



**FACULTY OF SHARIA AND LAW
UIN SYARIF HIDAYATULLAH JAKARTA**

INTERNATIONAL SEMINAR



THE PRACTICE OF ISLAMIC LAW IN THE MODERN WORLD

المؤتمر الدولي : تطبيق الشريعة الإسلامية في العالم المعاصر

Jakarta, December 11-12, 2013

Sponsored by:



UNDANGAN



FACULTY OF SHARIA AND LAW
UIN SYARIF HIDAYATULLAH JAKARTA

INTERNATIONAL SEMINAR



THE PRACTICE OF ISLAMIC LAW IN THE MODERN WORLD

المؤتمر الدولي : تطبيق الشريعة الإسلامية في العالم المعاصر



December 11, 2013

8.00 AM Opening Ceremony

10.00 AM Welcoming Speech : **Dr. Hamdan Zoelva, SH., MH.**
(Chief of Constitutional Court of the Republic of Indonesia)

11.00 AM **Panel (1) :** Family Law and Islamic Penal Law: Positive Law and its Practice in Malaysia and Indonesia
أحكام الأسرة والجناية الإسلامية: الأحكام الوضعية وتطبيقها في ماليزيا وإندونيسيا
Prof. Dr. Hidayat Buang (Malaysia) | Prof. Dr. H. Muhammad Amin Suma, SH., MA., MM. (Indonesia)

11.00 AM Working Groups

A

Ushul Fiqh and Islamic Law Epistemology in the Modern World

Dr. Abdurrahman Syadiy (Saudi Arabia) | Dr. Muwaga Musa (Uganda) | Prof. Dr. Hj. Huzaemah Tahido Yanggo, MA. (Indonesia)

B

The Teaching of Islamic Law in Some Universities in Islamic Countries

Prof. Dr. Raihanah Buang (Malaysia) | Dr. Sahraman D. Hadji Latif (The Philipines) | Prof. Dr. Murod Mahmud Haidar (Egypt)

C

Islamic Penal Law and its Practice in Some Countries

Dr. Mudzakkir., SH., MH. (Indonesia) | Dr. Bassam Alkhatib (Syria) | Dr. Amru Wardhani (Egypt)

December 12, 2013

8.30 AM **Panel (2) :** The Practice of (Islamic) Law, Nation-State and Modernity: Legal and Socio-Political Perspectives
تطبيق الشريعة (الإسلامية) والدولة الشعبية والحداثة: نظريات قانونية واجتماعية
Prof. Dr. Margareth Gfrerer (Austria) | Prof. Dr. Atho Mudzhar, MSPD (Indonesia) | Dr. Abdeljalel Salim (Tunisia)

1.00 PM Working Groups

A

Islamic Law and International Law

Dr. Manuel Jordao (Belgium) | Dr. Christopher Harland (ICRC/Switzerland) | Dr. Lalu M. Iqbal (Indonesia)

B

Ethics and Islamic Business Law

Prof. Dr. M. Rusydi (Australia) | Dr. (HC). A. Riawan Amin (Indonesia) | Rifki Ismal, Ph.D (Indonesia) | Dr. Gemala Dewi, S.H., L.L.M. (Indonesia)

C

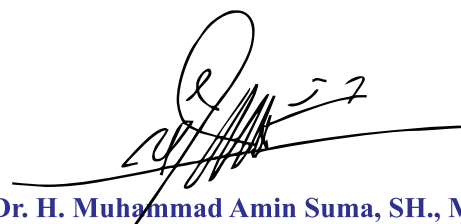
Islamic Political Studies: Siyasa Syar'iyah in the Modern World

Prof. Dr. Masykuri Abdillah (Indonesia) | Dr. Hojjatollah Ebrahimian (Iran)

3.00 PM **Panel (3) :** Academic Review

3.30 PM Closing Ceremony

Dean,



Prof. Dr. H. Muhammad Amin Suma, SH., MA., MM.

Sponsored by:





Faculty of Sharia and Law
Syarif Hidayatullah State Islamic University (UIN)
Jakarta - Indonesia

Certificate

This certificate is awarded to :

Zulham, M.Hum

For his/her participation as :

Speaker

in International Seminar on "THE PRACTICE OF ISLAMIC LAW IN THE MODERN WORLD" held by
Faculty of Sharia and Law Syarif Hidayatullah State Islamic University (UIN) Jakarta - Indonesia
on December 11-12, 2013 M / Muharram 8-9, 1435 H

Dean,



Prof. Dr. H. Muhammad Amin Suma, SH., MA., MM.



Universitas Islam Negeri
SYARIF HIDAYATULLAH JAKARTA

THE LIST OF ACCEPTED RESEARCH PAPERS
International Seminar "The Practice of Islamic Law in the Modern
World"
Faculty of Sharia and Law UIN Syarif Hidayatullah Jakarta

Wednesday, December 11, 2013

01.30-4.15 p.m

Working Groups	Name	Theme	Institution
A Venue: Theater Room 4th Floor FAH	Ahmad Satori Ismail	Daur al-Lughah al-Arabiyah fi Istinja' al-Ahkam al-Fiqhiyyah	Ikatan Dai Indonesia (Ikadi)
	Iffatin Nur	Maqashid Syari'ah: The Main Reference and the Ethical-Spiritual Foundation for the Process of the Dynamization of the Islamic Law in Accomodating Contemporary Issues	STAIN Tulungagung
	Rafiqah Ahmad	Tajdid Ushul al-Fiqh, Hal min al-Mumkin? Kaifa? Limadza? (Al-Ta'arruf 'ala Uslub Jadid wa Manhaj Mu'ashir li Tadris 'Ilm Ushul al-Fiqh)	LIPIA Jakarta
B Venue: Meeting Room 2nd Floor FSH	JM Muslimin	Learning from <i>Lembaga Konsultasi dan Bantuan Hukum (LKBH)</i> : Teaching Law through Social Empowerment	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah
C Venue: Theater Room 2nd Floor FSH	Ahmad Mukri Adji	'Uqubah al-Gharamah ka al-Ta'ziirah al-Maaliyah wa Muqaaranatuha bi al-Qaanun al-Indunisi	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah
	Asmawi	The Sanction of Impoverishing Corruptor in Order to Eradicating the Corruption in Indonesia (Islamic Criminal Law Perspective)	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah
	Fitria	The Practice of Restorative Justice in Correction Departement of France, New Zealand And Saudy Arabia: A comparative Study	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah

	Hartini	Has Indonesian Procedural Law in Religious Court Been Ready in Adoption Evidence Based on Invention of Science and Technology?	Fakultas Hukum Universitas Gadjah Mada
	Noor Azizah	Islamic Criminal Law Enforcement as Strategy in Preventing Corruption	IAIN Sumatera Utara

Thursday, December 12, 2013
01.00-3.00 p.m

Working Groups	Name	Theme	Institution
A Venue: Meeting Room 2nd Floor FSH	Arlina Permanasari	Legal Comparison on the Means and Methods of Welfare in Armed Conflict Based on Islamic Law and International Humanitarian Law	Fakultas Hukum Universitas Trisakti
	Any Setianingrum	Systematization of Business Ethics Through the Implementation of <i>Musharaka</i> Contract, Case Study Results for Farmers Tradition in Indonesia	Universitas Azzahra Jakarta
B Venue: Theater Room 2nd Floor FSH	Binti Nur Aisyah	Social Contributions of Islamic Economic Law in Social Justice, Through the Analysis Source of Fund <i>Qardh</i> -Financing in Islamic Bank	STAIN Tulungagung
	Djawahir Hezzajiey	The Role of Islamic Politics in Establishing the Shariah Banking Law in Indonesia	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah
	Hasyim Nawawi	Internalisasi dan Legislasi Hukum Ekonomi Syariah dalam Pranata Hukum Konvensional	STAIN Tulungagung
	Muhamad Nadratuazzam an Hosen	Insurance Law in the Contemporary Jurists Review	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah

✓	Muhammad Fazlur Rahman Syarif	Workplace Spirituality: The Value of Religions in Management of Modern Business (Islam, Christian, Hindu and Buddhist Perspectives)	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah
	Zulham	The Concept of Amanah in the Informed Consent the Perspective of Health and Consumer Protection Law	IAIN Sumatera Utara
	Wurianalya Maria Novenanty dan Dewi Sukma Kristianti	Collateral in Banking According to Islamic Law, Private Law, and Banking Law in Indonesia: "How it Should be Implemented?"	Fakultas Hukum Universitas Parahyangan
C Venue: Theater Room 4th Floor FAH	Ansari Yamamah	Transnational Fatwas on Jihad in Indonesia: The Ideology of Violence and Link	IAIN Sumatera Utara
	Arif Hidayat	Religious Nation State and Formalization of Sharia in Indonesia (Constitutional Perspective)	Fakultas Hukum Universitas Negeri Semarang
	Arskal Salim	Empowering Shari'a in the Constitution of Egypt, 1971-2012: <i>A Siyasa Shar'iyya</i> Point of View	Fakultas Syariah dan Hukum UIN Syarif Hidayatullah

THE CONCEPT OF AMANAH IN INFORMED CONSENT: THE PERSPECTIVES OF HEALTH AND CONSUMER PROTECTION LAW

Zulham

Lecturer in the Shari'ah Faculty of State Institute for Islamic Studies, North
Sumatra

PhD Student in the Faculty of Law, University of Indonesia (UI)

Email: heam_akhtar@yahoo.co.id

Abstract:

The Appeal Decision of the Supreme Court of the Republic of Indonesia (*Putusan Kasasi Mahkamah Agung Republik Indonesia*) Number 365K/Pid/2012 granted the appeal request of Public Prosecutor (*Jaksa Penuntut Umum*) of Manado State Public Prosecutor's Office (*Kejaksaan Negeri Manado*). The Supreme Court annulled the Manado State Court Decision (*Putusan Pengadilan Negeri Manado*) Number 90/PID.B/2011/PN.MDO, imposing 10 (ten) months criminal imprisonment to each defendant. This Appeal Decision was debated hotly at the regional and national level for the past several weeks, when doctors demonstrated against the Decision and left medical treatment to patients. Indonesian Doctors Association (*Ikatan Dokter Indonesia*) argued that the contract between doctor and patient is a contract of process, not a contract of result. At the very least, this Appeal Decision provided an avenue for legal experts to examine and evaluate philosophically and juridically the concept of informed consent, as well as rights and responsibility attached with the concept, especially regarding doctor and patient relationship. This paper argues that informed consent should be build on the framework of *amanah*, which is an important concept in Islamic law, as Islamic law has contributed greatly to the development of national law, Islam being the majority religion in Indonesia. In national law, the relationship between doctor and patient could be seen simultaneously from two aspects, health law and consumer protection law. Doctrines contained in both health law and consumer protection law could utilize the concept of *amanah* in the formulation of informed consent. Using juridical, normative, and qualitative methodology and statutes approach, several regulations related to the topic of the paper were examined, such as Law Number 29 Year 2004 on Medical Practice (*Undang-Undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran*), Law Number 36 Year 2009 on Health (*Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan*), and Law Number 8 Year 1999 on Consumer Protection (*Undang-Undang Nomor 8 Tahun 1999 tentang Perlindungan Konsumen*). This paper is divided into several sections, discussing: The Concept of *Amanah* in Islamic Law, the Legal Relationship between Doctor and Patient, the Concept of Informed Consent from the Perspective of Health Law, The Concept of Informed Consent from the Perspective of Consumer Protection Law, and the Application of the Concept of *Amanah* in Informed Consent.

