5

The National Cultural Property (Preservation) Act

Mark Busse

We must build a nation in which tribal languages and cultural boundaries are transcended, not for exploitation of one group by another but for mutual support of each other (Narokobi 1980:78).

The people of the Lake Murray–Middle Fly area of Western Province, among whom I carried out anthropological research in the 1980s, said that objects could never be separated in any way that mattered from the people who made them, and that one could always see the person who made an object in the object that he or she made. This was a striking claim about the relationship between objects and people and an astute statement about the complexity of objects and the capacity that certain things have for evoking complicated thoughts and feelings in those who see them or interact with them. Objects are more than physical things. They are manifestations of creativity, knowledge, physical skill (which is a type of embodied knowledge) and social relations. *Garamuts* from the Sepik River are not simply carved and hollowed out logs which can be used to produce sound—they are the products of the skill and genius of the persons who carved them. They contain and express the beliefs and aesthetics of the people who make and use them, and they are embedded in a system of social relations, both in their ownership and their production, for the person-in-the-object is a social person.

An object can have different meanings for different people, and the same object can have different meanings in different contexts—different

places, different times and different events. The significance of a *garamut* is different for men and women or for older men and younger men in its home community. Similarly, its meaning is different depending on whether it is in the village *haus tambaran*, the National Museum in Port Moresby or an auction house in Sydney, London or New York.

This chapter explores the multiple and often intricate meanings of a particular category of objects—national cultural property—with reference to the National Cultural Property (Preservation) Act which, according to its preamble, is ‘an Act relating to the preservation and protection of objects of cultural or historical importance to Papua New Guinea’.

The relevance of national cultural property to the broader issues of intellectual property in Papua New Guinea is two-fold. First, inasmuch as cultural objects are manifestations of knowledge, creativity and social relations and cannot be separated from these, they are a type of intellectual property. Second, the National Cultural Property (Preservation) Act provides an example of legislation which already exists in Papua New Guinea that is designed to protect a particular form of intellectual property. Therefore, it is worth considering the historical development and provisions of this law, as well as how the law is implemented and enforced.

A consideration of the National Cultural Property (Preservation) Act suggests some important questions that need to be asked in the development of intellectual property legislation. Some of these questions relate to definitions of property and ownership—how we think about the basic multiple relationships between people and things. Others concern the possibility that certain types of property should be protected—and, if so, how and from whom—and whether there are objects that should not be considered property at all. Additionally the National Cultural Property (Preservation) Act raises important questions about how a national government, through intellectual property legislation for example, might act on behalf of the plurality of people who make up the country. These are fundamental questions that arise repeatedly in working with the National Cultural Property (Preservation) Act, and they are the types of questions which must be asked in the process of developing intellectual property legislation.

History

The historical context of the development of cultural property legislation in Papua New Guinea is that of European colonialism. Since the fifteenth century—when both European colonial empires and the systematic collection of antiquities and artifacts by Europeans had their beginnings—war, colonial administration, the desire for scientific knowledge, economic power and theft all contributed to a flow of cultural objects out of colonies and into the powerful countries of Europe and America. The collections in the great eighteenth and nineteenth century museums in cities such as London, Paris, Madrid and Berlin were closely linked to the military, commercial and colonial activities of their governments abroad (Ley 1991:14–16).

The flow of cultural objects from Africa, Central and South America and the Pacific into countries in Europe and North America continues today, although on a lesser scale. The reduction in the movement of cultural objects has been due in part to the efforts of organisations such as UNESCO—which has encouraged greater respect for non-Western cultures and greater international cooperation concerning cultural property—and in part to the efforts of previous colonies to enact and enforce legislation to protect their cultural property (*ibid*:14–16).

The first legislation regulating and restricting the trade and export of cultural property in what is now Papua New Guinea was instituted in the Territory of Papua in 1913. Since then, the laws that deal with cultural objects have developed in response to changing local attitudes about cultural heritage as well as international developments concerning the protection of cultural property. Throughout these changes, what has remained fundamental has been the assertion by the government—first the colonial government and then the government of the independent state—of the importance of restricting the acquisition, ownership and movement of certain objects and categories of objects thought to be important to a wider segment of people than those individuals or groups who owned or controlled them.

