

Conference Paper 05

A green horizontal band with silhouettes of people and a heart. The silhouettes are in a darker shade of green, and the heart is a lighter shade. The background of the band is a medium green color.

Legal Issues Pertaining to Community Based Fisheries Management

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ABSTRACT

The Bangladesh Environmental Lawyers Association (BELA) provided legal support to the CBFM-2 project and in particular to the 130 Community Based Organisations established under the project. The project was implemented against an uncertain legal background due to many changes in the way that wetlands and fisheries in Bangladesh have been managed over recent decades. Many of the key interventions, such as sanctuaries have yet to receive legal recognition. Many currently accepted norms and practices have come about through gazette notifications or individual decisions rather than being supported by Acts or clear policies.

This paper outlines the legal background for community managed fisheries in Bangladesh and the challenges faced during implementation of the project. It also suggests what needs to happen if community managed fisheries are to become more widespread in Bangladesh.

INTRODUCTION

Management of Fisheries

In Bangladesh, the legal framework for the management of fisheries developed from two different legal regimes - “Doctrine of Public Trust” of the ancient Roman Empire in which the Government held certain common properties such as rivers and seashore in trusteeship for the free and unimpeded use of the general public and English Common Law in which the sovereign could own these resources but could not grant these to private owners if the effect was to interfere with public interest in navigation or fishing.

Under the Permanent Settlement Regulation (PSR) of 1793, the Zamindars (landlords) owned and managed flowing rivers, their tributaries, and flood plains containing depressions or beels. In 1947 under the State Acquisition and Tenancy (SAT) Act, 1950, the Government took over the rent receiving rights of the landlords as under SAT, public fisheries (jalmohals) became an estate that cannot be retained under private ownership. Most of the public fisheries are owned by the Ministry of Land, although the conservation of water bodies and fishes are entrusted with the Ministry of Water Resources, Ministry of Environment and Forest and the Ministry of Fisheries and Livestock.

The various laws on fisheries enacted during the colonial period define fisheries as “public”¹ and “private”². For management purposes, “fisheries” have also been classified as “open” and “closed” water fisheries in the management guidelines.

¹ Section 20(2a) (ii) of the State Acquisition and Tenancy Act, 1950

² The Private Fisheries Protection Act, 1889

The definition of “fishery” was first included in the Protection and Conservation Act, 1950 through an amendment in 1995. In this Act “fishery” means "any water body, natural or artificial, open or closed, flowing or stagnant (such as river, haor, baor, beel, floodplain, canal etc.) where activities for growing fish, or for conservation, development, demonstration, breeding, exploitation or disposal of fish or of living organisms related to such activities are undertaken, but does not include an artificial aquarium of fish used as a decorative article, pond or tank"³.

This definition is inclusive only of what is commonly understood as “inland” fisheries while the Marine Fisheries Ordinance (MFO), 1983 defines “marine” fisheries.

In general, laws on fisheries do not regulate the principles and practices of leasing or physical management of fisheries. This was attempted to be done by the Land Management Manual, 1990 that now stands thoroughly changed through subsequent administrative decisions.

The current classification of fisheries for leasing and management purposes and their leasing arrangements remain as follows:

Open Fishery

The Government has abolished the leasing practice of all open water bodies vide Gazette notification dated 4 September, 1995. The rationale behind such proclamation is to protect the rights of the poor fishermen and facilitate their livelihood.

However, some open water fisheries can still be outside the purview of the above notification if the same be required by the government for development projects.

Closed Fishery up to 3 Acres⁴

Under the existing arrangements, closed water bodies up to 3 acres are to be managed by local government authorities who are empowered to lease these out for a maximum of three years. If the valuation of the closed jalmohal is more than taka 30,000, the process is managed by an Upazila Tender Committee and the Upazila Nirbahi Officer (UNO). The final decision is made by the Upazila Development Coordinating Committee.

Local government institutions for urban areas such as the Paurashavas and City Corporations can also lease jalmohals within their geographical boundary.

At all levels, the lease for closed jalmohals has to be offered first to either fishermen’s cooperative societies, women’s cooperative societies or tribal people’s cooperative societies.

³ Protection and Conservation of Fish Act, 1950, Section 2 (1a)

⁴ 20 April, 1994

Closed Fishery up to 20 Acres⁵

Since 1997 by virtue of notification dated 30 September, 1997, closed jalmohals up to 20 acres are vested with the Ministry of Youth and Sports to create self-employment of the youth⁶. Such jalmohals can be leased out to the youth community for a period of 3-5 years. Two separate committees for City Corporation areas and areas beyond City Corporations have been proposed to lease out closed water bodies up to 20 acres within and outside City Corporation areas. The leasing shall be through tender and shall be allotted to the higher bidder. In getting the lease, trained (male and female) youth groups registered as cooperative societies get priority.