Keywords: The Concept of *Amanah*, Informed Consent, Health Law, Consumer Protection Law

A. INTRODUCTION

1. Background

The Appeal Decision of the Supreme Court of the Republic of Indonesia (*Putusan Kasasi Mahkamah Agung Republik Indonesia*) Number 365K/Pid/2012¹ annulled the Manado State Court Decision (*Putusan Pengadilan Negeri Manado*) Number 90/PID.B/2011/PN.MDO.² The Manado State Court Decision stated that: the First Defendant (*Terdakwa I*) dr. Dewa Ayu Sasiary Prawani, the Second Defendant (*Terdakwa II*) dr. Hendry Simanjuntak, and the Third Defendant (*Terdakwa III*) dr. Hendy Siagian has not been proven legitimately and conclusively guilty in the criminal charges contained in the indictment; as well as acquitting the First Defendant, the Second Defendant, and the Third Defendant of all criminal charges (*vrijspraak*).³

Based on the appeal submitted by the Public Prosecutor (*Jaksa Penuntut Umum - JPU*) of the Manado State Public Prosecutor's Office (*Kejaksaan Negeri Manado*), the Supreme Court through the Appeal Decision Number 365K/Pid/2012 judged and granted the appeal and annulled the Manado State Court Decision Number 90/PID.B/2011/PN.MDO. Further the Supreme Court judged by itself and decided that the First Defendant, Second Defendant, and Third Defendant has been proven legitimately and conclusively guilty of the criminal charge due to "action caused by negligence which resulted in the death of others"; as well as convicting the Defendants with imprisonment for 10 (ten) months each.⁴ The Appeal Decision of the Supreme Court examined several legal facts, one of which could still be debated philosophically and juridically, which is informed consent.

¹ See 'Putusan Kasasi Mahkamah Agung Republik Indonesia Nomor 365K/Pid/2012'.

² See 'Putusan Pengadilan Negeri Manado Nomor 90/PID.B/2011/PN.MDO'.

³ See 'Putusan Pengadilan Negeri Manado Nomor 90/PID.B/2011/PN.MDO'.

⁴ See 'Putusan Kasasi Mahkamah Agung Republik Indonesia Nomor 365K/Pid/2012'.

Indonesian Doctor Association (*Ikatan Dokter Indonesia* - IDI) argued that the Supreme Court verdict is a criminalization of doctor's profession.⁵ As such, IDI has urged doctors to demonstrate against the verdict.⁶ IDI further argued that the contract between doctor and patient is a contract of process not a contract of result.⁷ IDI regretted the use of KUHP (*Kitab Undang-undang Hukum Pidana* – Criminal Law Sourcebook/Indonesian Penal Code) to judge cases arising out of medical treatments.⁸ This development has provided an impetus to review the Law of Doctor's Practice (*Undang-Undang Praktik Kedokteran*) as doctors need the sense of security when performing their profession to prevent criminalization against them.⁹ Doctors' nationwide demonstration has caused a drastic reduction of public health service and a consequent tension in the relationship between doctors and patients.¹⁰ This saga has provided the impetus for much needed evaluation of Indonesian health law, such that it could provide more elegantly and unbiasedly legal certainty between doctors and patients.

The concept of state's role in public health begins with the theory of protection, where the state is obligated to protect the public by provided health services.¹¹ This concept then develops into the theory of right, where

⁵ Sindonews.com, *Demo Dokter*, Wednesday, 27 November 2013, <http://daerah.sindonews.com/read/2013/11/27/16/810501/demo-dokter>, accessed on 06 Desember 2013.

⁶ Tribunnews.com, *Dokter Mogok nasional*, Tuesday, 26 November 2013, <http://www.tribunnews.com/kesehatan/2013/11/26/jakarta-diperkirakan-paling-heboh-dalam-demonstrasi-dokter-mogok-kerja-besok>, accessed on 06 Desember 2013.

⁷ Zainal Abidin, *Bisakah Dokter Dipenjarakan?*, Indonesia Lawyer Club talk show, tvOne, Tuesday, 03 December 2013.

⁸ IDI Sesalkan Penggunaan KUHP pada Kasus Tindakan Medis Dokter, <http://health.okezone.com/read/2013/11/18/482/898643/idi-sesalkan-penggunaan-kuhp-pada-kasus-tindakan-medis-dokter>, accessed on 06 December 2013.

⁹ Republikaonline, *Politikus Minta Kriminalisasi Dokter Disikapi secara Arif*, Wednesday, 27 November 2013, <http://www.republika.co.id/berita/nasional/hukum/13/11/27/mwx6ux-politikus-minta-kriminalisasi-dokter-disikapi-secara-arif>, accessed on 06 Desember 2013.

¹⁰ Tempo.co, Kolom, *Menyoal Demonsntrasi Dokter*, Friday, 29 November 2013, <http://www.tempo.co/read/kolom/2013/11/29/937/Menyoal-Demonstrasi-Dokter>, accessed on 06 Desember 2013.

¹¹ The function of government to protect all individuals, as long as it is faithful to this pledge, the government cannot be denied its power but when it ceases to do it, its laws have no validity and the government may be overthrown. Hari Chand, *Modern Jurisprudence*, Kuala Lumpur: International Law Book Services: 1994, p. 45.

the public as citizens have the rights to obtain health services.¹² These reasons caused the amendment of the 1945 Republic of Indonesia Constitution (*Undang-Undang Dasar Republik Indonesia Tahun 1945* – UUD 1945), in which principally the guarantee of health insurance is regulated under Article 28H Clause (1),¹³ Article 34 Clause (3)¹⁴ of UUD 1945. Based on this foundational constitution¹⁵, public health service provision is arranged further under lower-level regulations.¹⁶

The Constitution of the World Health Organisation (WHO)¹⁷ stated that “The enjoyment of the highest attainable standard of health is one of the

¹² Without the health law, the legal branch of health law will not be complete when we take the right of health and life as the goal. Wu Chongqi, *Law, Health Law and Science of Health Law*, (World Association for Medical Law, August-December 2012, Vol. 4), p. 5.

¹³ Article 28H clause (1) UUD 1945 states that; “Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.”

¹⁴ Article 34 clause (3) states that “The state has the responsibility to provide proper medical and public service facilities.”