The historical discussion that follows focuses on the definitions of cultural property and the kinds of restrictions imposed by the government on movement and ownership of that property.

The Papuan Antiquities Ordinance (1913)

Ordinance Number 14 of 1913 (Section 2), titled 'An Ordinance Relating to Papuan Antiquities', defined Papuan antiquities to include 'Papuan relics' and 'such articles manufactured with Papuan tools and according to Papuan methods and such other articles and things of historical or scientific value or interest and relating to Papua as may be prescribed by regulation'.¹

The 1913 Ordinance made it illegal to remove Papuan antiquities from Papua without first offering the objects for sale at a reasonable price to the colonial government. Enforcement of the Ordinance was 'the duty of all European [meaning white] constables and officers of the Customs' who were given the power to 'seize and detain' any antiquities that were being removed from the Territory. The penalty for exporting Papuan antiquities from the Territory without the written permission of the Commissioner for Native Affairs and Control was a fine not exceeding £100 or, in default, imprisonment for a period not exceeding six months with or without hard labour—substantial penalties for that time. The Ordinance also provided that any Papuan antiquities entered or shipped for export without the permission of the Commissioner for Native Affairs and Control were to be forfeited and vested in the King 'for the use of the people of the Territory'.

The Ordinance was, not surprisingly, very paternalistic. The emphasis was on how an object was made rather than on the meaning of an object for the people who made and used it. What constituted Papuan tools and Papuan methods was assumed to be non-problematic.² There was no suggestion that colonial officers should consult with Papuans or in any way seek their views about what kinds of objects should or should not have been protected under the Ordinance. It was the duty of white police constables and white customs officers to enforce the Ordinance, and they had the power to seize Papuan antiquities which would then be forfeited to the King. It was not the responsibility of indigenous police constables, and no mention was made of the possibility of returning seized objects to the communities from which they had been removed. From the determination as to which objects were worthy of protection to the final disposition of objects that people tried to remove illegally from the Territory, Papuan antiquities were assumed to be the exclusive concern of the colonial government.

The temporal distance contained in the phrase 'Papuan antiquities' underlined the separation between Europeans and Papuans. The word

‘antiquity’ generally refers to ancient times or to objects of great age. The only references in the Papuan Antiquities Ordinance to the past or to the age of objects, however, were implicit in the definition of Papuan antiquities as including relics and things of historical value.³ Despite the fact that the Ordinance was explicitly about antiquities (and thus, it would seem, about objects of great age), it is clear from the definition that objects still being ‘manufactured with Papuan tools and according to Papuan methods’ in 1913 were also considered antiquities, implying that the people who made such objects were living in the distant past.

The dismissal of Papuans and the objects that they made to the distant past was compatible with early twentieth century European ideas about social evolution which expressed the differences between Europeans and non-Europeans in evolutionary and thus temporal terms. This temporal distancing was not only manifested in colonial ordinances such as the Papuan Antiquities Ordinance, but was also reflected in statements characterising Papuans as living in the stone age or in formulations such as ‘the land that time forgot’ and ‘10,000 years in a lifetime’. These characterisations continue to influence Western images of Papua New Guinea today and have been an enduring part of the marketing of Melanesia as a tourist destination for the last 70 years (Douglas 1996:174–80).

Regulations under the Papuan Antiquities Ordinance

During the 40 years following 1913, regulations made under the Papuan Antiquities Ordinance suggest the kinds of conflicts to which the Ordinance gave rise. These regulations further defined the objects protected under the Ordinance, the administrative procedures through which permission to remove antiquities from Papua could be obtained and the factors taken into account in deciding to grant such permission. It is clear that these regulations responded to conflicts between Europeans who had differing views about the appropriateness of buying, selling and exporting Papuan material culture. No evidence suggests that any regulations reflected Papuan concerns or that there was any consultation with Papuans about what should be or should not be protected.

