CONFLICTING CLAIMS TO THE GARDENS OF THE SEA: THE TRADITIONAL OWNERSHIP OF RESOURCES IN THE TROBRIAND ISLANDS OF PAPUA NEW GUINEA

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INTRODUCTION

To the average tourist who visits one of the Island states of the South Pacific, the sight o a local fisherman in a small, outrigger canoe casting his nets onto the blue and sparklin waters of reef or lagoon will prompt at least the taking of a photograph, to take home an show friends how "traditional" life still exists in the islands. What cannot be seen, but i nonetheless present, is the conflict which is raging between these traditional practices and the aspirations of the national governments to manage and exploit the resources o the offshore in a technologically modern manner. To many local fisherman, the sight of modern freezer-trawler systematically stripping the reef, their reef, of all its fis represents an act of theft and plunder. The fact that the trawler has a fishing licence granted by the central government of the state, only exacerbates the situation, ofte leading to feelings of betrayal[1].

To undertake the analysis of this study, it is necessary to consider the issue from tw perspectives: external, and internal. The external perspective is International Law, an specifically, the newly developing Law of the Sea as reflected in the 1982 *Untied Nation Convention on Law of the Sea*.[2] The second, internal perspective is the National Law o Papua New Guinea. It is PNG's domestic law that will determine the division an allocation of the rights recognized by the 1982 convention.

The choice of the Trobriand Islands as a location for this study was based on two factors First, Mr Tom'tavala, is from the main island of Kiriwina, and was able to act a interpreter and adviser on local customs. His position and that of his family in the villag of Okaiboma, which was used as a base for the duration of the study, provided the vita element of local acceptance and cooperation in completing the questionnaires.[3] Th

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1. For the purposes of this paper, the term "foreign" fishing includes all fisheries not conducted b the island inhabitants themselves, irrespective of whether the foreigners are citizens of PNG o not.

2. A/CONF.62/122, 5 October 1982; (1982) 21 I.L.M. 1261 hereinafter LOSC.

3 It is probably worthwhile illustrating the village's interest in the project. The only vehicl available for hire on the island was a fifteen passenger bus, obtained through the cooperation o the Island's Member of Parliament. The excess space in the vehicle was occupied by variou members of the village: elders, family members, and friends. The journeys around the islan provided an opportunity for people to visit other villages around the island, visiting with cla members, Kula partners, and friends. Our arrival at any of the target villages was an event of som importance, and the presence of village elders gave a stature to our study which it would not hav otherwise enjoyed. As a result, we were shown considerable deference, and were able to overcom any suspicion that the people might ordinarily have had about answering questions from a outsider. Both sides benefited from this arrangement.

second factor in chosing the Trobriand Islands was the availability of historical information on the practices of the island community. The Trobriand Islands prove an excellent vehicle for the study of these phenomena. A considerable wealth of historical information is available,[4] making possible a comparison between contemporary and historically established practices. The Islands have also been the centre of several notable controversies over the exploitation of marine resources.[5] The issues which are analysed here are not just relevant in the context of Papua New Guinea, but may be applied to many states, where traditional peoples find themselves in conflict with the new order.

The Trobriand Islands are probably the most famous seafaring area in the South Pacific. The close connection of the Kiriwina peoples to the sea has been well documented in numerous books, journal articles, and film documentaries. But, the more celebrated activities, the Kula Trade, and Shark Calling, should not be allowed to detract from the general fact that the sea has, and still is a major influence in the life of the island people.

What is true for the people of the Trobriand Islands is also true for the rest of the coastal and island peoples of Papua New Guinea, and indeed, for many of the island peoples of the South Pacific region. While the sea is still a dominant force in their lives, the sea itself has changed considerably, not just its physical environment, but its legal regime as well. The national and international laws which govern the use of the sea and its resources has undergone a major transformation, most notably in the last decade with the signing of the *LOSC* in 1982, and the emergence of the colonies and trust territories of the South Pacific as independent states. In such a dynamic environment, conflicts will inevitably arise, between the traditional users of the sea, and their governments who, motivated by national aspirations and international obligations, seek to regulate the way in which the sea is used.

RESEARCH METHODOLOGY IN A TRADITIONAL CULTURE

The Trobriand Islands consist of one main island, Kiriwina, several smaller islands, and numerous offshore reefs. The main portion of the population of approximately 30,000 live on the main island in numerous small villages. The study concentrated on coastal or semi-coastal villages, those who traditionally fished and traded in marine artifacts. The Northern part of the Island is quite wide, and contains many inland villages which are exclusively agricultural, and trade for fish caught by coastal villages. These villages were not included, with the exception of the village which is home to the paramount chief of the island, who was interviewed in his own right.

The procedure which we followed for each of the target villages was to gain prior approval to come and conduct the survey. This was usually accomplished by dropping off one of our village members, usually an elder who wished to visit with friends, relatives or Kula partners, at the village on our way the most distant of the day's target villages. The

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4. In specific, the many anthropological works of Bronislaw Malinowski:

   B. Malinowski, Argonauts of the Western Pacific, (London: Routledge & Kegan Paul, 1922); 'Fishing in the Trobriand Islands' (1918) 53 Man. 87; Crime and Custom on Savage Society, (London: Kegan Paul, Trench, Trubner and Co., 1926); Coral Gardens and their Magic, (London: Allen & Unwin, 1935).

