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SUSTAINABLE FISHERIES MANAGEMENT PROJECT (SFMP)

Supporting The Fisheries Commission's Community Fisheries Watchdog Committees: Review of the Ghanaian Legal Context

APRIL 2016



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ACRONYMS

BD	Bantay Dugat
CRC	Coastal Resources Center at the Graduate School of Oceanography, University of Rhode Island
EEZ	Exclusive Economic Zone
FEU	Fisheries Enforcement Unit
FC	Fisheries Commission
FWCs	Fisheries Watchdog Committees
GNCFC	Ghana National Canoe Fishermen Council
IUU	Illegal Unreported Unregulated
MCSU	Monitoring, Control and Surveillance Unit
MOFAD	Ministry of Fisheries and Aquaculture Development
NAFPTA	National Fish Processors and Traders Association
NGOs	Non-Governmental Organizations
SFMP	Sustainable Fisheries Management Project
SSG	SSG Advisors
URI	University of Rhode Island
USAID	United States Agency for International Development

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INTRODUCTION AND SUMMARY

This report reviews the legal basis for the introduction and implementation of a community-based enforcement initiative, called the Fisheries Watchdog Committees (FWCs), to support sustainable fisheries management in Ghana. This program would be led and supported by the Government of Ghana with additional support provided by the Sustainable Fisheries Management Project (SFMP) funded by the U.S. Agency for International Development (USAID).

Methodology

This assignment was undertaken through a review of relevant Ghanaian law, secondary data, and interviews with key stakeholders in Ghana.¹ The key stakeholders interviewed included members of the Fisheries Commission (FC), law enforcement, and non-governmental organizations.²

Summary of Conclusions

There is no express provision of Ghanaian law that prescribes the establishment of the FWCs by the Ministry of Fisheries and Aquaculture Development (MOFAD). However, the combined effect of articles 35(6)(d); 36(9); 41(k); 240(2) of the 1992 Constitution and sections 2(2)(o) and 94(4) of the Fisheries Act, 2002 (Act 625) is that the FWCs can be lawfully established by the Minister of Fisheries and piloted immediately.

However, for FWC volunteers to place a more robust role in fisheries enforcement, including engaging in arrests or seizures, it is appropriate to operate with an express backing of the law, in light of the serious nature of the involvement of citizens in fisheries law enforcement activities. This would require an amendment to the existing Fisheries Act

BACKGROUND

Importance of Fishing to Ghana

Fishing is important to the development of Ghana's economy at 5 percent of Ghana's GDP, with exports growing. The artisanal fishing industry contributes nearly 70% of the total national fish catch. Fish are also an important source of protein to residents in Ghana with almost three fourths of Ghana's catch consumed domestically.³

The fishing industry in Ghana is under threat from unacceptable fishing methods and overfishing. These fishing methods include the use of light aggregating devices, the use of unapproved nets, pair trawling, the use of chemicals, and dynamite and other explosives.

Legal Responses

Legal responses to these threats include constitutional provisions, the Fisheries Act, and law enforcement activities, including those of the Fisheries Enforcement Unit (FEU).

¹ The secondary sources of information consulted include 1992 Constitution and Acts of Parliament such as the Fisheries Act, 2002 (Act 625); the Criminal and other offences (Procedure) Act, 1960 (Act 30); the Ghana Police Service Act, 1970 (Act 350); the Ghana Maritime Authority Act, 2002 (Act 630); the Chieftaincy Act, 2008 (Act 759); the Ghana Maritime Security Act, 2004 (Act 675); and the Forestry Commission Act, 1999 (Act 571). The Subsidiary legislations reviewed include LI 1968, 2010; LI 1571, 1992 and LI 1599, 1994.

² The stakeholders include members of the Fisheries Commission, the Monitoring, Control and Surveillance Unit, the Marine Police and civil society groups such as the National Canoe Fishermen Council, Fish Processors, the Fisheries Alliance, Friends of the Nation, and Oil Watch Ghana.

³ Ghana Export Promotion Council

Constitutional Provisions

The 1992 Constitution of Ghana in article 36(9) requires the State to take appropriate measures to protect the national environment. The State is also at liberty to seek the cooperation of other States and bodies for the purposes of protecting the wider international environment for mankind. In addition to the responsibility of the State to safeguard the environment, article 41(k) of the 1992 Constitution obligated *individual citizens* to take action to protect and safeguard the environment.

