultural heritage, such as terrorism, wars, and conflicts, amount to violations of 'everyone's right to access to and enjoyment of cultural life. On 6 October 2016, the Human Rights Council unanimously adopted a resolution that called for all States to respect, promote

and protect the right of everyone to participate in cultural life, including the ability to access and enjoy cultural heritage and take relevant actions to achieve them (Bennoune, 2018). Upon designation of heritage sites, natural and cultural heritage conservation measures seem to complicate the daily life of local communities (Noyes, 2011). The consequences may include prohibiting people from utilising their local and traditional livelihood sources or removing them from their homelands. It is also deemed to impede and threaten stability, social unity and cultural identity (Bennoune, 2018). In the context of the implementation of the heritage site management, the designation and conservation issues demonstrate the importance of laying down constructive solutions where heritage conservation processes intersect with the rights of indigenous peoples, cultural groups, local communities and individuals associated with heritage properties. Many researchers demonstrated that these issues could be resolved through the human right based approach (Ziegler, 2007;; Kraak, 2017). This research will analyse the extent to which human rights doctrine is aligned and applied in 'Malaysia's heritage site conservation strategy. In exploring the dimension of the right to access to cultural heritage, particularly in the heritage designation and conservation practices, some relevant provisions to the National Heritage Act 2005 (Act 564) and the Town and Country Planning 1976 (Act 172). These provisions are related to the right to participate, which is associated with the right to access cultural life as enshrined in the human rights principle. Some reported cases experienced by the local communities following the heritage designation process will finally determine the extent of their enjoyment of cultural heritage by them. This article focuses merely on built heritage gazetted by the Malaysian government as national or world heritage, and it will not include intangible heritage aspects. As much as there is a space for the right of cultural life, there must equally be room for a minimum standard that acknowledges such right.

Literature Review

The notion of cultural heritage is a human rights issue, and thus, a human rights-based approach is recommended in dealing with the development of cultural heritage (Blake, 2011). The exact meaning of 'right' is constantly debated. Still, there is a consensus that human rights encompass a wide diversity of rights, including the right to life, right to a fair trial, freedom of slavery, and freedom of speech (Francioni, 2008). The conception of human rights in cultural heritage is highly influential within international law, such as the Universal Declaration of Human Rights (UDHR). UDHR advocates that "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" (Article 27(1) of UDHR). Accessing and enjoying culture is an integral part of being a citizen, a member of a community and, more widely, a member of society. Another international document, the International Covenant on Economic, Social and Cultural Rights (ICESCR), guarantees the right of everyone to take part in cultural life and enjoy the benefits of scientific progress and its applications (Article 15 of ICESCR). Notably the right to science and culture that appear in both the UDHR and ICESCR is a right to take part in cultural life and includes "the right to benefit from scientific progress and its applications" (Ekern et al., 2012). Shaver (2009) demonstrates that the right to a scientific advancement includes the duty of policymakers to implement human rights principles and jurists to mediate rights-based challenges to copyright and patent laws. According to D. Campagna(2017), the 'inclusive cultural empowerment of people is recognised as the crucial driver to implementing the human right to take part in cultural life. Thus, a poor realisation of 'culture's 'empowering' dimension endangers its effective contribution to sustainable developmental processes (Dian

et al., 2018). In assessing human rights and cultural heritage, scholars believe that it is significant to understand the concept and scope of these rights, as well as the threats to these rights nowadays (Shaheed, 2011). In Malaysia, human rights law receives relatively little attention, and with regard to cultural rights in heritage site conservation drives, it is undeveloped. Thus this research recommends some ideas to fill the gaps.

Methodology

This study adopted a qualitative research methodology. This study primarily analyses the current legislation pertaining to heritage management and conservation, namely the Federal Constitution, the National Heritage Act 2005, and the Town and Country Planning Act 1976. With regard to case reports, full judgements of cases concerning heritage sites were accessed from CLJ Law and LexisNexis databases. As for secondary materials such as journal articles, conference papers, theses, websites, and newspaper reports, this study accessed the respective sites for each material.

