



Penal Mediation in the Tourist Accident Case

Kuswardani kuswardani^{a*}, Fajar Ilhamsyah^b

^{a,b}*Faculty of Law, Universitas Muhammadiyah Surakarta, Indonesia*

^a*Email: kus283@ums.ac.id*

^b*Email: fajarilhamsyah3@gmail.com*

Abstract

Previously, mediation is an alternative settlement of disputes in the civil law, but in its development it became an alternative in resolving certain criminal cases, among them is the tourist accident cases at the tourism. This mediation is actually a conflict solving that rooted in philosophical values of the Indonesian nation, and this is a manifestation of customary justice. This study aims to describe penal mediation in tourist accidents, while the research approach is normative - empirical. The research results show that the solving of tourist accidents usually using penal mediation in the form of victim-offender mediation. That solving can accommodate better the rights of victims, so that the balance can be realized, and the principles of justice are fast, simple, and the effective cost can be achieved.

Key Words: penal mediation; tourist accident; alternative criminal settlement.

1. Introduction

Tourism or recreation is not only a human need, but it is legally the right of everyone who is protected by law. This statement is in Article 19 paragraph (1) a letter of Law about Tourism, stating that "Everyone has the right to have opportunity in meet tourism needs." Furthermore, on the Article 20 c and e letters regulate about the legal and security protection also personal rights protection [1]. These articles show that tourists or visitors of tourism have a legal guarantee of their rights and legal protection. Furthermore, this law also regulates the obligations that must be fulfilled by tourism entrepreneurs [2] among others, providing comfort, friendliness, security protection, and tourist safety.

* Corresponding author.

Reference [3] So tourism entrepreneurs should not be or forbidden to ignore the safety of visitors, especially tourist destinations with relatively high risk. Rowo Jombor and Umbul Ponggok are two tourist attractions located in Klaten Regency. This tourism spot is a choice of domestic tourists in the Central Java and Yogyakarta Special Region (DIY). Rowo Jombor is a water tourist attractions equipped with floating stalls and supermarkets [4] while Umbul Ponggok is tourist attractions such as snorkeling, besides that this tourist attractions is often also used for diving practice. Therefore, the last two years is increased drastically to reach 300 - 400 visitors per day [5] while tourism in Rowo Jombor has experienced a decrease, but since 2018 there has been an increase in visitors per day, on average almost the same as Umbul Ponggok [6]. Due to The Increasing number of visitors, tourist attractions entrepreneurs should be more notice to the safety of visitors in order to safe, comfortable and truly able to enjoy the tour. However, it is important to understand that accidents at tourist attractions, such as beach, pennant, and swamp cannot simply blame tourism attractions managers, because visitors often have a desire to know and try, so that visitors often do not pay attention to the warnings or neglect which is installed by a tourist attraction entrepreneur. These warnings bellow:



Figure 1: Example of Sign Board in Umbul Ponggok

This is also happened in Umbul Ponggok and Rowo Jombor tourist attractions. According to the tourist attractions in the past five years have occurred five cases of accidents and victims died [7]. Cases of tourist accidents in Umbul Ponggok are (1) Cases of accidents involving dead victims (Galang Norendra) at the bottom of the pond, which occurred in 2016, due to stomach cramps [8]. (2) Cases of accidents which happened to Sutarno after conducting an underwater photo session, which is suspected of having a heart attack, which ultimately cannot be helped [9]. (3) The incident in 2018 in Rowo Jombor, a father (Suwito) who drowned in Rowo because he wanted to help his son who was swept away in [10]. The case above in a legal perspective is a criminal law incident, which should be resolved through a judicial process, which starts from the investigation, examination, prosecution and interrogation stages in court proceedings. But in reality in the cases mentioned above are not resolved through the judicial process but through penal mediation, namely an alternative settlement outside the court of criminal cases. That solving in customary law in Indonesia is a common solving that is conducted, not only to resolve civil problems (debt) but also problems related to criminal problems, such as theft by neighbors or household violence. The reason is more maintaining a balanced relationship between individuals as well as society, in addition also do not opened disgrace a person in public [11]. Solving of criminal cases outside the court in the criminal law literature is referred as penal mediation or *mediation in penal matters or mediation in criminal cases or victim – offender mediation*. The concept of penal mediation is

