

PROTECTING THE TRADITIONAL CULTURAL EXPRESSIONS OF INDIGENOUS PEOPLES: A CASE STUDY OF THE *KADAZANDUSUN PENAMPANG* COMMUNITY IN SABAH, MALAYSIA

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Abstract

Traditional cultural expressions are inextricably linked with the lives of indigenous peoples and are an important facet of their existence. Various international efforts to look for a suitable paradigm to protect traditional cultural expressions have been made and these serve as invaluable guidance to national governments when putting in place a suitable regime to protect their indigenous peoples' traditional cultural expressions. This paper explores the traditional cultural expressions of the *Kadazandusun Penampang* Community in Sabah, Malaysia and the needs as well as expectations of the community with regard to their traditional cultural expressions. It then considers the legal regime that is currently available to protect their traditional cultural expressions. The objective of the paper is to examine the adequacy or otherwise of the Malaysian government's efforts in protecting the traditional cultural expressions of the *Kadazandusun Penampang* community and, on a broader scale, in protecting the other indigenous communities in Malaysia generally.

Keywords: Traditional culture expressions, Indigenous, Protections & Kadazan Penampang

Introduction

Discussions on the legal protection of traditional cultural expressions have taken place at international, regional and national levels and various approaches have been suggested as appropriate solutions to adequately protect traditional cultural expressions.¹ For instance, the possibility of protecting traditional cultural expressions within the rubric of copyright was considered in the 1960s when, at the Stockholm Conference to revise the Berne Convention for the Protection of Literary and Artistic Works, developing countries pressed for provisions on the protection of their folklore. As a response to such calls, Article 15(4) was introduced into the Berne Convention to protect folklore by providing for copyright protection for unpublished works where the identity of the author was unknown but there was every ground to presume that he was a national of a country of the Berne Union. However, the appropriateness of protecting traditional cultural expressions through the intellectual property system has been doubted and queried by various quarters who argue that the nature and characteristics of traditional cultural expressions are inconsistent with the philosophy of the intellectual property system. In addition, those who challenge the appropriateness of the intellectual property system contend that traditional cultural expressions do not fit within the prerequisites for protection under the different branches of intellectual property. Other suggestions for protecting traditional cultural expressions include extending the intellectual property rights regime, applying customary law, enacting legislation on the protection of cultural heritage, drafting various international agreements concerning the protection of human rights and developing a *sui generis* system which is tailored to respond to the needs and expectations of indigenous peoples and traditional communities.

Work on the international dimension of the protection of traditional cultural expressions has been largely carried out by the World Intellectual Property Organisation (WIPO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO). In 1998 and 1999, WIPO conducted nine fact-finding missions to 28 countries for the purpose of identifying the intellectual property needs and expectations of traditional knowledge holders. Following that, WIPO published a report of its findings (WIPO, 2001). In September 2000, the Member States of WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to discuss intellectual property issues that arose in the context, *inter alia*, of expressions of folklore. The IGC had reviewed legal and policy options for the protection of traditional cultural expressions (WIPO, 2004a) as well as analysed existing national and regional legal mechanisms and forms of protection available under the intellectual property system and other laws (WIPO, 2003). Apart from WIPO, UNESCO has also conducted studies on the possibility of international protection of traditional cultural expressions since the 1970s. Working together with WIPO, UNESCO formulated the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, which were adopted by both organisations in 1985.² The Model Provisions were intended to encourage legal protection of traditional

cultural expressions at national level (Lucas-Schloetter, 2004). More recently, in 2005, the UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which is a binding international legal instrument to protect and promote the diversity of cultural expressions.³

Although discussions on the international protection of traditional cultural expressions have been ongoing and extensively pursued for close to four decades, little progress has been made in terms of international norm-setting. This scenario is in stark contrast with issues on piracy and counterfeiting of products originating from developed countries, which were also intensively debated in the late 1970s and 1980s. Piracy and counterfeiting issues were quickly dealt with in an internationally binding document concluded in 1994 in the form of the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. This Agreement was concluded in the framework of the prominent international body dealing with the rules of trade between nations, that is, the World Trade Organisation. Yet, the international dimension of the protection of traditional cultural expressions has yet to take shape and is unlikely to be part of WIPO's legislative agenda in view of the political hostility between developing and developed countries (Blakeney, 2006). Indeed, WIPO has stated that the international dimension of the protection of traditional cultural expressions within the intellectual property regime is dictated by the operation of legal tools and mechanisms at the national level (WIPO, 2004b). In the light of this, the protection of traditional cultural expressions would best be addressed at national level, at least for the time being.

The objective of this paper is twofold. First, it explores the range of traditional cultural expressions of the *Kadazandusun Penampang* community in the State of Sabah, Malaysia and the needs as well as expectations of the community vis-à-vis the protection of their expressions. Secondly, it considers the different paradigms of the law that are currently available to protect those expressions with a view to determining the adequacy of the laws in meeting the needs and expectations of that indigenous community and, on a broader perspective, other indigenous communities in Malaysia. The *Kadazandusun Penampang* community is selected for this study because it is a large indigenous community in East Malaysia and is rich in traditional culture, such as dance, songs, music, folklore and musical instruments. Its traditional cultural expressions are representative of the varied types of traditional cultural expressions that exist in other indigenous communities throughout the country, albeit the exact forms differ from one community to another. In discussing the current laws and their adequacy in addressing the protection of the *Kadazandusun Penampang* community's traditional cultural expressions, this paper examines three pieces of legislation, namely, the National Heritage Act 2005, the Cultural Heritage (Conservation) Enactment 1997 of Sabah and the Copyright Act 1987. Both the National Heritage Act 2005 and the Copyright Act 1987 are federal legislation while the Sabah Cultural Heritage (Conservation) Enactment 1997 is a legislation enacted by the Sabah state legislature. As their names suggest, both the National Heritage Act 2005 and the Cultural Heritage (Conservation) Enactment 1997 of Sabah are very specific legislation enacted with the aim of providing some form of legal protection to

cultural heritage. On the other hand, the Copyright Act 1987 has a more secular purpose and the few provisions that currently exist in that statute which can be construed as affording some degree of protection to traditional cultural expressions have been inserted primarily to meet the country's obligations under international treaties.

