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Permeable border

Indonesian fishermen whose traditional fishing grounds are in Australian waters may have a Mabo-style claim, says CAMPBELL WATSON.

Papela is situated on the island of Roti south-west of Timor, near the maritime border between Indonesia and Australia.

Local tradition says Papela was established during the sixteenth century as a base to fish for shark and trepang around the sandy islands and reefs between north-western Australia and Roti. So Papelans have been fishing there for 500 years.

Most of the 7,000 Papelans are descended from the Islamic seafaring peoples of south and south-east Sulawesi such as the Makassans, Bugis, Butonese and Bajo, and from the islands on the sea route from there such as Flores, Solor and Alor.

Colonial claims

Colonial Great Britain took possession of the Ashmore Islands in 1878 and Cartier Island in 1909. Presumably the claim was based on the same now debunked grounds as claims to the Australian continent itself, namely that they were terra nullius because they had no permanent inhabitants.

In 1931 Britain transferred the Ashmore and Cartier Islands to Australia. Approximately the present land areas were under the control of each state at the time of Indonesian independence soon after World War II.

But claims by Australia and Indonesia to ever more extensive seas continued to move forward. There is not simply one border between the countries but a whole set of them (see map). In 1952 Australia unilaterally claimed the living natural resources of the entire Australian continental shelf, which extends to within 150 km of Roti. It included the trepang and trochus within the Papelans' traditional fisheries.

In 1968 both nations extended their territorial seas, a zone

of exclusive control, from three to twelve miles. In 1973 they reached agreement on a seabed jurisdiction line. In 1979 Australia, along with 60 other countries, extended its exclusive fishing zone to 200 miles. The 1982 United Nations Convention on the Law of the Sea (UNCLOS III, coming into effect in 1994) legitimated these extensions to sovereignty.

In 1981 Australia and Indonesia agreed on a provisional fisheries surveillance and enforcement boundary approximately equidistant from each country's coast. The 1993 Timor Gap Treaty for the exploration and exploitation of non-living resources of a large part of the seabed stops just short of the Ashmore and Cartier Islands, which have been identified as highly prospective region for oil and gas.

Restricted fishing

The effect of these extensions of sovereignty has been that gradually the traditional fishing grounds of the Papelans have come to lie entirely within Australian territory. It was only in the 1970s that the Australian government attempted to restrict fishing in those waters by Indonesian craft. Negotiations with the Indonesian government resulted in the Memorandum of Understanding (MOU) of 1974 by which a kind of reservation was set up for Indonesian fishermen. The MOU zone now includes all the waters in a boxed area around the initial group of reefs and cays right up to the Indonesian border.

The MOU provides for Indonesian fishermen using traditional sailing craft and methods of catch to fish within this zone. Fishermen may only use sail and compass and may not operate a radio. Fishing and collecting may only be carried out by traditional means. It is forbidden to take turtles or their eggs or any land based products.

Taking of trochus, trepang, abalone, green snails, sponges and molluscs was initially allowed everywhere. But in 1988 the Ashmore Reef National Nature Reserve was created. This drastically reduced the area in which products could be collected to just the sea bed next to Browse islet and Scott and Seringapatem reefs. Fishermen are only allowed to step onto land within the MOU zone at two of the Ashmore islands and then only to collect fresh water.

Several fishermen claimed it would take a month to catch in

Indonesian waters what it would take a week to catch in Australian waters. This is partly due to overfishing and lack of marine management in Indonesia compared to Australia.

Not exclusive

The Papelans themselves regard the seas as open and free and are not inclined to claim exclusive ownership of their traditional fishing grounds.

Many vessels from Sulawesi and other Indonesian ports also fish the waters throughout the border zone. These craft are bigger and motorised. Much of this fishing in Australian waters is 'illegal', although in some cases also based on purported historical rights. The MOU simply specifies 'Indonesian fishermen' as a whole.