Human Rights and Heritage Site Conservation in Malaysian Legal Framework

Many writers claim that cultural right is one of the fundamental human rights which provides that 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 derive therefrom (Odello, 2011; Romainville, 2017). However, the Malaysian Constitution does not explicitly stipulate the rights to heritage conservation and environmental rights. Nonetheless, judicial interpretation of the right to life under Article 5(1) of the Federal Constitution helps expand the scope of 'life'. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261*, the Court of Appeal held that the right to life includes livelihood. The court emphasised that the right to life is not restricted to personal liberty but all facets of life, including the right to live in a reasonably healthy and pollution-free environment.

To ensure the effective expansion of the right to life to heritage conservation, the roles of Act 564 and Act 172 in underlying the human rights principles are significant. Both statutes provide a legal basis for the right of everyone to take part in cultural life, particularly in the heritage designation and conservation practice, respectively. The legal basis is deemed purposeful and substantial only if specific measures are available for everyone, individually or within a community.

Human Rights and Heritage Site Designation in Malaysia

Applying the human rights features in the heritage site designation process promotes the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage. It is not merely about the protection of their place of living there for decades. It also affects the local community who earn a living through tourism heritage after the designation is gazetted. The question is, how does the Act 645 assist the local people with such rights? In the designation process, while section 24 of Act 645 empowers the Commissioner to designate a site of a cultural heritage significance as a "heritage site", Section 67(1) of Act 645 authorises the Minister to declare any heritage site as a "national heritage" if it meets any one of the criteria stipulated under Section 67(2)(a) - (i).

In 2006, for example, the demolition of Bok House to make way for a 60-storey building on the site soon after Act 645 was gazetted has drawn a serious debate by many quarters on the question of interpretation of heritage sites' significance (Ali, 2006). Even though the law

provides the right of the people to nominate any site of their choice to be a national heritage, it is however subject to the discretion of the Commissioner or Minister to approve such a nomination. A high cost to maintain the site was the reason adduced by the Commissioner of Heritage when rejecting heritage designation. The right of "everyone", among others the historians, heritage experts, and archaeologists, to participate in the designation process seemed immaterial (Dian & Abdullah, 2013).

The role of the National Heritage Council in advising the Commissioner and Minister at this stage (Section 9(1) as the NH Council's advice is not binding on the Commissioner or Minister (Section 9(2)). In Penang, for example, Kampung Siam, which was previously granted to the Burmese and Siamese communities in 1845 by Queen Victoria for the communal and religious use of these two communities, was also demolished. The appeal made by the squatters to the Chief Minister to preserve their village as a state heritage was refused as the state has to bear a high cost for payment of compensation to the developer. Again, the cost to be incurred to preserve the valuable site appears to be a determining factor in the heritage site designation. Hence, it is clear that the right of everyone to cultural life as enshrined under Article of UHDR is not adequately upheld under Act 645. The right of people to cultural life in preserving their identity and dignity has been clearly violated.

Human Rights and Heritage Site Management in Malaysia

The role of managing after the designation of the heritage sites falls within the jurisdiction of the Town and Country Planning Department (Planning Department). Its management process starts when the Commissioner notifies the Planning Department of its designation has been completed. From this stage onwards, any application for planning permission for development affecting the designated sites must get prior approval from the Commissioner, but it is not a concern in this research. The main problem in the management process is what happens to the sites which have not been designated under Act 645 but have the potential of having cultural significance value. It appears that the law is silent on the role of the Planning Department to protect the valuable sites in approving the planning permissions for development (Dian et al., 2018). While it is understandable that it is not the jurisdiction of the Planning Department to designate places as heritage sites, there is a grey area under Act 172 that fails to advocate the spirit endorsed by the Heritage Department in interpreting heritage values before planning permission for development is granted. This argument is evidenced in several cases raised by the media and NGOs. For example, the Stadium Merdeka, which is linked to the nation's declaration of Malaysian independence, was approved for demolition but later was withdrawn due to public outcry; the Bujang Valley in Kedah, an ancient Hindu temple believed to be more than 1,000 years old was demolished by a developer in 2013; the Runnymede Hotel, one of the oldest buildings in Penang, was demolished over the Chinese New Year holidays in early 2015. There was a proposal to construct a Light Rail Transit (LRT) and proposed monorail projects under Penang Transport Master Plan (PTMP) near the Penang heritage zone border.

