

BAB I

PENDAHULUAN

1.1.Latar Belakang

The State's task as the State Purpose is contained in the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia.¹The phrase *"that shall protect the whole people of Indonesia and the entire homeland of Indonesia"* contained in the fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia is the aim of protecting all components that make up the Indonesian nation, including the people, natural wealth, and national values that should be preserved. Therefore, the State is obliged to protect the culture of the Indonesian people.

There are 99,154 registered cultural heritage objects and 49,756 are verified from 2013 to 2020.² This shows the cultural diversity of Indonesia as the identity of a nation whose cultural diversity is internationally recognized. According to Richards, one of the trends in global tourism is the growing awareness of tourists to understand past cultural heritage objects. This is intended to seek authenticity and identity for the tourist concerned. Efforts to understand cultural heritage objects of the past (cultural heritage) are not only carried out within the territory of one's own country but also across countries. Past cultural heritage objects are considered as cultural capital in the development of cultural tourism.³

The large number of cultural heritage objects scattered throughout Indonesia is a challenge for the Indonesian government in protecting its existence to remain in the territory of the Republic of Indonesia. The cultural property that was illegally taken out from the territory of Indonesia, mostly caused by illegal trade, smuggling, and looting during the colonialism era. The Illegal ownership of Indonesian cultural property is no longer limited to objects of cultural value

¹ See Fourth Alinea of preamble of the 1945 Constitution of the Republic of Indonesia, *"Pursuant to which, in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice"*.

² Direktorat Perlindungan Kebudayaan Kementerian Pendidikan dan Kebudayaan Republik Indonesia, *Sistem Registrasi Nasional Cagar Budaya: Rekap Tahunan*, accessed through <https://cagarbudaya.kemdikbud.go.id/public/rekap> dated October 21, 2020, 10.09 AM.

³ Ardika, I.W, (2015) *Warisan Budaya Perspektif Masa Kini*, Denpasar: Udayana University Press, at 57. Nuraini, 2021

but also objects of religious value.⁴ According to Intan Mardiana, many historical objects belonging to Indonesia are scattered in the Netherlands, England, Austria, and even Russia. In England, for example, there are around 6,000 collections, while in Australia there are around 3,000 Indonesian Ethnographic objects.⁵ Meanwhile, 1,500 pieces of Indonesian historical objects brought by the Dutch during the colonial period were returned at the end of 2019.⁶ International law has regulated legal protection of cultural heritage objects through the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁷ and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.⁸ It can be said that the 1995 UNIDROIT Convention and the 1970 Convention are compatible and complementary. To date, the 1970 Convention has been ratified by 140 states.⁹

Meanwhile, the 1995 Convention has 48 contracting states in 2019,¹⁰ from total 63 state parties. However, until now Indonesia has ratified neither the UNESCO Convention 1970 nor the 1995 UNIDROIT Convention even though Indonesia has been a member of UNESCO since 27 May 1950 and ratified the United Nations Convention Against Transnational Organized Crime (UNTOC) with Law Number 5 of 2009 which one of the forms the transnational organized crime, as stipulated in UNTOC, is a crime against cultural heritage objects.

Daud Aris Tanudirjo, an archaeologist from Gadjah Mada University, believes that the time has come for the Indonesian Government to take a position on the plan to ratify the UNESCO 1970 Convention and the 1995 UNIDROIT Convention. This urgency is triggered by Law Nr. 11 of

⁴ (Makara, M.T, 2006) cited in Ibrahim, A.L, Dirkareshza, R, (2020), Pemberantasan Kejahatan Transnasional Penyelundupan Benda Cagar Budaya Melalui Hukum Nasional dan Kerja Sama Internasional, *Justitia Et Pax Jurnal Hukum*, Volume 36, Number 1 at 71.

⁵ (Nurdin, N, 2020) cited in Aji Lukman Ibrahim, Rianda Dirkareshza.

⁶ Setiawan, A, (January 8, 2020) *Jalan Panjang Memulangkan Jarahan Belanda*, accessed through <https://historia.id/kultur/articles/jalan-panjang-memulangkan-jarahan-belanda-vgXm0>, dated October 21 2020, 11.20 AM.

⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entry into force 24 April 1972)

⁸ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted June 24, 1995, entry into force July 1, 1998)

⁹ Convention 1970 against Illicit Trafficking, accessed through <https://en.unesco.org/fighttrafficking/1970> dated October 21, 2020, 1.00 PM.

¹⁰ UNIDROIT, (January 12, 2021), Status - UNIDROIT - International Institute for the Unification of Private Law - Institut International pour l'Unification du droit privé, accessed through <https://www.unidroit.org/status-> cp dated October 21, 1.30 PM.

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2010 concerning Cultural Heritage and Law Nr. 5 of 2017 concerning Cultural Advancement which requires the protection of cultural heritage objects including the return of these objects. Dr. Wahyu Yun Santoso, an expert on international public law at Gadjah Mada University, supports this idea by emphasizing that the current laws and regulations need to be updated by referring to the latest cases regarding the theft of cultural heritage objects.¹¹ Article 20 of Law Nr. 11 of 2010 concerning Cultural Conservation has regulated the returning of cultural heritage objects abroad to Indonesia can be conducted one of them by ratified international treaties.¹² In practice, the return of cultural heritage objects to Indonesia always depends on diplomacy to other countries. Ratification is deemed necessary and important because these agreements generally involve the interests and bind the future of the state in certain matters because it must be ratified by the highest state power.¹³ To ensure legal certainty and legal protection for the return of Indonesian cultural property, it is necessary to ratify the 1970 Convention and the 1995 Convention and reform the regulations regarding procedures of repatriation of cultural conservation objects to Indonesia.

