

LEGAL FRAMEWORK ON THE CONSERVATION ISSUE OF PULAU KUKUP NATIONAL PARK IN JOHOR, MALAYSIA

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Abstract: The Ramsar Convention came into force on 21 December 1975, and Malaysia ratified the convention in 1994. As a party to the convention, Malaysia has shown its commitment by promoting seven Ramsar sites. Although the Ramsar sites have experienced human intervention and degradation over time, legislation in Malaysia has helped to promote the sustainable development of wetlands in Malaysia. In this paper, a critical analysis of the role of law in protecting and conserving Pulau Kukup Johor National Park as one of the Ramsar sites in Malaysia was conducted based on documents and newspaper-reports analysis. In addition, the prohibition of environmental impact assessment (EIA) to be conducted on any Ramsar site in Malaysia is also discussed. Results reveal the importance of legislation to conserve and protect wetlands in Malaysia.

Keywords: Ramsar Convention, wetlands, sustainable, development, legislation.

Introduction

The Ramsar Convention on Wetlands, the most important international initiative for wetland protection, is a treaty adopted in 1971 with the objective of recognizing the importance of wetlands and promoting their conservation (Reis *et al.*, 2017). Under Article 1 of the Convention, wetland is defined as areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water, the depth of which at low tide does not exceed 6 meters. Wetlands are highly productive and biodiverse ecosystems (Keddy *et al.*, 2009). They provide many ecosystem services, including water purification, buffering of runoff and river discharge, production of food and fiber, and ecotourism (Keddy, 2010). Wetland ecosystems are important from conservation and sustainable management viewpoints due to their rich flora and fauna diversity. Tangible and intangible diverse resources and products of wetlands function, such as fodder, protein source (fishes, mussels etc), fuelwood, non-timber forest products, ecotourism, and flood control, have historically provided a source

of income and livelihood for humans (Lamsal *et al.*, 2017). Wetlands remain a source of sustenance for local populations, especially in developing countries, and are highly valued in many traditional societies and cultures (Gopal, 2013).

Despite the ecosystem services they provide, wetlands have been lost, degraded, or strongly modified worldwide (Reis *et al.*, 2017). Owing to their high productivity, fertile soils, and importance for provision of water, many of the world's wetlands have historically been occupied and intensively utilized by humans (Maltby & Acreman, 2011). The reported long-term loss of natural wetlands averages between 54% to 57% and reaching up to 90% in some regions of the world (Junk *et al.*, 2013). As was shown by Davidson in a compilation of 169 reports of historical loss of wetlands, the extent of inland wetlands declined by 69% to 75% in the 20th century, whereas coastal wetlands declined 62% to 63% (Reis *et al.*, 2017). In fact, more than 50% of the world's wetlands have been altered, degraded or lost in the last 150 years (O'Connell, 2003).

Human Intervention

There is a strong association between wetland distribution in the landscape and human occupation, with the most significant threats to wetlands being associated with direct or indirect human use of these areas (Gibbs, 2011). In developing countries, where food security and poverty reduction are higher priorities than environmental protection, wetland conservation is difficult if local communities do not understand the value of wetlands (Wood *et al.*, 2002). Moreover, the livelihood-generating actions of poor communities near wetlands and their dependence on wetland resources have contributed to various degrees of degradation (Lamsal *et al.*, 2017). Although Pulau Kukup is uninhabited by humans, a mere 1km separates it from Kukup village, which comprises three major settlements – Kukup, Kampung Sungai and Kampung Air Masin (Hampton, 2010). Barau & Stringer (2015) estimated the population of the Kukup fishing village to be around 1,000, with most inhabitants being Hokkien Chinese. According to Jaafar *et al.* (2014) and Lim *et al.* (2014), recent studies have revealed that water quality degradation due to urban and industrial use is threatening livelihoods and ecosystems around Pulau Kukup.