an alternative prosecution that provides the possibility of a negotiation solving between the perpetrator and the victim [12]. Another term for penal mediation is Alternative Dispute Resolution (ADR). Studies about penal mediation have been conducted by previous studies, there are (1) Studies of abuse cases solving by penal mediation, that cases by the police as investigators and examiner in the criminal justice process, in fact it is not proceed to the criminal justice process, but facilitated to conduct negotiations to resolve by penal mediation [13]. (2) A study of the responsibilities of tourism managers for tourist losses, which are reviewed from perspective of civil law not criminal law. The result is that the tour manager should pay compensation to tourists, but in practice the manager of the tourism attractions in Tirta Gangga does not carry out the responsibility to provide compensation in accordance with the regulations for the loss of tourists who have an accident that is slipped on the pool causing injury [14]. This study aims to try to describe tourist accidents from the perspective of criminal law and also try to describe tourist accidents in the perspective of criminal law and penal mediation in solving tourist accidents.

2. Research Methods

This study is not only a research with a normative approach, but also using a case approach about tourist accidents that occurred at tourist attractions in Klaten, Central Java, Indonesia [15]. Legal documents and empirical facts about the solving case of tourist accidents in Umbol Ponggok and Rawa Jombor tourist attractions, Klaten Regency, are the source of the study data. Legal documents are obtained through searching, identifying relevant documents, while empirical facts are obtained through interviews with the tourism manager/businessman. The data source is used to explain and analyze the main problems in this study, based on the principles of criminal law and penal mediation.

3. Result and Discussion

3.1. Tourist Accidents in Perspective of Indonesian Criminal Law

The problem of tourism is an urgent problem especially from the economic aspect, because with tourism it can increase the national income of the country concerned. ASEAN member countries make agreements on tourism (*ASEAN Tourism Agreement*), Indonesia ratified the agreement with Presidential Regulation RI No. 2/2007 concerning Ratification of the Asean Tourism Agreement. This agreement also regulates the safety and security of tourists in Article 6 that:

Member States shall ensure the safety and security of travelers by:

- (1) Stepping up cooperation among law-enforcement agencies in charge of tourist safety and security;
- (2) Intensifying the sharing of information on immigration matters among law-enforcement agencies; and
- (3) Taking all necessary measures to ensure communications and assistance systems to deal with visitors concerns.

This provision shows the importance of guarantee legal protection and tourist safety by the country concerned.

This is considering that tourism is not only a human need which is social spatially, but also a human right. *Universal Declaration of Human Rights* at Article 24 states that "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay" [16]. The Indonesian government has validate Law No. 10/2009 about Tourism in the preamble also stated that "the freedom do traveling and spending free time in the form of travel is part of human rights" [17]. Therefore it is not a weird or excessive thing if the criminal law also regulates it in the things of a violation against tourist rights in order to provide legal protection and security guarantees. It is a recall function of criminal law, which provides protection to individual, community and state rights. This law also regulates about criminal sanctions (Article 64) and administrative sanctions (Articles 62 & 63). These administrative sanctions in Articles 62 and 63 are aimed at tourists and tourism entrepreneurs. Administrative sanctions are imposed to tourists if they do not fulfill their obligations, namely :

- (a) maintaining and respecting religious norms, customs, culture and values that live in the local community;
- (b) maintaining and preserving the environment;
- (c) participate in maintaining discipline and environmental security; and
- (d) participate in preventing all forms of acts that violate decency and activities that violate the law.