The Fisheries Act, 2002 (Act 625)

The Fisheries Act, 2002 (Act 625) regulates unacceptable fisheries practices. For instance section 92 of Act 625 provides that “a person who directly or indirectly introduces a deleterious substance into the fishery waters which adversely affects the habitat or health of the fish or other living aquatic resource commits an offense and is liable on summary conviction to a fine no less than \$50,000 and not more than \$2 million where a local industrial or semi-industrial vessel or a foreign fishing vessel is used in the commission of the offense, or 50 penalty units and not more than 500 penalty units in any other case.”

Fisheries Law Enforcement

In order to effectively enforce the provisions of Act 625, the law established the FEU in section 94 as part of the FC. Section 94 provides that the FEU will be responsible for “monitoring, control, and surveillance of all fishing operations within the fishery waters by whatever appropriate means, including the management and running of a satellite base station for using satellite communications for data transmission relating to the activities of foreign fishing vessels licensed to operate within the [Exclusive Economic Zone (EEZ)] and the enforcement of the Act, Regulations made under the Act and any other enactment relating to the regulation of fishing activities.”

FEU

The FEU comprises of personnel from the Ghana Navy, Ghana Air Force, and the Secretariat of the FC. These personnel are given police and other powers under the Act when they perform their duties within the Ghanaian EEZ and beyond the limits of the EEZ when the need arises.⁴ They are also given full insurance coverage for the duration of their sea duties, as well as indemnity from prosecution for acts done in good faith in the performance of their functions under the Act.⁵

To compliment and support the work of the FEU, the USAID SFMP and the FC plan to introduce a community-based FWC initiative, drawing on trained community volunteers to support enforcement activities.

Act 625 empowers the Minister to request personnel from other Departments, agencies, of State, and other competent bodies or organizations to assist the FEU. It is reasonable to assume that other competent bodies or organizations include civil society organizations.

The FWC Initiative: A Way Forward

The FWC program is to be modeled on the successful “Bantay Dagat (BD)” program in the Philippines. The BD network is a network of fishermen who volunteer to aid in the detection and reporting of illegal fishing. They conduct patrols together with marine law enforcement and sometimes, BD also plays a more active enforcement role, directly engaging and

⁴ Section 97 of Act 625

⁵ Sections 104 and 105 of Act 625

arresting illegal fishing suspects. The BD also plays a role in educating local communities on good fishing practices and promoting sustainable fishing.

While the final and specific mandate and scope for the FWCs will need to be determined by MOFAD and SFMP, it is imagined that FWC volunteer could engage in the following activities during the program's initial pilot phase:

- Conduct seaborne and land-based patrols for visibility and monitoring
- Educate fishers on fisheries and other relevant environmental laws
- Listen to stakeholders and collect feedback and information
- Coherent reporting of infractions to the police and fisheries authorities
- Assist in gathering evidence on fisheries infractions to facilitate conviction of violators
- Serve as witnesses in court proceedings
- Ensure that all canoes or vessels at the landing site or beach are registered, and maintain a list of active fishermen at specified sites.

In the long term, however, the FWC volunteers could potentially take on the following additional activities – if approved by MOFAD and supported by an Amendment to the Fisheries Act to make explicit legal provisions for the program (see **Recommendations** at the end of this document).

- Conduct monitoring and inspection of various fishing activities at the beach, fish landing sites or local markets to ensure compliance with established rules and regulations on fishing, processing, handling and sanitation, among others.
- Conduct warrantless arrest and seizure of articles used as instruments in illegal activity or illegally caught fish, in coordination with a composite team, including FEU agents.
- Undertake fish examination conducted by a qualified and trained volunteer posted in strategic areas in the community and duly supervised by the appropriate government authority.
- Actively coordinate with various institutions in the enforcement chain (law enforcement, prosecutor and the Courts) to ensure high probability of arrest and prosecution of violators.
- Actively promote community-based fisheries management and conservation through various activities designed to elicit the participation of fishing communities and other relevant stakeholders.

To design and implement a FWC program in Ghana, the Government of Ghana and SFMP need to fully understand the regulatory and legal basis for such a program. This report seek to explore the extent to which the current policy and regulatory in Ghana would support such a program and any legal or policy changes that might be necessary for the FWCs to be successful and sustainable in Ghana.