Andrade and Rhodes (2012) are of the opinion that the traditional approach of protection by prohibition through legislation and guarding is losing ground. Turner *et al.* (2000) added that underlying causes of degradation of wetlands are, among others, price distortions, income distribution inequalities, absence of full cost accounting, policy failure, market failure (missing price), lack of property rights and population/urbanization growth and consequent encroachment. However, Maltchik *et al.* (2018) emphasized that laws and legal statutes are crucial tools to protect and conserve wetland habitats, and how these laws are written and have important implications for wetland conservation. Ibrahim *et al.* (2012) said if these habitats and sites are protected by the enforcement of law, it will give more meaningful impacts to the people to find the subsistence for their life, and to make full use of natural resources. To date, limited

studies have been conducted on the role of law in protecting wetlands in Malaysia, with most previous studies showing only the degradation of wetlands due to human intervention. Therefore, this study will show the crucial role of law in conserving and protecting wetlands in Malaysia. This paper will focus on the claim by the Sultan of Johor of the Pulau Kukup Johor National Park as sultanate land under section 2(1) of the Sultanate Land Enactment 1934 and how the law plays a role in protecting and conserving Pulau Kukup Johor National Park as a National Park of Johor.

Materials, Methods and Study Area

The primary aim of this study is to observe how the law has been implemented and amended to protect and conserve the Pulau Kukup Johor National Park in Malaysia. Qualitative methodology has been adopted in this study. In qualitative research, data are usually collected through three methods, either exclusively or in combination: direct observation, in-depth interviews and analysis of documents (May, 2001; Patton, 2002). To achieve the aims of this study, the researchers have focused on document analysis and studying text-based sources. Document analysis, ranging from the official to the personal, the text-based and image based, can provide a wealth of data (Webley, 2010). Documents reflect or report reality, describing an event, a perception, or an understanding (May, 2001). The mode of analysis depends on legislation as well as newspaper reports.

Pulau Kukup is located between 01°19'N and 103°25'E on the shores of southern Peninsular Malaysia's state of Johor. The total area of this mangrove island is 6.47km². Pulau Kukup offers physical protection to the shoreline and acts as a barrier against strong winds and tides for the low-density coastal settlement (Barau & Stringer, 2015). Pulau Kukup was designated as Ramsar Site No. 1287 under the Ramsar Convention on 31st January 2003 (Giesen *et al.*, 2007). According to Johor National Parks (2019), there are three criteria that justified the Ramsar listing of Pulau Kukup.

Pulau Kukup contains a representative, rare or unique example of a natural or near-natural wetland type found within the appropriate biogeographical region and it supports vulnerable, endangered, or critically endangered species or threatened ecological communities. In addition, it supports populations of plant and/or animal species important for maintaining the biological diversity of a particular biogeographic region.

Results and Discussion

Malaysia and Its Commitment to the Ramsar Convention

Malaysia ratified the Ramsar Convention in 1994 (Ibrahim *et al.*, 2012). Article 3(1) of the Ramsar Convention states that the contracting parties shall formulate and implement their planning so as to promote the conservation of

wetlands included on the list. Each party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands (Article 4(1)). Where a contracting party in its urgent national interest, deletes or restricts the boundaries of the wetland, it should compensate for any loss of wetland resources, and create additional nature reserves for waterfowl (Article 4 (2)). In addition, Article 4(4) encourages the contracting party to increase waterfowl population on appropriate wetlands. As a commitment to the Ramsar Convention, Malaysia has established seven Ramsar sites with a total area of 134,182.2 hectares. The seven Ramsar sites are Tasek Bera, Tanjung Piai, Sungai Pulai, Pulau Kukup, Lower Kinabatangan-Segama Wetlands, Kuching Wetlands National Park and Kota Kinabalu Wetland. Details of these wetlands are as follows:

Table 1: Malaysia: Ramsar sites, dates and sizes (Ramsar, 2020)

Ramsar site	Designated	Size
Kota Kinabalu Wetland	22 October 2016	24.2 ha
Lower Kinabatangan-Segama Wetlands	08 September 2008	78,803 ha
Kuching Wetland National Park	08 November 2005	6,610 ha
Pulau Kukup	31 January 2003	647 ha
Sungai Pulai	31 January 2003	9,126 ha
Tanjung Piai	31 January 2003	526 ha
Tasek Bera	10 November 1994	38,446 ha
Total		134, 182.2 ha

The Division of Powers between Federal and State Governments in Malaysia

In Malaysia, the Federal Constitution is the supreme law of the land. However, its provision regarding environmental protection and the extent of responsibility between the federal and state government are vague. Land matters are under the jurisdiction of state governments, including forests and wetlands (Ibrahim *et al.* 2012). The National Policy of Wetlands has listed more than 60 federal and state laws that can be implemented for wetlands protection. One of the relevant statutes is the National Forestry

Act 1984, which is an important legislation for the Forestry Department. Other statutes include the National Park Act 1984 and, for endangered species, the Wildlife Conservation Act 2010 and the International Trade in Endangered Species Act 2008 (Ibrahim *et al.* 2012).