Many boats from nations such as Taiwan and Japan also fish on both sides of the border. They employ state of the art technology with devastating effect. Unlike Indonesian vessels most have sufficient capital to purchase licenses although there are also many instances of illegal fishing.

Relations with Australian fishermen are said to be amicable. In certain areas of Indonesia however conflicts are escalating between fishermen from different regions or using different methods of catch. As pressure on marine resources within Indonesia mounts ports adjacent to the border zone, including Papela, are becoming a magnet for their accessibility to unexploited resources. The border remains permeable to marine resources, and inevitably to the fishermen that derive their livelihoods from them.

Dirt poor

Since 1997 the Australian government has begun exercising an increasingly intolerant approach towards boats breaching the strict terms of the MOU. Boats are seized by the Australian navy under directions from the Department of Fisheries and the crews taken into custody. The boats are then towed to either Broome or Darwin. When convicted the crews may be fined heavily or imprisoned, and their boats may be burnt.

Meanwhile the livelihood of the community as a whole is eroding. Forty seven boats were captured and destroyed in 1996 alone, out of a fleet of around 200, leaving over 250

fishermen without a livelihood. Multiply this by each fisherman's unsupported dependents, as well as businesses dependent on their income. Community members claim an increase in violence, disenchantment and alcoholism as a direct effect.

Papela is dirt poor. Malnutrition, infant mortality and birthrates are high. Houses are small and crowded and few have even running water. Most Papelans are educated only to primary level. The average fisherman is lucky to earn Rp 4,000 Rp (a dollar or two) a day.

The small number of boat owners or 'bosses' live in moderate opulence. Most fishermen work for a boss in return for a share of the catch. The majority are already in debt either to a boss or a moneylender before departing to the border fishing grounds. When they lose their livelihood they become further indebted to the boss, who is nevertheless seen as a benefactor.

The fishermen are all male and aged from their mid teens to their thirties. But the economic crisis resulting from the Australian Government's actions affects the entire community. I often encountered anger towards Australia, including at times towards myself as an Australian, because the government denied them a livelihood.

Fishermen explain that primitive navigational methods (as required by the MOU) leave them unable to take reliable bearings or prevent drifting into Australian waters. They are often confused about the terms of the MOU and the area it covers. The border is not marked.

When, occasionally, they admit breaking the terms of the MOU intentionally, they justify it by asserting traditional rights not written into the MOU. One fisherman said: 'What right does a latecomer colonial government have to deny me the right to fish the same grounds as my ancestors?'. Another quoted a more mundane reason: 'It's not the same as Australia here. If we don't go out looking for a living the government doesn't give us money, we starve!'.

Mabo

Only as recently as 1992, in the Mabo decision, has the highest court in Australia recognised that the customary laws of peoples who were in Australia before white

sovereignty can give rise to rights within the common law of present-day Australia. These peoples include fishermen from present-day Indonesia, as we have seen.

The Australian government responded with the Native Title Act of 1993, which tried to extinguish the rights of Aboriginals and Torres Strait Islanders that had been recognised at common law and to replace them with a legislative scheme of land and sea rights. Negotiations prior to the legislation, and the legislation itself, did not include any foreign nationals such as the Papelans who may also possess such rights. As a result the Native Title Act may not have extinguished those rights, and the present actions of the Australian government may conceivably be contrary to the common law of Australia.

But doesn't the MOU do effectively the same thing as the Native Title Act? Not exactly. During the negotiations for the MOU the Papelans themselves were only consulted indirectly. The MOU did not embody their negotiating position and as such should not be effective as a voluntary extinguishment of their rights. The MOU can perhaps best be seen as an agreement controlling and regulating the enjoyment of historical and traditional rights that remain intact.

These rights can be renegotiated in line with developments in Australia's common law and its international obligations. Negotiations must involve their genuine representatives in a fair process in which all parties are fully informed of their likely rights.