5. Numerous incidents were reported during the interviews, of problems with "foreign", which means foreign to the Trobriand Islands, fishermen and traders. Recent incidents included Crocodile hunters from the Sepik area of PNG, and and ongoing dispute over Beche-de-mer.

elder would then explain what we were doing, and "Who the 'dim-dim"[6] was When we finally made our way back, the headman or chief of the village would then be aware of our arrival and good intentions and prepared to meet us

The formalities of the village interviews followed a set pattern. Upon our arrival we would be taken to either the chief or headman's house, or to the central gathering area A new palm thatch mat would be spread out on the porch, or a raised platform, and we would be invited to sit down. At this point, we would take out several sticks of black, twisted tobacco, and several sheets of newspaper, and ask the elder or chief if he wished to smoke The tobacco and newspaper would then be distributed among the senior village members, men and women, and to some of the younger men. Once everyone had made their cigarettes, and was happily smoking, the elder would nod, and we could take out our questionnaire and start to work.

There was a marked variance to how questions were answered, and by whom. In some villages, one individual, usually the chief, or occasionally an elder would answer. In others, there would be considerable discussion and sometimes argument among all the assembled villagers before a consensus could be reached. These discussions were often quite heated, especially on matters dealing with traditional ownership or practices, in which the elder men and women held sway.

LAND OWNERSHIP

The issue of land ownership in the Trobriand Islands is a complex one, extensively intertwined with tradition and legend. Land, as opposed to beach area, is owned by one clan. It would be beyond the scope of this paper to attempt to explain the details of the system[7] except to say that uses are exclusive, clearly delimited, and require the payment of compensation to the owners.

The ownership of beaches appears to have a different basis. In virtually all of the villages visited, the beach and shore area was viewed as communal land. As such, it was available to all members of the village on an equal basis, clan member and non-clan member alike. Use of the beach did not require the payment of compensation by any of the village members. The village chiefs or headmen indicated that they would not even expect to be asked for permission if a village member wished to build a canoe house or net drying rack, though most felt that they could settle any disputes between village members on overlapping claims. For the most part, however, the right of use comes with first occupation, and ends with abandonment of the use.[8]

The issue of beach use by non-village members seems not to have arisen, as each of the villages coastal had its own beach, and villagers could not understand why anyone from another village would want to use theirs However, the general feeling was that it would

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6 "Dim-dim" is the Kiriwina word for an outsider, usually a "European"

In the Trobriand Islands, family membership and therefore land ownership is based on Matrilinial lines The inhabitants of any village may be members of a number of different clans, however, only those with matrilinial ancestors from their home village will have property rights to the village lands.

7 The subject is exhaustively dealt with in Malinowski, Coral Gardens and their Magic, op cit n3 supra

8 This point was stressed by the island's paramount chief, Chief Pulayasi of Omarakana Village, who expressed the view that village chiefs and headmen held the beach as trustees for the village members.

not be permitted. As previously explained, all the land on the island is owned by one or other of the clans. As a result, all of the beach and coastal area belongs, by tradition, to the village whose land it adjoins. One village's beach extends right up to where the adjoining villages claim ends.

OCEAN OWNERSHIP

The villages claim to ownership of the coastal waters is considerably less clear and appears to be mostly resource based, as opposed to strictly territorial . When asked if the village owned the ocean space which adjoined their beach, most of the villagers indicated that they felt they did. One village indicated that it owned as far as could be seen from the top of their highest tree[9]. In another, the headman indicated a passing tanker, almost on the horizon, and stated that even this ship was in their ocean space.[10] However, when asked about the extent of their rights in this area, with one exception, all the villages acknowledged that they could neither prevent nor would they attempt to control the passage of any vessels, either inside or outside the fringing reef area.

An exception to this view was expressed in the village of Labai, whose inhabitants claim a periodic exclusivity to the reef and lagoon waters ajoining the village. This village is viewed by the Trobriand Islanders as the source of their heritage, and as such has a special responsibility for the keeping of magic and traditions.[11] The Chief of this village was extremely old, and still performs important rites of ceremonial magic.

The village makes an exclusive claim on the waters of the adjoining reef and lagoon during the time when a particular species of fish, the Mullet (Kalala), schools on the reef. At this time, which coincides with the full moon, the villagers deny access to the reef as well as the village to all outsiders. This is to preserve the secrecy of the magic which is used in the fisheries.[12]

Another exception to the general practice is found in the village of Kevatariya. This village, located on the lagoon near Losuia, is home of the Offshore reef fishermen. While other villages fished the fringing reefs adjoining their village, the people of Kevatariya fished on the extensive shallow reefs on the western side of the island. These reefs are found up to 15 nautical miles from the village, and are up to 10 nautical miles off shore. The clans and families of this village claim exclusive ownership to distinct portions of the reef, actually referring to them as "Our Gardens". Each claim is clearly delimited by the villagers, mutually recognized, and formed part of the family inheritance. These offshore claims are also acknowledged by the other villages.[13]

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9. The southern coastal village of Sinakita.

10. The northern coastal village of Kapwani which overlooks the major deepwater channel through the Solomon Sea.

11. This was also reported by Malinowski, see M.W. Young ed, The Ethnography of MALINOWSKI, (London: Routlidge & Kegan Paul, 1979), 28.

12. We were told that the secrecy was such that anyone who even accidently came upon the reef would be killed. It was made very plain that this would even include Dim-Dim (IE non-islanders or Europeans). While we could not find any record of killings actually occurring, there was no doubt that this attitude was well known in the other villages on the islands and believed implicitly.

13 In other villages on the island, especially those on the south and western side of the island of Kiriwina, the claims of the village of Kevatariya are well known. When we asked the villagers the extent of their offshore claims, their response was always qualified by the statement that, of course, the far reefs were the property of Kevatariya.

