

The dilemma and countermeasure of Chinese fishermen's protection of fishery right

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Abstract: As a big fishing country, China has rich fishery resources and fishery production areas. In judicial practice, China has gradually strengthened the crackdown on fishery violations, but neglected the protection of fishermen's rights and interests. The protection of the rights and interests of Chinese fishermen has the following problems: inadequate legislation on fishery rights, unreasonable establishment of fishery administrative agencies, lack of effective supervision over fishery administration, unclear authority of fishery administrative law enforcement, and lack of supervision over non-performance of aquaculture rights obligations. In this regard, it is necessary to effectively protect the rights and interests of Chinese fishermen, clearly define the subjects of fishermen's rights and interests, incorporate the concept of fishery rights into laws, set up fishery management institutions, and improve fishery administration procedures, so as to effectively protect the rights and interests of fishermen on sea islands and promote the sustainable development of fishing villages on sea islands.

1. Introduction

China is a country with a long history of fishing culture and a vast coastline, providing fishermen with rich Marine resources. However, in recent years, Chinese fishermen have faced challenges in safeguarding their fishing rights. The lack of clear laws and regulations and effective enforcement mechanisms, the unclear authority of fishery administrative law enforcement, and the lack of supervision of non-performance of the obligations of farming rights further aggravate the difficulties faced by Chinese fishermen in protecting their fishery rights and interests. By addressing the root causes of the problem and strengthening the legal framework for fisheries management, we can promote the sustainable development of fisheries and ensure the livelihoods of Chinese fishermen.

2. Fisheries related concepts

2.1 The connotation of fisheries and fishermen

The Japanese Fisheries Law defines fishery as "the business of collecting aquatic animals and plants and aquaculture", that is, the business of harvesting and breeding fish and shellfish for profit purposes. A person who specializes in fishing is called a fisherman. Fisheries and agriculture

are the same as the primary industry, but fishing is different from agriculture and is subject to the restrictions of fishery rights and fishery law.

At present, there is no clear definition of the concept of fishermen in our country's laws, and there is no clear subject of fishermen's rights and interests in the Fisheries Law and the Sea Area Use Management Law. The main difference between fishermen and farmers is the difference in the means of production used in their production activities. Farmers mainly rely on farm tools and land for planting, while fishermen rely on fishing gear and waters where the state has ownership or jurisdiction.^[1]The broad definition of a fisherman includes people who fish for a living, whether at sea, in rivers or in ponds. Fishermen usually refer to those who live on islands and engage in fishing activities. However, these people are not just fishermen, they are also part of the entire fishing community. If fishermen choose to change careers or work in different directions, this will have a significant impact on the fishing community as a whole. Fishermen are people who earn their living through fishing and other fishing activities, not only by engaging in fishing activities, but also by taking care of their family members. Fishers may also earn remuneration or business income by engaging in other fishing industries, which can be divided into three categories: fishing professionals, fishing part-time workers and fishing temporary workers.

The status of fishermen is not limited to fishermen, but people with more professions. Therefore, the transformation of fishermen will have a profound impact on the development of fisheries. Fishing labor refers to those 16 years of age and above, have the ability to work, engaged in fishing activities, and receive corresponding remuneration or business income, they can be full-time fishermen, part-time fishermen, and even temporary fishermen.

2.2 The definition of fishery rights

2.2.1 Extraterritorial definition of fishery rights

In the fishermen community, the relationship between fishermen and the state is mainly reflected in the fishery rights. Fishery right refers to the right of fishermen to exercise fishery activities, which is called "fishery rights" or "fishing rights" in English. Due to the different legal system of each country, the basic theory and legal characteristics of fishery rights are also different.

Under U.S. law, all American nationals have the right to fish freely. Coastal landowners own fishing rights in the adjacent waters. But its fishing rights do not belong to "specific people", but are "rights attached to specific land", and if the land ownership is transferred, the fishing rights must be transferred.

