



Arbitration as a Medical Dispute Resolution Method under Indonesian Positive Law

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ABSTRACT

Medical disputes arising from conflicts between patients and doctors/dentists can be addressed through litigation or non-litigation channels. Law Number 17 of 2023 concerning health mandates that all medical disputes must first be resolved through Alternative Dispute Resolution (ADR) outside of court. The aim of this paper is to analyze ADR as a method of resolving medical disputes in Indonesia and to examine the legality and potential of arbitration as a dispute resolution method under Indonesian law. The benefits of this study include providing a juridical understanding of medical dispute resolution according to Indonesia's positive law and contributing to the field of health law. The study addresses the ambiguity and conflict of norms related to medical dispute resolution by employing normative legal research with a statute approach, supported by descriptive and evaluative analysis. The results indicate that, according to Article 310 of Law Number 17 of 2023, medical disputes must be resolved through non-litigation channels. Among the available ADR methods, arbitration offers advantages over mediation due to its binding final decision, making it more efficient for both parties. The legal foundation for arbitration in medical dispute resolution is outlined in Law Number 30 of 1999 concerning arbitration and alternative dispute resolution. Consequently, arbitration presents a new paradigm for resolving medical disputes in accordance with Indonesian positive law.

Keywords: Medical Disputes, Alternative Dispute Resolution, Arbitration

INTRODUCTION

The relationship between doctors and patients is founded on trust. Patients place trust in doctors based on the authority granted by law to safeguard their health (Laurie & Mason, 2016). This trust is formalized through a therapeutic contract, which outlines the rights and obligations of both parties. Over time, the nature of these contracts has evolved, particularly in terms of the patient-doctor dynamic, shifting from a hierarchical relationship to one of equality where patients can actively participate in their healthcare decisions under certain conditions. This change underscores the importance of obtaining consent from patients before any medical procedures are performed, known as Informed Consent (Millum & Bromwich, 2021).

Informed Consent encompasses various information, such as diagnosis, the cause of illness, treatment plans, potential complications, alternative treatments, and other relevant details that aid patients in making informed healthcare decisions (Faden et al., 2014). This consent allows doctors to fulfill their obligation to make every effort to heal the patient within the framework of therapeutic contracts. These efforts are understood as best-effort commitments (inspanning

verbintennis), rather than outcome guarantees (resultaat verbintennis), given the complexity of the human body and the limitations of medical science and technology. Therefore, the focus is on whether the doctor's actions were performed to the best of their ability rather than the specific outcome of the treatment. Patients, understandably, expect doctors to make their best effort, but conflicts may arise when this effort does not align with the patient's expectations of what constitutes maximum effort (Olson et al., 2021).

Disputes between doctors and patients in this context are termed medical disputes. Such disputes often occur when patients feel harmed, whether materially or morally, due to a lack of recovery, treatments resulting in disability, increased suffering, or even death (White & Pope, 2016). This dissatisfaction may lead patients to believe that a medical error has occurred, prompting legal action. However, it is important to note that doctors rarely, if ever, act with the intention of causing harm. All medical practitioners take an oath to prioritize the health and well-being of their patients. Therefore, actions that are perceived as medical errors by patients are not necessarily so, provided the doctor acted in accordance with accepted procedures and received consent through Informed Consent.

Medical disputes can be resolved through litigation or non-litigation channels. Litigation falls within the purview of the judiciary and can involve criminal, civil, or consumer protection laws (White & Pope, 2016). Relevant criminal laws include Articles 359, 360, and 361, while civil suits may be based on unlawful acts or breaches of contract. Non-litigation avenues, on the other hand, involve methods such as mediation, negotiation, expert assessment, and arbitration. Mediation and arbitration are particularly common alternatives, with mediation focusing on a win-win compromise and arbitration offering a legally binding, win-lose decision that can be enforced like a court ruling once registered (executory force). Arbitration has distinct advantages over mediation due to the binding nature of its decisions, making it an emerging paradigm in the resolution of medical disputes (Menkel-Meadow, 2020).

Law Number 17 of 2023, Article 310, regulates medical dispute resolution by stipulating that, "In the event that a Medical Worker or Health Worker is suspected of making a mistake in carrying out his profession that causes losses to the Patient, disputes arising from the error shall be resolved first through alternative dispute resolution outside the court." This article implies that all medical disputes must initially be addressed through non-litigation means. As a law specifically governing healthcare disputes, this provision takes precedence over general laws (Criminal and Civil Codes) under the principle of *lex specialis derogat legi generali*. The legal implication is that non-litigation channels must be exhausted before pursuing litigation.

