Comparative analysis of malpractice by midwives in the Americas and Indonesia

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ABSTRACT
Midwife is a profession, so in its implementation in addition to basing on service standards set by laws and regulations, it must also be subject to a code of ethics established by professional organizations (Article 24 paragraph and 2 of the health law). So that a midwife as one of the health workers must not only be responsible to the community based on laws and regulations, but also human rights are responsible to professional organizations (midwifery) on the basis of the midwife’s code of ethics. Responsibilities based on the government-invitation regulations as legal responsibilities can be divided into 3 aspects, namely, aspects of civil law, aspects of criminal law and aspects of administrative law. This thesis raises the issue of how criminal liability for malpractice committed by midwives and what efforts can be made to prevent malpractice from occurring by midwives. The accountability of the criminal act of malpractice is currently an important highlight because the rule of law that regulates it is still vague. This is because the regulation regarding the qualifications of malpractice acts is not clearly stated in the rule of law, this act of malpractice cannot be seen from one scientific point of view alone, but in terms of legal science as well. Malpractice contains criminal and civil elements, this should be considered so that each party does not give their own interpretation according to their respective sciences. The factors causing this criminal act of malpractice are still confusing. On the one hand, the perpetrator of malpractice cannot be blamed considering that his actions were done to solve a problem but his actions do not guarantee the completion of the problem. That Law number 36 of 2009 concerning health is not sufficient to regulate the crime of malpractice, in the Criminal Code it is also not found about the qualifications of malpractice acts that are found only qualifications due to the act of malpractice. For this reason, according to the author, the regulation regarding the criminal act of malpractice must be in good form in terms of the quanification of malpractice acts, the consequences of malpractice acts and the accountability of the perpetrators of malpractice crimes.

INTRODUCTION
The act of medical malpractice is one of the branches of error in the professional field, especially in the world of health. Medical malpractice involving doctors and other health workers such as nurses and midwives there are many types and forms, for example, misdiagnosis, incorrect treatment actions that are appropriate to the patient or failing to carry out the delivery process for patients properly, meticulously and meticulously. In some developed countries such as Australia and the United States, cases of medical malpractice also occur a lot, even every year the number increases. Such a situation is not much different from that in Indonesia, in recent years cases of prosecutions of doctors and other health workers for alleged medical malpractice have increased compared to previous years. Even in every mass and electronic media almost all the time reporting about cases of medical malpractice carried out by doctors or other health workers both in hospitals in big cities and regional level hospitals or in places of practice (Kleisiaris, et al, 2014).

Patients can sue the doctor if the doctor makes a mistake/omission, using the legal basis of article 1365 of the Civil Code. Based on the article, if the doctor makes a mistake/omission but does not cause harm to the patient, then he cannot be held accountable. As long as the patient can still be cured and does not leave a permanent disability, then the doctor cannot be asked for compensation. It may be that the patient is suing for damages for the costs incurred for healing from the doctor's mistakes/omissions, but suing for immaterial reimbursement, for many judges in developed Countries is an excessive request,
Besides every medical action always carries a risk, also medical action is not an action that can be calculated mathematically in the sense that it cannot be taken into account definitively (Chandrawila, 2001).

The omission here is an attitude of lack of heart. Negligence is not a violation of law or a crime, if the negligence is not to the point of bringing harm or injury to another person and that person can accept it. It is based on the legal principle “De minimis noncurat lex” which means that the law does not interfere in things that are considered trivial. But if the negligence results in material losses, harm and even takes the lives of others, then this is classified as gross negligence (culpa lata), serious and criminally. To be able to sue the doctor with a lawsuit against the law, the patient must be able to show the presence of the doctor’s fault which, due to his negligence in carrying out his professional obligations, caused harm to the patient. The harm caused must be explained as a result of the negligent actions of the doctor or in other words there is a clear causal relationship and there is no justification. A doctor can be declared to have made an mistake and must pay compensation, if between the losses i caused there is a close relationship with the mistakes made by the doctor. For example, in Jakarta, i where the patient will perform surgery with the aim of tightening the eyelids of his eye bags. This plastic surgery was performed in early November 16, 2015 by two doctors with the nitalis YM and SS. However, after the operation was completed, fluid came out on the patient's left forehead, causing swelling on his left face. The doctor still tried to remove the fluid using a hose, but after the hose was removed, the victim's face remained is isken and the fluid came out continuously. I before performing the operation, the patient has already had a consultation, but the relevant doctor never gives an explanation of all the possible risks that may occur if the plastic surgery is performed (Soewono, 2006).

