

## Steering the Boat: The Right to Fish in Malaysia and Australia

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### Abstract

Malaysia is a country possessing a coast rich in biodiversity that contributes to the country's economy through tourism and the fishing industry. As incomes and the demand for seafood rises, commercial fishers are able to leverage on these new and unprecedented circumstances. However, there is considerable debate surrounding the status of fisheries and its impact on the environment. The present study focuses on the effectiveness and impact that the current legislation surrounding commercial and recreational marine fishing activities is having on the conservation of marine ecosystems and the protection of fish stock populations in Malaysia. The current legislation and methods of regulation enforcement in both Malaysia and Australia was compared to identify areas where Malaysia may improve in its efforts of protecting the fishing industry and marine environment. Findings of this study revealed a lack of assessment within the Malaysian fishery industry and low levels of regulation enforcement when compared to that of Australia. The review within the study revealed geographical, economic and food security implications in Malaysia that were not present in Australia. These implications play a role in the unsustainable nature of the Malaysian fishing industry. Despite these challenges, this study suggests that with increased legislation, enforcement, assessment and awareness, Malaysia can achieve sustainable goals within its fishery industry that conserves ecosystems and marine fish stocks.

**Keywords:** fisheries management, fishing rights, marine ecosystem.

### 1. Introduction

The commercial marine fishing industry is one that dates back hundreds of years, yet in recent times this industry has come under scrutiny on a global scale for the negative impacts it is having on ocean ecosystems.<sup>39</sup> In an effort to combat this as well as protect the future of the industry, many well-developed countries are creating legislation that enforce sustainable

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<sup>39</sup> Ruth H. Thurstan, Simon Brockington and Callum M. Roberts, 'The Effects of 118 years of Industrial Fishing on UK Bottom Trawl Fisheries' (2010) 1(15) Nature Communications <<https://www.nature.com/articles/ncomms1013.pdf>> accessed 8 August 2021.

industrial practices.<sup>40</sup> The same cannot be said for lower socioeconomic countries that comprise >80% of the global catch and where fisheries are lacking formal assessment.<sup>41</sup> This study will examine and compare Malaysia's current legislation and assessment over its fishery industry to that of Australia.

A doctrinal approach will be employed to determine the adequacy of the laws that exist as well as its enforcement in relation to the right to fish in Malaysian waters. This approach forms the precursor to a socio-legal analysis on the right to fish and the responsibilities that fishing entails from both a recreational and commercial perspective. The scope of the research explores the adequacy of fishing laws only within Peninsular Malaysia, not including the states of Sabah and Sarawak that have separate local systems of legislation. It is important to state that although the discussions within this study focus solely on marine fishing, parallels may still be drawn and applied to the riverine wild catch industry as well.

Banakar states that traditional legal research has always utilized the top-down approach. Socio-legal research on the other hand conducts its studies both top-down and bottom-up.<sup>42</sup> The researchers are of the view that the top-down research must always serve as a starting point which more often than not is complemented by a comparative element to appreciate the best practices from jurisdictions with a similar legal framework. This forms the precursor to the bottom-up approach that allows for societal needs to scientifically inform future law-making. Since the law in relation to fishing is at best fragmented, there is a need to be selective of the laws referred to based on the reception to the law and its usage. The international and regional law commitments must also be taken into consideration in the selection of laws for this purpose. Gaps are then easily identified and best practices from other States are used to bridge those gaps. Relevant Malaysian legislation referred to in this analysis are the Fisheries Act 1985, the Exclusive Economic Zone Act 1984 and the Continental Shelf Act 1966. The comparative Australian legislation mentioned are the Fisheries Administration Act 1991, the Fisheries Management Act 1991, the Fisheries Levy Act 1991 and the National Compliance and Enforcement Policy 2020.

## 2. Malaysian & Australian Fisheries

Malaysia has a coast rich in biodiversity that spans 4,675 kilometres (km). The fishery industry of Malaysia has and continues to play a significant role in supplying food-based protein to the country. Annual estimations of tonnage produced within this industry has been approximated to a total of 1.7 million tonnes wherein 1.5 million tonnes were attributed to wild caught fish and the remaining 0.2 million tonnes from aquaculture.<sup>43</sup> International law zones have demarcations that allow commercial as well as recreational fishing to take place within these oceanic waters. Despite this, there are many conflicts that arise among South and Southeast

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<sup>40</sup> Christopher Costello and others, 'Status and Solutions for the World's Unassessed Fisheries' (2012) 338 (6106) *Science* <<https://www.science.org/doi/10.1126/science.1223389>> accessed 8 August 2021.

<sup>41</sup> *Ibid.*

<sup>42</sup> Reza Banakar, 'On Socio-Legal Design' (2019) Lund University Working Paper, 3 <<https://portal.research.lu.se/sv/publications/on-socio-legal-design>> accessed 8 August 2021.

<sup>43</sup> 'Fishery and Aquaculture Country Profile: Malaysia' (*Food and Agriculture Organization of the United Nations*, May 2019) <<https://www.fao.org/fishery/en/facp/mys>> accessed 18 May 2021.

Asia (SSEA) countries in the context of these demarcations over access rights to fish resources.<sup>44</sup>

The lack of assessment within the SSEA fishery industries with the addition of conflicts where non-cooperation is evident leads to illegal, unreported and unregulated fishing (IUU) and Malaysia is no exception. In fact, approximately 980,000 tonnes of seafood are lost each year due to illegal fishing, and only 50% reaches local markets whilst the rest are untraceable.<sup>45</sup>

In addition to IUU, Yasin provides a list of issues that arise within Malaysian waters which include pollution, habitat destruction, destructive fishing methods, ineffective marine park management and planning, scarcity in research data, lack of research and monitoring, and issues in relation to loss of biodiversity among others.<sup>46</sup> However, as a developing country, there are multiple socio-economic complexities as well as food security and livelihood considerations that lead IUU activities.

