

Tracing the ‘Cultural’ Element of Small Fisher’s Definition in International Legal Frameworks and its Relevance to Small-fisher Legal Definition in Indonesia Laws

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Abstract

Varied and un-uniform terminologies and definitions refer to subsistence fishing in Indonesia’s legal framework undermine the efforts to recognize and to protect small-fisher. Variety of terminologies and definitions of small-scale fishers are found in different pieces of legislation, spanning from Job Creation, Fisheries, Regional Autonomy, and Protection and Empowerment of Fisherfolks. This is impacting on how different authorized bodies perceived small-scale fishers and granted their rights. Therefore, this paper would assess it from the perspective international laws, tracing ‘culture’ as an important element of small-fisher from arbitration awards, Law of the Sea Convention 1982 (henceforth the LOSC 1982) and its implementing agreements, FAO Fisheries Laws, and the bilateral agreements under Article 51 paragraph (1) the LOSC 1982. Using doctrinal method, this research found that cultural element of artisanal fishing has been acknowledged in international legal frameworks, could be seen in the concluded bilateral agreements on the recognition of traditional fishing rights (henceforth TFR) in archipelagic waters, the South China Sea and Eritrea/Yemen arbitration awards, as well as non-binding FAO fisheries instruments. Therefore, to be consistent, Indonesia’s legal definition on artisanal fisher shall adopt the same approach.

Keywords

Cultural Element

International Law

Indonesia Law

Small Fisher’ Definition



Introduction

Currently, in international legal framework there is no single terminology employed to describes subsistence fishing activities. This illustrates in the South China Sea Arbitration Award between the Republic of the Philippines and the People's Republic of China PCA Case No. 2013-19 12 July 2016 (henceforth the SCS Award), "it has been a matter of concern in a variety of international fora without any common definition having been adopted on artisanal fishing" (SCS Award, 2016) This statement reflects the global concern as regard no accepted legal and technical definition of small-scale fishers (henceforth SSF) worldwide, despite the fact of its social, economic, and traditional aspects are recognized internationally (García-Flórez et al., 2014). This is because, every country defines SSF according to its own laws, and current fisheries law under the FAO, Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Poverty Eradication and Food Security 2015 (henceforth *SSF Guidelines 2015*), did not impose any requirements on any country to follow while developing its own legal definition of SSF (Nakamura and Hazin, 2020).

This problem occurs in Indonesia. Un-uniform legal definition of SSF causes multiple legal effects in the country: protection and inclusion of the sector difficult to achieve due to inconsistency of terms used in national legal frameworks (Rousseau et al., 2019) and legal conflict among authorized state institutions on SSF (Solihin et al., 2023). Being an archipelagic state, Indonesia has been significantly influenced by the LOSC 1982 due to the inclusion of archipelagic legal framework in Part IV LOSC 1982; it implies international acknowledgment of an archipelagic state's extended marine jurisdiction (Wisnumurti, 1987).

This paper argues that in order to fulfil Indonesia's obligation under the LOSC 1982, it is important to implement it in domestic laws. This is a mandate of the general principle of international law, *pacta sunt servanda* and good faith; from which the party of a treaty has a duty to take all necessary actions to carry out the treaty. Performing all the provisions in the existing international agreements, and refraining from the use of domestic law as a justification for its noncompliance with a treaty should occur with the adoption and implementation of international law consistently in the national legal system. Therefore, the ratified international law probably should consider as a significant state's source of law in national legal making.

The international law paradigm is relevant due to Indonesia having ratified many international and bilateral agreements related to law of the sea as well as contemporary international fisheries laws, spanning from LOSC 1982, the Code of Conduct for Responsible Fisheries 1995 (henceforth the CCRF 1995), to the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stock 1995 (henceforth UN FSA 1995). Hence, states party have a legal duty to implement ratified international treaties as the basic principles of international law require them to ensure the consistency of national laws and internal practices with international treaties.