¹⁵ The terms *constitution* and foundational law (*Undang-Undang Dasar*) are often debated among legal experts, whether it is derived from *constitution* (English), *grondwet* (Dutch), and *grundgesetz* (German). In general constitution is defined broader than foundational law, as constitution covers written and unwritten aspects. Moh. Mahfud MD, *Perdebatan Hukum Tata Negara Pasca Amendemen Konstitusi*, (Jakarta: LP3ES, 2007), p. xi-xii. Jimly elaborated, constitution in general rests on three consensual elements, which are: (1) The consensus of common purpose or aspiration (the general goals of society or general acceptance of the same philosophy of government); (2) The consensus of rule of law as the foundation of government and management of state (the basis of government); (3) The consensus of institutional forms and state procedures (the form of institutions and procedures). Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006), p. 25. While A.V. Dicey proposed three main elements of a state of law, which are: supremacy of law, equality before the law, and constitution based on individual rights. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, (Indianapolis: Liberty Fund, 1982), p. 123-187.

¹⁶ Among them are Law Number 29 Year 2004 on Medical Practice (*Undang-Undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran*), Law Number 40 Year 2004 on National Social Security System (*Undang-Undang Nomor 40 Tahun 2004 tentang Sistem Jaminan Sosial Nasional*), Law Number 36 Year 2009 on Health (*Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan*). Juridically Law of Medical Practice (*Undang-Undang Praktik Kedokteran*) and Law of Health (*Undang-Undang Kesehatan*) implements the provision of Article 34 clause (3) UUD 1945, while Law on National Social Security System implements the provision of Article 34 clause (2) UUD 1945 which states “The state develops a social security system for everybody and empowers the weak and underprivileged in society in accordance with their dignity as human beings.” Social security mentioned could also be understood as health provision guarantee to society.

¹⁷ WHO's Constitution came into force on 7 April 1948 – a date we now celebrate every year as World Health Day. <http://www.who.int/about/history/en/index.html>, accessed on 06 December 2013.

fundamental rights of every human being..."¹⁸ The issue of health law has been developing for a long time, along with the development of consumer protection law.¹⁹ However, officially the development of health law in the world at large started since the First Congress of World Association for Medical Law in 1967 to guarantee public health rights. Berna Arda elaborated; human rights concept has three stages. The first one contains mostly personal rights, such as equality, freedom, personal security, political rights and owner's right. Second stage human rights can be characterized as economical, social, and cultural rights. Third stage of human rights arised at the second half of the 20th century. And human rights such as peace, living in a healthy environment, patient's rights, and consumer rights are part of third stage rights. Because of the collective feature of these third stage human rights these also named as "solidarity rights".²⁰

Agreeing with the above idea, Yutaka Arai-Takahashi elaborated, the right to health is conceptually or practically interwoven with other economic, social and cultural rights, such as the right to work, food, clothing, housing, education and social security. That the protective scope of the right to education can be extended to an individual entitlement to education on nutrition prenatal or post-natal care suggests that other stand-alone economic and social rights have considerable bearing on health.²¹

The idea of health law provides guarantee to the public that they would obtain the necessary health service. In health law, informed consent is an important factor of doctor and patient relationship. The verdict of the

¹⁸ "Health and human rights," <http://www.who.int/hhr/en>, accessed on 06 December 2013.

¹⁹ Tragedy *Elixir Sulfanilamide*, a type of medicine from sulphur, in 1937 causes 93 consumers in the United States to die. Laurence P. Feldman, *Consumer Protection, Problems and Prospect*, (St. Paul, West Publishing, 1977), p. 14.

²⁰ Berna Arda, "Informed Consent Right and Children", (Beijing: Book of Abstracts, 17th World Congress on Medical Law, 2008), p. 95. See, Roberia, *Paradigma Jaminan Kesehatan Semesta*, (Proposal Disertasi, Universitas Indonesia, 2012), p. 30

²¹ Yutaka Arai-Takahashi, *The Right to Health in International Law, A Critical Appraisal*, in Robyn Martin and Linda Johnson (ed), *Law and the Public Dimension of Health*, (London: Cavendish Publishing Limited, 2001), p. 161.

Supreme Court is closely related to this idea.²² What is the real foundation of informed consent philosophy? How is informed consent implemented? How is informed consent related to the concept of *amanah*? The answers to this question would be viewed from the perspective of health law and consumer protection law which would be discussed in this paper.

2. Aim

This paper aims to elucidate the concept of *amanah* in relation to informed consent with regards to doctor and patient relationship viewed from the perspective of health law and consumer protection law. Islamic law as one of the sources of law in Indonesia could be utilized to examine doctor and patient relationship especially issues related to informed consent, where the concept of *amanah* in Islamic law is the philosophical foundation for all human activities, as all contracts (*akad*) is begun with the concept of *amanah*.

3. Methodology

Using juridical normative methodology with statutes approach, presented under qualitative methodology, this study analyzed legal foundations and legal norms of informed consent from the perspective of health law and consumer protection law. Foundations, norms, and doctrines contained in the Qur'an, Hadith, Islamic law, and other laws such as legal norm contained in state regulations were analyzed. Statutes approach is conducted through the analysis of state regulations related to informed consent, which is the 1945 Foundational Law of the Republic of Indonesia, the Law Number 29 Year 2004 on Medical Practice (*Praktek Kedokteran*), the Law Number 36 Year 2009 on Health (*Kesehatan*), and the Law Number 8 Year 1999 on Consumer Protection (*Perlindungan Konsumen*). Data were analyzed qualitatively, exhaustively, holistically, and comprehensively to

²² See 'Putusan Kasasi Mahkamah Agung Republik Indonesia Nomor 365K/Pid/2012'. Indeed the Constitutional Court through 'Putusan Nomor 4/PUU-V/2007' decided that the threat of criminal imprisonment and incarceration regulated in Article 75 clause (1), Article 76, and Article 79 letter c (about words "*or letter e*") Law Number 29 Year 2004 on Medical Practice, contradicts UUD 1945 and does not possess legal binding force as they induce threat and fear in doctors performing medical practice and providing medical service to the public. But the verdict of the Constitutional Court (*Mahkamah Konstitusi*) does not immediately eliminate all criminal threat in medical practice. See Article 51 Law Number 29 Year 2004 on Medical Practice.

elucidate the concept of *amanah* in informed consent related to doctor and patient relationship.