The underlying problem in Malaysia appears two-fold wherein the administrative authorities have the responsibility to enforce legislation which ensures that Malaysian waters are well managed. In addition to this, preservation of stock, biodiversity and oceanic ecosystems can be better conserved by providing education and awareness to the country's citizenry. These increased inputs toward improved enforcement and education have been utilised in developed countries such as Australia.

On a global scale Australia is listed among the top four countries for sustainable initiatives within the management of wild fishers and has the third largest economic zone for fishing that spans approximately eleven million square kilometres.<sup>47</sup> The fishing industry contributes an annual landed value of AUD 3.9 billion to the national economy where AUD 1.4 billion stems from the commercial food-based industry and AUD 2.5 billion from recreational fishers.<sup>48</sup>

Australia is a smaller producer globally, ranked at 55<sup>th</sup> while Malaysia is 16<sup>th</sup> on the world major producers list.<sup>49</sup> This is a telling finding considering Australia has access to a larger

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<sup>44</sup> Nerissa D. Salayo and others, 'An Overview of Fisheries Conflicts in South and Southeast Asia: Recommendations, Challenges and Directions' (2006) 29(1) NAGA WorldFish Center Quarterly 11 <[http://pubs.iclarm.net/resource\\_centre/overview.pdf](http://pubs.iclarm.net/resource_centre/overview.pdf)> accessed 20 May 2021.

<sup>45</sup> 'Fisheries Dept: Malaysia Loses RM6b a Year to Illegal Fishing' *Malaymail* (Kuala Lumpur, 4 September 2019) <<https://www.malaymail.com/news/malaysia/2019/09/04/fisheries-dept-malaysia-loses-rm6b-a-year-to-illegal-fishing/1787016>> accessed 9 March 2022.

<sup>46</sup> Abdul Hamid bin Yassin, 'Fisheries Management Policy in Malaysia: Issues on Responsible Fishing' (*SEAFDEC Institutional Repository*, 1997) <<http://repository.seafdec.org/handle/20.500.12066/4281>> accessed 2 October 2021.

<sup>47</sup> 'Australian Fishing Industry and Sustainability' (*Fisheries Research and Development Corporation*) <<https://www.frdc.com.au/issues/q-and-a-australian-fishing-industry-and-its-sustainability>> accessed 18 May 2021; 'Fishery and Aquaculture Country Profiles: Australia' (*Food and Agriculture Organization of United Nations*, 2015) <<https://www.fao.org/fishery/en/facp/aus?lang=en>> accessed 18 May 2021.

<sup>48</sup> 'Fishery and Aquaculture Country Profiles: Australia' (*Food and Agriculture Organization of United Nations*, 2015) <<https://www.fao.org/fishery/en/facp/aus?lang=en>> accessed 18 May 2021.

<sup>49</sup> 'Total Fisheries Production (metric tons)' (*The World Bank*) <[https://data.worldbank.org/indicator/ER.FSH.PROD.MT?end=2016&start=1960&view=chart&year\\_high\\_desc=true](https://data.worldbank.org/indicator/ER.FSH.PROD.MT?end=2016&start=1960&view=chart&year_high_desc=true)> accessed 23 May 2021.

fishing zone with little to no fishing conflicts with neighbouring nations and yet possesses a significantly decreased output of seafood production compared to Malaysia. A suggested reason for this difference is due to the many sustainable initiatives in place and enforced by the Australian government to ensure the protection and conservation of native marine ecosystems. These tie into the focus of this paper that serves to highlight the impact of the lack of applied regulations as well as awareness among Malaysians in regards to national fishing legislation that is leading to marine habitat destruction from concerns such as overfishing.

### **3. Fishing Laws and Policies and International and Regional Commitments**

#### **3.1 Malaysia**

A host of legislation exists in relation to fishing in Peninsular Malaysia waters. Due to its long-established culture, fishing is an activity that has been included in the apex law of the land, i.e. the Federal Constitution. Item 9(d) of the Federal list to the Ninth Schedule in the Federal Constitution empowers the Federation to engage in 'maritime and estuarine fishing and fisheries including turtles'. The Federal Constitution states that the federal government has jurisdiction over the marine estate up to 200 nautical miles out of the sea whilst the state governments have authority over the foreshore up to 3 nautical miles.

The Preamble of the Fisheries Act 1985 stipulates that it is a primary legislation that deals with conservation, management and development of maritime and estuarine fishing and fisheries, within Malaysian waters as well as internal waters. This is complemented by the Exclusive Economic Zone Act 1984 and the Continental Shelf Act 1966 which have generally been enacted in compliance with international law of the sea. Section 8 of the Fisheries Act 1985 makes it an offence to undertake fishing activities without a licence or in contravention of a condition or direction. Section 13 further provides that operating any stakes, appliances, devices, culture systems without a licence is illegal. Therefore, the act of setting up appliances or establishing any marine culture system is regarded as an offence within the same section. All foreign fishing vessels are required to obtain formal authorization to fish within Malaysian fishing zones and are not permitted to do so otherwise by virtue of s 15. In addition to this, s 26 clearly states that use of explosives, poisons and pollutants to catch fish is unacceptable with legal consequences associated.

The exclusive economic zone (EEZ) spans the distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.<sup>50</sup> Section 8 of the Act clearly provides that the Fisheries Act 1985 applies to the EEZ. Section 2(1) of the Continental Shelf Act 1966 (Act 83) provides that all rights in relation to the continental shelf are vested with the Federal Government. Sedentary creatures or fish that are usually found within coral reefs will fall under this category of fish and are the most vulnerable to illegal fishing. There is significant uncertainty as to the comprehension of citizenry in regard to the presence of these laws suggesting the existence of local anglers who are unaware of the legality of their actions and the consequences which incur penalization. As maritime fishing is part of the Federal list, all revenue from fishing produce goes to the Federal government.

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<sup>50</sup> Exclusive Economic Zone Act 1984 (Act 311), s 3(1).