Methodology

This research can be categorized as qualitative legal research, which mainly follow a doctrinal method. According to The Pearce Committee, the doctrinal method is a study that "provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments" (Hutchinson and Duncan, 2012). In addition, Van Gestel says that:

Doctrinal legal research is research that aims to give a systematic exposition of the principles, rules, and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules, and concepts to solve unclarity and gaps in the existing law (Van Gestel et al., 2017)

Under the doctrinal research, this paper conducted two major steps in doctrinal method: finding the objective reality through primary and secondary sources as well as assess the relevant historical legislation on the subject comprehensively. And second, interpret and analyse the law (Hutchinson, 2006). Therefore, primary sources in this research are the LOSC 1982, UN FSA 1995, the FAO Fisheries Law. In addition, as this research aims to formulate legal definition of small-fishers in Indonesia legal framework, the 1945 Constitution of the Republic of Indonesia, higher-level laws or *undang-undang* and ministerial decrees also are the source of legislation for this study. Secondary sources here refer to vary articles in international and national reputable journals, as well as previous researches on the subject matter. Analysing and interpreting primary and secondary materials are not an individual process. Any vagueness and unclear black letter law found in the assessing primary sources are interpreted in light of the legal doctrines, principles, and concepts. To complete the legal theories, this paper assessed concepts in the marine and fisheries studies which related to this issue.

Results and Discussion

Current Indonesia's Legislation on SSF

The management of SSF in Indonesia faces challenges due to the lack of clarity of SSF definitions in Indonesian laws and regulations (Solihin et al., 2023). A uniform legal definition for SSF in the Indonesian fisheries law is required, due to the exemption of SSF from fisheries management measures: licensing and reporting obligations (Article 27 paragraph 5 Law No. 45/2009 on Fisheries), and their unrestricted access to all areas of Indonesian Fishing Management Areas (FMAs) (Article 27 paragraph (5) Law No. 23/2014 on Local Government). In short, the criteria provided by the law impacted SSF's rights and obligations. And, the uniform definition will provide clarity for law enforcers and fisheries managers in distinguishing SSF.

Law Number 6 of 2023 on Job Creation (henceforth Law No. 6/2023) defines small-fishermen as "anybody that earns livelihood by catching fish to meet their daily needs, whether using fishing vessel or not using fishing vessel". This new definition revoked the fishing vessel criteria, and focuses on the purpose of fishing activity; to meet daily needs or subsistence. Nonetheless, it has been argued that the definition could have multiple interpretations and seems to allow medium and large fishing vessels to disobey reporting and monitoring obligations (Januar Rizki, 2023), due to the elimination of the size of fishing vessel's criterion. Moreover, the definition would put SSF in a detrimental position as there is no visible physical criteria to determine what SSF is (Ambarwati, 2021), (Oktaryal, 2021). Consequently, more than 10 GT fishing vessels would perceived as SSF.

In addition, small-fishermen has another definition stipulated in Law No. 23/2014 says that:

Fishermen from traditional communities who use traditional fishing materials and tools and are not subject to business license and are free from tax and are free to catch fish in all parts of Fisheries Management Areas (FMAs) of the Republic of Indonesia.

This definition contains several criteria for small-scale fisher: subjects, methods, rights, and access; also, it defined small fisher as a fisherman from traditional community. Law No. 6/2023 and Law No. 23/2014 have different interpretations, criteria and approaches to determine a small-fishermen. Thus, causing conflict of power between the authorized institutions (Solihin et al., 2023) in managing SSF in this regard are Ministry of Home Affairs and Ministry of Marine Affairs and Fisheries.

Adding the confusion and inconsistency, the definition for the phrase “traditional communities” in small-fishermen’s definition in Law No. 23/2014 is found in *Law Number 1 of 2014 on the amendment of Law Number 27 of 2007 on Management of Coastal Zone and Small Islands* (henceforth Law 1/2014), Article 1 letter (35), reads as:

Traditional community means traditional fishery community whose traditional rights in fishing activities or any legitimate rights are still recognized in particular areas within the archipelagic waters in accordance with international law of the sea

This definition illustrates the relations and impacts of LOSC 1982 on the definition of traditional fishery community, which has a similar character to small-scale fisher communities in Indonesian coastal areas. They are frequently distinguished by the utilization of sail or outboard-powered vessels and the absence of a boat, regardless of the size of their gear (Budimartono et al., 2015).