This paper is laid out in the following manner. After this introductory part, the paper addresses two preliminary matters. These are the clarification of the scope of the term 'traditional cultural expressions' as used in this paper and the identification of the needs and expectations of the *Kadazandusun Penampang* community as expressed to the writers during some of the field studies that were conducted. The section following that describes the traditional cultural expressions that exist in the *Kadazandusun Penampang* community. This is then followed by a discussion and analysis of the three different statutes that offer some form of protection to the traditional cultural expressions of the *Kadazandusun Penampang* community, namely, the National Heritage Act 2005, the Cultural Heritage (Conservation) Enactment 1997 of Sabah and the Copyright Act 1987. The penultimate part assesses the adequacy of those statutes in meeting the needs and expectations of the *Kadazandusun Penampang* community. Finally, the paper concludes with some thoughts on the way forward in the legal protection of the traditional cultural expressions of the *Kadazandusun Penampang* community.

Preliminary matters

Terminological concerns

Many learned writings by distinguished scholars have traced the historical debates that have taken place at the international fora to search for a suitable terminology to describe the creations of a cultural community.⁴ Suffice it to mention that in the initial years of international discussions on the protection of creations of cultural communities, the term 'folklore' was used. However, the term 'folklore' was later thought by some countries to be an archaism and bore negative connotations or associations with less civilized and undeveloped communities.⁵ In later years, the term 'traditional cultural expressions' was preferred as a more neutral and less offensive term. This paper will adopt the phrase 'traditional cultural expressions' as the terminology to describe the creations of a cultural community. It will also adopt the meaning assigned to that term in section 2 of the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982. The section defines 'traditional cultural expressions' as:

... productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (a) verbal expressions, such as folk tales, folk poetry and riddles, signs, symbols and indications;

- (b) musical expressions, such as folk songs and instrumental music;
- (c) expressions by actions, such as folk dances, plays and artistic forms or rituals; whether reduced or not reduced to a material form; and
- (d) tangible expressions, such as:
 - (i) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
 - (ii) crafts;
 - (iii) musical instruments;
 - (iv) architectural forms.

Needs and expectations of the Kadazandusun Penampang community

For the *Kadazandusun Penampang* community, as is also the case with other indigenous communities, traditional cultural expressions are the manifestations of their cultural identity. These are passed down from one generation to the next not simply as a matter of practice or tradition but as a process to educate the next generation on the culture of the community so as to keep the culture alive and secure the maintenance of the community's collective identity. Thus, the legal protection of traditional cultural expressions should be undertaken not as an end in itself, but as a means of achieving the aspiration and expectations of indigenous people (WIPO, 2006). The needs and expectations of the *Kadazandusun Penampang* community may be divided into three broad categories.⁶ First, and the most forceful expectation put forth by the community, is the wish that outsiders who perform or reproduce their traditional cultural expressions should properly acknowledge the community as the source of their works. While the community does not in principle object to outsiders performing or reproducing their works, the members are concerned that the failure to make acknowledgement will eventually result in the public being unable to form a mental link that such works originated from the community with the consequence that their traditional cultural expressions will be claimed to belong to all and sundry. Secondly, their traditional cultural expressions have intrinsic value which embody the community's social, spiritual, moral and educational values. Accordingly, the community has expressed a desire that their traditional cultural expressions be respected. In particular, their ritual specialists, also known as *bobohizan*, lead in spiritual matters and are the medium to connect the physical with the supernatural. Only the *bobohizan* can perform specific rituals that have a high religious connotation and, therefore, any attempt by outsiders to perform such rituals would be very offensive to the community. Thirdly, there is a need to prevent the unauthorised exploitation, the misappropriation and distortion of their traditional cultural expressions albeit the known extent of such incidences is minimal. Such misappropriation could take the form of making and selling reproductions of crafts which are claimed to originate from the community when they are not. There have been complaints by community members that their well-known *sumazau* dance has been performed by outsiders in a distorted manner because the outsiders did not,

for instance, follow the requisite number of dancers or musical instruments of the *sumazau* dance. Finally, the community realises that as a direct result of external influence, the younger generation of their community are not interested in their traditional cultural expressions but are more engrossed with the modern way of life. The elders therefore realize that there is a need to preserve and promote their traditional cultural expressions so as to prevent the erosion and extinction of the tradition. The preservation of traditional cultural expressions helps to ensure that the culture continues to survive, grow and develop.

Traditional cultural expressions of the *Kadazandusun Penampang* community

Folklore and traditional cultural expressions are closely woven into the identity and lives of the *Kadazandusun Penampang* community (Hanafi Hussin, 2005: 171). Music, folksongs and dance are popular forms of traditional cultural expressions of this community. In particular, their performing arts, such as music and musical instruments, dances, folk tales, folk songs, folk poetry, rituals and handicrafts, are an embodiment of their culture today which is inherited from several generations. Much of their folklore and traditional cultural expressions are derived from their padi planting. Until recently, padi planting was the primary occupation of the community members who depended heavily on supernatural assistance in the success of their agricultural endeavours. Hence, many of their traditional cultural expressions, particularly music and dance have religious significance and connotations. The religious connotations of the *sumazau* dance, *gandang* and *sompogogungan* are evident from the community's belief that these serve as a conduit between humans and the spiritual world.

The life of the *Kadazandusun Penampang* community is steeped in rituals. These rituals are conducted by ritual specialists, are sacred in nature and are a means of communication with spirits in the supernatural world. Various musical instruments, such as the *gandang* and *sompogogungan* (which is the ensemble of six gongs that accompany the *sumazau* dance), are played simultaneously during rituals. The traditional performing arts of the *Kadazadusun Penampang* community are therefore very much related to their ritual.

Music

The music repertoire in the *Kadazandusun Penampang* community may be divided into two categories, namely, ritual music and music for celebration. Ritual music is further classified into music with or without instrumental music accompaniment. The latter characteristically focused on vocal lyrics.