The Malaysian government provides fishing subsidies, such as reduced fuel prices. In 2018, as much as RM 600,525,989.00 worth of subsidised diesel and petrol was distributed.<sup>51</sup> Furthermore, in 2019 the Fisheries Development Authority of Malaysia (FDAM) requested the Ministry of Finance to provide it with the fuel subsidy supply quota annually instead of doing so monthly.<sup>52</sup> Muhammad Faiz Fadzil who is the FDAM Chairman states that this would allow the FDAM to better monitor and manage the fuel subsidy because demand for fuel varies according to the season.<sup>53</sup> This is possibly a step in the right direction, as the FDAM would be on alert if there is an unusual demand for fuel which may indicate IUU activities. Despite the positive impact of fuel subsidies on fishermen, Sumaila states that the fuel subsidy leads to issues of overfishing because it leads to a 'marginal increase in profit'.<sup>54</sup> Fuel subsidies are a catch-22 - whilst it assists in alleviating the economic poverty fishermen face, this subsidy leads to overfishing and eventually the worsening of fishing income. For long-term benefit, these subsidies would be better invested into fisheries management and conservation.<sup>55</sup>

Over the years, the Malaysian government has increased its policies surrounding the fishery industry in an attempt to improve the management of marine environment. Malaysia's National Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (Malaysia's NPOA-IUU) incorporates national, international and regional measures within its plan. Capacity building and promoting awareness programmes were rolled out by the Department of Fisheries Malaysia where focus was aimed toward encouraging the public on reporting all illegal fishing activities.<sup>56</sup> The creation of these policies serves as evidence of the Malaysian government's cognizance of the importance and crucial role of awareness programmes in curbing the onslaught of illegal fishing practices.

The international commitments of Malaysia directly or indirectly in relation to fishing include international law instruments as follows:

- (i) the Law of the Sea Convention 1982,
- (ii) the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES),
- (iii) the Convention on Biological Diversity 1992 (CBD),
- (iv) the World Organisation for Animal Health 1924 (OIE),
- (v) the CODEX Alimentarius,
- (vi) the Indian Ocean Tuna Commission (IOTC),
- (vii) the South East Asian Fisheries Development Centre (SEAFDEC),
- (viii) the Network of Aquaculture Centres in Asia-Pacific (NACA),

<sup>51</sup> 'Laporan Tahunan 2018' (Annual Report 2018) (*Fisheries Development Authority of Malaysia*, 2018) <<https://www.lkim.gov.my/wp-content/uploads/2020/09/LKIM-2018-Complete-141119.pdf>> accessed 9 March 2022.

<sup>52</sup> 'Give Fuel Subsidy Annually, Fisheries Development Authority urges Finance Ministry' *Malaymail* (Kuala Lumpur, 11 July 2019) <<https://www.malaymail.com/news/malaysia/2019/07/11/give-fuel-subsidy-annually-fisheries-development-authority-urges-finance-mi/1770563>> accessed 9 March 2022.

<sup>53</sup> Ibid.

<sup>54</sup> Rashid U. Sumaila and others, 'A Bottom-up Re-estimation of Global Fisheries Subsidies' (2010) 12 *Journal of Bioeconomics* 201, 202.

<sup>55</sup> 'Global Fishing Index: Malaysia' (*Minderoo Foundation*, 2021) <<https://www.minderoo.org/global-fishing-index/results/country-reports/mys/>> accessed 9 March 2022.

<sup>56</sup> 'Malaysia's National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (*Department of Fisheries Malaysia*, 2013) <<http://extwprlegs1.fao.org/docs/pdf/mal163554.pdf>> accessed 3 November 2021.

- (ix) the Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated Fishing 2013 (RPOA-IUU),
- (x) the Asia-Pacific Fisheries Commission (APFIC), and
- (xi) the ILO (considering that the right to fish is intertwined with labour laws).

There are, however, several conventions that Malaysia has chosen not to ratify and this includes (among others):

- (i) the United Nations Fish Stocks Agreement (UNFSA),
- (ii) the Port States Measures Agreement (PSMA),
- (iii) the FAO Compliance Agreement 1993 (FAOCA), and
- (iv) the ILO Work in Fishing Convention C188.

It is important to note that the conventions stated above which were not acceded to by Malaysia directly relate to fishing and the rights of fishermen. Regionally, the Association of Southeast Asian Nations (ASEAN) has incrementally created legal instruments that serve to improve the fishing practices and management of resources within ASEAN states. Policies on sustainable Fisheries Resource Management, IUU Fishing and Special Support for Small-scale Fisheries serve to encourage rights-based fishing, enhance participation of local communities in the fisheries management and stock-assessments, enhance capacity to resolve conflicts, whilst respecting traditional, artisanal and small-scale fisheries and providing assistance with the management of these fisheries resources. Relevant ASEAN instruments (among others) include:

- (i) the Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region,
- (ii) ASEAN-SEAFDEC, 2011a. Resolution on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2020,
- (iii) ASEAN-SEAFDEC, 2011b. Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2020,
- (iv) SEAFDEC 2020. Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2030, and
- (v) ASEAN, 2015c. ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into The Supply Chain.

It has been highlighted that the coverage of issues in relation to fishing may not be exhaustive. This is on top of the fact that the policies are scattered with inconsistent implementation within ASEAN member states.<sup>57</sup> It has been stated that there is a failure in policy implementation and evaluation.<sup>58</sup> This is not surprising considering the multitude of policies that exist within this sector.

ASEAN's strong preference for a rights-based approach is a step in the right direction. The rights-based approach resorts to quotas for individual fishers, providing exclusive use rights whilst limiting the number of fish caught. This rights-based approach to fishing assumes that fishermen, if allowed exclusive use rights whilst included more directly in fishery management

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<sup>57</sup> Graeme Macfadyen and Heiko Seilert, 'Development of ASEAN General Fisheries Policy: Final Feasibility Study Report' (ASEAN, 19 June 2020) 36 <<https://asean.org/wp-content/uploads/15.-AGFP-Feasibility-Study-report-28ASWGF.pdf>> accessed 25 October 2021.