Furthermore, other terminologies that being used are traditional and local fishermen. Traditional and local fishermen are found in Law No. 6/2023 and its implementing regulation, Government Regulation Number 11 of 2023 on Measured Fishing, respectively.

Traditional fisherman is a fisherman that catches fish in waters that serves as a traditional fishing right used hereditarily according to the local culture and wisdom. Local fishermen are fishermen who domiciled in provinces on the Measured Fishing Zone in accordance with resident identity card or business domicile and carrying out fishing activity in the area up to 12 nautical miles determined from the coastline towards high seas or archipelagic waters.

The definitions of small fishers, traditional fishers, traditional community are scattered in different pieces of legislation, causing confusion in the law enforcement especially in handling unregulated and unreported fishing as well as providing aid, protection and empowerment programmes for small fishers as mandated by the law. Therefore, finding the appropriate terminology and defining it accordingly is important for managing SSF effectively in Indonesia.

Rationale for the adoption of definition from international and bilateral agreements for small-scale in Indonesia’s Legislation

Since the Reform Era in 1998, Indonesia has undoubtedly played a more active roles at international forums (Butt, 2014). To date Indonesia has ratified about 4,000 treaties covering a wide range of issues. (Agusman, 2008). This reflects the

aims of the Indonesian government as stipulated in the Paragraph 2 Preamble of *the 1945 Constitution of the Republic Indonesia* regarding diplomacy and foreign policy in the regional and international arena; to participate in the achievement of world order based on freedom, lasting peace and social justice.

As a party to a treaty, Indonesia is obliged to comply by its provisions once it enters into force. The general principle to this effect is known as *pacta sunt servanda*, which is expressed in Article 26 Vienna Convention on the Law of Treaties 1969 (henceforth VCLT 1969): “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. *Pacta sunt servanda* is a *grundnorm* (Kammerhofer, 2009) or meta rule of international law, whose legitimacy does not need to be supported further (Goldmann, 2012), as it is a universally recognized rule together with free consent and good faith (Preamble of VCLT).

In addition, the *pacta sunt servanda* rule developed part of the general principles of law mentioned in Article 38(1)(c) of *the Statute of the International Court of Justice*. *Pacta sunt servanda* is one of the cornerstones of international treaty relations, from which the party has a duty to take all necessary actions to carry out the treaty. It also has legal consequence for compliance at the national level (Binder, 2012). Hence, *pacta sunt servanda* and good faith dictates that state parties consider and perform the obligations in the ratified treaty.

Therefore, the foundation of synchronization in Indonesian national laws based on ratified international law is supported by these principles, *pacta sunt servanda* and good faith. Performing all the provisions in the existing international agreements, and refraining from the use of domestic law as a justification for its noncompliance with a treaty should occur with the adoption and implementation of international law consistently into the national legal system.

Furthermore, the differences in adoption and implementation models of international law in a given domestic law stems from the dichotomy between monism and dualism. (Lumbantobing, 2019). State sovereignty demands individual states must determine for themselves how rights and duties under international law will be applied and interpreted within its own legal framework (Butt, 2014). This should be explicitly written in the constitution or upheld by the domestic legal system and legal commentaries consistently; confirming the dualist or monist character of the state (Lumbantobing, 2019).

The status of international agreements is not well-arranged in Indonesia national laws, doctrine, or practice; which frequently leads to difficulties when attempting to apply international agreements within the confines of the national legal system (Agusman, 2008). It can be seen by the absence of provisions on the position of international law in the Indonesian legal system in the country' constitution (Butt, 2014). The 1945 Constitution of the Republic of Indonesia only refers to international agreements in Article 11, which states:

- *The President with the approval of the DPR (Dewan Perwakilan Rakyat/National Parliament) may declare war, make peace, and conclude treaties with other countries.*
- *The President in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which is linked to state financial burden, that will require an amendment to or the enactment of a law, shall obtain the approval of the DPR (Dewan Perwakilan Rakyat/National Parliament).*
- *Further provisions on international agreements are to be regulated by statute.*

The position of international law in the Indonesian legal system has been discussed and is quite a controversy among international law scholars in the country (Agusman, 2008). Moreover, the debate has become more contentious since

Indonesia has not yet ratified the VCLT 1969, instead provisions in VCLT 1969 were adopted in Indonesia's law on International Agreements, Law Number 24 of 2000. Again, the law is silent on how international law applies in national law. However, this paper will leave the argument on that regards, so as to focus on Indonesian practices after ratifying LOSC 1982 and implementing it at national level.