There is a legal relationship between doctors and patients. The legal relationship between the doctor and the patient at this time is a legal relationship that is horizontally i contractual or joint participation. In this contractual horizontal relationship, an equal relationship is the basis for the rejection of a contractual relationship that requires an agreement between the parties to provide each other with achievements for services. The principle that underlies this pattern of contractual horizontal relations is essentially the sale and purchase of services between service sellers and recipients/users/buyers of services which in law are identified with the legal relationship between producers and consumers. Because of this form of equal relationship that is synonymous with buying and selling services, the sickperson's adherence to the treatment process and the advice given by the doctor will be achieved if the doctor can reciprocally communicate with his patient.

Like doctors, midwives also often get the spotlight regarding malpractice. Because as long as there is a human reproduction process, the existence of midwives in Indonesia is very necessary to improve the welfare of the and fetus, so that obstetric services are everywhere and anytime. Midwives in carrying out their professional duties are sometimes protested by the community for making mistakes or omissions that bring harm to the patients they treat. The possibility of such errors or omissions, usually brings no small losses to the patient, be it physical, psychic or material losses. Where the physical harm that can be experienced by the patient as a result of malpractice actions carried out by the midwife can result in the death of the baby as well as the patient himself. The problem that is often faced by malpractice victims is the difficulty in proving whether there has been malpractice or not, this is because there are no rules governing malpractice in more detail, especially for midwives and nurses.5 Unlike the case with doctors who are under the auspices of the Indonesian Doctors Association (IDI), if there are indications of malpractice committed by doctors, the IDI through the Honorary Council of Medical Ethics (MKEK) will conduct a preliminary investigation whether or not there are any mistakes made by doctors. This is because IDI has a clear legal basis contained in the explanation of Article 8 letter of Law No. 29 of 2004 concerning the ractice of Medicine which discusses professional ethics. Thus, based on Article 8 letter F, IDI as an official organization that accommodates doctors throughout Indonesia has the authority to investigate whether it is true that the doctor concerned committed malpractice or not in accordance with the code of ethics owned by doctors. If it is true that the doctor committed malpractice, the IDI will also impose sanctions on the doctor. Meanwhile, midwives who are under the auspices of the Indonesian Midwives Association (IBI) and nurses who are under the auspices of the Indonesian National Nurses Association (PPNI), do not have a firm basis for both the Health Workers Law, the Midwifery Law, the Nursing Law, and the Wetboek van Strafrecht (KUHP), which can be used as a basis for cracking down on midwives and nurses who are indicated to be malpractice. Thus making it an empty norm. Regarding the problem of malpractice committed by midwives and nurses, the author is encouraged to examine further the arrangements for the criminal liability of midwives and nurses for malpractice carried out under the Health Workers Act, the Midwifery Act, the Nursing Act, and the Wetboek van Strafrecht (Criminal Code) (Guwandi, 2009; Supriadi, 2001).

Literature Review

Midwife

Midwife is a woman who graduated from midwife education that has been registered in accordance with the provisions of the regulations of the association definition of midwife according to the ICM (International Confederation of Midwives), a midwife is someone who has participated in a midwife education program recognized in her country, has graduated from the education, and meets the qualifications to be registered and or has a valid
permit (license) to practice midwifery. Amidwife is someone who has undergone a midwife education program, which is recognized by the country in which she lives, and has successfully completed obstetrics-related studies and meets the requirements to be registered and have a formal permit for midwife practice (Supriadi, 2001).