<sup>58</sup> Ibid.

decisions, will clearly see the benefits of managing the allowable catch for the long-term health and productivity of their fisheries.<sup>59</sup> In other words, fishermen directly participate in the management of the Malaysian waters.

### 3.2 Australia

Australian fishery policy and planning is undertaken by the Australian Fisheries Management Authority (AFMA). The AFMA functions under the legislative organ, representing the Commonwealth Parliament to manage Australia's fishing industry which include both the domestic legislation and international fishery treaty obligations.<sup>60</sup> The objectives, powers, and functions of the AFMA are in line with the Fisheries Administration Act 1991 and the Fisheries Management Act 1991. These two pieces of legislation represent the fundamental foundation and statutory basis of the operations within the Australian industry.

There are two main objectives to the Fisheries Administration Act 1991 that surround the establishment of an Australian Fisheries Management Authority as well as a Fishing Industry Policy Council to encourage participation of persons involved within the industry in the processes of government policy formulation for fishery management.<sup>61</sup> The Fisheries Management Act 1991 defines the parameters of the Australian Fishing Zone (AFZ) and contains the majority of the Commonwealth fisheries offences enforced by the country. In addition to this it provides descriptive responsibilities relating to the pursuit of ecologically sustainable development and works alongside The Environment Protection and Biodiversity Conservation Act 1999 that states assessments are to be conducted for all Commonwealth-managed fisheries.<sup>62</sup>

The list below represents the principal current regulations applied by the AFMA regarding the fisheries industry:

- (i) the Torres Strait Fisheries Regulations 1985,
- (ii) the Fisheries (Administration) Regulations 1992,
- (iii) the Fisheries Management Regulations 2019, and
- (iv) the Fisheries Levy (Torres Strait Prawn Fishery) Regulations 1998.

In addition to the above listed principal regulations, the AFMA has created multiple other regulatory documents enforced by this industry. These are as follows:

- (i) the Fisheries Management (Southern Bluefin Tuna Fishery) Regulation 1995,
- (ii) the Fisheries Management (South East Trawl Fishery) Regulations 1998,
- (iii) the Fisheries Management (Refund) Regulations 2001,
- (iv) the Fisheries Management (Bass Strait and Central Scallop Fishery) Regulations 2002,
- (v) the Fishery Management (Heard Island and McDonald Islands Fishery) Regulations 2002,

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<sup>59</sup> 'Rights-based Fishing: Transition to a New Industry' (1996) 124 Resources for the Future <[https://media.rff.org/archive/files/sharepoint/Documents/Resources/Resources-124\\_fishing.pdf](https://media.rff.org/archive/files/sharepoint/Documents/Resources/Resources-124_fishing.pdf)> date accessed 26 October 2021.

<sup>60</sup> 'Legislation and Regulation' (Australian Fisheries Management Authority) <<https://www.afma.gov.au/about/legislation-regulation>> accessed 23 May 2021.

<sup>61</sup> Fisheries Administration Act 1991, s 3.

<sup>62</sup> Environmental Protection and Biodiversity Conservation Act 1999, Part 10 Division 2.

- (vi) the Fisheries Management (Southern and Eastern Scalefish and Shark Fishery) Regulations 2004, and
- (vii) Fishery Management (International Agreements) Regulation 2009.

Similar to Malaysia, the Australian fisheries participate in international level obligations of the law. International regulations are pertinent within the fishery industry unlike any other stock species; fish have migratory patterns that have no boundaries. The following list represents Australia's engagement in international regulations:<sup>63</sup>

- (i) the Law of the Sea Convention 1982,
- (ii) the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973,
- (iii) the Convention on Biological Diversity 1992 (CBD),
- (iv) the World Organisation for Animal Health 1924 (OIE),
- (v) the CODEX Alimentarius,
- (vi) the United Nations Fish Stock Agreement 1995,
- (vii) the Code of Conduct for Responsible Fisheries 1991,
- (viii) the Food and Agriculture Organization (FAO) Compliance Agreement 1993,
- (ix) the Indian Ocean Tuna Commission (IOTC),
- (x) the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),
- (xi) the Network of Aquaculture Centres in Asia-Pacific (NACA),
- (xii) the Western and Central Pacific Fisheries Commission (WCPFC),
- (xiii) the Commission for the Conservation of Southern Bluefin Tuna (CCSBT),
- (xiv) the South Pacific Regional Fisheries Management Organisation (SPRFMO),
- (xv) the South Indian Ocean Fisheries Agreement (SIOFA),
- (xvi) the Asia-Pacific Fisheries Commission (APFIC), and
- (xvii) the ILO (considering that the right to fish is intertwined with labour laws).

In direct contrast to Malaysia, Australia appears to be participating in legislation that directly relates to fishing as well as the rights of fishermen. The AFMA oversees the implementation and adherence of these legislations by undertaking key activities such as developing management plans and arrangements that cover target and non-target species, such as bycatch, to ensure the consideration of broader marine ecosystem impact. Consistent consultation and liaisons with Regional Fishery Management Organisations (RFMOs) are carried out to ensure appropriate management of the high seas stocks. Domestically, the AFMA is continuously analysing, forecasting, and researching on local fishery performance to provide transparent and effective communications with stakeholders, and to ensure the development of ecological sustainability tools with the goal of minimising fishery impact on the marine environment.<sup>64</sup>

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<sup>63</sup> 'International Fisheries Obligations Given Legal Effect' (*Australian Fisheries Management Authority*, 12 May 2015) <<https://www.afma.gov.au/international-fisheries-obligations-given-legal-effect>> accessed 24 May 2021; 'Legal and Arrangements' (*Department of Agriculture, Water and the Environment*, 2019) <<https://www.agriculture.gov.au/fisheries/legal-arrangements>> accessed 24 May 2021.