Indonesia realized that formal ratification is the best path to make sure that the LOSC 1982 has effective legal force (Agoes, 1991), thus, Indonesia ratified the LOSC 1982 with the Law Number 17 of 1985. Since then, Indonesia consistently continues in respecting, upholding, and implementing LOSC 1982 provisions into the national legal system, among others are: Law No. 6 of 1996 on Indonesian Waters, Law No. 5 of 1983 on Exclusive Economic Zone, Law No. 32 of 2014 on Ocean Affairs, and Law No. 16 of 2023 on Continental Shelf and its implementing regulations.

This paper argues that in order to fulfil Indonesia's obligation under the LOSC 1982 it is important to implement it in domestic laws, thus the Indonesian government may not invoke the requirements of Indonesia domestic legislation as an excuse for not carrying out a treaty. Hence, to prevent this occurring, national laws shall be in line with ratified international treaties and bilateral agreements.

SSF in International Laws: How these Legal Frameworks Perceive the Majority Players of the Oceans

The LOSC 1982 does not cover fisheries issues sufficiently which were subsequently resolved through one of the LOSC 1982's implementing legally binding instruments UN FSA 1995 (Nakamura et al., 2021), and with a non-binding FAO's CCRF, both concluded in 1995. These two instruments say a little on small-scale fisheries. Furthermore, due to the increased of attention in the international forums on small-scale fisheries, in 2015, the FAO adopted the SSF Guidelines 2015. This guideline supplemented the CCRF 1995, which is the most globally acknowledge and used international fisheries instrument.

The LOSC 1982 does not explicitly mention SSF or traditional fishers instead it mentions TFR in Article 51 (1), and it requires bilateral agreements between state parties to recognize the TFR this including the nature, the extent, and the areas to which TFR applies. Therefore, for the purpose of giving recognition for foreign traditional fishers to fish in archipelagic waters several bilateral agreements concluded between Indonesia and its neighbouring countries. Nonetheless, this is not limited only to the bilateral agreements between Indonesia and its neighbouring countries, also assessing other bilateral agreements among Indonesia's neighbouring countries to each other such as between Australia and PNG.

a. Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australia Exclusive Fishing Zone and Continental Shelf 1974

The agreement was concluded in 7th of November 1974, in Jakarta. In this agreement, Australia agreed to permit Indonesian traditional fishers to exercise TFR in the Australian exclusive economic zone and continental shelf limited to the fishermen who meet the conditions stipulated in the MoU. Therefore, the Australian Government will refrain applying its laws regarding fisheries to Indonesian traditional fishermen (Article 2).

“Traditional fishermen are the fishermen who have traditionally taken fish and sedentary organisms in Australian waters by methods which have been the tradition over decades of time (Paragraph 1)”. There are two criteria to enjoy the rights: the subject and the method. Fishermen who have the rights here have fished traditionally in Australian waters and using traditional methods. Therefore, in regards to the method, Indonesian traditional fishermen are only allowed to enter Australian fishing grounds by using sail-powered fishing boats and non-motorized equipment; hand collection and free diving for example (Halim et al., 2019). In regard to the subjects in the agreement, there is a need to determine who constitutes a traditional fisher, which ideally is by identifying the groups that have historically or traditionally used the territories within the MoU Box (Dyspriani, 2011)

b. Agreement between the Government of the Republic of Indonesia and the Government of Papua New Guinea concerning Maritime Boundaries between the Republic of Indonesia and Papua New Guinea and Cooperation on Related Matters 13th of December 1980

The agreement mainly regulates the maritime border between these two archipelagic states, it did not develop any certain criteria and requirements for being a traditional fisher. It mentions only those with customary rights who use traditional fishing methods are allowed to fish in other party's waters. This can be seen in the provision of Article 5, states that:

The right of nationals of either party who have, customary and by traditional method fished in the waters of the other party is recognised and shall be respected.