Article 73 of the Federal Constitution states that “ *in exercising the legislative powers conferred on it by this Constitution, (a) Parliament may make law for the whole or any part of the federation and law having effect outside as well as within the federation; and (b) the legislature of a state may of that state make*

laws for the whole or any part.” Legislative jurisdiction of state and federal governments is based on Article 74, which shall be read together with the 9th Schedule of the Constitution. Article 75 of the Federal Constitution states that if any state law is inconsistent with a federal law, the federal law shall prevail and the state law shall, to the extent of inconsistency, be void. In addition, Article 76 (1) of the Federal Constitution states that Parliament may make laws with respect to any matter enumerated in the State List, but only (a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member. Meanwhile, Section 7 of the National Forestry Act 1984 states that a state government has the power to declare a forest area as Permanent Forest Reserve, while Section 34A of the Environmental Quality Act 1974 states that an environmental impact assessment is required for certain development projects.

Jurisdiction of Pulau Kukup National Park, Johor

In Malaysia, some laws are federal legislation while others are state enactments. Not all legislation will apply to the whole Peninsula, or to the states of Sabah and Sarawak. To provide for the establishment and control of National Parks and for matters connected herewith, the Federal National Parks Act (Act 226) was introduced in 1980 (Pakhriazad *et al.*, 2009). This federal act shall not apply to national parks in three states – Taman Negara Pahang National Park, Taman Negara Kelantan National Park and Taman Negara Terengganu National Park. These three national parks have their own legislations – Taman Negara Enactment (Pahang) No.2 1939 [En.2 of 1938], Taman Negara Enactment (Kelantan) No.14, 1938 [En.14 of 1938] and Taman Negara Enactment Terengganu No.6, 1939 [En. 6 of 1358] (Pakhriazad *et al.*, 2009). Since this is the constitutional position, constraints, especially on uniformity of laws, either to promote or enforce, particularly in

respect to matters on List I - Federal List (Ninth Schedule of Article 74, 77 Legislative Lists), List II - State List (Article 95B(1)(a) and List III -Concurrent List (Article 95B (1)(b), often exist (Pakhriazad *et al.*, 2009). Thus, there are some matters in which the National Parks fall under the legislative authority of both Federal and State governments. The act provides for states to establish National Parks to be administered by the Department of Wildlife and National Parks under the Federal Government. This act allows the State Authority to set aside land for the maintenance of roads, airstrips, reservoirs, dams and service buildings. However, forestry and land fall under the jurisdiction and legislative authority of the state in accordance with the Concurrent List of the Ninth Schedule (Pakhriazad *et al.*, 2009). Despite the clear distribution of legislative power between the federal Parliament and State legislatures, there are still exceptional instances where Parliament can legislate on state matters. These exceptions will ensure that the Federal Government can be empowered to honour their covenants under international treaties or conventions (Talaat *et al.*, 2013).

Pulau Kukup gained prominence in the 1990s when scientists began focusing on the island’s biodiversity and unique ecological characteristics. In the interest of preserving this unique habitat, Pulau Kukup was gazetted as a National Park on 27 March 1997 under the Johor State Park Corporation Enactment 1989. On 31 January 2003, this island was granted the status of a “Wetland of International Importance” or RAMSAR Site, by the Geneva-based Ramsar Convention Bureau (Perbadanan Taman Negara Johor, 2020).

Regazettement of Pulau Kukup as Johor National Park

The crucial enactment involved when discussing the status of Pulau Kukup is the National Park (Johor) Corporation Enactment 1989. In section 3(1) of the National Park (Johor) Corporation Enactment 1989, it is stated that ‘the State Authority may reserve any State land for the

purpose of National Park', which implies that state authorities have the right to gazette and degazette any of its land as a National Park since land is under state legislative jurisdiction.