Based on the issues above, it can be concluded that this research will explain Indonesia's Urgency To Ratify The 1970 UNESCO Convention and The 1995 UNIDROIT Convention To Protect Cultural Properties' Existence As Effort To Reform Law Nr. 11 Of 2010 Concerning Cultural Conservation and The Concept Of Regulation Regarding The Return Of Stolen Or Illegally Exported Cultural Property Of Indonesia Based On Other Countries' Regulation In Perspective Of International Law.

1.2. Rumusan Masalah

1. What is Indonesia's Urgency to Ratify the 1970 UNESCO Convention and the 1995 UNIDROIT Convention to Protect Cultural Properties' Existence as Effort to Reform Law

¹¹ Kementerian Luar Negeri Republik Indonesia, (November 13, 2019) *Urgensi Pelindungan Cagar Budaya dan Pengembalian Benda Cagar Budaya Indonesia dari Luar Negeri*, accessed through <https://kemlu.go.id/portal/id/read/784/berita/urgensi-pelindungan-cagar-budaya-dan-pengembalian-benda-cagar-budaya-indonesia-dari-luar-negeri> dated October 16, 2020, 4.00 PM.

¹² See Article 20 Law Nr. 11 of 2010 concerning Cultural Conservation: "*The returning of Cultural Conservation from Indonesia available outside the territory of the Republic of Indonesia shall be conducted by the Government according to the ratified international agreement, bilateral agreement, or delivered directly by the owner, unless agreed otherwise as long as not contradictory to the provisions of the legislation.*"

¹³ Mauna, B, (2018), *Hukum Internasional Pengertian, Peranan, dan Fungsi dalam Era Dinamika Global*, second ed, Bandung: PT. Alumni, at 118.

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Nr. 11 Of 2010 Concerning Cultural Conservation?

2. How is The Concept of Regulation Regarding The Return of Stolen or Illegally Exported Cultural Property of Indonesia Based on Other Countries' Regulation in Perspective of International Law?

1.3. Ruang Lingkup Penelitian

1. Indonesia's Urgency to Ratify the 1970 UNESCO Convention and the 1995 UNIDROIT Convention to Protect Cultural Properties' Existence as Effort to Reform Law Nr. 11 Of 2010 Concerning Cultural Conservation.
2. The Concept of Regulation Regarding The Return of Stolen or Illegally Exported Cultural Property of Indonesia Based on Other Countries' Regulation in Perspective of International Law.

1.4. Tujuan dan Manfaat Penelitian

1. Tujuan Penelitian

- a. Untuk Menganalisa Urgensi Indonesia Meratifikasi Konvensi UNESCO 1970 dan UNIDROIT 1995 untuk Melindungi Keberadaan Benda Cagar Budaya Indonesia Sebagai Upaya Pembaruan Hukum Nasional.
- b. Untuk Menganalisa Konsep Pengaturan Mengenai Repatriasi Benda Cagar Budaya di Indonesia dari Negara-Negara Lain di Masa Mendatang dari Perspektif Hukum Internasional.

2. Manfaat Penelitian

a) Manfaat Akademis/Teoritis

- 1) Hasil penelitian ini dapat memberikan kontribusi dalam pemahaman dan pengembangan pengetahuan di bidang hukum mengenai urgensi Indonesia meratifikasi Konvensi UNESCO 1970 dan Konvensi UNIDROIT 1995 untuk menjamin kepastian hukum dalam hal repatriasi benda cagar budaya akibat penyelundupan, pencurian maupun kepemilikan ilegal di luar negeri.
- 2) Hasil penelitian ini dapat memberikan kontribusi dalam pemahaman bahwa benda cagar budaya milik Indonesia bernilai historis dan ekonomis yang mana

dapat menunjang kegiatan ekonomi di daerah tempat benda cagar budaya tersebut berada, sehingga dalam hal perlindungan hukum dan upaya repatriasi terhadap benda cagar budaya perlu menjadi atensi untuk Indonesia sebagai negara yang mempunyai banyak benda cagar budaya.

- 3) Hasil penelitian ini dapat memberikan masukan untuk pembentuk undang-undang dalam hal memperbaharui Undang-Undang Nomor 11 Tahun 2010 tentang Cagar Budaya khususnya terkait pengaturan lebih rinci mengenai repatriasi/pemulangan benda cagar budaya ke Indonesia.

b) Manfaat Praktis

- 1) Hasil penelitian ini dapat menjadi bahan pembelajaran dan masukan positif bagi Peneliti untuk lebih memahami mengenai aspek hukum perlindungan terhadap benda cagar budaya khususnya dalam hal benda cagar budaya yang dicuri, diselundupkan ke luar negeri atau hasil dari kepemilikan ilegal di luar negeri dan upaya pemulangnya ke Indonesia.
- 2) Hasil penelitian ini dapat memberikan masukan bagi Pemerintah Indonesia untuk segera meratifikasi Konvensi UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 dan Konvensi UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 untuk menjamin kepastian dan perlindungan hukum terhadap benda cagar budaya Indonesia yang hilang karena dicuri atau diselundupkan ke negara lain dapat dipulangkan ke Indonesia dengan ketentuan hukum yang berlaku pada kedua konvensi tersebut.
- 3) Hasil penelitian ini dapat memberikan masukan bagi Kementerian Pendidikan dan Kebudayaan RI, Kementerian Luar Negeri, NCB INTERPOL Indonesia dan instansi terkait lainnya dalam melakukan upaya preventif dan represif mengenai benda cagar budaya yang dicuri atau diselundupkan ke luar negeri atau dimiliki dengan cara-cara yang ilegal dan upaya repatriasi terhadap benda cagar budaya tersebut.