1. The nature and extent of the rights referred to in paragraph 1 of this Article shall be determined by Agreement between the parties

c. Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters 1978

The Torres Strait Treaty is one of the most significant bilateral arrangements Papua New Guinea has entered into, especially as a former Australian colonial territory, was able to negotiate a border delineation agreement (Renton, 1995). The treaty describes traditional fishing and traditional inhabitant as:

Traditional fishing is the taking, by traditional inhabitants for their own or their dependants' consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle (Article 1 letter (l)).

Traditional inhabitants mean (Article 1 letter (m)):

in relation to Australia, persons who:

- *Are Torres Strait Islanders who live in the Protected Zone or the adjacent coastal area of Australia*
- *Are citizens of Australia, and*
- *Maintain traditional customary associations with areas or features on or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities.*

In relation to Papua New Guinea, persons who:

- *Live in the protected zone or the adjacent coastal area of Papua New Guinea*
- *Are citizens of Papua New Guinea, and*
- *Maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural, or religious activities.*

Subjects of this treaty are both Australian and Papuan who are qualified as traditional inhabitants. Furthermore, it highlights that the traditional activities, including fishing conducted by the traditional inhabitants are intended for consumption, traditional activities, and for barter and market trade in accordance with local tradition. Traditional nature shall be interpreted liberally and in the light of prevailing customs (Article 1 letter (k)) which highlights that the purpose of the activity has to be considered as TFR practices (Dyspriani, 2011).

d. Treaty between the Republic of Indonesia and Malaysia relating to the Legal Regime of Archipelagic States and the Right of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the *Airspace* above the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia, 25 February 1982

There are three concepts provided in the 1982 Treaty, traditional fishermen, traditional fishing, and traditional fishing boat:

Traditional fishermen as Malaysian fishermen who, as their basic means of livelihood, are engaged directly in traditional fishing in the designated area" (Article 1 paragraph (8)) Traditional fishing as fishing by Malaysian traditional fishermen using traditional methods in the traditional areas within the territorial sea and archipelagic waters of the Republic of Indonesia lying between East and West Malaysia (Article 1 paragraph (7)). Traditional fishing boat means any boat owned and used by Malaysian traditional fishermen specifically for traditional fishing in the designated Fishing Area (Article 1 paragraph (9)).

The definition, rights, and obligations of SSF concluded in the bilateral agreements primarily rely on the 'traditional' concept of TFR, which covers the fishermen themselves, the gear type, the catch, and the area, and a time frame for evaluation (Djalal, 1995). This is in accord with the Eritrea/Yemen and the SCS Arbitration Awards which stipulates several requirements as the legal basis for protecting artisanal fishing including (Paragraph 798): "fishing over an

extended period, generations of fishermen have acquired a right, akin to property, and the ability to continue to fish in the manner of their forebearers” (SCS Award, 2016).

Furthermore, the Eritrea/Yemen and SCS Arbitration Awards formulate three elements of TFR, are: the traditions or customs which attached to the activity (Paragraph 107 Eritrea/Yemen), acquired through long usage and method of fishing that has been carried out for generations (Paragraph 806 (SCS Award, 2016)). These two international judicial awards give foundations on the importance of ‘culture’ as crucial element for traditional fishing activities.

e. UN FSA 1995 and FAO Fisheries Laws

LOSC 1982’s implementing agreement, UN FSA 1995 ensured that the interest of artisanal fishermen has to be considered in the conservation and management of straddling and highly migratory fish stocks (Article 5). This agreement leaves the debate of the variety of terminologies employed to refer to subsistence fishing activity: artisanal, small-scale, subsistence, and indigenous fishers.

This trend further was followed by the FAO Fisheries Laws; CCRF 1995 and the SSF Guidelines 2015. The CCRF 1995 is directed towards fishing and aquaculture industries (Camilleri, 2012), thus it only has a few points on small-scale fisheries. Art. 6.18 of the CCRF 1995 provides for recognition of the important contribution and protection of artisanal and SSF’S rights (particularly those engaged in subsistence, small-scale and artisanal fisheries) to a secure and just livelihood, as well as small-scale fishers preferential access to traditional fishing grounds. Clearly, the CCRF 1995 says only a little about SSF. It did not particularly use one terminology, instead it combined the terminologies and put it together in one article as expressed by the wording of Article 6.18; artisanal, subsistence, and small-scale.