Midwives have a role, function and competence in providing midwifery care to women. The role of midwives is as implementers, managers, educators and researchers. The role of midwives as educators includes providing education and health counseling to individuals, families, groups and communities about overcoming health problems, especially those related to maternal health including women of childbearing age, children and family planning. The code of ethics is a norm that must be heeded by every profession in carrying out the duties of his profession and his life in society. The norm contains instructions for members of the profession about how they should carry out their profession and prohibitions, namely provisions on what can and cannot be done or carried out by members of the profession, not only in carrying out their professional duties, but also concerning behavior in general in daily associations in society (Lubis, 2009; Soewono, 2006).

**Patient**

The definition of a patient according to Article 1 paragraph (10) of Law Number 29 of 2004 concerning the Practice of Medicine explains that a patient is any person who consults his health problems to obtain the necessary health services either directly or indirectly to a doctor or dentist. Meanwhile, according to Article 1 paragraph (4) of Law Number 44 of 2009 concerning Hospitals, it is explained that a patient is everyone who consults their health problems to obtain the necessary health services, either directly or indirectly in the hospital. According to Wila Chandrawila Supriadi, a patient is a sick person who needs the help of a doctor to cure the disease he suffers from and the patient is also interpreted as a sick person who is unfamiliar with his illness. Meanwhile, according to Agus Budianto and Gwendolyn Ingrid Utama, it defines a patient as an individual person who needs the services of another person, who in this case is a doctor for consultation of his health problems, either directly or indirectly (Nasution, 2013).

Based on the definition above, it can be concluded that the patient is an individual person who is in an unsanitary condition who requires services and consultations regarding his health problems either directly or indirectly. Sudikno Mertokusumo stated that in the legal sense, rights are legal interests protected by law. This interest itself is defined as a demand that is expected to be fulfilled, so it can be said that a right is a demand whose fulfillment is protected by law (Iisfandyarie, 2006).

**Malpractice**

Public criticism of the medical profession in Indonesia has recently appeared more and more frequently in various media, both print and electronic media. In the past doctors seemed to live an isolated life untouched by the law. However, since the events of Pati 1981, allegations of malpractice and criticism of medical profesi are increasingly numerous. The forms of malpractice alleged in doctors are of several kinds. Ngesti Lestari and Soedjatmikoro distinguish medical malpractice into two forms, namely, ethical malpractice and juridical malpractice, in terms of professional ethics and legal aspects. Any juridical malpractice is definitely an ethical malpractice, but not all ethical malpractice is a juridical malpractice. Criminal malpractice occurs when the patient dies or experiences disability due to doctors or other health workers being less careful or less careful in making efforts to cure the deceased or disabled patient (Koeswadji, 1998).

1. Criminal malpractice due to intentionality (intentionality), for example in cases of performing abortions without medical indications, euthanasia, leaking medical secrets, not helping emergency cases when it is known that no one else can help, and providing incorrect doctor's certificates;
2. Criminal malpractice due to recklessness, for example committing acts that are not lege artist or not in accordance with professional standards and performing actions without the approval of medical measures;
3. Criminal malpractice due to negligence, for example, occurs disability or death in the patient as a result of the actions of a less careful doctor or alpa with the lagging of the operating apparatus inside the patient's body cavity.

**Methods**

The type of research used by the author is normative juridical. Marzuki (2014) the author's consideration in using this type of research is to find out, analyze, and explain the norms governing the Comparative Analysis of Malpractice by Midwives in America and Indonesia. In this normative juridical law research, the author uses a statutory approach (statute approach). This research uses a type of statutory approach because the mainstudy material is legislation related to Comparative Analysis of Malpractice by Midwives in America and Indonesia.
Results