In 1986, New Zealand implemented the Fisheries Amendment Act, which stipulates that the fishery right is not the right to catch fish, but the right to conduct the fishery industry, and that the person engaged in the fishery is not a "fisherman" but a "fish company employee". The amendment impairs the rights of free fishermen.

In Japan, Article 6 (2) of the Fisheries Law of Japan stipulates that fishery rights are divided into three types: set rights, zoning rights and shared rights.^[2]The application, declaration, approval, recognition, etc. of fishery rights shall be carried out in accordance with the provisions of the Fisheries Law. In addition, if you have objections to the punishment, you can file a complaint in accordance with the Administrative Procedures Law, the Administrative Objection Review Law, and the Administrative Cases Litigation Law. The fishery right, as long as it does not violate the provisions of public law such as the Fisheries Law, has the nature of creditor's right in private law as opposed to the administrative organ. Article 23 of the Fisheries Law of Japan stipulates that the fishery right belongs to the real right of the Japanese civil law. In practice, however, fisheries rights are not transferable except in special cases,^[3]But they can be used for loans.^[4]At the same time, there are restrictions on the right of mortgage and the method of use. As a result, few people regard

fisheries rights as property rights under civil law. In addition, the fishery rights established on the sea surface are not "beneficial rights", that is, the right to use the sea surface is not transferable.

2.2.2 China's definition of fishery rights

There is no clear definition of fishery right in the current legal system of our country, but according to some provisions of "Civil Code" and "Fisheries Law", fishery right can be divided into fishing right and breeding right. According to domestic research, the concept of fishery right can be defined as the following points of view: First, the right to engage in fishery production and operation activities in a certain area according to laws and regulations, that is, the right to use certain waters to independently conduct fishing or engage in aquaculture ;^[5](2) The right of natural persons, legal persons or other organizations to engage in fishing or aquaculture in certain waters in accordance with the provisions of law .^[6]

3. The status quo and cause analysis of the plight of fishermen's rights protection

3.1 The supply of fishery right system in our country is not clear

Because the legislation is not clear, it is difficult to guarantee the fishermen's fishery right. Article 329 of the Civil Code clearly stipulates that the exploration rights, mining rights, water extraction rights, and the rights to use water areas and beaches for aquaculture and fishing are protected by law, and it is clear that fishing rights and farming rights are usufructuary rights. The Fisheries Law of the People's Republic of China and the Law of the People's Republic of China on the Management of the Use of Sea Areas do not clearly establish fishermen as the subject of fishery rights. It is only mentioned in the Regulations on the Administration of Fishery Fishing Permits that all individuals and organizations in the sea areas under China's jurisdiction are engaged in fishery fishing activities, which makes it impossible to play a full role in adjusting the relationship of property rights. In addition, the way of obtaining fishery rights lacks clarity and specificity, and the Civil Code and the Fisheries Law fail to reasonably distinguish the nature of aquaculture rights and fishing rights, leading to the ambiguity of the ownership relationship of fishery resources.

According to whether the acquisition of fishing rights requires the acquisition of fishing licenses, the two methods of acquisition of fishing rights can be divided into licensing and free acquisition. Fishing rights acquired by license are defined in articles 23 and 25 of the Fisheries Law, while fishing rights freely acquired are defined in article 18 of the Regulations for the Implementation of the Fisheries Law. The acquisition of aquaculture right includes the acquisition of concession and contract, but limits the acquisition of subsequent, which sets up obstacles for the circulation of fishery right, reduces the access of fishery market, and adversely affects the sustainable development of fishery. In addition, there is a contradiction between the fishing license system established by the Fisheries Law and the Civil Code. According to the Civil Code, the farming right and the fishing right belong to the usufructuary right and should have the general characteristics of usufructuary right, but the circulation system of fishery right is not clearly stipulated. The "Fisheries Law" clearly stipulates that fishing licenses may not be sold, leased or transferred in other forms, and may not be altered, forged or altered.