However, this raises a legal issue: there is ambiguity in the norms outlined in Article 310 of Law Number 17 of 2023. While the article mandates the use of non-litigation methods as the primary resolution approach, it fails to specify which alternative dispute resolution methods are to be employed (Hanifah, 2024). Moreover, if a patient is dissatisfied with the outcome of the non-litigation process, particularly when arbitration—known for its binding and permanent legal force—is involved, the question arises: can the patient still pursue litigation? This lack of clarity

creates a significant legal challenge in determining the proper course of action in medical dispute resolution, and this research aims to resolve these ambiguities and assess the role of arbitration as a viable solution.

RESEARCH METHODS

Legal research can be interpreted as a process of rediscovering carefully and carefully the law or legal data to solve legal problems. The problem in this study is the ambiguity and conflict of norms in the law related to medical dispute resolution. Based on this description, the legal research method that can be the basis for writing this research is normative legal research. Normative law research positions laws and regulations as the object of research. This study uses a statute approach using data sourced from primary and secondary legal materials. The author conveys the arguments and legal basis outlined in the writing systematically in analyzing the arrangement of medical dispute resolution in Indonesia. Based on this, the technique of collecting legal materials will be in the form of literature research by understanding and studying existing legal materials to conduct analysis in solving the problem of ambiguity of norms in this study (Bhat, 2019).

The data obtained requires analysis that allows an objective depiction/decomposition of medical dispute resolution in Indonesia, so the author uses descriptive techniques. In addition to descriptive techniques, the research data requires analysis that allows us to find out whether it is true or not and whether it is appropriate or not to use arbitration methods in medical dispute resolution, so evaluative techniques are also used in this study.

Research problems in the form of ambiguities in norms contained in Law Number 17 of 2023 article 310 and external horizontal conflicts with the Criminal and Civil Code in resolving medical disputes require a general theory that can be used as an analytical knife. The Stufenbau Theory, also known as the Theory of Leveling Legal Norms, was put forward by Hans Kelsen. This theory states that the supreme legal system and rule (such as the constitution) will be the handle for the rules under it. A tiered and multi-layered legal norm where a lower norm applies is sourced and is based on a higher norm. And so on to a basic norm (Grundnorm). Based on this description, Stufenbau's Theory can help in identifying and analyzing problems related to the ambiguity of norms in law by identifying legal norms related to the ambiguity of norms, analyzing the hierarchy of legal norms related to ambiguous norms, and evaluating how the ambiguity of norms affects the application and justice of law in practice. Regarding the conflict of norms between Law Number 17 of 2023 article 310 and the Criminal and Civil Code, the principle of "lex specialis derogat legi generali" can be used because this principle makes general rules (Criminal and Civil Code) will be overridden by special rules (Law No. 17 of 2023) in terms of medical dispute resolution methods

RESULTS AND DISCUSSION

Alternative Methods of Dispute Resolution in Medical Dispute Resolution in Indonesia

A dispute is a continuation of a conflict that occurs between two parties. Conflict is the opposition or opposition between people, groups, or organizations on a problem. Conflicts that are not resolved can develop into disputes if one of the parties who feels aggrieved has directly or indirectly expressed loss or dissatisfaction with the other party. According to the Great Indonesian Dictionary, a dispute is a conflict or conflict that occurs between individuals or groups that leads to legal consequences for each other. A dispute is also defined as something that causes differences of opinion, disputes, minor quarrels, disputes and cases that continue in court (Caplan, 2020).

Disputes that occur between patients and doctors/dentists when carrying out health service efforts are called medical disputes (Damayanti et al., 2023). A medical dispute is a conflict between the patient and the doctor/dentist and/or hospital caused by one party who is dissatisfied or violated by the other party. Medical disputes can also be interpreted as disputes between the patient and/or the patient's family and medical personnel and/or health workers or between the patient and the hospital and/or health care facilities (Van Keer et al., 2015).

