

BAB V

KESIMPULAN DAN SARAN

A. KESIMPULAN

Kepemilikan dari suatu benda selalu diidentikan dengan penguasaan. Suatu benda harus berada di tangan pemiliknya. Hal inilah yang melatarbelakangi klaim restitusi dan pengembalian oleh negara dalam hukum internasional publik. Hukum Internasional tidak secara tegas mengatur mengenai kepemilikan, tapi yang diatur adalah hubungan (*link*) antara negara dan benda cagar budaya yang menjadikannya benda cagar budaya suatu negara.

Walaupun kepemilikan tidak dapat ditentukan secara absolut melalui hukum internasional dan instrumen hukum internasional tidak berlaku retroaktif sehingga sulit diterapkan kepada kasus-kasus yang terjadi sebelumnya, prinsip-prinsip hukum internasional dan hukum kebiasaan internasional tetap bisa digunakan untuk menentukan pihak mana yang paling berhak atas suatu benda cagar budaya. Pandangan prinsip-prinsip umum hukum internasional tetap cenderung berpihak ke negara asal yang bagaimanapun mengalami kerugian atas kehilangan budayanya. Jika terbukti perolehannya dilakukan dengan cara dicuri atau diekspor secara ilegal, maka negara yang memperolehnya tersebut harus mengembalikannya ke negara asal. Oleh karena itu, aspek-aspek lain, seperti keabsahan ekspor, juga menjadi pertimbangan.

Perkembangan hukum internasional dewasa ini menunjukkan pendekatan penyelesaian sengketa yang lebih memperhatikan dan peka terhadap kepentingan seluruh pihak. Fokus utama penyelesaian sengketa bukan lagi menentukan secara mutlak pihak mana yang harus memiliki dan menguasai suatu benda cagar budaya, tetapi mencari jalan keluar alternatif yang bisa diterima semua pihak. Dengan demikian, perbedaan pandangan atas kepemilikan, penguasaan dan restitusi benda cagar budaya bisa dipertemukan.

B. SARAN

Negara-negara yang mengambil benda cagar budaya secara ilegal atau melalui penjarahan, berdasarkan kesadaran hukum dan moral, seharusnya mengembalikan benda cagar budaya tersebut kepada negara asalnya. Negara harus memulai usaha untuk melakukan kerja sama internasional dan mencari solusi alternatif atas sengketa-sengketa benda cagar budaya demi terpenuhinya kepentingan seluruh pihak secara efektif dan efisien.

Penelitian ini belum lengkap, selanjutnya dapat dilakukan lebih spesifik terhadap isu-isu yang lebih mendalam dari aspek-aspek yang dibahas secara luas dalam tulisan ini, seperti dalam tulisan ini penulis cenderung fokus pada hubungan antar negara dan tidak terlalu membahas pihak-pihak lainnya seperti masyarakat adat, museum atau orang perseorangan. Penelitian dapat juga dikaji melalui perspektif bidang hukum lain, seperti Hukum Perdata Internasional dan Hukum Internasional Intertemporal, yang dapat melengkapi cakupan tulisan ini.

DAFTAR PUSTAKA

Konvensi dan Perjanjian Internasional

- Convention Concerning the Protection of the World Cultural and Natural Heritage (diadopsi 16 November 1972, mulai berlaku 17 Desember 1975) 1037 UNTS 151.
- Convention for the Protection of Cultural Property in the Event of Armed Conflict (diadopsi 14 May 1954) 249 UNTS 240.
- First Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (diadopsi 14 Mei 1954, mulai berlaku 7 Agustus 1956) 249 UNTS 358.
- Statute of the International Court of Justice (diadopsi 26 Juni 1945, mulai berlaku 24 Oktober 1945) T.S. No. 993.
- Treaty of Lahore (Duleep Singh-East India Company) (diadopsi 29 Maret 1849, mulai berlaku 5 April 1849)
- UNESCO Convention on the Means of Prohibiting and Preventing (diadopsi 14 November 1970, mulai berlaku pada 24 April 1972) 823 UNTS 231.
- UNCHR, 'Human Rights of Indigenous Peoples: Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people' (2000) E/CN.4/Sub.2/2000/26.
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (diadopsi 24 Juni 1995, mulai berlaku 1 Juli 1998) 34 ILM 1322.
- Vienna Convention on the Law of Treaties (diadopsi 23 May 1969, mulai berlaku 27 January 1980) 1155 UNTS 331