3.2 The administrative defects of fishery rights

Many problems, such as the unreasonable establishment of fishery administration, the lack of effective supervision of fishery administration, and the unclear authority of fishery administration law enforcement, lead to the serious deficiency of fishery administration. The existence of these

problems challenges the rational utilization of fishery resources, the rights and interests of fishermen cannot be effectively protected, and the operation efficiency and fairness of the entire fishery administration system are questioned.

3.2.1 Abuse of administrative discretion

The power of administrative discretion refers to that when administrative subjects exercise administrative powers within the scope prescribed by law, they have certain autonomy to choose, that is, they can choose to take action or not to take action within the scope permitted by law, and they can also flexibly adjust the scope of action according to specific circumstances.^[7] According to Article 40 of the Fisheries Law of the People's Republic of China, those who do not reasonably use the waters for aquaculture production can be ordered to develop and utilize within a time limit or punished.^[8] Fishery administrative law enforcement agencies have the right to choose whether to take action and the extent of action, such as penalties for illegal farming or rectification within a time limit, when implementing law enforcement. However, in the process of grassroots fishery law enforcement, some law enforcement personnel may have the idea of privilege, resulting in greater arbitrariness of law enforcement, and fishermen with weak legal knowledge may abuse their discretion to decide whether or not to punish or how to punish. This phenomenon needs to be paid attention to, strengthen the standardization of law enforcement and legal awareness education, and ensure that law enforcement is fair, legal and transparent.

3.2.2 Maritime administrative procedures are flawed

In the practice of Marine administration, the rights and interests of fishermen are often ignored, which leads to their interests inevitably falling into trouble. From the perspective of maritime administrative procedures, there are deficiencies in hearing, administrative compensation and legal supervision.^[9] Due to the lack of an effective monitoring mechanism, the outcome of the hearing process is often unfair, and the lack of legal knowledge of fishermen is also an important problem. Therefore, in carrying out the hearing procedure, the supervision of fishermen should be strengthened to ensure that their rights and interests are fully protected. In addition, due to the widespread concept of valuing substance over procedure, the hearing often becomes a formality formality.

In the process of implementation, there are a series of phenomena of administrative disorder and inaction. Due to the serious phenomenon of local protectionism and departmental protectionism, it is not uncommon to use words to substitute law, power to suppress law and punishment to substitute law in some places.

Maritime administrative remedy can provide the remedy after the event, it involves not only the entity norm, but also the procedure norm. For fishermen, once they are damaged, it is particularly important to obtain economic compensation. However, the Fisheries Law does not clearly stipulate the compensation system for damage to fisheries rights, which makes it impossible for fishermen to get substantial help in obtaining compensation.

Although an effective supervision mechanism can provide strong support, due to the limitations of its supervision method, audience and coverage, it cannot play its due effect, so it cannot really play its due importance, so it cannot effectively safeguard the legitimate rights of fishermen. These problems need to be paid attention to, strengthen the construction of supervision mechanisms, ensure the effective implementation of the rule of law in maritime administration, and protect the legitimate rights and interests of fishermen.

3.3 There is a lack of regulation of farming rights

3.3.1 Illegal farming practices cannot be relied upon

China is gradually changing from a big fishing country to a big aquaculture country. Standardization and institutionalization are very important to the quality of aquatic products. The rapid development and expansion of the aquaculture industry has brought problems, such as excessive use of drugs and feed, irregular management, improper operation, resulting in water pollution and the quality of aquatic products, and some of these violations have not been clearly punished in the regulations, which brings difficulties to law enforcement.