On 25 October 2018, a gazette was issued by the State of Johor to notify that the state authority will cancel Pulau Kukup as a National Park under subsection 3(3) of the National Park (Johor) Corporation Enactment 1989. The cancellation of the National Park gazette status is to facilitate the land to be registered under the name of the Johor Ruler, Sultan Ibrahim Sultan Iskandar. The member of Parliament for Johor's Pasir Gudang district, Mr. Hassan Abdul Karim opposed the degazette of Pulau Kukup and said, "*without rectifying the status of Pulau Kukup as a National Park, the whole state executive council had committed omission for having failed to save the area as a Ramsar site in Malaysia* (Malaysiakini, 2018)."

On 5 December 2018, the Crown Prince of Johor, Tunku Ismail Sultan Ibrahim, announced that Pulau Kukup will become Sultanate land under Schedule II of the Sultanate Land Enactment 1934 after the Johor state government had degazetted it from being a National Park. However, it is important to note that section 2(1) of the Sultanate Land Enactment 1934 provides that land held as Sultanate land is "not as part of the property of the State". Tunku Ismail claimed that Sultan Ibrahim Sultan Iskandar aimed to change the status of all the National Parks to Sultanate lands to ensure better protection and preservation for future generations (The Star, 2018a).

On 6 December 2018, the Johor state assembly approved an emergency motion declaring that the National Park status be maintained for environmental preservation regardless of the land status. Based on a letter dated 5 December 2018, which carried the

signature of Johor Ruler, Sultan Ibrahim Sultan Iskandar, His Highness made clear his stance that Pulau Kukup's status as a National Park despite it being gazetted as Sultanate land. Pulau Kukup would be gazetted as a National Park according to Schedule II of the Sultanate Land Enactment 1934 (The Star, 2018b).

Interestingly, on 7 December 2018, the Federal Government interfered with the decision of Sultan Ibrahim. The Federal Government decided that Pulau Kukup would remain a National Park. The Minister of Water, Land and Natural Resources said the change in status of Pulau Kukup from National Park land to Sultanate land will have an effect on its recognition as an area of international interest as well as Malaysia's reputation as a country that prioritizes biodiversity. Any failure to manage this area can lead to the loss of priceless biodiversity (New Straits Times, 2018). On 9 December 2018, Tunku Ismail said only the Johor ruler has the jurisdiction to override the State Constitution. To rebut Tunku Ismail, the then-prime minister, Tun Dr Mahathir Mohamad said "*Malaysians are not outsiders. The Federal Government is not an outsider. We are responsible for all things in the country. That is the stance of the Federal Government. Pulau Kukup should not be developed. It should remain as a forest reserve particularly as it is a special mangrove forest* (The Star, 2018c)."

Finally, on 31 January 2019, Pulau Kukup's forest reserve status was restored according to the Johor state government gazette. The gazette states that the land will be reserved as Pulau Kukup National Park (Johor) as per the decision by the state government on 7 January 2019, with the state government invoking subsection 3(4) of the National Parks (Johor) Corporation Enactment 1989 (New Strait Times, 2019). The timeline of the degazette and regazette of Pulau Kukup can be summarised as follows:

Table 2: Timeline of Pulau Kukup's degazettement and regazettement

Date	Event
25 October 2018	Degazettement of Pulau Kukup as a National Park.
5 December 2018	The Crown Prince of Johor, Tunku Ismail Sultan Ibrahim, announces that Pulau Kukup to be made Sultanate land. Letter dated 5 December 2018 signed by Sultan Ibrahim Sultan Iskandar says Pulau Kukup's status is a National Park despite being made Sultanate land.
6 December 2018	Johor state assembly approves Pulau Kukup to remain a National Park regardless of the land status. Pulau Kukup to be gazetted as a National Park under Schedule II of the Sultanate Land Enactment 1934.
7 December 2018	Cabinet decides that Pulau Kukup remain a National Park.
9 December 2018	Tunku Ismail Pulau Kukup is under state jurisdiction and that the Federal Government should not interfere with state matters.
31 January 2019	Based on the gazette dated 7 January 2019, the status of Pulau Kukup as a a National Park and under state jurisdiction has been restored.