Analysis of Midwife Malpractice In America

Almost all over the world have experienced medical malpractice problems. In America this crisis occurred in the 1950s and 1980s (Williams, 2012). Whereas, some state that medical malarapctics have existed for more than 3 decades (Yackee, 2009; Noland, 2018). In India patients have started suing doctors since the passage of the Consumer Protection Act in 1986 (Murthy, 2007). While in Japan in 2003 it became a dark year for doctors (Hiyama, et al, 2008). At that time, many doketers in Japan were prosecuted and convicted, 3 times greater than the period 1972-2003. Statistics explain that out of 100 cases only 92 were convicted, while 7 were innocent. Of the 92 convicted, 65 were convicted (70%) of professional negligence resulting in death. Meanwhile, another 21 (23%) of professional negligence resulted in bodily injury, and 4 cases (4%) of violations of the Japan Physician’s Act (JPA), and 1 case (1%) of professional negligence resulted in death and bodily injury. Meanwhile, 1 case (1%) of the two was in the form of professional negligence resulting in death and violation of the JPA (Glaser, et al 2017; Cohen, 2019).

In the United States, the most demanded doctors in obstetrics and gynecology, general surgeons and obstetricians are 5 times more likely to be sued, surgeons have a greater tendency to be prosecuted than general practitioners and psychiatrists and 80% of those demands come from the practice of doctors in hospitals. However, a different case occurred in Germany, where private practice doctors (independent) were more often prosecuted, while in Indonesia from the complaint data to the MKDKI, it was illustrated that it had similarities with America, namely obstetricians who were the most complained about. The assessment process for the punishment of medical malpractice in several countries including: America, doctors suspected of malpractice must first be examined by the General Medical Council (GMC), after the GMC determines that there is a violation/crime, it can be forwarded to the Civil and Criminal Courts. America itself until the late 1980s and near the 1990s 70% of these claims ended without compensation payments but after the 1990s many courts decided to give compensation so that doctors and hospitals insured their actions in anticipation of fines due to malpractice claims (Noland, 2018); a serious concern in all American states especially in Washinton The reform of medical malpractice and defensive medicine is one of the ways doctors can reduce the high demands of malpractice but has the opposite side, medical malpractice reform tends to aim to reduce health care financing while defensive medicine is the opposite by increasing the financing arising from the implementation of (Budetti, et al, 2005; Arrigo, & Milovanovic, 2009).

Analysis of Midwife Malpractice in Indonesia

The development of midwifery education goes hand in hand and is always related to the development of midwifery services. In its development, it always follows the demands or needs of the community on the one hand, on the other hand it also follows the modern management system and increasingly modern services, midwife is a dynamic profession that must keep up with the development of this era. Therefore, midwives must participate in developing themselves following the global game. This participation is in the form of the active role of midwives in improving the quality of services, education and professional organizations (Son, 2020).

Midwifes are recognized as responsible and accountable professionals, who work as female partners to provide support, upbringing and advice during pregnancy, childbirth and puerperium, lead childbirth at their own responsibility and provide care to newborns and babies. This upbringing includes preventive measures, promotion of normal childbirth, detection of complications to the mother and child, and access to medical assistance or other appropriate assistance, as well as carrying out emergency measures. Midwives have an important task in counseling and health education, not only to women, but also to families and communities. These activities should include antenatal education and parenthood preparation and may extend to women’s health, sexual health or reproductive health Setiani, 2018; Wahjoeramono, 2012).

The work of an iaid midwife is a profession, so in its implementation in addition to basing on the service standards established by laws and regulations, it must also be subject to the code of ethics established by professional organizations (Article 24 paragraphs 1 and 2 of the Health Law). Midwives are one of the components of providing health services to the community have a very important role, because they are directly related to the provision of health services and the quality of services to mothers in Indonesia. Permenkes RI Number HK.02.02/Menkes/149/2010 concerning the permit and implementation of midwife practice gives the understanding that an aid midwife is a woman, which means that the midwife profession must be carried out by women, because the duties of midwives include providing obstetric services and female reproductive services. Setorano hidan minima! must be a graduation from midwife education and in carrying out midwife practice must have a midwife practice license (SIFB). This is in accordance with the provision of permenkes Number 900/Menikes/SK/III/2002 concerning Registration and Practice of Midwives (Nuryuniarti, 2017).