3.3.2 Disorganization of aquaculture fisheries

There are two main forms of farming fisheries in Japan. The first is a fishing enterprise, which holds a fishing license issued by the government and is directly managed by the relevant government departments. The second type is aquaculture fisheries based on fisherfolk families. Farmers must join the fisheries Association, which manages aquaculture activities on behalf of the government and issues aquaculture permits. Fishermen in different regions shall establish cooperative organizations based on fishing villages. This is the biggest difference between Japanese aquaculture fisheries and Chinese aquaculture fisheries in terms of management. Japan has formed a close legal relationship between the government, the fisheries association and the farmers in the aquaculture industry. As an organization of the government to manage fishermen, the fisheries Association has not only reduced the burden of fishermen but also improved the management efficiency. Oyster farming in Japan relies on fishing and government guidance, reflecting the interaction with society and the state under the collective model. In contrast, oyster farming in China lacks effective interaction with society and the country, and its anti-risk ability is not as good as that of Japan.

4. Measures to protect the rights and interests of fishermen

4.1 Clarify the subject of fishermen's rights and interests

The Fisheries Law of the People's Republic of China should clearly delineate the rights and obligations of fishermen, specify the subjects of fishermen's rights and interests, include coastal fishermen and island fishermen who rely on aquaculture and fishing for their main sources of income, and require individuals and units to bear responsibility for the illegal consequences of any form of illegal actions, so as to ensure the rights and interests of fishermen.

4.2 Establish fishing associations and fishing unions

4.2.1 Establishment of fisheries associations

The government and fishermen should establish a good relationship and make the fishery association a communication platform. Fisheries associations help policy makers and fishery rights holders share favorable agricultural policies, provide loan guarantees to fishermen, regulate market prices for aquatic products, and find markets for sales. In order to establish the legal status of the fishery association, it is suggested to formulate the Fishery Association Law as a legal support.

4.2.2 Establishment of fisheries unions

The establishment of fishery trade union can effectively separate the national fishery

management right from the fishermen's fishery ownership, and promote the reasonable transfer of fishery fishing right and fishery breeding right among the subjects of fishery right under the supervision and permission of the state, so as to increase the access to fishery right.

4.3 We will speed up the construction of fishery legislation

4.3.1 Improve the transfer system of fishery rights

When establishing the fishery right transfer system, it should be regarded as a civil right, reduce administrative intervention, and promote the independent choice of the competent fishery right holders to expand the scale of production. Define the division of labor and cooperation between government management and market regulation, and standardize the operation steps of the circulation of fishery rights. The lack of legislative system is the main obstacle to the circulation of fishery rights at present. We can learn from domestic and foreign experience, introduce the individual transferable quota system, clarify the property nature of fish quotas, and realize the circulation of fishery rights in the market through the transfer of quotas. At the same time, we will strengthen the administrative law enforcement of fishing permits to ensure the protection of fishermen's rights and interests, including strengthening the construction of fishery administration equipment in the South China Sea, increasing the number of large fishery administration vessels, and comprehensively covering the effective fishery administration in the South China Sea.

4.3.2 Incorporation of fisheries rights into the Fisheries Law

The Civil Code of the People's Republic of China should provide a sound legal framework for island fishermen to protect their subsistence and fishing rights, and ensure that they can obtain basic livelihood in the face of environmental challenges such as resource depletion and water pollution. The law should clearly stipulate that fishermen should have priority in enjoying fishing rights and farming rights to safeguard their legitimate rights and interests. The Fisheries Law of the People's Republic of China should give full consideration to the rights of fishermen, clarify the boundary between the right to fish and the right to fish, and establish provisions on the right to fish, so as to better protect the legitimate rights and interests of fishermen, and clarify the scope of application, priority, application and licensing procedures.^[10] In this way, the status of fishery right can be clarified, and it should be clearly reflected in fishery regulations and avoid taking it as a secondary right of administrative license.

5. Conclusion

The legal system of fishery right is very important to the healthy development of fishery. At present, the legal system of fishery right in China is still imperfect, which needs to be perfected through legislation, administrative management, establishment of social institutions, etc., in order to promote the sustainable development of fishery and protect the rights and interests of fishermen. It is hoped that this article can provide reference for the improvement of our country's legal system of fishery right.

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