The above cases demonstrate how interpretations of cultural significance in the heritage management by the Planning Department led to complexity in preserving the heritage value identified by the Commissioner or Minister. While it is always possible to carry interpretation beyond the bounds of the values identified by heritage official recognition, interpretation of these associative values could likely be proposed in the management plan.

Another crucial issue that needs to be addressed is the revocation of a heritage status after its designation. In one case, a notification which was signed by the Heritage Commissioner of the Federal National Heritage Department and published in several newspapers on 28 December 2016, to revoke the designation of the "Old Building of Malaysia Tourism Centre (MaTIC)" has raised many concerns (Cardosa, 2017). The site comprised Lots 45 and 139 (Section 58) and part of Lot 158 (Section 57) and was gazetted (Gazetted Number PU (B) 290) as "*Heritage*" on the National Heritage Register on 16 June 2016. The question is whether the Commissioner has the power to revoke a site's heritage status and whether the decision to cancel amounts to *ultra-vires* of Act 645? If this issue is not rectified, it will pave the way for abuse of power by the Commissioner to revoke the existing heritage status for any reason whatsoever, especially in the name of "development". It is also questionable whether the people are consulted either by way of publication of notice to object prior to the revocation process, just as what has been laid down by Act 645 during the process of designation. It is deemed a violation of the human right to participate in cultural life as the people should be consulted in the conservation process and when there is any decision to revoke the heritage status.

The people have also disputed the stance of the heritage administrative bodies. The inconsistent role of the government in defending the people's property is reflected in the latest issue where the Penang state government has taken a drastic decision in approving the demolition of a heritage building in Peel Avenue (Category II building) for a hospital expansion project (Kaur, 2017). The Island Hospital, a private organisation, intends to build the Island Medical City on the 6.4-acre land at Peel Avenue comprises this 600-bed hospital. It is also designed in the building plan that a hotel would be built to support the idea of introducing medical tourism in the country. Ironically, all the necessary approvals for the expansion project were yet to be granted by the relevant authority. The public raised a question about the hasty decision made by the state government without considering the status of the building to be destroyed and the views and inspiration of the people over the heritage building.

Heritage Designation and Impacts on Rights on Livelihood

As mentioned earlier, heritage site conservation requires close cooperation and strong support from the local community. Unfortunately, as time goes by, the local community has now felt that their daily life has been encroached on and disturbed by the presence of the tourists in their vicinity, especially in the world-historic city of George Town, Penang. This issue has caused the local people to be somewhat dispassionate and passive to respond to the aspiration of UNESCO. This is partly due to a lack of efforts from the relevant authority to take real action to disseminate all information pertinent to the public about the importance of heritage site protection. After nearly ten years since the World Historic Cities designation, the people of Melaka and Penang recently felt and realised that the tourism activities had overlooked the rights to privacy of the locals in the long term. It was reported that after the world heritage designation, some of the people in Penang were unhappy with the heritage designation impact even though foreign visitors claimed the heritage places offered remarkable experiences where they could "get a sense of the old-time ways" (Star, 2016). Penang's living heritage communities have shown their dissatisfaction with tourists peeking into their homes, taking pictures, making noise and litter, irrespective of day or night, due to the uniqueness of the wooden houses built on stilts. The Chairman of the local community organisation claimed that they have to put up signage to stipulate that visiting hours are from