MARINE RESOURCES OWNERSHIP

The real issue is the extent to which claims can be maintained to the living and non-living resources of the sea, and here, a clear pattern emerges from our questioning.

First, it is necessary to distinguish the claims of those villages which are primarily agricultural, and those which are primarily fishing. Second, it is important to separate subsistence fishing from commercial fishing. Third, there is a distinct difference between the view on living and non-living resources.

Living Resource Ownership

As might be expected, those villages which are largely dependant on fishing, have an attitude of exclusive ownership over the fish caught on their reef, while there was a much more tolerant attitude, at least to subsistence fishing, by the agriculturally based villages.

Compensation Payement

Probably the best indicator of the ownership claim, was the extent to which compensation was required for outsider fishing. The actual payment, in cash or kind, of a fee in exchange for fishing rights demonstrates both the intention to control on the one hand, and the recognition of the right to control, and acceptance of it, on the other.

Subsistance Fishing

Within the village community itself, there seemed to be a general acceptance that any village member could fish for as much, as often as he liked. It didn't seem to matter if it was for food, or for commerce. No limit was imposed, and no compensation was required. This view was held in all the villages surveyed except the village of Kavataria. In this village, the ownership of reef patches is by individual families. It was claimed by village members that they could recognize the species of fish which inhabited their particular patch. Disputes often arise in the market at Losuia when someone sees a fish from their part of the reef being sold by another. The headman of the village stated that he is regularly called to mediate these disputes between village members.

The attitude with respect to outsiders was different. On this issue, the villages divided according to the basis of the economy. The agricultural villages expressed the opinion that anyone could come and fish on their reef, especially if it was for food, and no compensation would be expected.

In the fishing villages, the attitude was understandably different. In the village of Gilibwa, outsiders are expected to pay 20 kina per day for the right to fish, a right which has been enforced through the use of force according to the villagers. A sign has been posted in the village to this effect.

The chief of the village of Bwadela claimed a daily fee of 100 kina. This levy was reportedly based on one half of the estimated earnings of a days fishing. We have no evidence that this amount has actually ever been collected. A similar claim is made by the village of Siniketa, for a one time licensing fee of 1000 Kina to gather beche de mer.

By way of contrast, several villages, notably the offshore diving village of Kevatariya, stated that they reserved fishing entirely for themselves, and would not permit others to fish even if compensation were paid. They added, however, that they would gather any species which they were paid to harvest.

Commercial Fishing

One thing is certain, however, and that is the attitude of the villages towards outside commercial fishing. All the villages expressed the belief that the right to earn money from their reef areas was exclusively the right of the village, and no outsiders had a right to come in to harvest commercial species. In contrast to former practice, the idea of any TABU or forbidden species seems to have disappeared, and the villagers expressed a willingness to gather any living resource for which there was a market. Even the secretive Labai village fisheries is done for purposes of trade.

Non-Living Resources

The gathering of non-living resources from the sea has a long history in the Trobriand Islands. All of the villages which we surveyed reported the gathering of sand and gravel for various domestic uses, and specifically, the gathering of coral limestone, to be burned for the production of Lime. This lime is used as an additive in the chewing of Betel Nut, a major pastime on the island. The practice among the villages was uniform on this point. Non-living resources gathering, especially limestone, was exclusive to the village. No outsiders could gather it, and no compensation would be accepted.

TRADITIONAL CLAIMS OF THE TROBRIAND ISLANDERS

The maritime claims of Kiriwina Island coastal villages is made in respect to beach areas, estuaries, coastal waters and fisheries resources within such waters. These claims have two bases.

First, the islanders regard that the coastal areas are connected to the land, so their maritime claims are based upon a doctrine of inseparable and natural appurtenance. By virtue of this doctrine, coastal villagers assert that their maritime claims are just an extension of their garden lands. Hence, along the coastline, the maritime claims of a particular coastal village extend to the boundary of its garden land. In major fishing villages the coastal waters and fisheries resources are regarded as much as a garden because fish that the villagers catch are exchanged for yams and other garden produce which are brought by inland villagers.

The second factor is traditions relating to, and customary usage of, maritime resources. To a great extent, the present claims of coastal villagers to garden land, beaches, estuaries, coastal waters and fisheries are determined on the basis of traditions and customary usage. The traditions of the islanders are contained in lores, legends and songs which are passed from generation to generation. These tell of the migration and exploits of the ancestors of a given clan, of how they acquired certain names or land, fishing grounds etc. Customary usage by a particular clan or village of certain resources is also important. In the sea, a clan or a village may assert its claim in respect to coastal waters, fishing areas or particular species of fish on the basis that their ancestors had customarily used certain coastal waters, fished in certain spots or fished for certain species of fish. However, such a customary usage must be recognized by the clans or villagers. Customary usages are also preserved in lores, legends, songs and dances. Traditions and customary usage are important in resolving disputes relating to maritime claims. Folklores, legends, songs and dances to a Kiriwinan are like principles of the English Common Law to judges in Common Law jurisdiction.

To contemporary Kiriwina Island societies, the livelihood of the people is almost totally dependent upon the land and the sea. The people live very much as their ancestors did. They grow their own food and catch their own fish. The sea yields fish, shells and provides a host of other uses. Furthermore, the islanders culture, beliefs and traditions are

intrinsically connected to the sea.[14] The Socio-economic significance of the sea coupled with the islander's original and uninterrupted occupation of the island has imbued in them a sense of an inherent right to ownership of beaches of the island, the coastal matters and fisheries. Given these claims based on custom,[15] the islanders regard the laws of the state and rights arising thereunder to be subject to their customary rights and claims.