The problem that is often disputed in a medical dispute is based on the final result by ignoring the process in which the final result occurs (Hidayati & Aripin, 2024). In health law, the concept of a therapeutic agreement or contract is known as *verbinding inspanning*. The meaning of this concept is that doctors/dentists or health workers, in carrying out health services, will strive to the maximum in accordance with existing procedures so that the responsibility of medical personnel and health workers is in the healing process and procedures that are carried out. Medical personnel and health workers do not guarantee/guarantee the final result of the healing process (*resultant verbintenis*).

Disagreements between the patient and the doctor/dentist in the healing effort often arise due to differences of opinion, as described above (Boring et al., 2022). Patients often look at the final outcome/recovery as a benchmark for the success of healing efforts, while the doctor/dentist sees the final result as not an obligation that must be achieved because medical personnel are aware of the limitations of science and technology and other factors. So that if the procedures and treatment procedures carried out are in accordance with what is required, then the doctor/doctor cannot be blamed the conflict between these two parties is a logical consequence.

This difference in understanding can occur due to several factors. The first factor is that the level of intelligence in the community is getting higher. The public's understanding of their rights is also better, and they are better able to express their opinions, especially if there is a difference between expectations and reality (Lippmann, 2017). The next factor is the wider flow of health-related information, which increases public expectations for health services. This is closely related to the first factor, which is that high expectations are often a source of problems in medical disputes. Another important factor is the high cost of health services, which is a logical consequence of people not receiving imperfect services. This demand for perfect service is also related to people's expectations. In addition, it is also due to propaganda by legal experts and by

health workers themselves, so public expectations will be higher and vulnerable to dissatisfaction (Chen, 2024).

The resolution of a dispute, according to positive law in Indonesia, can be through litigation or non-litigation channels. The litigation path is the resolution of disputes within the scope of the judiciary, the Court will decide the dispute between the two parties and issue a decision that is binding on both parties. The resulting verdict tends to be a win-or-lose judgment in contrast to the non-litigation route, which resolves disputes outside of court through mechanisms such as negotiation, mediation and other alternative dispute resolution (Hartini et al., 2020). The end result of dispute resolution through non-litigation is more of a compromise or win-win solution. The non-litigation route is also often known as Alternative dispute resolution.

Alternative dispute resolution refers to the method of resolving disputes outside the court. Some alternative forms of dispute resolution include consultation, negotiation, mediation, conciliation, arbitration, and expert assessment. This method provides advantages such as voluntariness, fast procedures, non-judicial decisions, confidential procedures, flexibility in determining the conditions for resolving problems and saving time and costs (Панов et al., 2024). In Indonesia, alternative dispute resolution is regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. This method can be applied in resolving business, land, and other conflicts. The advantages and disadvantages of each alternative dispute resolution method must be carefully considered before choosing the most suitable method for resolving disputes (Merrills, 2017).

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution regulates alternative dispute resolution. According to this law, alternative dispute resolution includes a variety of dispute resolution methods outside the court route, such as mediation, conciliation, negotiation, and arbitration. These methods provide flexibility, efficiency, and speed in dispute resolution, as well as allow the parties to reach an agreement amicably (Mania, 2015). The law also establishes general principles governing the implementation of alternative dispute resolution, including the principles of voluntariness, fairness, legal certainty, and openness. Thus, this law provides a strong legal basis for the application of alternative methods of dispute resolution in Indonesia. Alternative dispute resolution is commonly used in mediation and arbitration.

Mediation, according to Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, is one of the methods of dispute resolution outside the court route. Mediation is considered a process of activities that is a continuation of the failure of negotiations carried out by the parties to the dispute. The juridical basis for the implementation of out-of-court mediation in Indonesia is the Law on Arbitration and Alternative Dispute Resolution and Government Regulation Number 50 of 2000. According to Law Number 30 of 1999, mediation is a way of resolving disputes through negotiation, facilitation, mediation, or expert assessors. Mediation provides advantages such as voluntariness, prompt procedures, non-judicial decisions, confidential procedures, flexibility in determining the terms of problem resolution, and time and cost savings.

Law Number 17 of 2023 concerning Health Article 310 states that "In the event that a Medical Personnel or Health Worker is suspected of making a mistake in carrying out his profession that causes losses to the Patient, disputes arising from such mistakes shall be resolved first through alternative dispute resolution outside the court." The phrase "first" implies an obligation to use alternative dispute resolution in the event of a medical dispute as the first option. So, alternative dispute resolution (APS) is the first method for medical disputes that already have a fixed legal basis.