<sup>64</sup> 'Domestic Compliance' (*Australian Fisheries Management Authority*) <<https://www.afma.gov.au/domestic-compliance>> accessed 20 November 2021.



## 4. The Right to Fish and the Awareness Surrounding It

### 4.1 Malaysia

Article 5 of the Federal Constitution provides that all persons have the right to life. As India's Constitution also provides for this right, the Malaysian courts have acknowledged Indian case law which includes the right to livelihood within the ambit of the right to life. In the Indian case *Francis Corlie v. Union Territory of Delhi*, it was decided that the right to life encompasses the right to live with human dignity and all that goes along with it.<sup>65</sup> The right to life includes basic needs and the right to carry on such functions and activities as constituting the bare minimum expression of the human-self. Pavement dwellers in the case of *Olga Tellis v Bombay Municipal Corporation* contended that they had a right to live and one could not exercise this right without the means of livelihood.<sup>66</sup> In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan*, Justice of the Court of Appeal Gopal Sri Ram was of the view that the right to "life" appearing in Art 5(1) does not refer to mere existence.<sup>67</sup> It incorporates matters that encompass the quality of life and this would include lawful and gainful employment. The traditional or modern fisherman certainly has the right to gainful employment through fishing. Based on the discussion of the right to livelihood, it can be reasonably inferred that everyday civilians who undertake fishing activities whereby fish caught are brought home and consumed, do also have the right to fish. The question arises as to whether there is cognizance of the fact that the right only exists when the activity is lawful.

In Malaysia, recreational fishing laws only exist over areas deemed as marine parks or marine reserves. The Marine Parks & Marine Reserves Order 1994 states that the waters surrounding approximately 40 islands in Malaysian fishing zones have been demarcated as Marine parks wherein all forms of fishing of any aquatic animal is strictly prohibited.<sup>68</sup> The marine department of Malaysia's Ship Registry Division has released guidelines, for local fishing vessels carrying passengers for recreational fishing activities, which contains procedures focusing on vessel authorisation letter requirements and appropriate boat licensing and safety.<sup>69</sup> There is no mention of fishing regulations in terms of permitted catch species and sizes, and catch limits for recreational activities. This suggests that aside from marine park zones, recreational fishers are not bound to legislation regarding species of catch, size of catch and limit of catch.

Although the rights-based approach gives the fisherman certain rights in relation to the management of the sector, community involvement in the conservation of oceanic fish is moot at this point of time. The Convention on Biological Diversity 1992 has conservation of

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<sup>65</sup> (1981) SC 745.

<sup>66</sup> (1986) SC 180.

<sup>67</sup> (1996) 1 MLJ 261.

<sup>68</sup> 'Information on Fisheries Management in Malaysia' (*Food and Agriculture Organization of United Nations*, 2001) <<http://www.fao.org/fi/oldsite/fcp/en/mys/body.htm>> accessed 10 August 2021.

<sup>69</sup> 'User Guideline For The Issuance Local Fishing Vessel Authorisation Letter To Carry Passengers For Recreational Fishing Activities' (*Marine Department Malaysia Ship Registry Division*, 2020) <<https://www.marine.gov.my/jlm/admin/assets/uploads/images/contents/20201224120521-ec846-user-guideline-for-the-issuance-local-fishing-vessel-authorization-letter-to-carry-passengers-for-recreational-fishing-activities.pdf>> accessed 10 August 2021.

biological diversity as one of its three objectives.<sup>70</sup> In order to fulfill this objective, in the 4<sup>th</sup> Conference, State parties adopted six principles, the fifth being involvement of local and indigenous communities. Malaysia's NPOA-IUU mentions participation and coordination as key to the full implementation of the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). Full participation of stakeholders in combating IUU fishing, including industry, fishing communities, and non-governmental organizations are meant to be encouraged.<sup>71</sup>

## 4.2 Australia

Australia upholds the seven core international human rights treaties. The right to life is covered in Article 6(1) of the International Covenant on Civil Political Rights (ICCPR) as well as Article 1 of the Second Optional Protocol to ICCPR that states every human being has the right to life.<sup>72</sup>

In regard to the right of the public to catch fish from territorial waters, the common law systems can be traced back prior to the Magna Carta where “the right of the owner of the soil over which the water flow (whether the owner be the Crown or not) to enjoy the exclusive right of fishing in those waters or to grant such a right to another as *profit à prendre* is qualified by the paramount right to fish vested in the public... after Magna Charta, the Crown, in whom the title to the bed of tidal navigable rivers was vested, was precluded from granting a private right of fishery, the right of fishery being in the public...”.<sup>73</sup>

However, in recent years the problems of environment degradation and stock depletion from overfishing became apparent on the world stage. This consequently required the creation of new laws and policies to which fisheries must abide by to ensure sustainable management of fish stocks. In *Harper v. Minister for Sea Fisheries & Others*, the High Court quoted ‘...the right of fishing in the sea and in tidal navigable rivers, being a public not a proprietary right is freely amendable to abrogation or regulation by a competent legislature’.<sup>74</sup> This was utilised to limit access to fishing and was applied to ensure sustainability and prosperity for the future of the fisheries industry.

Legislation surrounding the right to fish in Australia as well as the management of wild capture species is shared between the Commonwealth and its States. Each state has set guidelines for both commercial and recreational fishing based on species type and location. Australia has published extensive legislation, regulations and policies that relate to fisheries, aquaculture

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<sup>70</sup> ‘Convention on Biological Diversity’ (*United Nations*, 1992) <<https://www.cbd.int/doc/legal/cbd-en.pdf>> accessed 11 August 2021.

<sup>71</sup> ‘Malaysia’s National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (*Department of Fisheries Malaysia*, 2013) <<http://extwprlegs1.fao.org/docs/pdf/mal163554.pdf>> accessed 12 August 2021.

<sup>72</sup> ‘Right to Life: Public Sector Guidance Sheet’ (*Australian Government Attorney-General’s Department*) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-life>> accessed 13 August 2021.