In 1914, a regulation was made which listed the objects considered to be Papuan antiquities within the meaning of the Ordinance. The items were listed in a schedule and defined by reference to the materials from which they were made.⁴ At the end of the list the general definition of

Papuan antiquities in the Ordinance was reiterated in a final catch-all phrase 'all articles manufactured with Papuan tools according to Papuan methods' regardless of material. The same regulation also listed types of items specifically exempted from the provisions of the Ordinance. These types of items did not require government permission in order to be exported.⁵ There is no explanation concerning why it was necessary to gazette a list of examples of Papuan antiquities in addition to restating the Ordinance's broad definition of Papuan antiquities, or why particular types of objects were put on one list rather than the other. Why, for example, were headdresses exceeding two feet in length specifically protected? Why were carvings and paintings on wood restricted, but shields were not? It is likely that the 1914 Regulation reflected a compromise between the business interest of artifact dealers and collectors on the one hand and the colonial administration's concern, for reasons which are unclear, about the wholesale export of indigenous material culture on the other.

A notice published in the *Papuan Government Gazette* in October 1916 and regulations gazetted in 1918 suggest that there were continuing conflicts over the buying, selling and exporting of material culture from Papua. The notice stated that 'permission will not be given to export or ship for export any Papuan Antiquities except to the accredited representative of an officially recognized scientific institution'. This was the first example of a growing justification of the exporting of artifacts from Papua and New Guinea on scientific grounds.⁶

The absurdities of calling contemporary objects antiquities were made clear in 1939 when the Papuan Antiquities Ordinance was amended to include archaeological objects. This amendment gave the Lieutenant-Governor the authority (in Council) to 'make regulations for the preservation and acquisition of objects of antiquity' where objects of antiquity were defined as 'any archaeological treasures of the Territory not being Papuan antiquities'. 'Objects of antiquity' were thus distinguished from 'Papuan antiquities' on the grounds that the former were objects from the past discovered through archaeological methods whereas the latter were objects made by people possibly living in the present but using methods and tools belonging to a culture (Papuan) belonging to the past.

Further historical developments

Legislation similar to the Papuan Antiquities Ordinance was enacted in the Territory of New Guinea in 1922. This ordinance, the New Guinea Antiquities Ordinance, was virtually identical to the Papuan Ordinance with many sections in the two ordinances using exactly the same words and expressions. Two amendments were subsequently made to the New Guinea Antiquities Ordinance that are significant for the purposes of this discussion.

First, an amendment made in 1923 gave the Administrator of the Territory of New Guinea the power not only to restrict the export of certain categories of objects but to prohibit the ownership of certain types of objects by certain people. The same year, this amendment was used to forbid the acquisition or transfer of ownership of human skeletal material of any type including human skulls. It was also subsequently used to prohibit the acquisition or transfer of ownership of two carvings from the Karawari River area.

Second, in 1936 authority to act under the Ordinance was delegated to District Officers in New Guinea. This delegation of authority was made in response to complaints from artifact dealers about what were perceived as unnecessary delays in the approval of exports of artifacts from the Territory.

Following the administrative amalgamation of the Territory of Papua and the Territory of New Guinea, the Papuan Antiquities Ordinance and the New Guinea Antiquities Ordinance were consolidated into the Antiquities Ordinance of 1953. This ordinance included no new provisions and simply incorporated the provisions of the two previous ordinances. It was repealed in 1965 by a new ordinance passed by the joint Territory's House of Assembly.

The National Cultural Property Ordinance (1965)

The passing of the new National Cultural Property (Preservation) Ordinance by the House of Assembly for the Territory of Papua and New Guinea in 1965 marked an important turning point in the legislation on cultural property in what is now Papua New Guinea. This ordinance, which at Independence became the National Cultural Property (Preservation) Act, replaced the language of antiquities with

the language of national cultural property. It also gave the responsibility for the enforcement of the ordinance to the Trustees of the Papua and New Guinea Public Museum and Art Gallery, which had been established in 1954 and was the immediate forerunner of the current National Museum and Art Gallery.