For example, Papelans could press to be allowed the use of motors, diving equipment and improved methods of catch. As many as 20 fishermen a year from Papela alone perish in Australian waters as a result of primitive craft and navigational instruments, and lack of cyclone warning equipment, as dictated by the terms of the MOU.

Perhaps specific licenses could be granted to those communities with traditional entitlements but who have been most disadvantaged by the extensions to Australia's waters.

The establishment of traditional rights may also act as a bargaining chip to allow Papelans to negotiate on any future oil or gas production in the area. Compensation could be in the form of aid packages, royalties or access to other

resources.

Indonesian law

Papelans have little formal education and do not understand how international or Australian law may benefit them. As citizens of Indonesia they have naturally turned to the mechanisms of their own country. However, I found that these bodies have been of little help.

Ever since independence Indonesia has been a unitary state. Empowering local communities has often been construed as being in conflict with this goal.

Of course traditional rights should not have sole claim to determining resource distribution. However in a society in which the state vigorously defends the rights of a small capital owning elite, community rights are a necessary counterbalance. They are part of ensuring a more equitable distribution of wealth. Without them, central governments tend to serve their own interests rather than those of their remote constituents.

Indonesia inherited the civil law tradition from the colonial Dutch. Unlike British and Australian common law, this system attempts to set down the entire contents of the law. While reserving supreme law making power the Dutch did allow for 'natives to be governed by their own customary (adat) laws'.

Ironically, since independence the civil law tradition has continued to expand in the form of increasingly comprehensive laws and regulations. These are usually divorced from traditional rights, and customary law has withered. The latter is now relegated to the role of a cultural anachronism. The official line is that customary law will eventually die out.

The passing of the new Fisheries Act of 1995 supercedes previous legislation and no longer protects traditional fishing rights. Yet Indonesia remains a signatory to UNCLOS III, which requires that such protection be given. In Australia, by contrast, the law is moving in the other direction, in line with broad international trends.

It is ironic that indigenous customary laws are receiving greater recognition within a predominantly settler society

such as Australia than in a predominantly 'indigenous' nation such as Indonesia.

If the customary law of a community whose citizens are Indonesian were recognised under Australian common law, it could act as an important bridge with the customary law tradition of Indonesia. It could even lead to a re-invigoration of customary law in Indonesia.

Unfortunately the current legal and political structures in Papela have not been a suitable vehicle to assert Papelans rights. The fishermen do not even know how to conceptualise those rights. Their official letters tend to speak about the Indonesian nation rather than about traditional rights.

Aboriginal communities

In 1993 the Australian Ambassador, Alan Taylor, came to Papela primarily it seems to make Australia's position clear to the fishermen. He made no concessions to a direct request from a fisherman for fishing licenses to be granted to Papelan boats.

The Ambassador was accompanied on his visit by representatives of several Aboriginal communities. Most Papelans did not understand why they were there. But as it becomes more widely known that Aboriginals have traditional sea rights in Australia, the possibility arises of direct negotiations between Indonesian fishing communities and Aboriginal communities on each community's traditional rights.

Papela is now on a trail well worn by Australian anthropologists, lawyers, fisheries staff, film makers, journalists and tourists. Awareness is growing in both Australia and Indonesia that the present agreement is inadequate. The time is certainly ripe for some informed and equitable negotiations

If Australia recognises the traditional rights of a group of Indonesian citizens within its territory, based on their own customary laws, it would blur the border between the two countries.

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If the Indonesian government supports the community of Papela to assert these traditional rights, it could by osmosis

lead to a more pluralist legal and political system within Indonesia itself.

Sovereignty would be dispersed to the subject communities of both countries. It would be part of an evolving international standards of rights that more easily crosses borders.

Campbell Watson is an Australian lawyer who has worked with Aboriginal organisations. He lived in Papela for two months in late 1996 under a program of Gajah Mada and Muhammadiyah Universities. He now researches international law at Leiden University. A more detailed report is available from him at: Herengracht 33E, 2312 LA Leiden, Netherlands.