The SSF Guidelines 2015 are a component of modern international fisheries law that integrates human rights, gender, and climate change with the management and development of fisheries by adopting a human-rights-based approach and taking-into account the ecosystem approach to small-scale fisheries (Nakamura and Hazin, 2020). The SSF Guidelines 2015 were intended to be broad and flexible, allowing for interpretation while requiring wide-ranging stakeholder input in the process of national implementation (Smith and Basurto, 2019).

A void in small-scale fisheries research is highlighted by the SSF Guidelines 2015 that mentions explicitly some elements of small-scale fishers (Gibson and Sumaila, 2017), however no definition of small-scale fisher was determined. Some scholars argued that small-scale fisher terminology is inherently relativist and leading them to choose an imprecise definition (Garcia et al., 2008). While another says that demarcation of small-scale fisheries should be more clearly defined (Johnson, 2006). Therefore, every country has its own definitions of small-scale fisheries which have evolved throughout time. Hence, there is a growing amount of uncertainty caused by the use and misuse of terminology like artisanal, small-scale, and subsistence (Rousseau et al., 2019).

SSF Guidelines 2015 imply the wide range of variations of SSF and the lack of a universally accepted definition for this subsector, thus regional, subregional, or national initiatives shall be implemented in accordance with the specific contexts in which they are to be applied (Art 2.4 SSF Guidelines 2015). SSF Guidelines 2015 also highlights the importance of culture in the lives of small-scale fisheries, thus it is embedded as one of the SSF Guidelines 2015 guiding principles. It states that the SSF Guidelines, “recognizing and respecting existing forms of organization, traditional and local knowledge and practices of small-scale fishing communities, including indigenous people and ethnic minority” (Article 3.2).

CCRF 1995 and SSF Guidelines 2015 frame that the terminologies are synonymous as they shared the same core elements: use traditional or small fishing vessels, has small capital and energy, and aim to fulfil local consumption. Moreover, the CCRF 1995 considered that the indigenous fishing community is a component or subset of artisanal fishing (FAO, 2009). Therefore, this paper argues that the preceding explanation establishes a clear equivalence between small-scale, traditional, indigenous, artisanal, and subsistence fishermen. They are synonymous and interchangeable.

Nonetheless, the SCS Award provides an adequate basis for the states and international organizations to designate and to employ a single terminology; from traditional, indigenous, small-scale, subsistence and artisanal fishing as according to the Tribunal, “it has been a matter of concern in a variety of international fora without any common definition having been adopted on artisanal fishing (paragraph 797 (SCS Award, 2016)). Hence, it is important to prevent further confusion from using different terminologies to refer to one concept, household level fishing activity.

Proposed Terminology for Subsistence Fishing in Indonesia’s Legal Framework

It is crucial to employ legal definitions precisely, as they clarify the legislator’s intended meaning and facilitate comprehension of the phrase (Chami and Ezzerouali, 2023). Furthermore, a uniform and consistent legal terminology and definition for SSF in the Indonesian laws is required, as it constructs certain rights and obligations for the SSF communities; in this case exemption of SSF from fisheries management measures such as licencing and reporting obligations, and their free and uninterrupted access to all locations of Indonesian FMAs.

Based on study of the literature on fisheries, there are numerous adjectives being used to describe household level of fisheries. Meanwhile, their meaning outside of the field of fisheries is described below (Rousseau et al., 2019):

1. *Artisanal has a specific definition in industry or craft, based on the process and technology involved, itself linked to the idea of ‘primitive’ craftsmanship. Therefore, there is a concept of technique, process and technology, with a focus on the process rather than mass production of the produce.*
2. *Scaling is generally agreed to be the size of the enterprise, a clear, numerical representation of its extent.*
3. *Coastal is equally meaningful, a representation of the distance to the shore line, depth and geographic limitations. The word has therefore a clear topographical connotation.*
4. *Subsistence is however, relatively tricky. The concept mirrors the idea of survival dependent on the product.*

In this regard, this paper argues that artisanal fisher is perhaps the most suitable terminology, this is because the definition SSF in Indonesia historically consists of two main concepts, the purpose of the activity, and the method; using a fishing vessel or not using a fishing vessel. This is consistent with the idea of artisanal which refer to the concept of technique, process and technology, with a focus on the process rather than mass production of the produce (Rousseau et al., 2019). Artisanal also refers to a method of fishing identified by using small vessels on short fishing trips and targeted small-multi species (Gibson and Sumaila, 2017).