Administrative sanctions imposed on tourism entrepreneurs, if they do not fulfill their obligations as follows: (1) not registering their business; (2) maintaining and respecting religious norms, customs, culture, and values that live in the local community; (3) providing accurate and responsible information; (4) providing services that are not discriminatory; (5) providing comfort, friendliness, security protection, and tourists safety; (6) providing insurance protection for tourism businesses with high-risk activities; (7) developing partnerships with local micro, small and cooperative businesses that need, strengthen and beneficial each other; (8) prioritizing the user of local community products, domestic products, and providing opportunities for local workers; (9) improving workforce competency through training and education; (10) Active in efforts to develop infrastructure and community empowerment programs; (11) participate in preventing all forms of acts that violate decency and activities that violate the law in the place of business; (12) maintaining a healthy, clean and beautiful environment; (13) Maintaining sustainability the natural environment and culture; (14) maintaining the image of the state and Indonesia nation through responsible tourism business activities; and (15) applying business standards and competency standards In accordance with regulations legislation. The formulation of an act which can be convicted according to this law is an act against the law that physically destroys the tourist attraction, the act was carried out intentionally or due to negligence. Physical destruction of this tourist attraction either partially or wholly that can by doing actions in the form of (a) changing the color; (b) changing shape; eliminating certain species; (c) polluting the environment; (d) moving, taking, rasing or destroy. These actions causing in reduced or loss of the uniqueness, beauty and authentic value of a tourist attraction. Criminal sanctions formulated cumulatively of criminal prison seven years and fine maximum of ten billion rupiah. While criminal sanctions are formulated cumulatively - alternative in the form of one-year prison and a maximum fine

of five billion rupiah, when the deed is done through negligence. Thereby, this law does not regulate the problem of tourist accidents whether caused by negligence tourism manager and because of tourists' recklessness, as the case that happened at the two tourist attractions (Umbul Ponggok and Rawa Jombor). Therefore in the case of a tourist accident, the case solving will be used the Code Penal, identifying normative elements in accordance with the elements of the act empirically. This is because in the Code Penal there are no articles regulate tourist accidents. The case of tourist accidents in Rowo Jombor and Umbul Ponggok as described above from the perspective of criminal law can be categorized as a criminal offense, if the accident was caused by deliberate or tourism managers/entrepreneurs. Articles that can be imposed on tour operators / entrepreneurs according to Articles 359 - 361 Penal Code, which articles state that (a) errors in the form of negligence; (c) the result of negligent actions; (c) this negligence act is carried out because he is running a position or livelihood. But the accident that occurred at the two tourist attractions was due to the fault of tourists who did not pay attention themselves *warnings*, which has been installed at tourist attraction as shown in figure number 1 above. Therefore the Penal Code provisions cannot be applied in this case.

3.2. Mediation Penal of Tourist Accident

Mediation from the cultural perspective of the Indonesian people is a value that is held in high esteem by the community, because this is a spirit of the law that lives in the community or customary law. This mediation is often practiced in the community to solve problems not only in civil matters but also in criminal cases, on the basis of deliberation and consensus, without any party being disadvantaged [18]. This mediation has gained international recognition, as a step to reduce the accumulation of cases in court, and quick resolution. In addition with a mediation process for this criminal case, the rights of victims and perpetrators can be balanced, none of which is ignored, and even the community can contribute to the resolution of the case [19]. However, not all criminal cases can be resolved by penal mediation, Mudzakir said [20] that cases which can be resolved by mediation include:

- (a) Criminal cases/offense that categorized into offenses complaint both relative and absolute;
- (b) Criminal offense which are categorized as violations rather than crime;
- (c) Criminal offense in the aspect of administrative law that place criminal sanctions as *ultimum remedium*;
- (d) That criminal case is categorized as leniency and law enforcement officials use their authority to conduct discretion, such as traffic cases;
- (e) violations of criminal law which may not be prosecuted by the Attorney General in accordance with their authority;
- (f) Criminal cases are included in violations of customary law.

Indonesia's positive criminal law does not specifically regulate the problem of penal mediation, but in some