The change from the language of antiquities to the language of national cultural property was important for at least three reasons. First, it removed the social evolutionary absurdity that objects produced in the present were described as objects from the distant past. Second, by defining national cultural property in terms of cultural heritage, it suggested a move from the protection of objects defined in terms of Western scientific interests or in terms of objects made in a particular way ('an article manufactured by Natives with Native-made tools and according to Native methods') to the protection of objects because they were important to Papua New Guineans' own understandings of their cultures and their past. Finally, the new ordinance introduced the idea of a national interest in the protection of cultural objects at the beginning of the last decade of Australian colonial rule.

The National Cultural Property (Preservation) Act

At Independence, the National Cultural Property (Preservation) Ordinance became the National Cultural Property (Preservation) Act. The Act explicitly states that the administration of the Act is the responsibility of the Trustees of the National Museum. The Act (Section 2) defines national cultural property as

any property, movable or immovable, of particular importance to the cultural heritage of the country, and in particular (but without limiting the generality of the foregoing) includes—any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of any of the peoples of the country, past or present.

The definition of national cultural property is thus intentionally broad and general. This is important both because of the cultural diversity of Papua New Guinea—and hence the existence of multiple cultural heritages instead of a single cultural heritage—and because the objects of cultural property covered by the Act are individually unique. In addition to national cultural property, the Act also divides cultural objects into two other categories—proclaimed cultural property and objects not covered by the provisions of the Act.

Proclaimed cultural property

The most restricted category of cultural property defined by the National Cultural Property (Preservation) Act is 'proclaimed cultural property'. Under Section 4 of the Act, the Head of State, acting on advice from the Trustees of the National Museum, may declare any object or category of objects to be proclaimed cultural property.

To date, about 400 individual objects have been gazetted as proclaimed cultural property. As required under Section 12 of the Act, the National Museum, on behalf of the Trustees, maintains a register of these objects which cannot legally be acquired or moved without the permission of the Trustees. People who have possession or control of objects that are proclaimed cultural property must legally notify the Trustees if there is any change in the situation or condition of the objects.

Some of these objects of proclaimed cultural property are now in the National Museum, but the majority are located in villages where villagers consider them to be important cultural objects. Because the protection of these objects depends on cooperation between the National Museum and the people in the villages in which the objects are located, the National Museum uses the Act as much as possible to assist villagers to protect those objects which they want to protect. This is in contrast with the colonial period and the period immediately following Independence when government officers recommended objects for gazettal primarily on the basis of an object's artistic or historical value from a European perspective. At the same time, the National Museum tries to monitor community attitudes since the meanings of objects may change over time. Thus objects that a community once wanted to protect may become less important and may even become objects that the community wants to dispose of.

Several categories of objects (as opposed to particular objects) have also been gazetted as proclaimed cultural property—human remains of any kind, traditional funerary objects, carvings or engravings on stone, carvings or engravings made wholly or partly with stone tools, paintings or carvings on rocks or in caves, ancient pottery and relics of historical or antiquarian interest. In addition, any of the following categories of objects are proclaimed cultural property if they were made before 31 December 1960—parts of ceremonial houses, carved *garamuts* and *garamut* sticks, carved wooden masks, masks of any material other than wood, carved wooden shields, carved wooden ancestral boards, musical

instruments and carved wooden figures. It is important to note that while the Act prohibits both the acquisition and exporting of objects in these categories if they were made before the end of 1960, this does not mean that objects made later are automatically acceptable exports. Objects made after 1960 may still be prohibited exports because of their importance to the cultural heritage of the country or the cultural heritage of a particular group of citizens.

Objects exempted from the Act

At the other end of the continuum from proclaimed cultural property are those categories of objects which are specifically exempted from the provisions of the National Cultural Property (Preservation) Act. These mainly include objects that have been recently made for sale to tourists and artifact dealers. Most objects regularly purchased by tourists as souvenirs are included on the list of exempted categories of objects.