From degazettement to regazettement of Pulau Kukup as a National Park, the researchers have identified two major issues that need further clarification. First, the jurisdiction of Pulau Kukup as forest and state National Park. According to Article 74 of the Federal Constitution, forests are under State List while National Parks are under the Concurrent List which involve both state and federal legislation. Both federal and state authorities have jurisdiction over matters which fall under the Concurrent List. Moreover, the National Parks Act 1980 allows states to establish National Parks to be administered by the Department of Wildlife and National Parks under the Federal Government. Section 3(1) of The National Park (Johor) Corporation Enactment 1989 states the power of State Authorities to reserve any state land as a National Park. However, Article 75 of the Federal Constitution needs to be taken into consideration whenever we discuss the Concurrent List of Federal and State jurisdiction. Article 75 of the Federal Constitution states that a federal law shall prevail over any inconsistent state law, and Article 76 grants the Federal Government the power to make laws under the State List for the purpose of implementing international treaties or conventions. Therefore, a decision by the Cabinet will prevail over the

decision of a state ruler or legislature. Based on Article 75 and Article 76 of the Federal Constitution, the degazettement of Pulau Kukup is invalid since the Cabinet decided that Pulau Kukup's legal status should remain a National Park on 7 December 2018. It is also important to note that as a party to the Ramsar Convention, Malaysia is obligated to promote the conservation of wetlands.

The second issue is the status of Pulau Kukup as Sultanate land. Section 2(1) of the Sultanate Lands Enactment 1934 states that Sultanate land is not state land. Meanwhile, Section 3(1) National Park (Johor) Corporation Enactment 1989 states that the State Authority shall reserve any state land for the purpose of a National Park. This means that His Highness Sultan Ibrahim Sultan Iskandar's statement contradicts Section 3(1) of the National Park (Johor) Corporation Enactment 1989 because Sultanate land is not considered as a part of state land under Section 2(1) of the Sultanate Land Enactment 1934 and, therefore, cannot be gazetted as a National Park under the National Park (Johor) Corporation Enactment 1989. The 31 January 2019 gazette indicates Pulau Kukup still belongs to Johor State, which allows the state government to invoke subsection 3(4) National Park (Johor) Corporation Enactment

1989 to regazette Pulau Kukup as a National Park.

No more Environmental Impact Assessment on All Ramsar Sites in Malaysia

Shortly after the controversial Pulau Kukup degazettement as National Park, the government of Malaysia has announced a total ban on environmental impact assessment on Ramsar sites in the country. Environmental impact assessments were introduced in 1988 as a measure of sustainability in development projects (Department of Environment, 2016) with development projects allowed at all Ramsar sites prior to 28 March 2019. Under Section 34 of the Environment Quality Act 1974, the project developer must take pollution prevention and control measures as a condition of environmental impact assessment approval to eliminate any threat to the ecosystem during the implementation of a project. In the event of damage or pollution during the development of the project, the developer will be liable for action under Section 34A of the Environment Quality Act 1974 and has to bear the costs of rehabilitating the area (Attorney-General's Chambers, 2006). However, on 28 March 2019, the then-Minister of Energy, Science, Technology, Environmental and Climate Change, Yeo Bee Yin, said in Parliament that the government will no longer approve environmental impact assessments on Ramsar sites to ensure the sustainability of these wetlands. She was replying to Kluang member of parliament Wong Shu Qi, who asked whether the government would approve development in the Ramsar site of Sungai Pulai in Johor (Bernama, 2019). Therefore, no development in Ramsar sites is allowed after 28 March 2019.

Conclusion

From the study, we find that legislation plays a crucial role in protecting and conserving wetlands in Malaysia. Regazettement of Pulau Kukup shows the role of legislation to protect and conserve wetlands in Malaysia. Strong legislation will ensure the sustainable development of wetlands in Malaysia. Although

there is no doubt that other factors play important roles to conserve wetlands, such as public awareness and climate change, legislation is still the key factor to ensure the sustainability of wetlands. Although Malaysia does not have a comprehensive legislation to govern wetlands, the existing laws do comprehensively protect wetlands in the country. With the announcement from the Minister of Energy, Science, Technology, Environment and Climate Change that no environmental impact assessments are allowed on Ramsar sites, it is hoped Malaysian legislation will be the essential weapon to protect and conserve wetlands in Malaysia.

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