As previously discussed, the findings of this study have more than an academic importance. Customary legal rights in PNG may be based on customary law, and customary law, in its turn, may be proven by resort to 'reference ...books, treatises, reports, or other works of reference' and a court of law may '...accept any matter or thing stated in such works as evidence on the question'.[16]

As will be seen, many of the responses given by the villagers to our questions are the same ones that Malinowski received when conducting his ethnography. It is submitted that this gives substantial proof of a custom of at least 70 years duration.

LEGAL OWNERSHIP OF THE SEA

What is the extent of ownership of marine resources under PNG law? To answer this question, it will first be necessary to consider the ownership issue under international law and then under PNG national law. What makes the situation potentially complex is the possibility that traditional peoples may, as a matter of customary right and practice, make a claim to territory or resource rights which is beyond the permitted scope of national claims under international Law of the Sea treaties. A State which wishes to satisfy its obligations under international law, and yet recognize the traditional rights of its people, may find itself in a constitutional dilemma.

OWNERSHIP UNDER INTERNATIONAL LAW

The emergence of PNG as an independent state took place at a time when the Law of the Sea was in a considerable state of flux. The Third United Nations Conference on Law of the Sea (UNCLOS) had been under way since 1971, and while substantial headway had been made on a number of important issues dealing with the extent of coastal state maritime jurisdiction, it was in no way certain just what the extent of the limits would be.

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14. This is best illustrated by the traditional system of exchange known as "kula". Islanders travel across the sea to trade with others. This fosters partnership, friendship and prestige. The long journeys across the sea also mean considerable hardship. Hence, the islanders have many rituals, taboos and lores that are connected to the sea.

15. "Custom" is used in this regard to denote societal rules that regulate a traditional society. As Professor Werramantry wrote:

    Malinowski's work in Trobriand Islands revolutionized modern jurisprudential thinking regarding the nature of law by showing that custom, which did not proceed from any identifiable sovereign, can have all the force of law.

    C.G. Weeramantry, 'Jurisprudence in the Third World Law School: A Blue-Print', (1982) 10 Mel. LJ. 145.

16. Customs Recognition Act, R.S.P.N.G. Ch.No.19, S.2(3)(a).

LAW OF THE SEA CONVENTIONS

(a) 1958

There were, however, four international conventions on the law of the Sea which had been adopted after the 1958 First United Nations Conference on Law of the Sea:

a) The Convention on the Territorial Sea and the Contiguous Zone;

b) The Convention on the High Seas;

c) The Convention on Fishing and Conservation of the Living Resources of the High Seas;

(d) The Convention on the Continental Shelf.

Even though these international conventions eventually received sufficient ratifications to come into force, two important factors must be noted. First, the number of ratifying states did not nearly represent a quorum of the worlds independent states. Second, there was no agreement then, nor was there agreement at the 1960 UNCLOS II conference, on the actual extent and limits of a states territorial jurisdiction.

On 25 February 1976, shortly after independence, the PNG Minister for Foreign Affairs and Trade gave formal notice to the Secretary-General of the United Nations that PNG did not intend to be bound by these conventions.[17]

(b) 1982

Nonetheless, as a leading member of the newly emergent states of the South Pacific, PNG took its place among the nations at the UNCLOS III negotiations. In 1982, PNG was one of the 119 states which signed the 1982 *United Nations Convention on the Law of the Sea,*[18] and is now in the process of ratification, a procedure which includes ensuring that all national legislation is compatible with the obligations and limitations imposed by the Convention.

The 1982 Convention allows a coastal state to claim a territorial sea of up to 12 miles[19] over which it has complete sovereignty. In addition, certain qualifying states may proclaim an archipelagic sea in which they retain exclusive ownership to all marine resources,[20] with the important caveat that:

> ... an archipelagic State shall ... recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.[21]

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17. The Constitution of the Independent State of Papua New Guinea, 1975 Chapter 1, Sec.12(c).

18. Supra, n2.

19. LOSC Art. 3.

20. LOSC Art. 49.

21. LOSC Art.51, para. 1.

Also, there is an obligation on the coastal state to allow vessels the right of innocent passage through within both the archipelagic and territorial waters.[22]

The convention also allows for the establishment of a 200 nautical mile Exclusive Economic Zone[23] in which the coastal state has paramount, but not exclusive rights to the living resources. Sedentary species, or bottom living organisms, as defined by the LOSC[24] are the exclusive property of the coastal state.[25] However, free swimming fish stocks, must be utilized to their maximum potential,[26] and the coastal state must permit other states to fish for those species which are under utilized.

One interesting development is the provision which restricts the taking of Catadromous[27] and Anadromous[28] species to the waters inside the EEZ. Since the articles use the term "species" and not "fish", it would appear that a number of marine reptiles, birds, and mammals, including the Estuarial Crocodile, Dugong, and Marine Turtle could no longer be fished on the High Seas.

TREATIES

In addition to the *Law of the Sea Convention*, PNG is a party to several other international treaties, most notably the CITES convention.[29] This convention controls the taking and export of rare and endangered species of plants and animals, among which are numerous marine organisms. Some of these organisms represent species which have been traditionally fished for food and trade by the island's populations.

OWNERSHIP UNDER NATIONAL LAW

National Statutes

During the course of the UNCLOS III negotiations, PNG enacted its own domestic ocean resources and marine territorial laws. These Acts, collectively known as the National Seas Legislation[30] were passed in 1977, and, following what had become the practice of modern state legislation in this period, closely approximated the provisions which were beginning to crystallize out of the UNCLOS III negotiations. The legislation consisted of: (a) The Interpretations Act (Application of Laws)[31] (b) The National Seas Act[32] (c)The

22. LOSC Art.17, Art.52.

23. LOSC Arts.56, 57.

24. LOSC Art.77, Para.4.

25. LOSC Art.68.

26. LOSC Art.62.

27. Catadromous species are those which breed in the ocean, but live in shallow waters or rivers, (i.e. eels), LOSC Art.67.