Closed Fishery above 20 Acres

The Ministry of Land may lease out closed Jalmohal above 20 acres for 4-10 years to the real fisherman cooperative society.

In general, the policy documents that purport to regulate management of fisheries through leasing prescribe the following:

- Identification of leasing authority
- Requirement of tender
- Detailing of tender process
- Pre-requisition of participating parties to tender
- Approval process
- Lease period
- Mode of Appeal
- Amount to be deposited
- Mode for handing over of fishery
- Management Plan (development project)

LAWS AND POLICIES

The conservation issues related to fisheries are addressed by the Protection and Conservation Act, 1950 and the MFO.

⁵ Public Jalmohal Management Policy, 2005

⁶ Water bodies included in the projects on ideal village and shelter, the vested and abandoned water bodies, khas water bodies adjacent to the offices of Union Land Office, Assistant Commissioner (Land), Upazila Nirbahi Officer and the Deputy Commissioners, water bodies in enjoyment of public easement or situated within the boundary of and owned by City Corporations/Municipality/ Zila Parishads shall be outside the purview of this notification.

There are as many as five definitions of “fish”⁷. Under the Act of 1950, “fish” has been defined as all cartilaginous, bony fishes, prawn, shrimp, amphibians, tortoises, turtles, crustacean, animals, molasses, echinoderms and frogs at all stages in their life history⁸. The Act sets ‘protection’ and ‘conservation’ as its prime focus, but neither defines them nor elaborates on what should be done to promote these measures.

The Protection and Conservation of Fish Act, 1950 that came into force on 29 June, 1950 vide notification No. 5459 dated 22 June, 1950 was enacted to address the following concerns raised by the Agriculture and Industries Department in 1932:

- prevent depletion of fishing grounds
- help scientific research into fisheries
- safeguard the interests of the trade and of fishing communities
- ensure the maintenance of good order among fishermen
- ensure sanitary and hygienic conditions in the manufacture and trade of fishery products
- adopt restrictive measures about forms and dimensions of fish appliances, close times, wasteful and destructive methods of fishing

The Act of 1950 empowers the Government to prohibit:

- killing or catching of fishes of prescribed species in certain seasons
- killing or selling of fish of any prescribed species below a minimum size
- all fishing in all waters or in any specified waters for a specified period,
- destruction of fishes by drying or de-watering of any fishery⁹, and
- catching, carrying, transporting etc. of fishes below the prescribed size of any prescribed species throughout Bangladesh¹⁰.

The 1950 Act has, although enacted to protect "fish" and purported to regulate some of the growing concerns for gradual depletion of fishery and fish resources. As such the Act has empowered the Government to make rules regulating the depletion of fishery by pollution, by trade effluent or otherwise and also the construction of dams, bunds, embankments and other structures that may be harmful to fish¹¹.

The Protection and Conservation of Fish Rules, 1985 prohibited the erection of fixed engines in rivers, canals, khals and beels, construction of dams and embankment other than for irrigation, flood control or drainage purposes, destruction of fish by explosives in inland or coastal territorial waters¹² or by poisoning/depleting water¹³.

⁷ Bangladesh Fisheries Development Corporation Act, 1973, The fish and fisheries Products (Inspection and Quality Control) Ordinance, 1983, The Marine Fisheries Ordinance, 1983, The private Fisheries Protection Act, 1889 and The Protection and Conservation of Fish Act, 1950.

⁸ Protection and Conservation of Fish Act, 1950, Section 2 (1)

⁹ Protection and Conservation of Fish Act, 1950, Section 3 (3)

¹⁰ Protection and Conservation of Fish Act, 1950, Section 4

¹¹ Protection and Conservation of Fish Act, 1950, Section 3 (3)

¹² Protection and Conservation of Fish Rules, 1985, Rule 5

¹³ Protection and Conservation of Fish Rules, 1985, Rule 6

To facilitate the augmentation and production of particular fish species including Shol (*Channa striatus*), Gazar (*Channa marulius*) and Taki (*Channa punctatus*) the Rules prohibited the catch or destruction of fish fry or parent fish of these species between 1st of April to 31st August. Except for pisciculture, the Rules also prohibited the catching of carps such as Rui (*Labeo rohita*), Catla (*Catla catla*), Mrigal (*Cirrhinus cirrhosus*), Kalbaush (*Labeo calbasu*) or Ghania (*Labeo gonius*) of any size in the waters of rivers, khals etc. during variable periods between April to July in different water bodies as specified in the schedule. The sale of carps, Hilsha (*Tenualosa ilisha*), Pungus (*Pangasius pangasius*), Silon (*Silonia silondia*), Bola (*Raiamas bola*) and Aor (*Mystus aor*) below a specified size has also been prohibited at different times of the year.