B. DISCUSSION

1. The Concept of *Amanah* in Islamic Law

The word *amanah* in the Qur'an is mentioned 6 (six) times, be it in the singular (*mufrad*) or plural (*jamak*) form, as found in the verses:²³ Al-Baqarah (2): 283, Al-Nisa' (4): 58, Al-Anfal (8): 27, Al-Mu'minin (23): 8, Al-Ahzab (33): 72, and Al-Ma'arij (70): 32.

In addition of these verses, many other Qur'anic verses presented the messages and values of *amanah*. The word *amanah* originates from the Arabic word *amina-ya'manu*, and also *amana-yu'minu* which means trustworthy (*shiddiq*), and *iman* means believing, submitting, and obeying what God has decreed, while *amanah* means trustworthy, its antonym being *khianat* (traitorous).²⁴ *Amanah* does indeed possess a similarity of meaning with "trust", but between "*amanah*" and "trust" there is a philosophical difference. To implement *amanah* is a reflection of human servitude as God's creature, as mentioned in the above verses. While to implement trust is a reflection of the concept benefit which ultimately has its source in materialism and utilitarianism as could be seen in the definition of trust in Blacks Law Dictionary, "the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of third party (the *beneficiary*)."²⁵

Ibnu Arabi defined *amanah* as the entirety of action protected from fraud and its derivatives, as well as action that must be fulfilled to the giver of

²³ <http://quran.javakedaton.com/kata/amanat>, diunduh 06 Desember 2013.

²⁴ Lois Ma'luf, *Al-Munjid fi al-Lughah*, (Beirut-Lebanon: Dar El-Machreq Sarl Publisher, 1986), p. 18.

²⁵ Blacks Law Dictionary does indeed provide the definition of trust in the form of words, however all of them have roots in the concept of materialism. See Garner, Bryan A., *Black's Law Dictionary*, (St. Paul, Minn: West Publishing, 2004, Eight Edition), p. 1546.

amanah.²⁶ Dawam Rahardjo opined that everything that is related to duty, obligation, right and responsibility could be referred to the concept of *amanah* as foundational value,²⁷ hence *amanah* is an intention which must be paid attention to in all human activities.

Amanah is the entirety of responsibility accepted by someone given trust to perform an action as it should be,²⁸ as such the concept of *amanah* possess 3 (three) elements, such as; (1) *amanah* giver; (2) *amanah* receiver; and (3) *amanah* performed. The concept of *amanah* possesses a wide scope, which could be classified into four aspects, which are: (1) The concept of *amanah* to God;²⁹ (2) The concept of *amanah* to self;³⁰ (3) The concept of *amanah* to others;³¹ and (4) The concept of *amanah* to the environment.³²

Amanah actually begins from the creation of humans on earth (*khalifah fi al-ardhi*).³³ Humans are given *amanah* to maintain the universe responsibly to create prosperity (*mashlahat*)³⁴ for all of mankind. The

²⁶ Ibnu Arabi, *Ahkamu Al-Quran*, Juz I, (Beirut: Daar al-Kutub al-'Ilmiyyah, 2003), p. 570-571. The argument of Ibnu Arabi to not renege when given *amanah* is reinforced in Ibnu Arabi, *Ahkamu Al-Quran*, Juz III, (Beirut: Daar al-Kutub al-'Ilmiyyah, 2003), p. 316.

²⁷ Dawam Rahardjo, *Ensiklopedia Al-Qur'an Tafsir Sosial Berdasarkan Konsep-Konsep Kunci*, (Jakarta: Paramadina, 1996), p. 204.

²⁸ *Amanah* is something entrusted (deposited) to others. See Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, (Jakarta: Balai Pustaka, 2005), p. 35.

²⁹ All the *amanah* which is obligated on human, comes in the form of God's rights towards its slaves, such as prayer, alms, fast, expiation (*kafarat*), vow (*nazar*) all of which are *amanah* entrusted without monitoring. Abdullah bin Muhammad bin Abdurrahman bin Ishaq al-Syaikhi, *Tafsir Ibnu Katsir Jilid II*, translated by M. Abdul Ghoffar E.M. (Jakarta: Pustaka Imam Syafi'i, 2005), p. 336.

³⁰ All *amanah* related to rights upon self, such as eating, drinking, sleeping and others is one of the concept of 'the purpose of law' (*maqashid syari'i*), which is to preserve life. Abu Ishaq Ibrahim Al-Syatibi, *al-Muwafaqat fi Usul al-Syari'ah* (Bairut: Daar Kutub al-ilmiyah, Juz II, no date), p. 16-25.

³¹ All *amanah* related to other human rights such as deposit, loan, promise and others which must be fulfilled. Abdullah bin Muhammad bin Abdurrahman bin Ishaq al-Syaikhi, *op. cit.*, p. 336.

³² To safeguard the environment and the universe is *amanah* entrusted by God to humans, where humans are obligated to fulfill the *amanah*. Al-Baqarah (2):11, Al-A'raf (7):74, Al-Kahfi (18):94, Al-Qashah (28):83, Ar-Ruum (30):41.