scattered regulations it states that the relevant criminal case solving can be through penal mediation including (1) Law No. 11/2012 concerning the Juvenile Justice System, regulates that for child cases the solving is carried out through diversion; (2) Law No. 39/1999 concerning Human Rights, gives authority to the National Commission of Human Rights to resolve the issue of human rights violations by mediation; (3) RI State Police Letter No. Pol: B / 3022 / XXI / 2009 / SDEOPS, dated December 4, 2009, Regarding Case Handling through Alternative Dispute Resolution (ADR), that for minor criminal acts such as criminal acts regulated in Articles 205,302,315,352,373,379,384,407 and 482 KUHP, as well as traffic matters. The steps in the solving by this ADR must consider the following matters: (a) the material loss of the case is small; (b) the parties to the litigation must agree on the outcome of the solving, otherwise the solving is carried out through legal (court) procedures; (c) Solving is based on the principle of consensus agreement by including the Neighborhood Associations and Community Associations, and is known by the surrounding community; (d) The solving must respect social/customary norms and fulfill the principle of justice [21]. Forms of penal mediation in the *Recommendation No. R (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters* include (a) Informal mediation; (b) Traditional village or tribal moots; (c) Victim - offenders mediation; (d) Reparation negotiation programs; (e) Community panels or courts; (f) Family and community group conferences [22]. Barda Nawawi explained each of these forms, firstly, informal mediation is mediation carried out by judicial officials such as public prosecutors, police, or judges by inviting the parties to resolve their cases informally and if a case agreement does not proceed to the next legal process. Second, Traditional village or tribal moots, this is a mediation that brings all members of the community together to resolve conflicts or crimes that occur in that community. Third, Victim-offenders mediation, a mediation that brings together victims and perpetrators or their respective representatives, by presenting independent mediators appointed by both parties. This mediation can be carried out at any stage of the judicial process. Fourth, Reparation negotiation programs, this is a mediation plan for material improvement, because this form of mediation is only to estimate / assess compensation or reparation to be paid by the perpetrators of crime to the victim. This mediation usually takes place during an examination at a court hearing. Fifth, Community panels or courts, is a transfer of the settlement of criminal cases to community procedures that are informal and more flexible by involving local authorities. Sixth, Family and community group conferences, mediating criminal cases through meetings for family and community group meetings, which in this mediation not only bring together victims and perpetrators but also relatives of the perpetrators, victims and their supporters [23]. The case of tourist accidents in Rowo Jombor and Umbul Ponggok, both theoretically about cases that can be resolved through penal mediation and normatively based on the RI State Police Letter are not included cases that can be resolved by mediation, because the losses suffered by the victims' families are very large because the victim died. However, what needs to be underlined is that penal mediation can still be done because the act is not the fault of the tourism businessman but is the recklessness of the tourists themselves or the lack of supervision of caregivers/parents of children who take part in the tour. Nevertheless, the tour manager still has goodwill to resolve the case. This goodwill is a manifestation of the noble values of the people of Indonesia, which become the way of life every community member. This noble value is based on the values of Godhead that human dignity as human nature is given by the Creator, which in normative terms is called human rights. This can not be eliminated by anyone, even the state has an obligation to guarantee the fulfillment of that right through the rule of law. In addition, solidarity, maintaining balance and restoring the balance of people who are disturbed by deliberation are

characteristic of Indonesian society. These noble values and characteristics are reflected in their customary law which generally has a religious nature - magical, communal and concrete. So avoiding conflict as one of the characteristics of Indonesian society. This resolution aside from the legal side and from the economic side also can be accepted, that in the business world problems or conflicts between consumers (in this case tourists) and entrepreneurs/business managers are rarely even ever resolved through legal channels (judicial process) in practice. It is to maintain harmonious relations with consumers and the sustainability of their businesses. Oskari Juurikkala stated that law is an important rule for entrepreneurs, but for social norms and informal practices it can still be enforced to resolve conflicts that occur [24]. Penal Mediation for all cases of tourist accidents in Rowo Jombor and Umbul Ponggok were all resolved through simple mediation with the same model even though the time was different because of the accident in a different time. A solving technique that the tour manager and the victim's family meet with each other to negotiate for finding a solution that can be accepted by both parties. In this meeting there is a third party present as an arbitrated or mediator that is the local police officers and both parties can accept the mediator. However, before the deliberations, police as mediator described the chronology of the incident as described above, the police had previously conducted an investigation. The mediator also stated that the victim, even though he was dead, was still taken to the nearest hospital for investigation. After that, the manager submits a request for forgiveness and explains that all tourists visiting Rowo Jombor and Umbul Ponggok are insured, insurance management is the responsibility of the tourism manager. The victim's family is given the opportunity to express their opinions and their objections, but the family accepts what is conveyed by the mediator, because the victim's family of the first Instiper student case knows that the victim has a weakness in the stomach. In the second case of Sutarno who carried out an underwater photo shoot, the victim family also know that the victim had a heart abnormality. The third case, family can also understand because less/lack control from the parent, besides that also the panic of a father seeing his child drowning. That understanding and perception can make the victim's family accept what is conveyed by the tour manager and mediator. Mediation conducted by the tour manager in the form of victim - offender's mediation. The reasons are (a) mediation attended by both parties, there are the victim's family and the perpetrator (tour manager); (b) Mediation is carried out at the police stage (investigation), so that the judicial process is not continued to the next stage, because an agreement in the mediation has been reached; (c) There is a mediator, but the mediator is not appointed by the victim's family, but is offered by the tour manager and the victim's family agrees. Based on the description above, it means that penal mediation is still urgent to get a place in criminal law, especially as Indonesia is currently doing *penal reform*, one of the basic ideas that background it, is victim protection. Second, penal mediation is an alternative to implementing the principle of a simple, fast and low cost judicial process, as in the Judicial Power Act. Third, that the solving of criminal cases through the penal mediation in the form of victim-offender mediation, the repetition rate of the actions by the offender is lower [25].