28. Anadromous species are those which breed in fresh water rivers, but spend their adult life in the ocean (i.e., salmon), LOSC Art.66.

29. Convention on International Trade in Endangered species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 244.

30. D. Weisbrot, 'Note: Papua New Guinea's National Seas Legislation, (1977) 5 Mel. L.J. 107.

31 No.3 of 1977, R.S.P.N.G. Ch. No.2.

Continental Shelf (Living Natural Resources) Act[33] (d) The Fisheries Act[34] and (e) The Whaling Act.[35]

Prior to the enactment of these laws, PNG's offshore jurisdiction had been governed by three pre-independence statutes,[36] and customary international law. These Acts provided for a territorial sea of three nautical miles, a controlled fishing zone to a further nine nautical miles, and an extended jurisdiction over the living and non-living resources of the continental shelf.

As previously mentioned, the PNG statutes of 1977 established the state's claim to ocean territory and resources, at least as far as international law is concerned. Under the *National Seas Act,*[37] PNG delimited four marine jurisdictions: internal waters comprising all waters within established baselines, a 12 nautical mile territorial sea, an offshore sea of 200 nautical miles (roughly corresponding to an EEZ) and archipelagic waters which included the seas surrounding most of the island groups, plus all the waters of Milne Bay and the Bismarck sea.

The preamble to the Act states that it is for ... 'the purpose of asserting the rights of the State in relation to those areas'. The Act does not state what those rights are, nor does it make any claim to sovereignty or exclusivity. This claim is made, instead, by the PNG Constitution, which provides:

2. The Area of Papua New Guinea

(1) The area of Papua New Guinea consists of the area... together with all internal waters and the territorial sea and underlying lands....

(2) The sovereignty of Papua New Guinea over its territory, and over the natural resources of its territory, is and shall remain absolute, subject only to such obligations at international law as are freely accepted by Papua New Guinea in accordance with this Constitution.[38]

This claim is further substantiated in the Interpretations Act which provides :

2A (1) ...it shall be presumed, unless the contrary intention appears, that a provision is intended to operate-

(b) ...within the area of the internal waters and territorial sea; ...[39]

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32. Id. Ch. No.361.

33. Id. Ch.210.

34. Id. Ch.214.

35. Id. Ch.225.

36. The Fisheries Act, 1974, No.31 of 1974; The Continental Shelf (Living Natural Resources) Act 1974, No.29 of 1974; The Petroleum (Submerged Lands) Act 1975, No.9 of 1975, as am. by No.57 of 1975.

37. Supra, n32, s2.

38. PNG Constitution Ch. No.1 Part I.

39. R.S.P.N.G. Ch. No.2 PART II.

It should be clear, from the language used in the *National Seas Act,* that the areas claimed are intended to coincide with those rights recognized under the 1982 *Law of the Sea Convention.* The effect of the law is to establish the oceanic boundaries of PNG, and to delimit the boundaries of the state, with respect to other states. Nothing in the language of the Act establishes how rights to these areas are to be divided within the state.

LAND OWNERSHIP UNDER PNG LAW

Kiriwina Island coastal villagers form but a minute fraction of the total component of the society that is the modern Independent State of Papua New Guinea. The modern state is a creature of law and has a mandate to govern its subjects by the rule of law. The applicable regime of law is prescribed by the State and the interests of the State, the "national" or "public" interest,[40] is accorded paramount consideration. Because of the diversity of vested interests in relation to coastal resources, it is apparent that where customary based claims are juxtaposed with the State's laws and claims arising thereunder, conflicts are bound to arise, if not in law, in fact. The object in this section is to examine the municipal law of Papua New Guinea regarding the ownership of beaches coastal waters, including estuaries, and coastal fisheries. This examination would enable assessments to be made as regards the validity of customary based maritime claims.

The extensive divestiture of indigenous people of their land was not a hallmark of colonialism in Papua New Guinea.[41] About 97% of the total land area is owned by the customary owners who control it according to their custom. The remainder, called alienated land, is owned by the State[42] which grants leases or freeholds under the *Land Act.* Under other statutes, the state has also been vested with ownership rights to other resources.

Coastal waters form part of the internal waters or national seas[43] of Papua New Guinea. The *Constitution* Ch. No.1 says that the area of Papua New Guinea includes, *inter alia,* "internal[44] waters, the territorial sea and underlying lands" The *National Seas Act* 'describes and provides for the demarcation of the territorial sea, the internal waters, the offshore seas, and the archipelago waters, for the purpose of asserting the rights of the State in relation to those areas'.[45]

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40. The paramounting of the public interest is illustrated by s38(1) of the Constitution which allows the qualification of certain basic rights for the purpose of giving effect to the public interest in defence, public safety, public order, public welfare, public health, protection of disabled persons or the development of underprivileged groups.

41. Unlike many other traditional peoples of the region, notibly the Aboriginal inhabitants of Australia and the Maori of New Zealand, PNG's people are not subject to treaty settlement of land claims. The current PNG government is not a succesor party to any colonial treaty with its own citizens. See Paul G. McHugh, 'The Legal Status of Maori Fishing Rights in Tidal Waters', (1984) 14 Vic. U. of Wellington L.R. 247-274 for a comparison with ownership under a treaty regime.