National cultural property

The third category of objects defined by the Act is national cultural property. Most cultural objects fall into this category. The Act defines national cultural property as any property of particular importance to the cultural heritage of the country, including any objects made or adapted for use in connection with the traditional cultural life of any of the peoples of the country. The Act thus allows for the protection of hybrid objects which are combinations of traditional and non-traditional materials. Objects as diverse as a *garamut* made in 1970, a lime gourd and spatula, a mask made in 1995 for the ordination of a priest and a piece of metal hafted as an adze for carving canoes are all national cultural property.

The Act gives the Trustees of the National Museum considerable power with respect to national cultural property. For example, they have the power to recommend to the Head of State that national cultural property—whether movable or immovable—should be compulsorily acquired, or that ownership of it should be prohibited or restricted.

The Trustees, or persons authorised by them, may enter and search any land, building, aircraft, vessel or vehicle in which there is reasonable cause to believe that there may be national cultural property. A person can be required to provide information about, or to produce for inspection, national cultural property in his or her control or possession.

The Trustees and their representatives also have the power to seize and detain for examination any item of national cultural property. Anyone who hinders or obstructs the Trustees or their representatives in the exercise of these powers is guilty of an offence under the Act. Finally, people who wilfully damage, deface or destroy national cultural property are also guilty of an offence.

Implementation and enforcement

Under the National Cultural Property (Preservation) Act, a person exporting or removing from the country any item of national cultural property without the written consent of the Trustees of the National Museum is guilty of an offence. This permission is given in the form of an export permit or license to export. The decision about whether an object of national cultural property should be allowed to leave the country is a decision for the Trustees of the National Museum who are also authorised to settle any disputes arising from the enforcement of the Act. The primary criterion used to make this decision is whether an object is important to the cultural heritage (or cultural heritages) of the country. Lesser criteria include age, rarity and whether the type of object is represented in the collections held by the National Museum.

On a day-to-day basis, the enforcement of the National Cultural Property (Preservation) Act, including the issuing of export permits, is carried out by staff at the National Museum. People who want an export permit must apply in writing and must either produce the objects that they want to export for inspection or provide clear photographs of the objects. The Museum reserves the right (given by the Act) to inspect objects in person. There is no charge for export permits, and most permits are issued within 24 hours after the application is received.

The cooperation of people in rural areas and provincial centres is vital to the enforcement efforts of the National Museum, and in most instances there is good cooperation from individuals and organisations. The Museum regularly receives reports from villagers, government officers and tourist operators about possible violations of the Act, which are investigated often in cooperation with police and customs officers at the district, provincial and national levels. Any item of national cultural property exported or attempted to be exported without the written permission of the Trustees is a prohibited export within the meaning of the Customs Act and so can be seized by the customs officers under the provisions of that Act.

The main difficulties encountered by the National Museum in implementing the National Cultural Property (Preservation) Act lie in not having sufficient resources to enforce the Act and in the high prices that Papua New Guinean national cultural property fetches on the international art market. The adequate enforcement of legislation such as the National Cultural Property (Preservation) Act requires a significant commitment of time by Museum personnel.

The high value of Papua New Guinean national cultural property on the international art market has two effects. First, the National Museum is unable to compete to purchase such objects when they are offered for sale in other countries. Second, and more importantly, dealers and collectors are willing to take considerable risks to remove objects from the country illegally.

International agreements

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (often referred to as the World Heritage Convention) is the primary international agreement concerned with cultural heritage. Papua New Guinea recently acceded to this convention, which in the cultural arena seeks to protect only immovable cultural property such as monuments, groups of buildings and sites. The National Museum is currently taking the first steps in having two important archaeological sites added to the list of World Heritage sites. These are the Kuk archaeological site outside Mount Hagen, which was one of the earliest agricultural sites in the world, and archaeological sites on the Huon Terraces in Morobe Province, which contain the earliest evidence of human habitation on the island of New Guinea. In July 1997, the Director of the National Museum made a preliminary presentation concerning these two sites at a UNESCO meeting in Suva where possible World Heritage sites in the Pacific were reviewed.