LEGAL BASIS FOR FWCS – DOMESTIC LAW

Domestic laws and policies that could serve as a legal basis for the FWCs include the 1992 Constitution and several Acts of Parliament. Certain Acts of Parliament, such as the Environmental Protection Agency (EPA) Act, 1994 (Act 490); the Ghana Maritime Authority Act, 2002 (Act 630); the Chieftaincy Act, 2008 (Act 759); the Ghana Maritime Security Act, 2004 (Act 675); and the Forestry Commission Act, 1999 (Act 571) that tangentially deal with the subject, were considered but not examined in detail.

1992 Constitution

The 1992 Constitution is the fundamental law of Ghana. Some provisions of the Constitution are relevant to the establishment of the FWCs in Ghana. These include citizen participation in governance, the duty of the state to protect the environment, the duty of the individual to protect and safeguard the environment, and the creation of armed forces.

Citizen Participation in Governance – Articles 35(6) (d); 202(2) (e)

Article 35(6) (d) of the 1992 Constitution requires the State to involve ordinary citizens in decision making processes. The Constitution also emphasizes the need to “make democracy a reality by decentralizing the administrative and financial machinery of government to the regions and the districts. The will afford the people all possible opportunities to participate in decision making at every level in national life and in government.” This is one of the constitutional bases for citizens’ involvement in the management of public resources in Ghana.

Ghana practices a decentralized form of government. The Constitution encourages devolution of authority to decentralized structures. The same idea is found in article 240 (2) (e) of the Constitution. Article 240 (e) provides that in order to ensure the accountability of local government authorities, people shall, as far as practicable, be afforded the opportunity to participate effectively in their governance. The Fisheries Watchdog Program may be established in collaboration with relevant metropolitan and District Assemblies or other competent organizations as envisaged under section 94 (4) of the Fisheries Act and in fulfillment of article 240 of the 1992 Constitution.

Duty of the Individual to Protect and Safeguard the Environment – Article 41 (k)

Article 41 (k) places a duty on citizens to take actions to protect the environment. It provides that the rights and freedoms of a citizen are inseparable from these duties and obligations/ the marine environment is not excluded in this article.

Creation of an Armed Force under Article 210 (2) or Request for Personnel for the Enforcement Unit under Section 94, Act 625

Setting up a FWC program in which ordinary citizens may monitor, report, and perhaps arrest in response to infractions of fisheries laws may appear to be an exercise in the creation of an “armed force.” This may be the case whether members of the group are actually armed with “weapons” or not. Article 210 (2) provides that no person shall raise an armed force except by or under the authority of an Act of Parliament. In view of this, article 202 (2) of the 1992 Constitution is relevant to the FWC program.

The functions of FWC members may also amount to the provision of security service by private security organizations. Section 38 of the Police Services Act, 1970 (Act 350) regulates the activities of private security organizations. According to Section 38 of Act 350, a private security organization is any organization “which undertakes private investigations as to facts or which performs services of watching, guarding, patrolling, but does not include the Police Services, Prisons Service, or the Armed Forces of Ghana.”

The activities of the FWC members may be akin to those of the Neighborhood Watch Committees. Neighborhood Watch Committees are recognized as a system for the provision of security in Ghana. It is important to note that the Police Service Act does not regulate the activities of the Neighborhood Watch Committees.⁶ Therefore, there is no legal instrument

⁶ This is the case although the Minister of Interior may by Regulations control the establishment and operations of any private security organizations. The Regulations so far passed, thus Legislative Instruments 1571 of 1992 and 1579 of 1994 govern the activities of registered, commercial private security organizations

for the regulation of the activities of not-for-profit private security systems such as Neighborhood Watch Committees, nor the activities of NGOs that are involved in the security sector.

Since the Fisheries Watchdog Program will not be run commercially or for profit, it will *not* fall under Regulations passed under Act 350. While the FWC may look like a private arrangement, they will actually operate under the direction of the FEU. Therefore, the FWC program has to complement the efforts of the FEU and Marine Police to provide security and investigate activities in the marine environment.

Article 210 (2) may be read with section 94 (4) of the Fisheries Act. Under section 94 (4), the Minister of Fisheries has the authority to request state institutions and other competent organizations to collaborate with the FEU established under section 94 (1) in the implementation of the Fisheries Act. This means personnel from other departments, agencies of State *or other competent bodies* may assist the Enforcement Unit in the performance of its functions.