4. Conclusion

Formal solving of criminal cases through criminal justice processes with several stages of investigation (investigation, interrogation, prosecution and examination in court proceedings), but in its development and internationally recognized that the solving of criminal cases can be solved through non-judicial way, that is through mediation. The mediation which is often applied is mediation that brings the victim or the victim's

family together with the perpetrator, and there is a mediator as an arbitrator. This mediation process is usually carried out in the initial stage of the criminal justice process which is the level of investigation in the police. Not all of criminal cases can be resolved by penal mediation, but for tourist accidents in tourist attractions (Umbul Ponggok and Rowo Jombor) always resolved by penal mediation in the form of victim-offender mediation. This solving is carried out if mistake in the form of negligence are conducted by visitors or tourists. This mistake in the perspective of criminal law is not the responsibility of the manager/businessman of tourism, but the philosophical community who condemns harmony in shared life, so in goodwill the businessman of the tour, the case is carried out by penal mediation, so that has no impact on economic aspects (empty of visitors).

5. Recommendation

Penal mediation needs to get a place in the renewal of criminal law in the future, to avoid the accumulation of cases in court, especially for minor criminal cases, and as an implementation of judicial principles that are fast, simple and low cost.

Reference

- [1]. UU No. 10 Tahun 2009 Tentang Kepariwisata, Lembaran Negara RI Tahun 2009, No. 11, Internet https://www.ekowisata.org/uploads/files/UU_10_2009.pdf, [April, 25, 2020].
- [2]. A tourism entrepreneur is a person or group of people who carry out tourism business activities, while tourism businesses are businesses that provide goods and / or services for meeting the needs of tourists and organizing tourism. See Article 1 numbers 7 and 8 of Law No. 10 of 2009 concerning tourism.
- [3]. Article 26 letter d, Law No. 10 of 2009 concerning tourism. Internet https://www.ekowisata.org/uploads/files/UU_10_2009.pdf, [April, 25, 2020].
- [4]. Go Trip Indonesia, , "Rowo Jombor Klaten, Warung Apung Dengan Daya Tarik Yang Memikat", Internet <https://gotripina.com/blog/rowo-jombor-klaten>, [December, 27, 2019].
- [5]. Ariyanto, "Pengunjung Wisata Umbul Ponggok Meningkat,", Internet <https://www.genpi.co/berita/4697/pengunjung-desa-wisata-umbul-ponggok-increased>, [December, 27, 2019].
- [6]. Maulana Job, "Warung Apung Rowo Jombor Masih Jadi Primadona Kuliner Saat Liburan", internet <http://klaten.sorot.co/berita-4914-warung-apung-rowo-jombor-masih-jadi-primadona-kuliner-saat-liburan.html>, [December, 27, 2019].
- [7]. Interview Result with Ahmad Susanto, Head of Development and Management of Attraction of Tourism Facilities, Klaten, [July, 11, 2019].
- [8]. Rustam Aji, "Mahasiswa Instiper Yogyakarta Tenggelam di Umbul Ponggok Klaten, Diduga Kram Perut, Tribunjateng.com, <https://jateng.tribunnews.com/2016/02/21/mahasiswa-instiper-yogyakarta-tenggelam-di-umbul-ponggok-klaten-diduga-kram-perut>, [December, 27, 2019].
- [9]. Rini Yustiningsih, "Umbul Ponggok Klaten Telan Korban, Warganet Bersympati," Solopos.com, <https://www.solopos.com/umbul-ponggok-klaten-telan-korban-warganet-sympathize-968622>, [December, 27, 2019].
- [10]. Cahyadi Kurniawan, Ayah Kehilangan Nyawa demi Selamatkan anaknya di Rowo Jombor Klaten,