<sup>73</sup> ‘Annex 1: Case Law Study: The Nature of Fishing Rights’ (*Food and Agriculture Organisation of the United Nations*, 2004). <<http://www.fao.org/3/y5672e/y5672e08.htm>> accessed 21 August 2021.

<sup>74</sup> (1989) 168 CLR 314.

as well as recreational activities. These published materials are made readily available to the public and can be accessed on the respective state governing websites as listed below:<sup>75</sup>

- (i) [www.daffa.gov.au/fisheries](http://www.daffa.gov.au/fisheries),
- (ii) [www.afma.gov.au](http://www.afma.gov.au),
- (iii) [www.dpi.nsw.gov.au](http://www.dpi.nsw.gov.au),
- (iv) [www.dpi.qld.gov.au](http://www.dpi.qld.gov.au),
- (v) [www.dpi.vic.gov.au](http://www.dpi.vic.gov.au),
- (vi) [www.pir.sa.gov.au](http://www.pir.sa.gov.au),
- (vii) [www.fish.wa.gov.au](http://www.fish.wa.gov.au),
- (viii) [www.nt.gov.au/dpifm/Fisheries](http://www.nt.gov.au/dpifm/Fisheries),
- (ix) [www.dpiw.tas.gov.au](http://www.dpiw.tas.gov.au), and
- (x) [www.australian-aquacultureporta.com](http://www.australian-aquacultureporta.com).

Unlike Malaysia, each of the Australian states appear to have laws that are equally distributed for both commercial and recreational fishing activities. Pending the location and species type, there are an array of legislations put in place on recreational fishermen to which they must abide by. This may include laws on species that can be caught, specific catch sizes allowed, as well as specific number of animals that can be caught which can be determined by weight or per animal. As an example, the government of Western Australia requires all recreational anglers to first and foremost purchase a licence to fish in Western Australian waters. In addition to this, there is a list available at their websites of bag limits of the fish species that are permitted for catch. In Western Australia, each recreational fisherman is allowed to catch only three large pelagic finfish. These fish also have minimum legal catch sizes to which the fishermen must abide. Penalties will apply to those who do not follow the guidelines provided and these offences may result in payments of up to \$400,000 AUD or imprisonment for four years alongside loss of boat licences, vehicles and equipment.<sup>76</sup>

In lieu of the stringency and the weight of the penalties, there is strong awareness amongst the Australian community regarding recreational fishing legislation. In Australia, the community awareness is sufficient enough that many initiatives are in place to promote community monitoring as an additional form of data collection method that can be used to store more information about recreational fishing.<sup>77</sup>

## 5. Implications of Illegal Fishing

### 5.1 Malaysia

As long as IUU fishing takes place, there is no certainty as to the number of fish that are being harvested from Malaysian waters. The situation is more dire in disputed EEZ zones. Baihaki

<sup>75</sup> 'Fisheries Services Australia' (*The Organisation for Economic Co-operation and Development*, 2020) <<https://www.oecd.org/australia/39925925.pdf>> accessed 11 August 2021.

<sup>76</sup> 'Recreational Fishing Guide 2022' (*Fisheries Sector of the Department of Primary Industries and Regional Development*, 2022) <[http://www.fish.wa.gov.au/Documents/recreational\\_fishing/rec\\_fishing\\_guide/recreational\\_fishing\\_guide.pdf](http://www.fish.wa.gov.au/Documents/recreational_fishing/rec_fishing_guide/recreational_fishing_guide.pdf)> accessed 18 August 2021.

<sup>77</sup> 'Community Involvement in Recreational Fisheries Data Collection: Opportunities and Challenges' (*Australian Bureau of Agricultural and Resource Economics and Sciences*, 2011) <[https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/abares/publications/TR11.5\\_Rec\\_Fisheries.pdf](https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/abares/publications/TR11.5_Rec_Fisheries.pdf)> accessed 18 August 2021.

reports that the failure of the Malaysian and Indonesian government to amicably resolve the dispute over the EEZ boundary limits of the Northern Region of the Straits of Malacca causes IUU fishing within the area as well as the illegal detention of fisherman.<sup>78</sup> There are pockets of waters in which the catch is unknown.

The Department of Fisheries Malaysia (DOF) has been working with the Royal Malaysian Navy, and the Malaysian Maritime Enforcement Agency in an effort to reduce illegal fishing. These patrols are not in vain and have been successful in capturing illegal fishing boats. In February 2021, the Royal Malaysian Navy chased 9 Indonesian fishing boats.<sup>79</sup> Despite this, the DOF reports that the country loses approximately RM 6 billion per year due to the occurrence of illegal fishing.<sup>80</sup> Recently, the Malaysian and Indonesian governments have agreed to carry out joint patrols to catch illegal fishing vessels at least three times a year.<sup>81</sup> According to Hamzah Bin Zainudin, the effort is intended to capture fishermen from Malaysia, Indonesia and other countries who engaged in IUU activities.<sup>82</sup>

The chances of widespread environmental degradation, negative social and economic consequences exist.<sup>83</sup> Overfishing may cause several species of fish to disappear, to the effect of there being less commercially important fish available for consumption and possibly disturbing the marine food chain and ecosystem. Coral reefs are common breeding and living grounds for many species of fish. Therefore, anchoring of boats and the use of traditional fishing equipment such as trawls in low-tide waters may destroy coral reefs and in the long-run, impact the number of fish species. In the end, lesser fish results in lower income for fishermen.

The sea is vast and fluid, making it difficult to enforce environmental, social and economic policies and laws. Afriansyah is of the view that environmental concerns have often had to give way to economic competitiveness.<sup>84</sup>

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<sup>78</sup> Ahmad Baihaki, 'Fighting Illegal Fishing: Making a Big Bang with Big Data' *The Jakarta Post* (Jakarta, 28 February 2019) <<https://www.thejakartapost.com/academia/2019/02/27/fighting-illegal-fishing-making-a-big-bang-with-big-data-1551250832.html>> accessed 20 August 2021.