Medical dispute resolution using APS has been carried out several times, the APS method in medical disputes that is often used is mediation (Nasution et al., 2023). This is based on the advantages of mediation, namely, the settlement that can be carried out will vary depending on the agreement and compromise between the parties. Mediation will also be guided by a mediator so that it will reduce tension in the dispute that occurs. Communication has a key role in mediation. Effective and impartial communication will make the mediation process run well. However, there are times when, in a mediation process, there is a deadlock related to the disputed issue. Settlement is no longer possible at the level of a win-win solution, so it must be a win or lose to decide this dispute (Menkel-Meadow, 2018). In the event of an impasse like this, the mediation process cannot be APS over ongoing medical disputes. Arbitration can be a solution to this impasse.

In Law Number 30 of 1999, arbitration is a way of resolving a civil dispute outside the general court based on an arbitration agreement. An arbitration agreement is an agreement represented by two parties to respect an arbitral award rendered by an arbitrator specified in the agreement (Ashford, 2019). Arbitration is often used to resolve disputes in the business realm. Although it is non-litigation, the result of dispute resolution using arbitration can be a binding decision and registered with the court so that it has permanent legal force. Arbitration can also be interpreted as a dispute resolution process where the parties agree that their dispute over their personal rights is fully examined and adjudicated by an impartial judge appointed by both parties, and the resulting judgment will be binding on them. Based on this description, basically, arbitration is a special form of court. The fundamental difference between arbitration and court is that the court uses the standing court system while the arbitration uses the tribunal forum (Demeter & Smith, 2016). Arbitrators act as judges in arbitral tribunals, even if only in cases that are handled alone.

Legality of arbitrage as a method of resolving medical disputes according to Indonesia's positive law

Arbitration as a method of resolving medical disputes has several applicable legal bases. The legal basis includes the following:

a. Law Number 17 of 2023 concerning Health

Article 310 states that "In the event that a Medical Worker or Health Worker is suspected of committing a mistake in the performance of his profession that causes losses to the Patient, the dispute arising from the mistake shall be resolved first through alternative dispute resolution outside the court." This article is the basis that any medical dispute that occurs between the patient

and/or the patient's family and doctors/dentists and/or hospitals/health service facilities must be resolved first with an alternative dispute resolution out of court (non-litigation). Arbitration is one of the alternative methods of dispute resolution so arbitration has a clear position to be used as a dispute resolution according to positive law in Indonesia (Baiquni, 2022).

b. Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution

This law contains several articles that regulate the implementation of arbitration and other alternative dispute resolution. These articles include:

- a) Article 1, paragraph 1: "Arbitration is a means of resolving a civil dispute outside the general court which is based on an arbitration agreement made in writing by the parties to the dispute."
- b) Article 1 Paragraph 3: "An arbitration agreement is an agreement in the form of an arbitration clause contained in a written agreement made by the parties before the dispute arises, or a separate arbitration agreement made by the parties after a dispute arises"
- c) Article 5 Paragraph 1: "Disputes that can be resolved through arbitration are only disputes in the field of commerce and regarding rights that, according to laws and regulations, are fully controlled by the disputing parties."
- d) Article 6 Paragraph 9: "If the peace effort as referred to in paragraphs (1) to (6) cannot be achieved, then the parties based on the written agreement may propose a settlement through an arbitration institution or ad hoc arbitration."

Medical disputes arise because the patient feels aggrieved by the medical efforts made by doctors/dentists. These losses can be in the form of material losses or the onset of disability and even death. If you look at the final result of the medical efforts made, every medical dispute can be processed through the general court, both criminally and civilly. This is related to the provisions of the Criminal Code article:

- a) 359: "Whoever by his fault (negligence) causes the death of another person is threatened with imprisonment for a maximum of five years or imprisonment for a maximum of one year"
- b) 360: "(1) Whoever by his fault (negligence) causes serious injury to another person shall be punished with imprisonment for a maximum of five years or imprisonment for a maximum of one year.

(2) Whoever by his fault (negligence) causes injury to another person in such a way that he suffers from illness or obstruction in carrying out his job or search for a certain period shall be threatened with imprisonment for a maximum of nine months or imprisonment for a maximum of six months or a fine of up to four thousand five hundred rupiah".