When article 210 (2) of the 1992 Constitution and Section 94 of the Fisheries Act, 2002, are read together, *the combined effect of these provisions is that the Minister can institute the FWC program under the mandate of the Enforcement Unit*. Such an establishment, even if it is labeled in the extreme case as an “armed force,” could be created under the authority of Parliament and the Minister. However, in order to avoid any ambiguity as to the legal basis of the FWC program, it may still be appropriate to introduce clear provisions into the Fisheries Act defining the Fisheries Watchdog Program.

Section 94 can be amended to make provision for the creation of the FWC (see proposed Legal Framework and language for a draft amendment in the SFMP *Supporting the Fisheries Commission’s Community Fisheries Watchdog Committees: Design Document*). Pending amendments to Act 625, the Minister of Fisheries is at liberty to work with the Minister for Local Government and Rural Development to set up the FWC program. This could mean that all coastal Metropolitan, Municipal, and District Assemblies work with various community groups to furnish the Minister of Fisheries with a list of proposed personnel to participate in the program. The Minister is also at liberty to work with “competent organizations” such as the Ghana National Canoe Fishermen Council (GNCFC) to establish the FWC program.

The Fisheries Act, 2002 (Act 625)

The Fisheries Act, 2002 (Act 625) provides for the regulation and management of marine resources in Ghana. The Act governs the development of the fisheries industry and seeks to move toward sustainable use of the fishery resources. The law achieves its mandate through the FC.⁷ The functions of the Commission are among others, “*in collaboration with District Assemblies and with fishing communities, ensure the enforcement of the fishery laws including by-laws made by the relevant District Assemblies.*”⁸

There is no direct provision in the Fisheries Act that mandates or prescribes the establishment of the FWCs. However, there is also no provision prohibiting the establishment of the FWCs. In this absence, section 2 (2) (o) together with 94 (4) *provide a legal basis for the involvement of District Assemblies or other competent organizations, such as the Ghana National Canoe Fishermen Council, in the governance of fisheries resources.*

If the FWC program only concerns activities of artisanal fishermen, it is worth noting that the Minister of Fisheries is mandated to regulate artisanal fishing activities through the Fisheries

⁷ The functions of the Fisheries Commission are captured in section 2(2) of Act 625

⁸ Section 2(2) (o), Fisheries Act, 2002 (Act 625).

Act. Section 59 of the Fisheries Act provides that, “the Minister may on the recommendation of the Commission make such further provisions as the Minister considers necessary for regulating artisanal fishing.” This provides legal space for the establishment of the FWC program by the Minister through Regulations if the intent is to ensure compliance with fishing laws by artisanal fishermen.

Enforcement by Authorized Officers Only

It could be argued that the enforcement powers under the Fisheries Act can only be exercised by “authorized officers” who are given police powers. Currently the list of “authorized officers” is limited to personnel of the FEU of the FC, personnel of the Ghana Navy and Air Force deployed for fisheries duties, officers of the Water Research Institute, and the fisheries officers of the secretariat of the FC.⁹

However, the Minister of Fisheries has the power to appoint, in writing, any public officer as an authorized officer. Although no official from any District Assembly has been appointed as an “authorized officer,” the Minister is at liberty to appoint officers of District Assemblies as “authorized officers” at any time. The Minister may also lawfully appoint members of competent organizations as authorized officers and no law prohibits the Minister from appointing members of “competent” organizations. Competency in this context may be understood to include the legitimacy of the organization, such as lawful establishment and a relevant organizational mission. Civil society groups and fisherfolk associations – National Fish Processors and Traders Association (NAFPTA) and GNCFC – may be assessed for consideration as “competent organizations.” For the purposes of this assessment, criteria must be developed to engender transparency in the selection process. The technical competence of individuals from competent organizations may also be examined by the Minister and may be achieved through appropriate personnel training.

Effects of LI 1961 on the Role of District Assemblies

It is worth noting that the District Assemblies have a mandate to coordinate, integrate, and harmonize the execution of programs promoted or carried out by Ministries, Departments, public organizations, and other statutory bodies and NGOs in the district.¹⁰ If the FWC will be carried out in collaboration with the GNCFC, the various District Assemblies could be involved for the purposes of coordinating these activities with other activities within the Districts.