Music for ritual

Sumazau music is categorized as ritual music. This repertoire is played in certain rituals such as rice farming rituals (*monogit* and *humabot*) and also death rituals.

Another type of ritual music is called *dunsai* which is played during funerals. After burial, the *sumazau* music is performed to the accompaniment of gongs which are collectively called *sompogogungan*. *Sompogogungan* music is also played in *monogit* rituals to accompany female shamans, known as *bobohizan*, in communicating with the spirits. This communication or *modsuut* with the spirits usually takes place between midnight and dawn.

The process of invoking the spirits starts with the beating of the *gandang* in four processes, namely, *pason*,⁷ *matang*,⁸ *tumingak*,⁹ and *savak*.¹⁰ The *gandang* is used together with the *sompogogungan* during the *modsuut*. The *sompogogungan* is continuously played during the *modsuut* culminating with the communication by the *bobohizan* with the spirit world (Hanafi Hussin, 2006: 7-10).

Music for celebration

Although music for harvest celebrations is traditionally a part of ritual, the harvest festival has now become a secular celebration. The music used in this ritual is *sumazau*, which is also the name for the dance accompanying it. Apart from harvest celebrations, this music is also played during weddings and other functions, such as ushering important guests and inauguration.

Folksongs

There are four types of folksongs, namely, *sugandoi*, *suminding*, *magavau* and *hius*. *Sugandoi* is a head-hunting song that is sung for the purpose of celebrating the achievement of a warrior in bringing home a head trophy. This is usually sung by male performers but is rarely performed nowadays. *Suminding* is a melodic poem about a bad dream traditionally performed by the dreamer himself. This is sung in order to prevent bad dreams from recurring. Nowadays, *suminding* can be performed by both male and female performers, though not necessarily by the dreamer himself. *Hius* is a melodic poem as well, traditionally sung for entertainment during drinking sessions or any social gatherings. This is performed by both males and females. *Magavau* is also a melodic poem which is usually recited during the harvest season to call on the spirits to give thanks for the bountiful harvest. As *magavau* is being chanted, a group of male and female performers, usually about 10 to 15 in number, rhythmically march around the house. The chant is called *inait magavau* or *hozou do magavau*. *Hozou do magavau* is divided into three parts, which are the *magagandai* (happy), *mangambai* or *papa'ambai* (waving of hands) and *mogkodim* (to celebrate).

Today, these folksongs are rarely performed according to tradition. The present generation assumes a minimal role in the main function of the melodic poems. For instance, *sugandoi*, which used to be performed during head-hunting celebrations, is today commonly performed during harvest festivals, thus naming it *sugandoi kaamatan*.

Dance

The *sumazau* dance in this community is performed in rituals and in celebrations.

Dance in rituals

Sumazau is performed in *monogit* and *humabot* rituals. The *sumazau* in *monogit* functions as a form of communication and a bridge between the spirits and human beings. The dance process in ritual starts with the first segment, *sumazau magampa*, wherein the *bobohizan* gets rid of a bad dream, bad luck, illness or the like (Hanafi Hussin, 2008: 177-178). This process is known as *moguzas nipi talaad*. In *sumazau magampa*, one of the *bobohizans* dances with the clattering of bamboo in the downward striking motion signaling the warding off of *moguzas nipi talaad*. The chief *bobohizan* or *bohungkitas* dances in the motion of collecting the *moguzas nipi talaad* by swinging the chicken back and forth over the sick person covered by a blanket. The dance is accompanied by a chant. The second segment is the *sumazau mundang* wherein dance and chant are done simultaneously telling the spirit that the feast is prepared for the *bobohizan* themselves to be susceptible to the entry of the spirit (*miontong*). Once the *miontong* possesses the *bobohizan* the feeding of the spirits starts. It is the *miontong*, the house guardian spirit, who feeds the summoned spirits in the form of dance. The *miontong* dances while serving the spirits. The actions are collectively called *pasasazau do miontong*. The dance has a specific structure with each step having its individual function and spiritual connotations.

The *sumazau* dance is composed of various movements. In *sumazau magampa*, the dance movement includes *momohipud*, *modsoladu*, *monokom do toluwa*, *mogihik do sakit*, *mogundosi*, *mintau*, *iduah*, *muzas*, *monibas* and *mongimuau*. In *pasasazau do miontong*, the dance movement includes *mangambai*, *tumindak*, *sumihok*, *mimiliun*, *mongonggom*, and *mongidai*. *Mangambai* and *tumindak* are the basic movements for *sumazau* as well as the standard dance movement among the *Kadazandusun* community in *Penampang*, thus calling it *sumazau penampang*.

Dance in celebrations

Although traditionally the *sumazau* dance is performed for sacred purposes (when so performed is called *kuminod*), the dance is also performed today during social functions and gatherings. Among the *Kadazandusun*, *sumazau penampang* is performed as a community dance in various celebrations, such as village functions, festivals and weddings. When performed in celebrations, the *sumazau* dance also makes use of various dance movements which are similar to those used in ritual dances. However, among the younger generation, the dance has been modified with choreography and adaptation although the basic rhythm and dance movements have been maintained. Indeed, in its modern form, the dance acquires a more social than religious relevance.

Today, the dance is widely known throughout the country and is particularly identified with the *Kadazandusun* community. The *sumazau* is not performed only by the *Penampang* community itself but also by the other

communities in Sabah and Peninsula Malaysia representing Sabah's identity (Hanafi Hussin, 2007: 208). With modernization and social changes occurring in the community, the religious significance of traditional beliefs and dance has diminished. The younger members of the community view their traditional religious beliefs as backward but the reality remains that these are their roots and culture and a legitimate base of their traditional cultural expressions.