- c) Article 361: "If the crime described in this chapter is committed in the exercise of an office or search, then the penalty shall be reduced by one-third, and the guilty person may be deprived of his right to carry out the search in which the crime was committed, and the judge may order that the verdict be pronounced".

and in the Civil Code article:

- d) Article 1243: "Reimbursement of costs, losses and interest due to the non-fulfillment of an obligation shall be obligatory if the debtor, even though it has been declared that he is still

obliged to fulfill the bond, or if something which he must give or do can only be given or done within a period beyond the prescribed time".

e) Article 1365: "Every act that violates the law and causes harm to another person obliges the person who caused the loss because of his fault to compensate for the loss".

Based on the description above, the settlement of medical disputes can lead to court, but keep in mind that in Law Number 17 of 2023 concerning Health, article 310 has been explained that every medical dispute that arises must first be resolved by alternative dispute resolution. Then, there will be a conflict of norms if the patient feels that he wants to bring a dispute directly to court based on the Criminal and Civil Code, unlike what is in Law Number 17 of 2023.

Legal norms are tiered and layered in a hierarchy, in the sense that a lower norm applies, is sourced and based on a higher norm, a higher norm applies, is sourced from and is based on a higher norm, and so on until a norm that cannot be further explored and is hypothetical and fictitious, namely the Basic Norm (Grundnorm). This theory is also known as the "Stufenbau des Recht" and has been further developed by Hans Nawiasky. When there is a horizontal conflict, such as in this problem, the principle of preference is used.

The principle of preference in legal science refers to the principle that determines which law takes precedence in cases of conflict of legal norms (Llewellyn, 2016). This principle is used to resolve conflicts between legal norms, such as legal vacuums, conflicts between legal norms (legal antinomies), and vague or unclear norms. There are three principles of preference used to resolve conflicts or conflicts between legal norms, namely: Lex Superior Derogat Legi Inferiori Base, Lex Specialis Derogat Legi Generali Base and Fundamentals of the Posterior Derogat Legi Priori. Use Basic Lex Specialis Derogat Legi Generali in the case of resolving medical disputes; Law Number 17 of 2023, which is special, will override the provisions in the General Criminal and Civil Code. With this, it is clear that every medical dispute must first be resolved with an alternative dispute resolution.

Mediation as an alternative dispute resolution has several weaknesses. One of the main disadvantages of mediation is that the results of the decision suggested by the mediator are not binding for both parties. In mediation, decisions that can be binding on both parties are those that are mutually agreed upon by both parties. The absence of a "referee/jury" in deciding this dispute will make mediation lead to an impasse. In arbitration, arbitrators appointed by both parties can render a binding final decision so that there will be no impasse in the settlement of the dispute. Article 310 of Law Number 17 of 2023 concerning health also does not provide restrictions on the (Shamir, 2016) Alternative Dispute Resolution methods that can be used. The principle of choice of law (choice of law) will accommodate other options besides mediation. Arbitration will make it easier to relate to a final decision that is more binding than mediation so that arbitration can become a new paradigm of alternative medical dispute resolution (Shamir, 2016).

CONCLUSION

Based on the description above, it can be concluded that arbitration serves as a viable method

for resolving medical disputes. Arbitration provides a binding and final resolution, offering greater certainty compared to other dispute resolution alternatives under Indonesia's positive law. The legally binding nature of arbitral awards, combined with the streamlined process, allows for a more efficient and decisive outcome, which is often more favorable than prolonged litigation. Given that arbitrators hold the authority to decide the outcome of the dispute, it is essential to establish a specialized certification for health arbitrators. This would ensure that those presiding over medical disputes possess the necessary expertise in healthcare matters, thus promoting fairness and accuracy in resolving such sensitive and complex cases.

Arbitration offers a robust framework for resolving medical disputes by delivering a final and binding decision that upholds the interests of both parties. Arbitration carries several advantages over other methods of dispute resolution, including mediation or litigation. Firstly, it ensures confidentiality, which is critical in medical disputes to protect both the patient's privacy and the doctor's professional reputation. Secondly, the arbitration process is faster and less formal than traditional court proceedings, which can reduce emotional and financial strain on the parties involved. Lastly, the binding nature of arbitral awards brings finality to the dispute, reducing the likelihood of protracted legal battles. This method also allows for the involvement of specialized arbitrators who have a deep understanding of medical issues, further ensuring that the decision-making process is informed and just. The use of arbitration in medical dispute resolution carries significant implications for Indonesian positive law.

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