42. Section 4(1) of the Land Act, R.S.P.N.G. Ch. No.185 provides: 'All land in the country other than customary land is the property of the State, subject to any estates... or interests in force under any law'.

43. Whilst coastal waters claimed by coastal villages are comprised in internal waters, it is not clear if their claims extend to other regimes of waters or seas.

44. S.2(1).

45. Preamble of the Act.

What rights does the state assert in relation to these areas? The most obvious right arises under s 2(2) of the *Constitution* which confers upon the state an absolute sovereignty to its natural resources and it's territory. The internal waters and the national seas of the State are within it's absolute sovereignty which means that it 'has liberty of action within its territorial boundaries and over the natural resources within those boundaries'.[46] Liberty of action for the State means that, subject to its international obligations, it can legislate and enforce it's laws. Furthermore, the state has the right under the *Fisheries Act* to regulate fishing within the declared fishing zone and the internal waters.[47] Apart from the right of state sovereignty, including the right to regulate fisheries, within coastal waters the scope of laws at present does not expressly confer upon the State ownership rights to coastal waters. Could it be argued that the States sovereignty over coastal waters impliedly rests in it ownership rights to coastal waters? This argument would be untenable because as a general rule a state may legitimately exercise sovereignty over subject matters which are not owned by the state but by subjects of the state. It is clear that the *National Seas Act* does not assert ownership or other rights of the State to areas which comprise the national seas.

RESOURCE OWNERSHIP UNDER PNG LAW

Under the *Mining Act* all gold and minerals in or on any land in the country are reserved as the property of the state.[48] Under s 2(1) of this Act "mineral" is defined to include "valuable earth and substances" and "valuable earth" means "any rock, stone, quartz, clay, sand, soil, or mineral". It is clear from the foregoing that sand, gravel or stone on beaches claimed by customary owners have been reserved by the *Mining Act* as the property of the State. In recognition of traditional land owners inherent reliance upon valuable earth and substances for innumerable purposes, the Act gives some concession to them in so far as they are conferred the right to quarry from unoccupied government land such substances as stone, earth, gravel and sand. This concession is far from being meritorious since traditional land owners are only given the right to extract valuable earth and substances from unoccupied government land - not from their own land or beaches. This is clearly untenable. Nevertheless, despite customary based claims to beach areas, the State owns the rocks, stones, gravel and sand on such beaches. If a beach is without rocks, stones, gravel and sand it does not have any substance: the same may be said of claims thereto.

The only provision of the *Constitution* which alludes to fisheries resources is the Fourth National Goal - Conservation of Natural Resources and the Environment. This goal calls upon citizens to make wise use of natural resources such as those in the sea and to take necessary steps to give adequate protection to fish and other resources. The *Fisheries Act*[49] provides for regulation of fisheries within the Declared Fisheries Zone (DFZ) and the internal waters. For the purposes of this Act, "fish" is defined to include turtles, dugong, crustaceans, molluscs, trochus and beche-de-mer. Under this Act the Minister for Fisheries and Marine Resources is empowered to regulate fishing by prohibition and licensing. The *Tuna Resources Management Act*[50] was passed with the express object to

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46. P. Donigi, 'Who Has the Rights to Natural Resources Memoranda of Opinion' in The Times of PNG 7-13 July, 1988, p.20.

47. S.2.

48. S.7 of Mining Act R.S.P.N.G. Ch. No.195.

49. Ch. No.214.

50. Ch. No.224.

develop and manage the tuna fishing industry. Under neither the Constitution nor the tw Acts considered above has the ownership of fisheries resources been vested in the State These Acts do no more than enable the State to regulate and manage commercia exploitation of fisheries.

From the foregoing, the following conclusions have been made regarding the ownershi of beaches, coastal waters and coastal fisheries. It is submitted that all beach areas belon to the State since it has been vested with ownership rights to all minerals includin valuable earth and substances such as rocks, sand and gravel. As regards coastal waters the state has sovereignty thereto in so far as the same is within the national seas of Papu New Guinea. However, under the framework of statutory laws, the state has n ownership claims to coastal waters. With regard to coastal fisheries, the State has passe laws to regulate and manage commercial exploitation of the resource but the laws do no go to the extent of reserving to the state ownership of fisheries.

Given the conclusion that the State does not have ownership rights to coastal waters an fisheries, a question is then posed: who owns these resources? To answer this questio the paper intends to examine the regime of customary law that applies in Papua Ne Guinea, in particular, the law regarding the ownership of coastal waters and fisheries.

THE CUSTOMARY LAW OF PNG

The *Constitution* prescribes the hierarchy of the laws of Papua New Guinea whic consists of the Constitution, Organic Laws, Acts of Parliament, Emergency Regulations Provincial Laws, subordinate legislation and underlying law.[51] Underlying Law i comprised of custom, principles of English Common Law and equity and Law formulated by the National Judicial System. Customs, adopted under Schedule 2.1 of the Constitution, may be applied and enforced to the extent that they are not inconsisten with a Constitutional Law or a statute or are not repugnant to the general principles o humanity.

The *Constitution's* general prescriptions for the adoption, application and enforcement o custom is substantiated by the *Customs Recognition Act*.[52] Section 5 of the Act provides:

> Subject to this Act and to any other Law, custom may be taken into account in a case other than a criminal case only in relation to -
>
> (b) the ownership by custom of rights in, over or in
>
> connection with the sea or a reef, or in or on the bed of the sea or of a river or lake, including rights of fishing; or
>
> (c) the ownership by custom of water, or of rights in, over or to water.