Article 361 of the Penal Code explains that if the crime described in this chapter is committed in the exercise of office or charging, then the criminal is punished by one-third, and the guilty may be deprived of the right to carry out the charge in which the crime was committed and the judge may order that the verdict be announced. A
midwife who deviates from the standards of the profession and commits a profession mistake that does not necessarily commit a punishable malpractice, a convicted malpractice requires the existence of an element of culpa lata or gross negligence and is fatal or serious. In the implementation of its practice, each health worker has their own authority. Both midwives and nurses have their authority expressly regulated in the Health Workers Act, the Midwifery Act and the Nursing Act. The duties of a Midwife can be seen from two things, namely in general and in particular. In general, midwives have duties, namely as caregivers, managers, extension workers and counselors. Educators, women's empowerment, and as researchers. In addition to general duties and authorities, there are also special duties and authorities that midwives have, including exercising control over pregnancy, assisting in childbirth, providing puerperal assistance, medical emergency assistance. As is the case with midwives, nurses in carrying out their duties are also regulated in several rules. Based on the Nursing Law Article 129 paragraph (1) states that the duties and authorities of nurses are to provide care, as extension workers and counselors, manage health services, as researchers, executors of the results of delegation or delegation, and executors of duties according to certain conditions. The nurse in carrying out nursing actions must be in accordance with the provisions of the nurse's competence that has been determined during the educational process that is taken. The function of nurses, once said to be an extension of doctors' hands, has changed to independent nursing services in an effort to achieve nursing care (Machmund, 2012; Chazawi, 2007).

The crime of malpractice is not clearly stated in the Law. No. 36 of 2009, however, the consequences of these criminal acts are regulated in the Criminal provisions in Chapter XX regulated in Article 190 which reads: (1) Leaders of health service facilities and/or health workers who practice or work in health service facilities who deliberately do not provide first aid to patients in emergencies as referred to in Article 32 paragraph (2) or Article 85 paragraph (2) shall be punished with the most imprisonment a duration of 2 (two) years and a maximum fine of Rp. 200,000,000 (two hundred million rupiah). (2) In the event that the act as referred to in paragraph (1) results in disability or death, the leader of the health service facility and/or health worker shall be punished with a maximum imprisonment of 10 (ten) years and a maximum fine of one billion rupiah.

Conclusion

In the Health Workers Act, the Midwifery Act and the Nursing Act there have been no legal formulations related to the Criminal liability of midwives and nurses who commit malpractice. Even in the Health Workers Act, the Midwifery Act, and the Nursing Act, it does not provide a basis for IBI and PPNI in cracking down on malpractice cases that occur as the IDI does to doctors. Meanwhile, Wetboek van Strafrecht (Criminal Code) only provides an explanation to be able to convict someone who made a mistake in terms of two things, namely based on intentionality or negligence. Willfulness must be based on the intentions of the perpetrator, while negligence is based on the inattention of the perpetrator. We recommend that medical personnel must be able to account for the medical actions that will be carried out, there is no element of "trial and error" in taking medical actions, this will be very dangerous considering that what is being handled is human life. The need for in-depth knowledge of the medical field he is engaged in. The process of punishing malpractice in Indonesia bears a resemblance to that carried out in the United States. However, in the implementation of control, it is felt that it is still ineffective. Among other things, it is evidenced by the rampant demands on doctors. For this reason, a more effective evaluation of sanctions is needed with the aim of making doctors not make these mistakes and/or can have a deterrent effect. In this case the author offers fines, social work, freezing and/or revocation of the practice license. But the punishment depends on the degree of seriousness of the malpractice it commits.

Discussions

With this, according to the author, what needs to be considered is the legal formulation regarding malpractice liability for midwives and nurses, so that the community avoids negligence committed by health workers, both midwives and nurses.

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