The main international agreement on movable cultural property, as opposed to immovable cultural property, is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Papua New Guinea is not currently a signatory to this agreement. This convention recognises that states have an obligation to protect cultural property from illegal export, theft and destruction. It also recognises that the exchange of cultural property is important for cross-cultural

understanding, and that the definition of cultural heritage is subjective and varies from culture to culture. Signatory states are permitted to declare exactly what forms of cultural property are to be protected (Ley 1991:19).

Signatories to the Convention on Cultural Property agree to oppose illicit traffic in cultural property in several ways, including creating inventories of cultural property, educating the general public, formulating appropriate laws and penalties, enforcing a system of import and export permits and assisting in returning illegally exported cultural property.

Opinions concerning the effectiveness of the Convention on Cultural Property vary considerably. In a 1991 report on a ministerial review of cultural heritage legislation in Australia, it was stated that the Convention 'is widely regarded as the most important agreement relating to the traffic in cultural property' (Ley 1991:18). A more recent 1996 review of the Convention, however, stated that '[t]he extent to which the convention has succeeded in stemming the flow of cultural property to dealers in ethnic artworks is not clear and may be minimal' (Posey and Dutfield 1996:115). Those who argue that the Convention is relatively ineffective point to the fact that it relies on member states to introduce their own legislation and to police it effectively, and to the fact that a number of states that are important in the art importing business, including Britain, France, Germany and Switzerland, have not acceded (Ley 1991:19–20).

Conclusion

Cultural objects are complex manifestations of creativity, knowledge and social relations, and cultural property is a form of intellectual property. For Papua New Guinea, legislation protecting cultural property has existed since 1913. At present, the movement and, in some instances, the ownership of cultural property is governed by the National Cultural Property (Preservation) Act which is administered by the Trustees of the National Museum.

While using the language of property, the National Cultural Property Act restricts the transaction of certain objects and categories of objects by asserting national interest—they are important to the collective history and identity of the whole people, the citizens, of the country. The history of the development of the Act has been toward allowing local people to say what objects they think are important and which

they want to protect. The government, by acting to protect objects of national cultural property, acts on behalf of a plurality of people. In taking account of local concerns, it argues for the importance of certain objects beyond the local level, for the importance of objects for the nation as a whole.

Debates about intellectual property, including cultural property, must consider not only the protection of people's rights over property and over the products of their creativity and labour. They also need to consider whether the capitalist concept of alienable property—of objects and things that can be freely bought and sold—is appropriate for all types of objects and cultural intangibles such as songs, dances and oral traditions. These debates must take account of the complexity and social embeddedness of objects, of the difficulty of saying where an object or an intangible aspect of culture begins and ends. They need to take account of what people in the Middle Fly would describe as the person-in-the-object.

Notes

- 1 In common English usage, a relic is a survival from the past or something of religious reverence.
- 2 For example, questions such as whether a steel axe head—hafted in the same way that stone axes were hafted—constituted a Papuan tool were not considered.
- 3 The historical value of an object was, of course, something for the colonial government rather than the local people to determine.
- 4 The items considered Papuan antiquities and listed in the regulation included: carvings, paintings or drawings on wood, bamboo, coconut palm, stone or bone (including skulls); implements, weapons, tools and ornaments made of the same materials; shell ornaments and carvings on shell; ceremonial canoes; drawings or representations of animals on pottery; garments made of feathers; feather headdresses exceeding two feet in length; fossilised bone; stuffed human heads; any dried or preserved specimen or part of a human body; and armour of any kind of material.
- 5 The categories of objects exempted were as follows: all articles consisting of common types of disc clubs, spears, miniature houses, model canoes, bows, arrows, nets, native cloth, *kaipas* (net bags), wooden clubs, belts, shields, bamboo pipes (*baubaus*), baskets, combs, spoons, wristlets, fishing sticks, walking sticks and matting.
- 6 The purpose of collecting, and in particular the distinction between the collecting of curios by artifact dealers and scientific collecting, was taken up in 1923 by the government anthropologist in Papua, F.E. Williams (1923).