As stated earlier, the Act does not define “conservation”. It has no provision relating ownership or management of fisheries and their physical possession. Also there is no mention of management of fisheries through community participation or through the actual fishermen’s community or NGOs. There is no definition of “fishermen” in any legal or policy documents of Bangladesh. This Act fails to recognize the concept of “fish sanctuary” as a conservation approach.

The National Fish Policy, 1998 calls for production based management of open water fisheries as opposed to leasing. The Policy commits to promote involvement of poor and traditional fisherfolk in the management and conservation of both open and closed water bodies although it does not mention community based management as an approach. As a conservation mode, the Policy explicitly recognizes the concept of sanctuary. The other management concerns for fisheries as identified in the policy remain use of harmful devices, pesticides, pollutions from both point and non-point sources, unregulated and over fishing and so on. All these management concerns are claimed to have been successfully addressed by community groups working in the various CBFM water bodies. The Policy commitment for alternative income generation for the fisherfolk to reduce pressure on fishery has also to some extent been addressed under CBFM.

LEGAL STATUS OF CBFM: LESSONS LEARNT

As a model of participatory fisheries management, the CBFM implemented in two phases (1996-2001 and 2001-2006) had the overall objective to sustainably improve the livelihoods of poor people dependent on aquatic resources.

The CBFM model is recognized by the Ministry of Land, Ministry of Fisheries and Livestock and is implemented with overall guidance and supervision of the Department of Fisheries. The total number of water bodies managed in the CBFM model counts to 117 including both open and closed water fisheries. The CBFM has managed to develop many fish sanctuaries.

The basic two legal documents on which CBFM is premised include the Memorandum of Understanding (MoU) signed between the Ministry of Land and Ministry of Fisheries

and Livestock and also the MoUs signed between the Department of Fisheries, the WorldFish Center (previously ICLARM) and the partner NGOs.

These agreements required the Ministry of Land to hand over the designated water bodies to Ministry of Fisheries and Livestock (MoFL) for managing the same through NGOs in the community based management model for ten years beginning in 2001. The CBFM arrangements that the NGOs followed involved the participation of concerned Deputy Commissioners, District Fisheries Officer, Upazila Fisheries Officer - all having their statutory responsibility regarding management of fisheries. The NGOs, with support and guidance from the local authorities, formed various community management committees with representation of local poor fishermen and drew up management plans for specific water bodies. Most of the community management groups are registered as cooperatives either under the Cooperatives Societies Act, 2001 or the Voluntary Social Welfare (Registration and Control) Ordinance, 1961.

Although the official arrangement with the MoFL, the WorldFish Center and the NGOs come to an end in 2007, these community groups shall continue managing the water bodies in the CBFM model for another five years, i.e., up to 2011. As such, the sanctuaries managed as part of the CBFM approach are expected to be managed until 2011 although no explicit legal recognition exists for this.

During the implementation phase, various CBFM components faced the following challenges requiring legal interventions:

- Unclear demarcation of water bodies
- Cancellation of CBFM lease arrangements by local administration
- Delayed handing over of possession of water bodies due to suits filed by previous lessees
- No access to a few CBFM water bodies due to pending cases
- Pollution
- Demands by persons claiming to have competing rights as riparian fishermen over CBFM water bodies
- Legality of leasing out open water bodies under CBFM
- Legal status of MoUs signed between two ministries as opposed to regular lease agreements executed in the name of the President
- Absence of executive order (gazette notification) giving legality to the CBFM agreements
- Payment of taxes to the government
- Sub-lease of CBFM water bodies by community management groups
- Criminal cases

At the concluding stage of CBFM, the following issues may create legal challenges for the community groups expected to manage the water bodies without institutional presence of the NGOs:

- lack of legal recognition of management models like CBFM (challenges from vested interest quarters)
- lack of institutional support from public agencies
- lack of coordination between statutory agencies
- administrative hierarchy amongst public agencies
- absence of legal recognition of the CBFM management plans
- absence of legal recognition of fish sanctuary
- unclear legal status of community groups yet to register under law
- inadequate fund/alternative income generation facilities
- high lease value
- conflicting claims of vested interest corners over water bodies, fish resources
- absence of provision for continuous legal support
- pollution
- criminal offences

C. Recommendations

Initiatives like CBFM require the following legal/policy interventions to ensure sustainability:

- Appropriate legal and institutional arrangement to translate into reality policy commitment for upliftment of poor fishermen and their involvement in management of fisheries
- Well defined management laws/rules for public water bodies to include and recognize concepts like CBFM
- Long term commitment to management practices like CBFM
- Avoidance of frequent changes of policies relating fisheries management through leasing (checking vested interests as opposed to the interests of poor fishermen whom programs like CBFM targets)
- Appropriate legal framework to institutionalize the successes and practices of concepts like CBFM
- Clearer definition of traditional fishermen and their right to access to water bodies and decision making process
- Realistic payment requirement (lease value and other legal requirements including taxation) for the traditional fishermen
- Capacity building of the participating fisher folk and community support
- Legal recognition of sanctuary and other sustainable fishing practices introduced through innovative programs like CBFM
- Mandatory and well defined management plans to arrest loss of fishery and other aquatic resources with clear monitoring mechanism (in case of commercial leasing out)
- Avoidance of conflicts in management priorities of different government offices
- Clear and strengthened role and jurisdiction of the MoFL, Department of Fisheries in dealing with water bodies designated for CBFM and alike projects
- Implementation of laws on pollution and conservation of fisheries

RELEVANT LAWS, RULES, POLICIES AND CONVENTIONS

Laws

The Constitution of the People's Republic of Bangladesh
Bangladesh Fisheries Development Corporation Act, 1973
Bangladesh Water and Power Development Board Order, 1972
Bengal Tenancy Act, 1885
Environment Court Act, 2000
The Acquisition of Waste Land Act, 1950
The Agricultural Pest Ordinance, 1962
The Agricultural Pesticides Ordinance, 1971
The Agriculture and Sanitary Improvement Act, 1920
The Canals Act, 1864
The Chittagong Port Authority Ordinance, 1976
The Coast Guard Act, 1994
The Culturable Waste Land (Utilization) Ordinance, 1959
The Dhaka City Corporation Ordinance, 1983
The Embankment and Drainage Act, 1952
The Environment Conservation Act, 1995
The Factories Act, 1965
The Fish and Fish Products (Inspection and Quality Control) Ordinance, 1983
The Fisheries Research Institute Ordinance, 1984
The Forest Act, 1927
The Government Fisheries (Protection) Ordinance, 1959
The Inland Shipping Ordinance, 1976
The Inland Water Transport Authority Ordinance, 1958
The Irrigation Act, 1876
The Land Reform Board Act, 1989
The Land Reforms Ordinance, 1984
The Local Government (Union Parishads) Ordinance, 1983
The Marine Fisheries Ordinance, 1983
The Mongla Port Authority Ordinance, 1976
The Non-Agricultural Tenancy Act, 1947
The Open Space Protection Act, 2000
The Paurashava Ordinance, 1977
The Penal Code, 1860
The Private Fisheries Protection Act, 1889
The Protection and Conservation of Fish Act, 1950
The Shrimp Cultivation Taxation Act, 1992
The State Acquisition and Tenancy Act, 1950
The Tanks Improvement Act, 1939
The Territorial Water and Maritime Zones Act, 1974
The Water Supply and Sewerage Authority Act, 1996

Rules

Environmental Conservation Rules, 1977

Marine Fisheries Rules, 1983
Permanent Settlement Regulation, 1793
Territorial Water and Maritime Zones Rules, 1977
The Fish and Fish Products (Inspection and Quality Control) Rules, 1997
The Protection and Conservation of Fish Rules, 1985
The Shrimp Cultivation Taxation Rules, 1993

Policies

Environment Policy, 1992
Export Policy, 1997-2002
Fifth Five Year Plan, 1997-2002
Industrial Policy, 1991
Land Management Manual, 1990
Land Use Policy, 2001
National Environment Management Action Plan, 1995
National Fish Policy, 1998
New Agricultural Extension Policy, 1996
Water Policy, 1999
Public Water Body Management Policy, 2005
And various circulars

Conventions

Convention for the Prevention of Pollution of the Sea by Oil
Convention on the Law of the Sea
The Convention on Biological Diversity, 1992
The Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971