³³ Al-Baqarah (2):30

³⁴ Etymologically, *al-mashlahah* could mean goodness, usefulness, appropriateness, worthiness, harmony, utility, *benefit*, *interest*. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Kuala Lumpur: Ilmiah Publisher Sdn., 1998), h. 267. Kaidah *ايما وجدة المصلحة فثم شرع الله* (Where there is *maslahat*, there would be the law of God). Muhammad Sa'id Ramadan al-Buti, *Dawabit al-Maslahah fi as-Syariah al-Islamiyah*, (Beirut: Mu'assasah

concept of *amanah* in Islam, consider the ability, qualification, and integrity of the *amanah* receiver. The Prophet Muhammad when giving *amanah* to his Companions always considers their ability to fulfill the *amanah*. There is a tradition that Abu Dzar once came to see the Prophet for a public position, but was denied by the Prophet as he was considered weak.³⁵ This proves that the Prophet consider the ability of *amanah* receiver. Another story, this time in the Qur'an, would be when the Prophet Yusuf requested the position of state treasurer to the king. In fact, the Prophet Yusuf has considered that he is able to fulfill the *amanah* that he requested.³⁶

Such was the case for the speech of Abu Bakar when he was appointed Caliph: "O People. I was entrusted as your ruler, although I am not better than any one of you. Support me as long as you see me following the right path, and correct me when you see me going astray. Obey me as long as I observe God in your affairs. If I disobey Him, you owe me no obedience. The weak among you are powerful (in my eyes) until I get them their due. The powerful you are weak (in my eyes) until I take away from them what is due to others. I say that and seek God's forgiveness for myself and for you."³⁷

Abu Bakar's speech contains a very deep concept of *amanah*, that he only wanted to be obeyed as long as he was considered to be in the right path and corrected and left behind when he strayed from the right path. This indicates that the *amanah* receiver could deviate at any given moment from the right path. Therefore a correction mechanism to maintain the fulfillment of *amanah* is needed.

ar-Risalah, 1977), h. 12. Lihat juga Zakaria Al-Barry, *Masadir al-Akhkam al-Islamiyah*, (Mesir: Dar al-Ittihad al-Arabi, 1975), h. 129

³⁵ Nasiruddin Al-Barabbasi, *Kisah-Kisah Islam Anti Korupsi*, (Bandung: Mizania, 2009), p. 54

³⁶ Yusuf (12):55

³⁷ Charles Kurzman, *Modernist Islam 1840-1940*, (New York: Oxford University Press, 2002), p. 93-94. Suzanne McIntire, *Speeches in World History*, (New York: An Imprint of Infobase Publishing 2009), p. 81-81

2. The Legal Relationship between Doctor and Patient

Daldiyono pointed that doctor and patient relationship possess several evolving natures, which are:³⁸

1. Religious nature; where disease is considered to originate from the anger of gods, in which patient comes to Religious Leader for cure through religious means. In this case the Religious Leader is viewed also as a doctor.
2. Paternalistic nature; in subsequent generation specialization and division of labor occur. People with expertise to treat patient (who could be considered the first generation doctors), no longer use religious means. As the lay public does not understand the healing process, an asymmetric relationship arises between doctor and patient. The dependency of patient to doctor is reinforced, as doctor's orders must be obeyed by patient as only the doctor understand the science of healing. This model of relationship occurs since the 5th century before the Common era to the modern century before the development of information technology.
3. Service and consumption nature; the development of technology and information changes the relationship theory between doctor and patient from paternalistic to service provider and consumer relationship, where the public becomes aware of its rights and able to evaluate doctor's work. However, this era of provider and consumer relationship resulted in a psychological distance between doctor and patient laden with business aspects. As such patient easily sue and doctor responds by providing medical service defensively.
4. Partnership and joint effort nature; this relationship format is very ideal where the doctor and patient must value and trust each other. This kind of partnership could be developed like familial relationship when the

³⁸ Daldiono, *Pasien Pintar dan Dokter Bijak, Buku Wajib bagi Pasien dan Dokter*, (Jakarta; Bhuana Ilmu Populer, 2007), p. 192-194. As a senior doctor, Daldiono explained that the relationship between doctor and patient should be proportional and balanced. He has also predicted that once there would be legal incidents in medical practice which would reach the court of law.

patient is aware and independent while the doctor is wise and acts virtuously.

Such is also the explanation of Mason and Smith, very early medicine was, of course, a matter of mystery; there being no apparent natural reason why disease struck one person rather than another, the answer had to be found in the supernatural and, supernatural powers being sparingly distributed, healing became a prerogative of a few whose power depended largely on the ignorance of others. At its inception, therefore, the medical profession was elitist and it is easy to imagine the transference of healing powers from the isolated tribal witch doctor to the priest of organised religion.³⁹

Further, medical profession is a “*common calling*” to protect the public. After the development of contract law, the principle of doctor’s responsibility to protect the public is replaced with contractual relationship, starting from the request of patient for medical care and the fulfillment of the request by doctor to provide medical care. In the last decade, the legal relationship between doctor and patient is dominated by tort of negligence, which develops concurrently with the development of hospital industry, not a few doctors have been judged based on this negligence principle.⁴⁰

Duty of care which is imposed upon law on the doctor arises when the doctor agrees to treat the patients, be the medical care requested explicitly or implicitly. As long as this relationship exists the doctor is obligated to treat the patient as long as necessary in medical practice. When this relationship is terminated, the doctor must agree to avoid the charge of abandoning the patient. The point of legal relationship between doctor and

³⁹ J.K. Mason and R.A. McCall Smith, *Law and Medical Ethic*, (London: Butterworths, 1991), p. 3

⁴⁰ In relationship with patient, doctor does not guarantee the health of patient, does not guarantee that the patient would be cured, but must guarantee that the implementation of medical treatment follows the proper procedure. The lack of clarity of this concept could be used as a trap against doctor, as any unsatisfied patient could sue the doctor. Law provides protection for doctor in such event, unless the doctor do promise health and cure or conduct medical treatment out of procedure. Ellen I. Picard and Gerald B. Robertson, *Legal Liability of Doctors and Hospital in Canada*, (Canada: Carswell Thompson Professional Publishing, 1996), p. 1-4.

patient is both have freedom of choice, except in emergency cases. In emergency cases, doctor has legal obligation to provide emergency care to anyone eventhough they are not his patients. In health law this is called the principle of duty to provide emergency services.⁴¹ As such Michael Davies pointed that medical law is concerned with the responsibility of members of the medical profession for their actions. It is also about human rights, moral viewpoints, ethical concepts, economic demands on society and duties owed.⁴²

3. The Perspective of Health and Consumer Protection Law on Informed Consent

In health law, the right of patient consent after provision of information (informed consent) is the foundation of relationship between patient and doctor. In Indonesia, the case of Muchjidin in Sukabumi in 1984 is the milestone of informed consent doctrine.⁴³ Informed consent was born due to the therapeutic relationship between medical personnel and patient,⁴⁴ in which every party possess rights and responsibilities which must be respected.