District Assemblies also have the power to make by-laws in relation to fisheries, although it may be argued that the Local Government (Department of District Assemblies) (Commencement) Instrument, 2009 (LI 1961) only empowers District Assemblies to contribute to the enforcement of fisheries legislation and education, without giving them any explicit rule-making powers. However, the absence of specific corresponding powers for District Assemblies in LI 1961 cannot be used to limit the mandate of District Assemblies under the Fisheries Act as LI 1961 is a subordinate legislation that cannot limit the scope of operation of substantive Acts of Parliament such as the Fisheries Act and the Local Government Act.

Criminal Procedure and Other Offenses (Procedure) Act, 1960 (Act 30)

In some limited circumstances, private persons may arrest other individuals without a warrant. This is provided for by section 12 of Act 30. For a private person to lawfully carry out an arrest without a warrant, the offenses either must have been committed in his presence

⁹ Section 94(4), Fisheries Act, 2002 (Act 625).

¹⁰ Section 10(5), Local Government Act, 1993 (Act 462).

or he must have a reasonable suspicion that such an offense was committed. Such offenses must involve:

- The use of force or violence
- The offense must have resulted in bodily harm to someone
- An item must have been stolen or fraud perpetrated
- Injury must have been caused to a public property
- Injury to property owned by or in the lawful custody of the person

An arrest outside the scope of this provision is likely to be declared unlawful. Carrying out an unlawful arrest exposes the person carrying out the arrest to civil suits under the human rights and fundamental freedoms provisions in Chapter 5 of the 1992 Constitution.

If a private person conducts an arrest on the basis of reasonable suspicion, an offense must actually have been committed in order for the arrest to be lawful. If a private person, for instance a member of the FWCs, conducts an arrest on the basis of reasonable suspicion when an offense was not in fact committed, such an arrest is likely to be declared unlawful. Conducting an unlawful arrest exposes the person carrying out the arrest to civil suits under the human rights and fundamental freedoms provisions in Chapter 5 of the 1992 Constitution.

CONCLUSIONS

There appears to be no provision of law that prohibits the participation of “the people” in the monitoring, controlling, and surveillance efforts of the FC. The Fisheries Act allows the Minister of Fisheries to request for support for the FEU to enhance the capacity of the FEU. Such requests for support may be made to other government establishments, NGOs, or other recognized organizations. Therefore, the Minister may officially request recognized competent organizations such as the GNCFC or District Assemblies to furnish the Minister with lists of persons to be considered for the FWC program.

Issues such as the security of FWC members, their incentives and the legal relationship between members of the FWCs and law enforcement agencies should be addressed before the program takes off. These issues are complex and need thorough examination, as they remain challenging for even established and reputable community enforcement programs, such as the BD program in the Philippines.

RECOMMENDATIONS

In view of the power of the Minister of Fisheries, the limited resources available at the disposal of the FEU of the FC, and the success of the BD program in the Philippines, it is recommended that:

1. The Minister of Fisheries establish the FWC Initiative under Sections 2 (2) (o) and 94 (4) of the Fisheries Act, 2002 *Act 625). This should be done with clear policy direction and should specifically request that recognized organizations, including the GNCFC and District Assemblies along the coast support and participate in the initiative.
2. The Minister of Fisheries should propose amendments to the Fisheries Act to specifically make provisions for the FWC Initiative (see Annex 1 of the related SFMP *Design Document* for possible language for a proposed Amendment). These provisions should identify clear jurisdiction and inter-relationships between institutions, the administrative and programmatic design, and sources of funding for the FWC program.

3. Thorough stakeholder analysis should be conducted to secure the buy-in of key stakeholders for the FWC program. How would stakeholders define success for the FWC initiative?
4. Ghana should review previous fisheries co-management initiatives in other contexts to inform the establishment of the FWC program
5. Volunteers should receive training and guidance, a Code of Ethics, and an Operations Guide that details the operations, roles and responsibilities, requirements, and restrictions
6. An inter-agency team should be established that includes police prosecutor(s) and/or lawyer(s) from the Office of the Minister of Justice and Attorney General's Department, to play an advisory role in the development and implementation of the FWC program
7. The FWC program should commence with a pilot program, to be reviewed and refined for scale-up
8. Develop a sustainability plan to determine revenue needs as well as methods for securing the necessary resources to establish, operate, and sustain the program

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