Two things should be pointed out as regards the construction or interpretation of the above provision. First, it appears to prescribe for the recognition and application of customs within the context of civil litigation *vis-a-vis* the prescription by custom of rights *in rem*. However, the fact that ownership by custom of water or of rights over or in connection with the sea can be proved in courts of law necessarily presupposes the pre-existence of such rights. Since section 5 does not prescribe for the creation of these rights, the pre-existence of customary rights to coastal water and Fisheries is dependent

51. S.9.

52. Ch. No.19.

upon the customs of each customary group. It is submitted that where the customs of a particular group allow the ownership of rights to coastal waters and fisheries, section 5 of the *Customs Recognition Act* implicitly recognize such rights. The second thing that should be pointed out is that the provision is made "subject to this Act and to any other law". This means that the provisions of any other law, other than common law,[53] that prescribes anything to the contrary would override the provisions of section 5 of the Act. However, as has been pointed out earlier, there is a dearth of statutory prescription as to the ownership of coastal waters and fishery resources in Papua New Guinea. This situation enables the *Customs Recognition Act* to allow the tacit existence, according to custom, of proprietary rights "in, over or in connection with the sea or a reef... including rights of fishing". It is therefore submitted that where the customs of coastal villages vests in them ownership of rights to coastal waters and fisheries, then these belong to them by virtue of their custom.

The ownership of rights by coastal villagers to coastal waters and fisheries means the existence of property. Such property, like any other private property of citizens, is protected from unjust deprivation by the *Constitution*. Section 53(1) of the constitution says that possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired except by an Organic Law or an Act of Parliament. Furthermore, section 53 requires the expropriating law to conform to certain requirements and the expropriating authority to pay just compensation on just terms.

HISTORICAL RECOGNITION OF CUSTOMARY RIGHTS

Under many of the previous colonial administrations which governed the various portions of PNG prior to independence, there was an implicit recognition of the historic rights of the people of the colonies to marine resources and territory.

(a) Trobriand Islands Practice

The Trobriand Islands have been the subject of an extensive commercial fisheries for export market, most notably in the trade for pearls, trocus shells, and Beche de mer.[54] The fisheries in these commodities in the Trobriand Island area was covered by Colonial Ordinances of the Administration of British New Guinea from 1891.[55] This series of Ordinances purported to regulate the licensing and control of the commercial fisheries in both pearls and beche de mer, by requiring the licensing of vessels, diving-suits, and "native" labourers. In addition, it controlled the sale and export of the catch by forbidding the sale to any but a licensed buyer and restricting the ports from which the pearls could be shipped.

While the Ordinance was clearly racist, prohibiting any "native" from holding a pearl-buyers licence, it also protected the interests of the Trobriand inhabitants in certain specific areas. The Ordinance only provided for the licensing and regulation of the fisheries from "ships" or using Hard hat diving suits. It did not restrict the traditional fisherman of the islands from gathering the catch in his dug-out canoe using traditional means, including breath-holding diving.

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53. This is because under the Constitution (Schedule 2.2(1) principles of common law and equity may be applied and enforced only to the extent that they are not inconsistent with, inter alia, custom.

54. The Beche-de-mer is a fleshy relative of the starfish for which there is a considerable demand in the orient. It is improperly identified as a "sea slug" in the Pearl-shell and Beche-de-mer Fishery Ordinance 1911-1934, (No.12 of 1934), Papua Govt. Gaz. of 7.11.1934).

55. The Pearl-shell and Beche-de-mer Fishery Ordinance of 1891, (No.3 of 1891), Statute Law of Papua, 1888-1916, Chapter 13.

Some confusion may result from the reading of the Proclamations of the Acting Administrator of the Possession of British New Guinea which in 1903, prohibited the fishing of Pearls in Western Kiriwina (Trobriand Islands[56]). Further prohibitions included the taking of Beche-de-mer and Pearl-shells, and finally, the Lieutenant-Governor closed the entire pearl fisheries in the whole of the Trobriand Islands in 1910.[57] While it might appear that this effectively closed the industry, the practical effect was that it merely closed it to outsiders, in order to protect the livelihood of the island people,[58] who could still collect and sell the shells and pearls.

Probably the clearest articulation of the rights of the traditional land holders to the resources of their ocean frontage is found in the final proclamation made under the *Pearl, Pearl-Shell and Beche-de-mer Ordinance*, in 1952 which stated:

> ...where any land owned leased or occupied by a Native or owned leased or occupied for the purpose of a plantation has a frontage to the foreshore upon any portion of the coast of the Territory, the fishing for collecting and obtaining of pearl oyster shell, trocus shell or beche-de-mer by any person other than the owner lessee or occupier of such land in any waters within any area bounded by-
>
> (i). he high-water mark on such foreshore;
>
> (ii) the line drawn parallel to and distant 800 metres from such high-water mark; and
>
> (iii) the straight lines drawn to such parallel lines from the points at which the shore boundaries of such land terminate at the high-water mark and drawn at right angles to the straight line joining such points is hereby prohibited until this Proclamation shall be revoked but nothing in this Proclamation shall be deemed to prohibit any Native from fishing in any waters adjacent to his home or waters in which by Native custom he has any rights of fishing for the purpose of supplying his own domestic requirements or disposing of fish for cash.[59]

Finally, in 1953, the *Ordinance* was amended to bring *'fish, crustaceans, oysters, other shell fish and all forms of marine animal life other than whales within the scope of that Ordinance.'*[60]

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56. Proclamation dated 23 June 1903, published in British N.G. Govt. Gaz. of 4th July 1903.