If related with KUHPerdata (*Kitab Undang-Undang Hukum Perdata* – Civil Code), there are 4 (four) requirements which must be fulfilled in informed consent: (1) agreement between those who bind themselves; (2) competence to enter into an agreement; (3) a certain definite problem; and

⁴¹ *Ibid*, 7-8.

⁴² Michael Davies, Textbook on Medical Law, (London: Blackstone Press Limited, 1998), p. 2.

⁴³ In the case of Muchjidin, he gave his signature as a sign of consent without being given adequate information of the risk of the medical treatment. In this case, the judge could annul the medical consent by law. This case was followed by *Fatwa* IDI No. 319/P/BA./1988 and adopted in Minister of Health Regulation the Republik of Indonesia No. 585/Men.Kes/Per/IX/1989 on the Consent of Medical Treatment (*Persetujuan Tindakan Medik*). This case arose out of the fact that the doctor GM. Husaini does not state that the risk of eye operation is “the patient’s eye would seem punctured.” <http://isugiarti.blogspot.com/2010/01/sejarah-hukum-doktrin-informed-consent.html>, accessed on 06 Desember 2013.

⁴⁴ M. Jusuf Hanafiah and Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, (Jakarta: Penerbit Buku Kedokteran, 1999), p. 67.

(4) a cause that is not forbidden.⁴⁵ However, the category of informed consent agreement in the relationship is *inspanningsverbintenis* agreement, which is agreement based on effort, not *resultaatsverbintenis* agreement, which is agreement based on result.⁴⁶

The informed consent doctrine is of course in opposition with paternalist doctrine, where the doctor impose upon themselves the obligation to cure patient, and the patient must accept and fulfill obligation requested by the doctor. In this doctrine, only the doctor understands medical care and thus the doctor can do no wrong. This argumentation potentially does much harm to patient whose consent is not needed for any medical treatment by the doctor. However, there are exceptions, such as in cases emergency, natural disaster, and disease, when the doctor's treatment could be performed without informed consent.⁴⁷

Related to development from paternalistic to informed consent doctrine, Ellen and Gerald pointed that law in Canada give patient the right to decide whether to undergo treatment or not.⁴⁸ Further, Ellen and Gerald stated that, the form of consent⁴⁹ is divided into (1) express consent; and (2) implied consent. Consent must possess several elements, which are: (1) given voluntarily; (2) given by a patient who has capacity; (3) referable both to the

⁴⁵ Article 1320 of KUHPerdata.

⁴⁶ Fred Ameln, *Kapita Selektta Hukum Kedokteran*, (Jakarta: Grafikatama Jaya, 1991), p. 42-43.

⁴⁷ J. K. Mason and R.A. McCall Smith, *op. cit*, p. 227-228.

⁴⁸ Physical contact with the patient is essential in virtually all medical treatment. The doctor may need to palpate the abdomen, use a tongue depressor, or attach the electrodes of an electrocardiograph. In these examples, the patient may have given more than mere passive consent and actually have requested the examination or procedure, and so it may seem that bodily contact in medical situations differs little from that in the social or sporting context. But there is an important difference in that the parties are not in an equal position, because the doctor is far more knowledgeable than the patient about the latter's condition and the available treatment. In the past, when doctors occupied more of a paternal role, there were fewer problems with consent because most patients expected and accepted the doctor's direction. While some modern patients continue to accept this traditional model of the doctor-patient relationship, many do not, and want to know more about the medical treatment or procedure involved, including the possible risks and available alternatives. As we shall see, this right to a thorough disclosure of information about proposed treatment is now firmly entrenched in Canadian law, as is the patient's right ultimately to decide whether or not to undergo that treatment. Ellen I. Picard and Gerald B. Robertson, *op. cit*, p. 40.

⁴⁹ Joseph H. King Jr., *The Law of Medical Malpractice*, (St. Paul, Minnesota: West Publishing Company, 1986), p. 131-137.

treatment and to the person who is to administer that treatment; and (4) given by a patient who is informed.⁵⁰

Informed consent emerges out of ethical principles in medical treatment. The principle of “autonomy” stated that “every person is an end in herself and deserves to be treated as an end in herself. Every person is to be treated as a separate person, able to govern herself.” As such the principle of autonomy is considered as a freedom to act, which is only valuable when people respect each other’s autonomy. In the field of health law, the idea of autonomy principle becomes very important as it is the foundation or acknowledgement of patient’s rights of his or her own self.⁵¹ As such, Peggy Foster stated by citing Ian Kennedy, that; “Consent in the context of modern medicine is... an ethical doctrine about respect for persons and about power.”⁵²

A further elaboration of autonomy which is very fundamental in health law, as stated by Judge Cardozo in *Schloendorff v. Society of New York Hospital* (1914) 105 N.E.92 is “Every person being of adult years and sound mind has a right to determine what shall be done with his own body.”⁵³ This elaboration of autonomy is very closely related to the concept of ownership, as the basis of the principle of autonomy is ownership, which is ownership of the patient’s body to undergo medical treatment.⁵⁴ As such, medical ethics rest on patient autonomy or patient acceptance of health care. However, the lack of medical knowledge and fear of illness, where patient is not equal morally to doctor who has more knowledge, thus patient needs encouragement and respect as an individual to be treated.⁵⁵

⁵⁰ *Ibid*, 45-55.

⁵¹ John Devereux, *Medical Law*, (London: Cavendish Publishing, 2002), p. 5.

⁵² Peggy Foster, *Informed Consent in Practice*, in Sally Sheldon and Michael Thomson (ed), *Feminist Perspectives on Health Care Law*, (London: Cavendish Publishing Limited, 1998), p. 53.