- Solopos.com, <https://www.solopos.com/ayah-kehilangan-nyawa-demi-selamatkan-anaknya-di-rawa-jombor-klaten-924682>, [December 27, 2019].
- [11]. Kuswardani dan Rosandra Deby, 2000, *Musyawaharah sebagai Alternatif Penyelesaian Masalah di Masyarakat (Studi Kasus di Solo Raya)*, Surakarta : FH – UMS.
- [12]. Cahyono, 2019, *Mediasi Penal Dalam Penanggulangan Konflik Kekerasan (Carok) Masyarakat Masyarakat Madura Berdasarkan Local Wisdom*, Yogyakarta : DEPUBLISH, pp. 288.
- [13]. Cucuk Sudarsono, “Pelaksanaan Mediasi Penal Dalam Penyelesaian Tindak Pidana Penganiayaan”, *UNES Law Journal*, Vol. 4, No. 1, 2015, pp. 20 – 34.
- [14]. Ni Ketut Pradnyawati et all, “Tanggung Jawab Pengelola Kawasan Pariwisata atas Kerugian Wisatawan Pada Objek Wisata Tirta Gangga, Karangasem, Bali”, *Kertha Semaya*, Vol 6, No. 4, 2020, p. 1 - 24
- [15]. Soetandyo Wignyosoebroto, 2013, *Hukum Konsep dan Metode*, Malang : Setara Press, p. 74 & 122.
- [16]. United Nations, “Universal Declaration of Human Rights”, internet <https://www.un.org/en/universal-declaration-human-rights/>, [May 4, 2020].
- [17]. JDIH BPK RI, Law No 10 of 2009 on Tourism, Published in the official gazette 2009 of No 11, from <https://peraturan.bpk.go.id/Home/Details/38598/uu-no-10-tahun-2009>, [May, 4, 2020].
- [18]. Ahmad Ubbe, *Mediasi Penal & Peradilan Adat*, Paper, This paper communicated on Seminar Peradilan Adat dalam Sistem Hukum Nasional by National Legal Development Agency , Ministry of Law and Human Rights, at June, 30 of 2013.
- [19]. Secretariat of United Nations, “Ninth United Nations Congress on The Prevention of Crime and The Treatment of Offender”, Internet, https://1997-2001.state.gov/global/narcotics_law/global_forum/F380mocr.pdf, [May, 12, 2020].
- [20]. Lilik Mulyadi, “Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia : Pengkajian Asas, Norma, Teori dan Praktik, *Justisia*, Vol 2, No. 1, Januari – April 2013.
- [21]. Suardi Alius, 2019, *Menjalin Sinergi : 14 Bulan sebagai Kabareskrim Polri*, Jakarta:Gramedia Pustaka Utama, p. 23
- [22]. Council of Europe, “Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters”, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168062e02b, [May, 12, 2020].
- [23]. Barda Nawawi Arief, 2016, *Mediasi Penal:Penyelesaian Perkara Pidana di Luar Pengadilan*, Semarang : Pstaka Magister, pp. 11.
- [24]. Oskari Jurrikala, *Law and Social Norms In Contractual Relationship*, *Helsinki Law Review*, Vol. 3 No. 1, 2009, pp. 49 – 67.
- [25]. Jiska Jonas – van Dijk, et all, *Victim Offender – Offender Mediation and Reduced Reoffending :Gauging the Self – Slection Bias*, *Sage Journal*s, Vol. 66 (6 – 7), June, 2019., pp. 949 – 972.