9 am to 9 pm. Some of the residents have to put up signs telling visitors about the rules to follow, such as visitors should keep the noise down, not trespass or litter. One of the residents has, at one time, used to tell off tourists who walked into her living room without permission. Some of the community decided to install a gate in front of the house to stop them, but they would continue to take photos from the outside. There is also a resident putting up a "no photography" sign to prevent tourists from snapping pictures of the interiors of her house. If it is true that the role of the people is recognised as fundamental in protecting this legacy. In that case, the government as the sovereign authority should support in terms of advice, financial, and technical assistance. This approach can inspire the citizens to jointly embrace the government's and UNESCO's inspiration to take care of the valuable assets. Without this support, the owners do not view the loss of this property as a significant problem in their lives. This aspect is clearly seen from the recent fire which destroyed four heritage shophouses carrying out a business of selling and repairing air conditioner items at Jalan Penang, George Town. Even though the heritage destruction is a huge loss, the people seem to accept the situation as fate, coupled with the poor conditions of the sites themselves that provoked the disaster (Basyer, 2017). As the maintenance costs are enormous, many argue that in the long term, the construction of a new structure will survive for a few more decades and thus would eradicate the issue of sustenance cost.

Cases on Heritage Sites in Malaysia

Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party) [2011] 4 MLJ 354 involves a civil claim by the plaintiff for the damage caused to a heritage building. The Chinese Courtyard Mansion, which is exquisitely embellished with Chinese artisan works and carvings, is one of only two of its type and size outside of China. It was erected in the 1880s and received UNESCO's Award of Excellence for Cultural Heritage Conservation in 2000, among other accolades. The extensive piling work done at the defendant's hotel caused excessive vibrations that led to extensive cracks and damage to the mansion. The court decided in favour of the plaintiff and held that the defendant failed to heed the plaintiff's concern and had breached the Street, Drainage and Building Act 1974 and the Penang Island Earthworks By-Laws 1975 by failing to conduct a soil investigation on the hotel extension site before commencement of piling work.

In *Hj Zainie Abdul Aucasa (suing on behalf of the Sabah Wetland Conservation Society) v Yabi Yangkat (Director of Sabah Environment Protection Department)* [2015] 8 MLJ 101, the president of the Sabah Wetlands Conservative Society filed a judicial review application on the refusal to be heard before the Environmental Appeal Board. In this case, the plaintiff claimed that the respondent's approval of the Environmental Impact Assessment (EIA) report for the development of 13-storey condominiums in Kota Kinabalu would be detrimental or cause an adverse effect on the ridge conservation areas as well as on the mangrove ecosystem with environmental pollution and disruption of the habitat around the Kota Kinabalu Wetlands (formerly known as Kota Kinabalu City Bird Sanctuary). It was also alleged that the proposed development would contravene the Sabah State Government's intention of declaring the Kota Kinabalu Wetlands as a conservation site and a cultural heritage under the Sabah Cultural Heritage (Conservation) 1997 Enactment. However, the court dismissed the application because the applicant failed to show that he was a "person aggrieved" by the public body's decision. The court further emphasised that the court's role in judicial review was supervisory in nature, and it was only to consider the decision-making process and not whether the decision on the merits of the case was fair and reasonable unless there was

illegality, irrationality or disproportionality none of which there was evidence of in the present case.

Conclusion

Even though the right of access to and enjoyment of cultural heritage is a human right guaranteed by international law, in Malaysia, such rights are not adequately aligned in the heritage management initiatives. Albeit there are provisions for the right to access to the cultural right through the public participation approach in the heritage designation and management decision-making process, they are nevertheless exercised with some limitations whereby the right is often overridden by the discretionary power awarded to the heritage and planning authorities by the relevant laws. The notion of effective and meaningful participation of people enshrined by the UDHR is thus lacking. It is recommended that the law provides clear and mandatory provisions requiring the relevant authorities to consult the people concerned, through appropriate procedures, mainly through their representative, whenever consideration is being given to legislative or administrative measures which may affect them directly. A proper and adequate right to participate mechanism, both in the cultural heritage designation and management practice, can enhance the people's right to enjoy cultural life. It is recommended that the present legal framework be reviewed to incorporate a rights-based approach effectively.

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