In the contrary, “scale” is generally agreed to be the size of the enterprise, numerical representation of its extent (Rousseau et al., 2019). Therefore, it is suggested that the terminology use in Indonesian’s *ius constituendum* to refer to household or subsistence fishing activity is artisanal fisher, as according to Rousseau et.al, Indonesian fisheries are ‘more artisanal’ than other countries.

Resolving the Inconsistency Definitions of Artisanal Fisher in Indonesian Law: Tracing and Attaching ‘Culture’ as an Element of Artisanal Fisher

In the early 2000s, papers tried to define small-scale fishers or small-scale fisheries placed the subject in direct opposition to another player of the ocean, large-scale fishers (Ruttan et al., 2000). They tried to distinguish these two sectors more to their quantifiable character, such as annual landings, number of crewmembers, and fuel consumption (Carvalho et al., 2011).

For SSF in general, there are three defining qualitative attributes: physical or vessel, economic, and social features. Physical characteristics are the most frequent identifier tools being used to differentiate between large- and small-scale fishing which include vessel descriptions, which are: non-motorized fishing vessel with length less than 12 m, out-dated or lower levels of technology and relies heavily on man power. Economic aspects can characterize fisheries in monetary terms that people can relate to. These include seven categories:

“low fuel consumption; relatively little capital and energy input; relatively low yield and income; part-time seasonal and multi-occupational; sold in local markets; sustain local or regional economies; and individual or community ownership”. (Gibson and Sumaila, 2017)

Furthermore, social and cultural characteristics are the most abstract features attached only to SSF. And because of this, they are rarely examined.

“These features include how fish is consumed in non-traditional markets as well as how cultural values attached to fish can be use in the management process. This feature has three categories: fish for food and community use; support of social and cultural values; and regulated through customary rules with some government involvement”. (Gibson and Sumaila, 2017)

Physical and economic features have been consistently used in Indonesian national laws in defining SSF, despite that all the three features encompass SSF activities in Indonesia; physical, economic, and social-cultural. Small-scale fishing operations in Indonesia employ a range of fishing gear including both passive and active gears, that can be used with or without a fishing boat to target various fish species that inhabit a range of habitats. Economic features of SSF in Indonesia illustrates by the daily activities of SSF in coastal villages, primarily unload their harvest at small-wooden jetties or directly on the beaches (Halim et al., 2019). Fishermen often combine farming and fishing, since Indonesia’s SSF are mainly part time seasonal and multi-occupational.

It has been argued that social and cultural elements of SSF represent the least tangible character, being mainly found in developing countries. In Indonesia, cultural element is embedded in artisanal fishing activities throughout the archipelago. This illustrates by the traditional groups employing their traditional knowledge in managing their coastal areas and its resources. Therefore, in Indonesia context longstanding norms and “keeping with local customs” is reflected by the existence of established *adat* laws in traditional fishing communities in many coastal areas. *Adat* law acknowledges and regulates traditional fishermen who are members of *adat* communities to fish in their coastal tenured areas (Regulation of Ministry of Marine and Fisheries Affairs No. 8/2018), how they use maritime resources, and how commercially valuable species are harvested (Satria and Adhuri, 2010).

Early in this paper, we concluded that the correct terminology to be used in Indonesian *ius constituendum* perhaps should be artisanal fisher since the two main components of SSF legal definition consistently adopt method, procedure, and technique of the activity. Technique, process, and technology associated with traditional craftsmanship are the most important elements to assess if fishing activity qualifies as artisanal. Moreover, a study found that the artisanal fishing also refers to the fishing practices that align with the longstanding norms of the community where it is performed, which is the third less-tangible category: social and cultural. It refers to the rights and privileges that all fishermen have consistently practiced throughout history (Wang and Xue, 2023). This is similar to the criteria determined by the Australian Government for Indonesian traditional fishermen to be able to fish the MoU Box area, they have to meet two categories: have fished traditionally and historically using traditional method (Paragraph 1 the MoU Box 1974).