Protecting the traditional cultural expressions of the Kadazandusun Penampang community

National Heritage Act 2005

Relevance of the Act in protecting traditional cultural expressions

The relevance of the National Heritage Act 2005¹¹ in the protection of traditional cultural expressions is evident from the preamble of the Act. The purpose of the Act as stated in the preamble is to provide for the conservation and preservation of, *inter alia*, National Heritage, natural heritage as well as tangible and intangible cultural heritage. Apart from the conservation and preservation of the subject matters that fall within the Act, the Act also extends to cover related matters pertaining to such subject matters. In his public speech to introduce the Act when it was enacted, the then Minister of Culture, Arts and Heritage, Datuk Seri Utama Dr Rais Yatim, explained that the scope of 'related matters' mentioned in the preamble was sufficiently wide to encompass the promotion, research and enforcement of the Act as well as the determination of the role of the state and federal government on heritage matters.¹² The Act came into force on 1 March 2006 and applied throughout Malaysia on that date.¹³

Prior to the enactment of the Act, the laws relating to heritage were narrowly circumscribed in two federal statutes which have since been repealed, namely, the Antiquities Act 1976¹⁴ and the Treasure Trove Act 1957.¹⁵ The Antiquities Act 1976 was concerned with matters pertaining to ancient and historical monuments, archaeological sites and remains, antiquities and historical objects. It did not provide for intangible heritage. Similarly, the Treasure Trove Act 1957 was concerned with tangible heritage in the form of money, coin, gold silver, plate, bullion jewellery, precious stones and the like which were found hidden in the soil or the bed of a river or sea. Heritage concerns under both these statutes came within the purview of the respective state governments where the heritage was located. However, it was later felt that the issue of culture and heritage had been sidelined for too long as the nation strove to reach further heights in its development.¹⁶ In January 2005, the Ninth Schedule to the Federal Constitution was amended to include the preservation of heritage as one of the items in the Concurrent List so that the Federal Government would be able to play a more meaningful role in heritage preservation.¹⁷ Consequently, heritage concerns are now within the purview of both the Federal and State Governments.

The National Heritage Act 2005 is in a sense an all encompassing statute in that its provisions were drafted to apply to all categories of conceivable heritage,

namely, tangible heritage, intangible heritage, natural heritage and underwater cultural heritage. The Act lays down a scheme of registration whereby intangible cultural heritage, among others, can be registered in the National Heritage Register as a heritage object. The establishment and maintenance of the National Heritage Register is provided under section 23(1). The Register, which is a public document, contains the list of heritage items registered under the Act.¹⁸

The maintenance of the Register is the responsibility of the Commissioner of Heritage.¹⁹ The Commissioner, whilst must be a body corporate, operates through an officer appointed by the Minister.²⁰ The officer has the responsibility of carrying out the powers and functions assigned to him under sections 6 and 7 of the Act.

Part IV of the Act provides for the establishment of a National Heritage Council.²¹ The functions of the Council are two-fold, as spelt out in section 9(1). First, the Council has the function to advise the Minister and the Commissioner on all matters relating to heritage, and its administration as well as enforcement. Secondly, the Council has the function to advise the Minister and the Commissioner on any matter referred to it by the Minister to the Commissioner.

The Act also provides for the establishment of a Heritage Fund under section 20(1). The purposes for which this fund may be expended are for conserving and preserving heritage items, objects and sites as well as promoting the public's understanding of the protection of the country's heritage. The financial assistance which this fund provides in the preservation and conservation of heritage items would serve as motivation and incentive for owners of heritage items to seek registration under the Act. Pursuant to section 21 of the Act, the fund may be expended for the following purposes:

- (a) payment for the purchase of heritage and conservation areas
- (b) payment of the expenses incurred for –
 - (i) the conservation and preservation of any heritage and conservation areas whether they are owned by the Government or otherwise
 - (ii) organizing campaigns, research, study, publication of materials for the protection of heritage and conservation areas and
 - (iii) the conservation and preservation of any heritage item and activities incidental to it
- (c) any disbursement of grant or loan under the Act
- (d) any payment for the purpose of the Act

The Act does not impose a positive duty on anyone (be it the owner or otherwise) to apply to register a site or object as a national heritage. This is evident from the wording of section 50(1) which provides that 'Any person may apply for an object to be registered as a heritage object'. Nevertheless, a number of provisions of the Act place an obligation on any person who discovers an object or site which could be of heritage significance to notify the Commissioner. For instance, section 47(1) of the Act requires any person who discovers any object which he has reason to believe has cultural significance, to notify the Commissioner, any authorised officer or the relevant District Officer. A similar obligation is imposed under section 61(1)

and section 74(1) on any person who discovers an underwater cultural heritage in the Malaysian waters or any treasure trove respectively.

As mentioned earlier, section 50(1) of the Act provides for the making of an application to register an object as a heritage object under the Act. Contrary to the general understanding of an 'object' as a physical thing which can be perceived by the eye, the term 'object' in the Act encompasses a broader and non-physical dimension. Section 2 of the Act defines an 'object' as including 'any movable antiquity, tangible cultural heritage, intangible cultural heritage and historical object but excluding treasure trove'. In turn, 'intangible cultural heritage' is defined as 'any form of expressions, languages, lingual utterances, sayings, musically produced tunes, notes, audible lyrics, songs, folk songs, 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'. Thus, the definition of 'object' under the Act encompasses both tangible and non-tangible heritage. Section 2 of the Act also provides a definition of the term 'cultural heritage', which appears to be superfluous in view of the fact that the terms 'tangible cultural heritage' and 'intangible cultural heritage' have already been defined in that section. Be that as it may, the section defines 'cultural heritage' as including 'tangible or intangible form of cultural property, structure or artifact and may include a heritage matter, object, item, artifact, 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'. Comparing the above definitions with the scope of traditional cultural expressions in the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982, it is clear that the Act is sufficiently broad to include verbal expressions, musical expressions and expressions by actions. Indeed, the *sumazau* dance is registered under the Act as a National Heritage.