57. Proclamation dated 26th May 1910, Published in Papua Govt. Gaz. of 26th May 1910.

58. The source for this is to be found in Malinowski, Coral Gardens and their Magic, n3, supra. While Malinowski's statements would appear on their face to be in complete contradiction to the intent of the Ordinances, it is quite certain that he knew what he was talking about. In addition to his reputation for careful and accurate reporting of the various facets of Island life, it should be remembered that he lived at various times with the "European" pearl traders, who were the only ones permitted to hold licences under the Ordinances. His discussions, in 1917, of aspects of the pearl trade would indicate that it was still functioning at that time.

59 Proclamation dated 28th August 1952, published in Terr. of Papua New Guinea, Govt. Gaz. 4 September, 1952.

60. Proclamation dated 23 April 1953, No.19 Papua New Guinea Gazette, p.158.

While it has not been possible to obtain the licensing history of the *Ordinance*, the practical effect is that in the area covered by the *Ordinance*, the Trobriand Island area, the coastal people had an exclusive right to all marine animals, except whales, to a distance of 800 metres offshore.

(b) Practice Elsewhere in PNG

In the Papuan region, and New Britain areas of PNG, both the German and British colonial administrations acknowledged the traditional fishing rights of "Natives".[61] The opinion at the time was that even though the colonial powers acquired sovereignty over a three mile territorial sea, this did not abolish the "Native Customary tenure".[62] This tenure was such that:

> The fishing is restricted by rights of ownership. The coast is, or rather was, in the section under discussion, strictly divided into districts, which with the adjoining sea bottom, are each considered as the property of one person for the exclusive rights of fishing with nets. To fish on a neighbours sphere must be previously paid for with TABU. Deep sea fishing with fish baskets was always free. Nobody from the interior could fish on the coasts, but was compelled to buy fish with TABU.[63]

This tenure was further recognized under the British administration such that the Fisheries Ordinance of the Territory of New Guinea[64] of 1922 included the provision:

> This Ordinance shall not apply to any native fishing in waters in which by native custom he has any rights of fishing.[65]

Furthermore, rights to fish in certain areas was a personal heritage and disputes over traditional fishing rights were settled by the Land Titles Commission.

Similar rights were recognized by the colonial administrations in Fiji,[66] and the New Hebrides,[67] where the Land tenure extended out "as far as was prudent to paddle a canoe".[68]

In the Solomon Islands, the following test was required to prove tenure. It must be: (i) continuously observed since its origin, (ii) certain in its principle, and application, and, (iii) reasonable at the time of its inception.[69]

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61. C. McCubbery, 'Marine Rights in the Pacific and New Guinea, in Land Tenure and Indigenous Group Enterprise in Melanesia', 3rd Waigani Seminar (UPNG: Waigani, 1969), p.2.

62. Ibid.

63. Quoting Dr Hahl, a Judge and the German Governor of the colony in 1897, Ibid.

64. As amended up to 1927 Sec.2A.

65. Ibid.

66. Fisheries Ordinance Sec.12, specifically preserves the right of customary tenure.

67. Now the independent state of Vanuatu.

68. Supra, n48, p.4.

69. Ibid.

CONCLUSION

Who owns the coastal seas of Papua New Guinea? If one considers the preceding analysis, and takes a functional approach to the ownership issue, it is fairly certain that, in the Trobriand Island case, no attempt was ever made to practice territorial exclusivity. It is arguable, even in the case of Labai and their secret Kalala fishing, that no serious attempts have been made to keep others from travelling on the seas, or to exact tribute, or even implicitly grant permission each time a trespass is observed. Territorially, then, the seas belong to the government of Papua New Guinea, and the government has not , as yet, transferred that right.

The issue of the resources of the sea is considerably more complex. There is a certain amount of dispute among the Trobriand Islanders themselves as to whether they can or cannot fish in each others waters. This may raise issues of implied licence, but it is a situation that has not been extended to include outsiders, whether they be from elsewhere in PNG, or overseas. There is no evidence that the Trobriand Islanders have ever accepted incursions by outsiders. On the contrary, the practice seems to have been one of exclusivity. There are, however, reported incidents of force being used to prevent outside exploitation.

In addition to the words and practices of the Islanders, there is evidence that successive administrations acknowledged these rights by: (1) *exempting "native" fishermen from laws and regulations which restricted or controlled fishing,* and; (2) *preventing outsiders from harvesting commercial species. In effect, protecting the local fisherman's exclusivity.*

It would also appear that all species are included, not just those which the islanders have traditionally harvested. Even though pearls were not a traditionally taken species, the early commercial pearl fisheries was effectively restricted to the Island's people.

The geographical extent of this practice would appear to be to the outer edge of the fringing reef around the island, and to the offshore reef areas claimed by the diving village of Kevatariya.[70]

The situation *vis-a vis* the Trobriand Islands and the Government of PNG would seem almost analogous to that which exists at international law, under the *Law of the Sea Convention* with respect to the EEZ. As far as issues of Navigation, criminal jurisdiction, pollution and environmental matters are concerned the rights would appear to lie with the Government. As far as resources are concerned, and specifically the living resources, the rights of ownership would appear to lie with the Islanders. As in the EEZ of the coastal state, the Islanders would appear to have first claim to the resources. Failure to make optimum utilization of these resources might open the door for outsiders to come and exploit them.

If the people of the Trobriand Island's have a traditional right of ownership over the reef fisheries, then the granting of fishing licences by the government without their consent would represent an uncompensated expropriation, a situation which would give rise to a cause of action under Papua New Guinea law. It remains to be seen how the situation will resolve itself with respect to outside licences. It was clear during the field study, that it is an issue which is not going to go away.

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70 The Island's Paramount Chief, Chief Pulayasi, when asked the extent of local marine living resource ownership, gave the same opinion.