<sup>79</sup> 'Navy Drives Out Nine Indonesian Fishing Boats from Malaysian Waters' *The Star* (Kuala Lumpur, 7 February 2021) <<https://www.thestar.com.my/news/nation/2021/02/07/navy-drives-out-nine-indonesian-fishing-boats-from-malaysian-waters>> accessed 9 March 2022.

<sup>80</sup> 'Fisheries Dept: Malaysia Loses RM6b a Year to Illegal Fishing' *Malaymail* (Kuala Lumpur, 4 September 2019) <<https://www.malaymail.com/news/malaysia/2019/09/04/fisheries-dept-malaysia-loses-rm6b-a-year-to-illegal-fishing/1787016>> accessed 9 March 2022.

<sup>81</sup> M Ambari, 'Indonesia, Malaysia to Hold Joint Patrols Against Illegal Fishing' *Mongabay* (Jakarta, 1 February 2022) <<https://news.mongabay.com/2022/02/indonesia-malaysia-to-hold-joint-patrols-against-illegal-fishing/>> accessed 9 March 2022.

<sup>82</sup> Ibid.

<sup>83</sup> 'Malaysia's National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (*Department of Fisheries Malaysia*, 2013) <<http://extwprlegs1.fao.org/docs/pdf/mal163554.pdf>> accessed 1 November 2021.

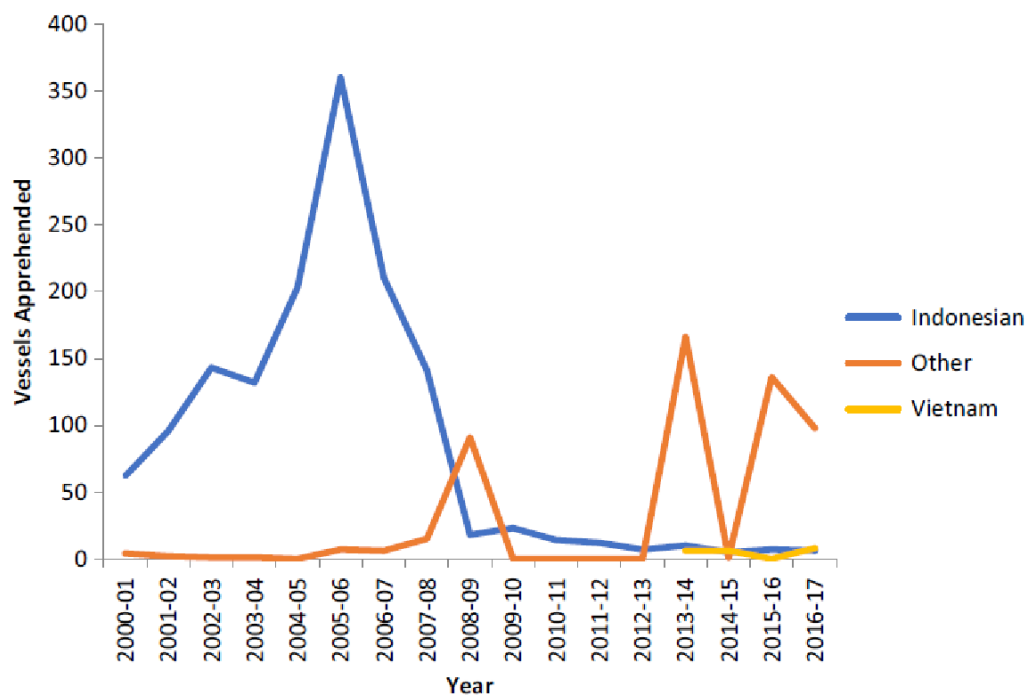
<sup>84</sup> Arie Afriansyah, 'Indonesia's Practice in Combating Illegal Fishing: 2015 – 2016' (2016) 22 *Asian Yearbook of International Law* 293 <[https://library.oapen.org/bitstream/handle/20.500.12657/38077/9789004379633\\_webready\\_content\\_text.pdf;jsessionid=F0E167F5A532200BAE553DD6AFE18835?sequence=1](https://library.oapen.org/bitstream/handle/20.500.12657/38077/9789004379633_webready_content_text.pdf;jsessionid=F0E167F5A532200BAE553DD6AFE18835?sequence=1)> accessed 1 November 2021.

The uncertainties also affect the very core of the State within the purview of international law i.e. sovereignty of state. At the level of the citizenry, it affects safety and security.<sup>85</sup> Legitimate fishers tend to lose out to illegal fishers as the pricing of legitimately caught fish would be higher. Legitimate fishers are therefore economically disadvantaged.

## 5.2 Australia

Australia is an exemplary example of a nation that has implemented measures to successfully combat illegal fishing where legitimate fishers are prioritised and advantaged. Through the years, Australia has faced a wide range of challenges from IUU vessels in southern and northern waters. Due to the crossing and adjoining borders of nearby countries, the northern waters were more heavily affected by illegal fishing as demonstrated in Figure 1 below.<sup>86</sup>

As demonstrated in Figure 1, between the 1990s to mid-2000s, illegal fishing within the Australian EEZ increased unprecedentedly. Due to the alarming increase the Australian government undertook multiple coordinated approaches such as policy and legislative responses, increased coastal surveillance, upgraded technological tools through mandatory VMS satellite vessel tracking as well as education, integration and collaboration between government agencies and neighbouring countries.<sup>87</sup> The success of these initiatives can be seen in Figure 1 below.



**Figure 1:** Data of apprehensions of foreign fishing vessels operating within the Australian EEZ from 2000 - 2017. This information was obtained from the Australian Fisheries Management Authority<sup>88</sup>

<sup>85</sup> (n 83).

<sup>86</sup> Joanna Vince, Britta D. Hardesty and Chris Wilcox, 'Progress and challenges in Eliminating Illegal Fishing' (2020) 22 *Fish and Fisheries* 518.