The definition of 'historical object' in section 2 demonstrates that the scope of the Act is sufficiently wide to encompass crafts and musical instruments, which are the tangible aspects of traditional cultural expressions. The definition of 'historical object' was adopted from the meaning assigned to that term in the now repealed Antiquities Act 1976. 'Historical object' is defined to mean any artifact or other object to which religious, traditional, artistic or historic interest is attached and includes any of the following:

- (a) ethnographic material such as a household or agricultural implement, decorative article or personal ornament;
- (b) work of art such as a carving, sculpture, painting, architecture, textile, musical instrument, weapon and any other handicraft;
- (c) manuscript, coin, currency note, medal, badge, insignia, coat of arm, crest flag, arm or armour;
- (d) vehicle, ship and boat, in part or in whole, whose production has ceased.

This definition encompasses tangible expressions in the form of folk art, crafts and musical instruments. From the foregoing discussion, it may be surmised that the Act grants protection to all categories of traditional cultural expressions which are within the meaning of the WIPO-UNESCO Model Provisions. The next section examines the extent of protection which this Act provides to traditional cultural expressions.

Protection of traditional cultural expressions under the Act

In examining the scope of protection of traditional cultural expressions under the National Heritage Act 2005, this paper categorises such expressions into intangible cultural expressions (such as verbal expressions, musical expressions and expressions by actions) and movable tangible cultural expressions (such as productions of folk art, crafts, musical instruments). In so far as intangible cultural expressions is concerned, the provisions of Part VIII of the Act entitled 'Heritage Object' applies. Pursuant to section 50, an application may be made by any person to register the traditional cultural expressions as a heritage object. The consequence of registering an intangible cultural heritage is provided in section 60(1). Section 60(1) places a duty on the owner or custodian of a heritage object in the form of an intangible cultural heritage to take all necessary steps to develop, identify and transmit such intangible cultural heritage. In addition, the owner or custodian is also required to take all necessary steps to cause the intangible cultural heritage to be performed. Furthermore, the owner or custodian is required to facilitate research on the intangible cultural heritage according to the guidelines and procedures prescribed by the Commissioner. An intangible cultural heritage listed in the Register may be declared by the Minister under section 67(1) of the Act or by any other person under section 68 to be a National Heritage. Section 67(5) provides that if copyright still subsists in such intangible cultural heritage, the consent of the copyright owner shall be obtained before any declaration is made. Such a requirement for prior consent from the copyright owner does not appear to be warranted. This is because ownership of copyright in an intangible cultural expression is a concept which is altogether different from the issue of conservation and preservation of heritage. To require prior consent from the copyright owner before declaring an intangible cultural heritage a National Heritage seems to suggest incorrectly that copyright ownership assumes precedence over the noble cause of conserving intangible cultural heritage.

With regard to movable tangible cultural expressions in the form of productions of folk art, such as drawings, paintings, carvings, sculptures, pottery, crafts and musical instruments, Part VIII of the Act is again relevant because of the manner in which the term 'object' is defined, as discussed above. Except for sections 50 to 53 which deal with matters pertaining to the registration of heritage object and section 60 which was discussed in the preceding paragraph on intangible cultural heritage, the remaining provisions in Part VIII are relevant only if the heritage was an object with physical form, whether discovered before or after the date of coming into operation of the Act, that could be delivered to governmental authorities²² or inspected by them,²³ could be valued,²⁴ be the subject

matter of custody, possession and retention²⁵ and sale or disposal.²⁶ Section 59(1) requires the owner or custodian of a heritage object to keep the heritage property in good condition and in a secure place. This is an onerous responsibility because section 59(3) provides that any person who fails to comply with this responsibility commits an offence under the Act. The movable tangible cultural objects which Part VIII contemplates are those physical objects of cultural heritage significance which have been discovered either before or after the coming into operation of the Act.

While the legal protection of heritage objects which are discovered is important, it is equally important to address the issue of how traditional cultural objects which are already known to exist in an indigenous community can obtain legal protection, such as how they may legally be preserved in their originally known form without any distortion and how they will remain attributed to that indigenous community. For instance, as discussed above, the musical instruments of the *Kadazandusun* community, such as *gandang* and *sompogogungan* are used in their *sumazau* dance and *Monogit* ritual. These instruments are not 'discovered objects' within the scope of Part VIII of the Act but their originally known form needs to be preserved against distortion, adulteration or modification. Yet, neither Part VIII nor any other section of the Act addresses such form of protection.

Cultural Heritage (Conservation) Enactment 1997 of Sabah

While the National Heritage Act 2005 is a federal statute, the state of Sabah has its own state legislation that deals with cultural heritage matters. The legislation, known as the Cultural Heritage (Conservation) Enactment 1997, was enacted to address issues of preservation, conservation and enhancement of cultural heritage and for matters incidental thereto. The preamble of the Enactment bears similar objectives as the National Heritage Act 2005. The Cultural Heritage (Conservation) Enactment 1997 of Sabah came into force on 1 September 1999.

Section 5 of the Enactment provides that the jurisdiction to control, enforce, develop or conserve cultural heritage in Sabah is vested in the State Government. As the Ninth Schedule of the Federal Constitution has been amended to place heritage matters in the concurrent list of both Federal and State jurisdictions, it remains to be seen how conflicts between the wishes of the State Government and the Federal Government arising from the overlapping jurisdiction will be settled.

The administrative and administrative-related aspects of the Enactment resemble that of the National Heritage Act 2005 but the obligations, duties and responsibilities laid down by both statutes differ in certain respects. The Enactment provides for the establishment of the State Cultural Heritage Council, the setting up of a Cultural Heritage Fund and the establishment of a Register, in terms which are substantially similar to that of the National Heritage Act 2005. For instance, section 3 provides for the establishment of the State Cultural Heritage Council whose responsibility is to advise the State Government on matters of policy, administration and management of cultural heritage and conservation areas. In addition, section 6 provides for the setting up of a Register, which is a public document, in which all cultural heritage or conservation areas which have been

declared to be subject to preservation or conservation shall be registered. Also, section 14(1) provides for the establishment of the Cultural Heritage Fund. By section 14(4), the Fund shall be expended for the following purposes which are not altogether different from the Heritage Fund set up by the National Heritage Act 2005. The purposes of the Fund are as follows:

- (a) maintenance, preservation, conservation and enhancement of any cultural heritage or conservation area
- (b) acquiring any cultural heritage or conservation area of exceptional importance to the state
- (c) carrying out any other projects or activities sponsored by the State Government such as the publication and exhibition of any cultural heritage or conservation area
- (d) carrying out and organising campaign for the protection of cultural heritage or conservation area
- (e) paying any cost or expense lawfully incurred by the Council or the Secretary for the enforcement or carrying out into effect the provisions of the Enactment

The Enactment applies to 'cultural heritage', which is defined in section 2 to include 'any antiquity, historical object, historical site, site area (whether on land or in the sea), fabric, building, structure, ethnographic matter, work of art, manuscript, coin, currency note, medal, badge, insignia, crest, flag, armour, vehicle, ship and tree, which has a significant and special architectural, aesthetic, historical, cultural, scientific, economic, environmental or any other interest or value'. The term 'historical object' is defined to mean 'any artifact or other object to which religious, traditional, artistic or historic interest is attached'. From this definition, it would appear that the thrust of the Enactment is on tangible cultural heritage. Intangible cultural heritage does not fall within the scope of the Enactment. Section 15 provides that the owner or any person in possession of a cultural heritage may apply to the State Government for financial assistance which is necessary for the maintenance, preservation, conservation and enhancement of the heritage.²⁷

Unlike the National Heritage Act 2005 which places obligations and, at times, seemingly burdensome responsibilities on owners or those in possession of cultural heritage,²⁸ the Enactment casts many obligations on the governmental head of the state, that is, the Yang di-Pertua Negeri or Council. By section 4(1) of the Enactment, the Yang di-Pertua Negeri may, on the recommendation of the Council, declare any heritage as cultural heritage. Section 4(2), which is worded in a permissive manner, provides that any person in possession of any cultural heritage may apply to the Council for a section 4(1) declaration. There is no provision in the Enactment which makes it mandatory for those who discover objects of cultural heritage significance to notify the relevant authority, unlike the position in the National Heritage Act 2005. Interestingly, section 10 of the Enactment casts the responsibility on the Council to purchase certain types of buildings of a cultural nature. The section provides that owners of certain types of buildings that are cultural heritage may serve on the Council a purchase notice requiring their buildings to be purchased by the Council in accordance with the Enactment. This

added responsibility that is cast on the Council is absent in the National Heritage Act 2005.

Copyright Act 1987

There have been ongoing debates on whether the intellectual property system is an appropriate model to protect traditional cultural expressions. Of the different branches of intellectual property rights, copyright law has been widely discussed more than other forms of intellectual property rights, as an apt regime to assimilate traditional cultural expressions within the intellectual property system.²⁹ The primary reason for this lies in the fact that traditional cultural expressions are almost always literary or artistic expressions. These are the same form as the subject matter of copyright law and it is almost impossible to think of any type of traditional cultural expression that does not fall within the categories of works or neighbouring rights of copyright law. However, the attempt to incorporate traditional cultural expressions within the framework of copyright is questionable and fraught with difficulties, both from the conceptual point of view as to the underlying purpose of copyright law and also from the substantive point of view as to the requirements for copyright protection. The purposes of copyright law are to promote the progress of the arts and science for the benefit of the public and to reward creators of works so as to encourage further creativity. In rewarding creators, the law confers on them proprietary right over their works for a limited duration during which time the creators may exercise a number of exclusive rights in relation to their works. However, the Western philosophy of property is alien to the indigenous systems. The understanding of property in the Western world presupposes the existence of exclusive rights in the sense that others are excluded from exercising the rights, apart from the owner himself. In indigenous societies, such concept of ownership does not exist and the trustees of the traditional cultural expressions are subject to various responsibilities and duties which are essentially aimed at benefiting the community.

Be that as it may, discussions on the protection of traditional cultural expressions under copyright law have proceeded by categorising traditional cultural expressions into two types. The first type refers to expressions that are contemporary because they are made by the current generation of the community and are based on tradition. The second type refers to pre-existing traditional cultural expressions. In so far as the first type is concerned, it is generally accepted that copyright protection is available for tangible, contemporary, tradition-based cultural expressions because these cultural expressions satisfy the substantive requirements for copyright protection.³⁰ More specifically, these meet the basic copyright requirements of originality, authorship and fixation. For the second type, namely, pre-existing traditional cultural expressions, it is highly doubtful that these can be assimilated within the copyright model. The arguments put forward against protecting pre-existing traditional cultural expressions within the copyright system, which essentially centre on issues of originality, fixation, authorship and duration of copyright, are well-known.³¹

The originality requirement

For a work to be protected by copyright, it must be original in the sense that the work originates from the author.³² The work must be the author's own intellectual creation and not copied from another source.³³ Under section 7(3) of the Malaysian Copyright Act 1987, originality entails that sufficient effort must have been expended to make the work original in character. Pre-existing traditional cultural expressions almost invariably are transmitted from generation to generation and evolve as well as develop over a long period of time. Unlike contemporary, tradition-based cultural expressions which can be regarded as original works because something original has been added, pre-existing traditional cultural expressions, by their nature, lack originality.

The fixation requirement

The copyright law of Malaysia as well as that of other common law countries requires that the work must be written down, recorded or otherwise reduced to material form to be eligible for copyright.³⁴ Pre-existing traditional cultural expressions, being orally transmitted from generation to generation, are not fixed in any material form. The dances, songs, folktales, poetry *etc* are performed without being fixed in any material form.

The author requirement

Although copyright belongs to the copyright owner and not the author of the work, the concept of authorship is nonetheless very important in copyright law. This is because the author is generally the first owner of the copyright although he may subsequently transfer his ownership to another. Hence, the identification of the author is important. For pre-existing traditional cultural expressions which originated from the supernatural realm or whose author, if there is one, had died centuries back, the identifiable author requirement is impossible to satisfy. With regard to unidentified authors, section 26(4)(c) of the Malaysian Copyright Act 1987 provides that where a work is unpublished and the identity of the author is unknown, but there is every reason to presume that he is a citizen of Malaysia, the copyright conferred shall be deemed to vest in the Minister in charge with the responsibility for culture. In the context of pre-existing traditional expressions where it is widely accepted and not challenged that certain traditional cultural expressions belong to a specific indigenous community, it is ironical that copyright protection, if conferred on the traditional cultural expressions, should vest in the Minister charged with responsibility for culture instead of a trustee from the indigenous community itself. Apart from that, the identifiable author requirement in the copyright system may not have its counterpart in the indigenous community system because some traditional cultural expressions are believed to originate from the supernatural.