Therefore, the defining characteristic of SSF is relative but its closely linked to the local custom and using fishing methods that have been historically used in the region, as states in the SCS award:

“Thus, traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community” (Paragraph 798 the SCS Award) Despite this attention, the essential defining element of artisanal fishing remains as the tribunal in Eritrea v Yemen noted, relative. The specific practice of artisanal fishing will vary from region to region, in keeping with local customs. Its distinguishing characteristics will be simple and carried out on a small-scale, using fishing methods that largely approximate those that have historically been used in the region.” (Paragraph 797 the SCS Award)

This reflects the acknowledgement of the Tribunal on social and cultural features of SSF. Therefore, to define SSF in Indonesia, this paper argues to adopt the general features of SSF, and adopting ‘culture’ as a significant element of the SSF, acknowledged by the FAO Fisheries laws as well as Eritrea/Yemen and the SCS Award. For Indonesia’s fisher, fishing is more than just employing small-boats to meet financial demands; it also pursues social and cultural lives that are governed by customary regulations.

Unarguably, that physical features could provide better clarity to reduce disparities in how enforcement officers and fisheries managers perceive SSF (Halim et al., 2019). Therefore, this paper propose that the ‘less than 5GT’ size of fishing vessel is the key component of artisanal fisher’s legal definition which also reflects the economic features of SSF (Pramoda and Apriliani, 2019), it is also associated with the low level of fuel consumption, and using relatively little capital and energy input (Gibson and Sumaila, 2017) and adopting the cultural element of the SSF activity.

Therefore, the proposed legal definition is, artisanal *‘fisher is anybody that earns livelihood by catching fish to meet their daily needs and for social and cultural purposes, employ traditional fishing gear and whether not using fishing vessel or using fishing vessel no larger than 5GT’*. This definition covers the three attributes of SSF: physical, economical, and social-cultural. It is adopting the traditional or cultural element of artisanal fishing as states in the concluded bilateral agreements between Indonesia and its neighbouring countries, the MoU Box 1974 and Torres Strait Treaty 1978; as well as two international arbitration awards, the SCS and the Eritrea/Yemen.

Conclusion

International and bilateral legal frameworks undoubtedly become one of the most important sources of national law, including Indonesia. Therefore, this paper looked for an alternative of definition SSF in the Indonesian legal framework and traced the ‘social and cultural’ element of SSF from ratified international and bilateral agreements, and included the

interpretation of the Eritrea/Yemen and the SCS Arbitration Awards for this purpose. In the LOSC 1982 and bilateral agreements under Article 51 paragraph (1) LOSC, the terminology is traditional fishers, which highlights the traditional rights and traditional methods of the fishing activity. Looking deeper to the LOSC 1982 implementing regulation, this paper found that UNFSA 1995, the CCRF 1995, and the SSF Guidelines 2015 uses the terminology of small-scale fisher combined with others; subsistence, artisanal, and indigenous. This reflects that these agreements did not develop a universal terminology of SSF.

The SCS arbitration award, declares that TFR include artisanal fishing activity which is defined as opposed to industrial fishing, and which has a close connection to local custom and using simple and efficient fishing gear. Therefore, by using international legal frameworks and adopting the general features of SSF; physical, economic, and social which are consistent with the essential defining elements of SSF acknowledged by Eritrea/Yemen and SCS Arbitration Awards, this paper proposed the legal definition of SSF for Indonesia *ius constituendum* by adding social and cultural elements of SSF since the current definition only covers economic and technical features of SSF.

Social and cultural aspects of SSF could not be neglected due to its contribution to the sustainable fisheries management through the implementation of traditional knowledge, ancient values, and traditional practices of SSF communities. It also has been recognized by the contemporary international fisheries laws under the FAO and in many in-forces bilateral agreements between Indonesia and its neighbouring countries which emphasize the use of the traditional fishing method by traditional fishers who have historically or traditionally used the territories to fish. Therefore, this paper argues that to be consistent with the applicable international laws and concluded bilateral agreements between Indonesia and its neighbouring countries, Indonesia's legal definition of SSF shall adopt the same features: physical, economic, and social-cultural.

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