<sup>87</sup> *Ibid.*

<sup>88</sup> Joanna Vince, Britta D. Hardesty and Chris Wilcox (n 86).

Initiatives such as the Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf (MOU 1974) is another example of a successful endeavour. The social and economic implications of the MOU on illegal fishing resulted in forfeiture of boats, imprisonment and non-profitable fishing trips resulted in a decline of the activity.

These effective coordinated measures also had an impact on illegal fishing by domestic patrons. The New South Wales (NSW) Department of Primary Industries documented fishery officers contacting 49,000 fishers between 2018 – 2019 wherein 4,220 obtained a written warning, 2,461 were issued penalties and 221 were successfully prosecuted in court for fishing violations that were predominantly recreational in nature.<sup>89</sup> The overarching success of these measures in reducing illegal fishing by enforcing negative implications and proper enforcement remains apparent. This in turn has also allowed for a positive impact in reducing overfishing and population degradation.

## 6. Gaps in Malaysia's Law Administration

In Malaysia, the problem lies in the fact that there is no one single body that manages the seas. Various departments play different roles which leads to duplication, conflict and gaps in implementation.<sup>90</sup> Neither is there a single comprehensive legislation that addresses conservation and management as a whole.<sup>91</sup> Fragmentation of laws begins with the Federal Constitution and the division of powers in relation to water, fisheries and conservation between the federation and the state. A variety of laws and policies created at different levels of legislative and delegated power makes cascading down information about legitimate fishing an arduous task. Further up within the legal spectrum, one observes that even regional and international law is not comprehensive. The Law of the Sea Convention 1982 is probably the only document that forms some level of codification in relation to law of the sea.

When it comes to the implementation of the law, the focus is on the top-down rather than bottom-up approach. Early writings of Yasin observed that the top-down approach has alienated the spectrum of managers at state and district levels, who implement and enforce the policies. Due to the lack of understanding of such policies, there is weak enthusiasm by state and local managers of the relevant agencies to implement the management plan.<sup>92</sup>

With different types of fishing being carried out, i.e. traditional and commercial fishing, bottom-up approaches allow for active engagement of the commercial and non-commercial fishing community whilst allowing the public authority to take cognizance of traditional fishing practices which may in certain circumstances be in line with the notion of protective

<sup>89</sup> Joanna Vince, Britta D. Hardesty and Chris Wilcox (n 86).

<sup>90</sup> Jasim Saad, 'Review of Malaysian Laws and Policies in relation to the Implementation of Ecosystem Approach to Fisheries Management in Malaysia' (*Coral Triangle Initiative*, 2013) <[https://www.coraltriangleinitiative.org/sites/default/files/resources/39\\_Review%20of%20Malaysian%20Law%20and%20Policies%20and%20EAFM%20in%20Malaysia.pdf](https://www.coraltriangleinitiative.org/sites/default/files/resources/39_Review%20of%20Malaysian%20Law%20and%20Policies%20and%20EAFM%20in%20Malaysia.pdf)> accessed 12 October 2021.

<sup>91</sup> Ibid.

<sup>92</sup> Abdul Hamid bin Yassin, 'Fisheries Management Policy in Malaysia: Issues on Responsible Fishing' (*SEAFDEC Institutional Repository*, 1997) <<http://repository.seafdec.org/handle/20.500.12066/4281>> accessed 12 October 2021.

fishing in view of conservation. The study advocates the bottom-up approach to allow for commercial and traditional fishers to engage in policy-making and implementation. This is in line with the participatory approach advocated by international standards on fishing as part of the objectives of the Convention of Biological Diversity 1992.

There are several recommendations that Malaysia should look towards implementing. First, developing a 'traceable seafood supply chain' to ensure responsible production of seafood. Second, encouraging local markets to enlist suppliers who obtain seafood in a sustainable manner that adheres to domestic regulations. On the consumer side, increase awareness campaigns to encourage consumers to make conscious efforts to buy seafood from sustainable sources. Next, workshops to educate local fishermen on the impact of traditional gears and fishing methods and provide incentive for switching over to sustainable methods that do not destroy the local marine ecosystem. Lastly, Malaysia should ratify all conventions related to fishing to ensure that the country's policies and law are in accordance with international standards.

## 7. Conclusion

From the array of legislation and commitment to international law rules pertaining to the sea, it is clear that Malaysia practices a 'law habit' of observance when it comes to fisheries. Laws in relation to fishing are captured from the apex law of the land, the Federal Constitution, down to the policies of the executive fiat. Activities such as joint patrols of the sea demonstrate Malaysia's commitment towards stemming IUU fishing. Fishing subsidies buttress Malaysia's commitment towards the plight of the fisherman.

Based on the efforts discussed above, Australia appears to have been more successful compared to Malaysia in its implementation of the law with the state often being the main driver of policy change and implementation. Each state is given this responsibility due to the 'curse of natural resources' whereby each state differs in their high value fishery resources and therefore the decision-making process for conserving those specific species-based resources may differ.

Australia's broad and integrated approach to combating domestic and foreign IUU fishing serves as an excellent example of how assessed fisheries can successfully contribute to a country's economy as well as nurturing natural resources. The country has achieved this by a coordinated and consistent approach across all levels of government. In addition to this, Australia has also been successful in engaging with its neighbouring countries to address issues of illegal fishing. It is important to note that Australia has had the capacity to invest financially, legally, politically and diplomatically for this process to be the effective endeavour it is today. The same level of investment is often not available in other developing countries which must be considered when discussing implementation and policy failure.<sup>93</sup> Unique features of Malaysian federal law in relation to fishing, driven by the Federation and not the constituent units of the state, acts as a driver towards consistency in relation to creation and implementation of the law. Best practices of Australia can serve as a starting point to better the legal implementation of fisheries laws in Malaysia.

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<sup>93</sup> Joanna Vince, Britta D. Hardesty and Chris Wilcox (n 86).

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