Limited term of protection

In many countries, the term of protection for copyright works is 50 years after the death of the author although some countries have extended the term to life of the author plus 70 years after his death. During the term of protection, the copyright owner has the exclusive rights to exploit his work and reap the economic benefits of his creative labour. The interest of the public to have access to the work is met by providing that the work falls into the public domain after the expiry of the term. Many traditional cultural expressions, by their nature, exist since time immemorial. Obviously, by subjecting traditional cultural expressions to the Western philosophy of copyright protection and conferring legal protection for a limited term of time, is paternalistic and condescending in nature.

From the above discussion, it is evident that there are strong arguments against the suitability of the copyright system in protecting traditional cultural expressions. However, it should be mentioned that two separate aspects of the Copyright Act 1987 are apt provisions for protecting traditional cultural expressions. The first is the notion of moral rights. The second is the protection conferred on performers of live performances.

Moral rights, which are concerned with the preservation of the author's integrity and reputation, is a dimension of copyright law which resemble the expressed desire of indigenous people that outsiders who use their traditional cultural expressions make appropriate acknowledgements as to the source in which the outsiders' works originate. Pursuant to section 25(2) of the Copyright Act 1987, there are two types of moral rights which exist during the subsistence of copyright in the work. The first type of moral right is the right to prevent anyone from presenting a work without identifying the author. The second type of moral right is the right to prevent anyone from distorting, mutilating or modifying the work if this significantly alters the work and might reasonably be regarded as adversely affecting the author's honour or reputation. Comparing these moral rights with the concerns and expectations of the indigenous people, it may be said that this dimension of copyright, though not given much importance in the common law world, is extremely significant to the indigenous community.

Performers' rights were introduced in Malaysia in the year 2000 in response to the country's international obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights. Section 16A(1) of the Copyright Act 1987 gives the performer the exclusive right to control in Malaysia the following rights:

- (a) the communication to the public of a live performance
- (b) the fixation of an unfixed performance
- (c) the reproduction of the fixation of a live performance in certain circumstances
- (d) the first making available to the public of a fixation of a live performance through any form of transfer of ownership
- (e) rental to the public of a fixation of a live performance or copies thereof

The definition of a 'live performance' is given an inclusionary meaning in section 3 of the Act and includes, *inter alia*, 'a performance in relation to expressions of folklore'. Performances of other forms of traditional cultural expressions, such as dances and musical works, are also entitled to performers' rights.

Evaluation of the current legal protection of the traditional cultural expressions of the Kadazandusun Penampang community

In evaluating the adequacy of the legal protection currently afforded to the traditional cultural expressions of the *Kadazandusun Penampang* community, it is important to bear in mind the expressed needs and expectations of the community. The needs and expectations of the community were identified at the outset of this paper.

The enactment of the National Heritage Act 2005, which covers wide-ranging matters pertaining to the conservation and preservation of heritage, is a laudable move on the part of the government. To a large extent, the National Heritage Act 2005 reflects one of the expressed needs of the *Kadazandusun Penampang* community, namely, the preservation and promotion of their traditional cultural expressions so as to ensure that these are kept alive and in ongoing development. However, a number of observations may be made about some provisions of the National Heritage Act 2005 which may not be advantageous to the *Kadazandusun Penampang* community and, in fact, may hamper the preservation and promotion of their traditional cultural expressions. One of the consequences of registering an intangible cultural heritage under the Act is provided in section 60(1). Section 60(1) places a highly onerous burden on the owner or custodian of the intangible cultural heritage to ensure conservation of the intangible cultural heritage. The section is worded such as to make it mandatory for the owner or custodian to 'take all necessary steps' to conserve the intangible cultural heritage. This in itself would arguably serve as a deterrent for the owner or custodian to register the traditional cultural expression as a heritage. In addition, the *Kadazandusun Penampang* community, as is also the case with other indigenous communities, usually comprises community members whose income is merely sufficient to meet their daily needs and that of their families. Assuming that the custodian of the heritage is unable to obtain funding from the Heritage Fund or other sources to carry out the purposes expressed in section 60(1), the custodian is technically in breach of that section if he fails to carry out the activities mentioned in that section. Accordingly, section 60(1) can be unduly burdensome on the custodian, who in the first place may have barely enough earnings to meet his daily needs and that of his family. Apart from that, the section presupposes that there is an owner or custodian of the traditional cultural expression. That may not be the case in all situations because some traditional cultural expressions of the *Kadazandusun Penampang* community do not have any custodian or trustee. For instance, there is no custodian of their musical instruments and the *sumazau* dance.

The notion of conserving an intangible cultural heritage should also entail prohibition of acts that would distort, mutilate or modify the cultural expressions. While it cannot be denied that traditional cultural expressions are evolving living

traditions, acts of distortion or mutilation would damage the purity of the originally known form of the intangible cultural heritage. Additionally, acts amounting to the unauthorised commercial exploitation of the traditional cultural expressions should also be sanctioned. The National Heritage Act 2005 is silent on this point.

In relation to tangible cultural expressions, the National Heritage Act 2005 also places onerous responsibilities on the owner or custodian of a heritage object to keep the heritage property in good condition and in a secure place, as required by section 59(1). By providing that the failure to comply with this responsibility amounts to an offence, and therefore placing a criminal dimension to such failure, section 59(3) has added an additional burden on the owner or custodian of heritage object.