Kasus dan Undang-Undang

- All India Human Rights & Social Justice Front vs. The High Commissioner of U.K. (W.P.(C) No. 000185/2016) 21 April 2017
- Syllogos Ton Athinaion v the United Kingdom (Decision) [31 Mei 2016] Application no. 48259/15.
- Undang-Undang Mesir Nomor 14 tahun 1912 tentang Barang Antik

Resolusi dan Publikasi Resmi

- Culture, Media and Sport Committee, Cultural property: return and illicit trade, 5 June 2000, HC 371-II, Q547-93
- UNESCO, 'Draft Operational Guidelines of the UNESCO 1970 Convention' (2013) C70/13/1.SC/INF.2/REV2.
- UNESCO, 'Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property' (2015).
- UNESCO dan UNIDROIT, 'Model Provisions on State Ownership of Undiscovered Cultural Objects: Explanatory Report with model provisions and explanatory guidelines' (UNIDROIT, 24 Juni 2014).
- UNGA, 'United Nations Declaration on the Rights of the Indigenous People' (13 September 2007) A/61/L.67.

UNIDROIT Secretariat, 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects : Explanatory Report' Unif. L. Rev. 2001
Woodhouse John dan Sarah Pepin, 'Briefing Paper Number 02075: The Parthenon Sculptures' (House of Commons, 9 Juni 2017).

Literatur: Buku

Soekanto Soerjono, S.H., M.A. dan Sri Mamudji, S.H., M.L.L., Penelitian Hukum Normatif Suatu Tinjauan Singkat, (Rajawali Pers 2015).
Dalrymple William dan Anita Anand, Koh-i-Noor: The History of the World's Most Infamous Diamond (Bloomsbury Publishing, 2017).
Gulö W, Metodologi Penelitian (Grasindo 2002)
Max Planck Encyclopedia of Public International Law, 'Restitution' (OPIL, Februari 2013).
Merryman John (ed.), Imperialism, Art And Restitution (Cambridge University Press, 2006).
Merryman John, Thinkin about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law (Kluwer Law International, 2009).
Prott LV, Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995 (Institute of Art and Law 1997).
Prott LV (ed.), Restitution of Works of Art pursuant to Private and Public International Law, Recueil des Cours 80–90, The Hague: Martinus Nijho).
Stamatoudi Irini, Cultural Property Law and Restitution (1st ed, Edward Elgar Publishing 2011)
St Clair William, Lord Elgin and the Marbles (Oxford University Press 1967)

Literatur: Jurnal

Bearden Lauren, 'Repatriating the Bust of Nefertiti: A Critical Perspective on Cultural Ownership' (2012) 2(1) The Kennesaw Journal of Undergraduate Research
Cornu Marie dan Marc André Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' (2010) International Journal of Cultural Property 17:1-31
Fishman Joseph, 'Locating the International Interest in Intranational Cultural Property Disputes' (2010) 35(2) Yale Journal of International Law 347
Frigo Manlio, 'Cultural property v. Cultural Heritage: A "battle of concepts" in international law?' (2004) 86 IRRC 367
Gerstenblith Patty, 'The Public Interest in the Restitution of Cultural Object' (2001) 16(2) Connecticut Journal of International Law.
Knox Christine, *Note: They've lost their Marbles: 2002 Universal Museums' Declaration, the Elgin Marbles and the Future of the Repatriation Movement*, (2006) 29 Suffolk Transnat'l L. Rev. 315
Merryman John, 'The Retention of Cultural Property' (1988) University of California Davis Vol. 21, 477
Merryman John, 'Thinking about the Elgin Marbles' (1985) 83(8) Michigan Law Review 1880.