The Act also does not appear to address the issue of how existing known forms of tangible cultural heritage, such as musical instruments and handicrafts, may be legally protected so that outsiders do not reproduce such tangible cultural heritage in a manner that distorts their original form. Equally lacking in the National Heritage Act 2005 are provisions to ensure that such tangible cultural expressions remain attributed to the original indigenous community even if outsiders have adapted or modified them.

The Cultural Heritage (Conservation) Enactment 1997 of Sabah, like the National Heritage Act 2005, is also concerned with the preservation, conservation and enhancement of cultural heritage. It is narrower in scope than the National Heritage Act 2005 because of its fairly restrictive definition of 'cultural heritage' which does not extend to intangible cultural expressions. The Enactment also does not contain any provision requiring outsiders who perform or reproduce the traditional cultural expressions to properly acknowledge the community as the source. Neither does the Enactment contain any provision that prevents unauthorised commercial exploitation, misappropriation or distortion of traditional cultural expressions.

With regard to the copyright regime, issues of fixation, originality, authorship and limited duration of protection pose difficulties when applied to traditional cultural expressions. The copyright regime, which essentially is an economic-motivated system, runs counter to the very existence of traditional cultural expressions. Traditional cultural expressions reflect the culture of the indigenous community and do not exist for economic-driven purposes. Although the concept of moral rights in the copyright regime seems to meet one of the expressed needs and expectations of the community, such rights presuppose that copyright subsists in that work. Moral rights only subsist during the subsistence of the copyright. However, as mentioned earlier, the technical difficulties of a copyright regime may mean that traditional cultural expressions do not qualify for copyright protection.

Conclusion

The above discussion illustrates that traditional cultural expressions are inextricably linked to the lives of indigenous people. Although the research has

looked at a specific indigenous group in Malaysia, the needs and expectations expressed by the *Kadazandusun Penampang* community reflect common themes which are shared by indigenous groups throughout the world. Most importantly, society at large must recognize that the traditional cultural expressions of indigenous people have significant intrinsic value and, therefore, merit society's due respect. Government's intervention through legislative enactments is an indispensable facet in the protection of traditional cultural expressions as this provides the necessary legal clout which is needed to ensure that the rights of indigenous people over their traditional cultural expressions are not violated. However, as the situation in Malaysia demonstrates, focusing on issues of conservation and preservation through legislation such as the National Heritage Act 2005 and the Cultural Heritage (Conservation) Enactment 1997 of Sabah is merely a step in responding to one out of the several needs of the community in relation to their traditional cultural expressions. Protecting the creativity and innovative nature of traditional cultural expressions, which is an aspect analogous to the interests protected under intellectual property rights, is another dimension in the legal protection of such expressions. As discussed above, the copyright regime is inappropriate for the protection of such traditional cultural expressions because they do not match the fundamentals of copyright law. Nonetheless, the need to protect the creativity and innovative features of traditional cultural expressions cannot be doubted and it augurs well for countries which as yet do not have laws that protect the intellectual and creativity aspects of traditional cultural expressions to put in place such a paradigm.

Endnotes

¹ Discussions on the international protection of folklore was first raised by the Government of Bolivia in 1973 when it sent a memorandum to the Director General of the United Nations Educational, Scientific and Cultural Organisation urging it to look into the possibility of having an international instrument on the protection of folklore.

² On the Model Provisions, see generally, Lucas-Schloetter (2004).

³ For further details on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, see _____. *Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Doc. CLT/CEI/DCE/2007/P1/32) available at <http://unesdoc.unesco.org/images/0014/001495/149502m.old.pdf>.

⁴ See, for instance, Gibson, J (2006).

⁵ Above n 4 at para 2.

⁶ At the international level, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore have identified the policy objectives and core principles in the legal protection of traditional cultural expressions. On this, see WIPO (2006).

⁷ The purpose of *pason* is to announce the event to the spirit world.

⁸ The purpose of *matang* is to awaken the spirit of the drum by chanting and smashing rice grains with a metal called *sindayang* on the drum head.

⁹ The purpose of *tumingak* is to give power to the ritual instruments.

¹⁰ The purpose of *savak* is to call the other spirits.

¹¹ Act 645.

¹² Speech of the then Minister of Culture, Arts and Heritage, Datuk Seri Utama Dr Rais Yatim held on 30 May 2006 at Hotel Sheraton, Kuala Lumpur.

¹³ See PU(B) 53/2006.

¹⁴ Act 168.

¹⁵ Act 542.

¹⁶ Above n 19.

¹⁷ See Explanatory Statement to the Bill on the Constitution (Amendment) Act 2004, item 4.

¹⁸ National Heritage Act 2005, section 23(2) and (3).

¹⁹ Section 4(1).

²⁰ Section 4(3).

²¹ Section 8.

²² National Heritage Act 2005, section 47(1).

²³ Section 47(4).

²⁴ Section 48(2).

²⁵ Section 53.

²⁶ Section 56.

²⁷ Sabah also has a state enactment known as the State Heritage Trust Fund Enactment 1996 which sets up the State Heritage Trust Fund. Monies from the Fund are to be invested and proceeds from the investment may be applied for a number of purposes including purposes specified in the Sabah Development Fund Ordinance 1963 and such other purposes specified in the resolution of the State Legislative Assembly granting the approval.

²⁸ For instance, section 60 of the National Heritage Act 2005 makes it mandatory for the owner or custodian of traditional cultural heritage to take all necessary steps to develop, identify, transmit, cause to be performed and facilitate the research on the intangible cultural heritage according to prescribed guidelines and procedures. Another instance is section 47(1) of the Act which places an obligation on the person who discovers any object believed to be of cultural heritage significance to deliver the object to the Commissioner of Heritage.

²⁹ Other types of intellectual property have also been discussed as possible forms of protecting traditional cultural expressions, but their applicability appears to be narrower than copyright law. For instance, geographical indications law, trade mark law and industrial designs law have been considered as possible options. On this, see above n 4.

³⁰ Above n 4 at paras 137-138.

³¹ At paras 102-136, Lucas-Schloetter, A, (2004).

³² *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

³³ *Ibid.*

³⁴ Malaysian Copyright Act 1987, section 7(3)(b).

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