- Merryman John, 'Two Ways of Thinking About Cultural Property' (1986) 80(4) AJIL 831.
- O' Keefe Roger, 'The Meaning of 'Cultural Property' under the 1954 Hague Convention' (1999) 46 NILR 26
- Roehrenbeck Carol, 'Repatriation of Cultural Property—Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments' (2010) 38(10) IJLI 185.
- Song Ho-Young, 'International Legal Instruments And New Judicial Principles For Restitution Of Illegally Exported Cultural Properties' (2016) 4(2) Penn State Journal of Law and International Affairs.
- Siehr Kurt, 'The Beautiful One has Come – To Return: The Return of the Bust of Nefertiti from Berlin to Cairo' (Imperialism, Art and Restitution Conference, Washington University School of Law, 26-27 Maret 2004) <[https://law.wustl.edu/harris/Conferences/imperialism/Siehr_PAPER_The %20Bust%20of%20Nefertiti%202.pdf](https://law.wustl.edu/harris/Conferences/imperialism/Siehr_PAPER_The%20Bust%20of%20Nefertiti%202.pdf)>.
- Siehr, 'The Protection of Cultural Heritage and International Commerce' (1997) 6(2) International Journal of Cultural Property 304.
- UNIDROIT Secretariat, 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects : Explanatory Report' Unif. L. Rev. 2001-3.
- Urice Stephen, 'The Beautiful One Has Come – to Stay' dalam John Henry Merryman (ed.) *Imperialism, Art And Restitution* (Cambridge University Press, 2006).

Literatur: Artikel

- Anand Anita, 'The Koh-i-Noor diamond is in Britain illegally. But it should still stay there' (*The Guardian*, 16 February 2016) <<https://www.theguardian.com/commentisfree/2016/feb/16/koh-i-noor-diamond-britain-illegally-india-pakistan-afghanistan-history-tower>>.
- El-Aref Nevine, '100-year battle for the iconic Egyptian bust of Nefertiti' (Ahrām Online, 1 September 2012) <<http://english.ahram.org.eg/NewsContent/9/40/51764/Heritage/Ancient-Egypt/year-battle-for-the-iconic-Egyptian-bust-of-Neferti.aspx>>
- Elginism, 'Arguments for & against the return of the Elgin Marbles' (Elginism, 14 Februari 2009) <<http://www.elginism.com/elgin-marbles/arguments-for-against-the-return-of-the-elgin-marbles/20090214/1733/>>
- Squires Nick, 'Greece Snubs Amal Clooney over Elgin Marbles' (The Telegraph, 14 Mei 2015) <<https://www.telegraph.co.uk/news/worldnews/europe/greece/11604881/Greece-snubs-Amal-Clooney-over-Elgin-Marbles.html>> d
- UN, 'United Nations Declaration on the Rights of Indigenous Peoples' (United Nations) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.
- UNESCO, '1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict' (UNESCO)

- <<http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/>>.
- UNESCO, ‘*Illicit Trafficking of Cultural Property*’ (UNESCO)
<<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention/>>.
- UNESCO, ‘The World Heritage Convention’ (UNESCO)
<<https://whc.unesco.org/en/convention/>>.
- UNESCO, ‘Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – 1970’ (UNESCO) <<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/>> diakses pada 16 April 2018.
- UNESCO, ‘The 1995 UNIDROIT Convention’ (*UNESCO*)
<<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention/>>.
- UNIDROIT, ‘The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects - an overview’ (UNIDROIT, 2014)
<<https://www.unidroit.org/overviecp/english>>.
- ‘Nefertiti’ (*Society for the Promotion of the Egyptian Museum Berlin*)
<<http://www.egyptian-museum-berlin.com/c53.php>>.
- ‘The Parthenon Sculptures’ (*The British Museum*)
<http://www.britishmuseum.org/about_us/news_and_press/statements/part_henon_sculptures.aspx>.