⁵³ Andrew Hockton, *The Law of Consent to Medical Treatment*, (London: Sweet & Maxwell, 2002), p. 5.

⁵⁴ Derek Morgan, *Issues in Medical Law and Ethics*, (London: Cavendish Publishing Limited, 2001), p. 84.

⁵⁵ Catherine Tay Swee Kian, *Medical Negligence, Get the Law on Your Side*, (Singapore: Times Books International, 2001), p. 34-35.

In later development, the principle of autonomy which has roots in the principle of ownership evolves into the principle of “beneficence”. Devereux stated that “The countervailing principle to autonomy is often beneficence. The moral duty of beneficence requires medical practitioners to act so as to produce the best medical result for their patient. That is to say, they must act so as to promote the wellbeing of the patient. Beneficence may also involve the prevention of harm; the removal of harm; benevolence or compassion. The idea of beneficence is trained to treat, to attempt to cure the patient.”⁵⁶ Further Catherine stated, “The principle of beneficence obliges a doctor to abstain from injuring others, and to help others further their legitimate interests by preventing or removing possible harms. It is the responsibility of the medical profession to do good to patients and the public. Beneficence includes efforts to improve the health of a community.”⁵⁷

The principle of “beneficence” is reinforced with the principle of “non-maleficence”. As stated by Catherine, non-maleficence is the duty to do no harm, an obligation not to inflict harm intentionally. Obligations of beneficence and non-maleficence are both expressed in the Hippocratic Oath; “I will follow that system of regimen which, according to my ability and judgement, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous.”⁵⁸

The principle of autonomy, beneficence, and non-maleficence becomes the philosophical foundation of informed consent regime in medical practice. In Indonesia, informed consent is formulated in Article 45 Law Number 29 Year 2004 on Medical Practice. Briefly, the article formulates that: “Every medical treatment being performed by a doctor to a patient must be with patient’s consent after the patient being given comprehensive information, which at least includes: (a) diagnosis and medical procedure; (b) the purpose of medical procedure; (c) other alternatives and accompanying risks; (d) risk and complication which might occur; and (e) prognosis on the

⁵⁶ John Devereux, *op. cit*, p. 5-6.

⁵⁷ Catherine Tay Swee Kian, *op. cit*, p. 35.

⁵⁸ *ibid*.

medical treatment performed. This consent could be given in writing or verbally, however medical treatments which carry with it high risk must be performed after written consent signed by those with rights to give consent.”

In the perspective of consumer protection law, the relationship between doctor and patient could be construed in terms of relationship between *health providers* and *health receivers*.⁵⁹ Business English Dictionary define consumer as a “person or company which buys and uses goods and service.”⁶⁰ According to Black’s Law Dictionary a consumer is: a person who buys goods or service for personal, family, or household use, with no intention or resale; a natural person who use products for personal rather than business purpose.⁶¹ While in the Textbook on Consumer Law, a consumer is “one who purchases goods or service”.⁶² Law Number 8 Year 1999 on Consumer Protection defines a consumer anyone who utilizes goods and/or services available in society, be it for personal, family, other people or creature benefit in which the goods and/or services are not resold”.⁶³

If a consumer could be defined as above, a patient would be *health receiver* of goods and/or services (such as medical treatment), while a doctor would be *health providers* of goods and/or services (again, such as medical treatment). So the health receiver is consumer while the health provider is producer. However, according to Daldiono, eventhough the relationship between a patient and a doctor could be likened to a consumer and a producer, as it is permeated with business aspects,⁶⁴ principles contained in consumer protection law also apply to guarantee⁶⁵ patient’s rights.⁶⁶

⁵⁹ Fred Ameln, *op. cit.*, p. 13.

⁶⁰ Peter Colin, *Business English Dictionary*, (London: Linguaphone Institute Limited), p. 60.

⁶¹ Bryan A. Garner, *Black’s Law Dictionary*, (St. Paul, Minn, West Publishing, 2004), Eight Edition, p. 335.

⁶² David Oughton and John Lowry, *Textbook on Consumer Law*, (London: Blackstone Press Limited, 1997), p. 1-2.

⁶³ See Article 1 Number 2 of Law Number 8 Year 1999 on Consumer Protection.

⁶⁴ Daldiono, *op. cit.*

⁶⁵ Consumer protection is all effort which guarantees legal certainty to provide protection to consumer. Article 1 Number 1 Law Number 8 Year 1999 on Consumer Protection.

⁶⁶ Black’s Law Dictionary includes a statute that safeguards consumers in the use goods and services. Bryan A. Garner, *op. cit.*, p. 335.

The speech of John F. Kennedy on 15 March 1962 in front of the United States Congress on consumer protection was marked as a new era for consumer protection. This speech obtained much support evidenced by the formation of consumer protection law in the United States, a move which was followed by many other states.⁶⁷ The rights mentioned by Kennedy were: (1) the right to safety; (2) the right to choose; (3) the right to be informed; and (4) the right to be heard.⁶⁸ These universal consumer rights could be construed as the rights of patients (health receivers) to obtain medical treatment from doctors (health providers) with the following explanation:

1. The right to be heard, which is the right of patient to be heard concerning the complaints the patient is suffering from, such that the doctor can diagnose the patient and determine the medical treatment to be performed.
2. The right to be informed, after presenting complaint of the illness being suffered based on the right to be heard, the patient has the right to obtain

⁶⁷ The speech of John F. Kennedy is an inspiration for the United Nations, in which with unanimous agreement the UN General Assembly issued the UN Resolution Number A/RES/39/248 date 16 April 1985 on the guidelines for consumer protection. The consumer rights protected according to this resolution is: (1) The protection of consumers from hazards to their health and safety; (2) The promotion and protection of the economic interests of consumers; (3) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs; (4) Consumer education, including education on the environmental, social and economic impacts of consumer choice; (5) Availability of effective consumer redress; (6) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them. In addition, the European Economic Community defines consumer rights in 5 (five) fundamental rights, which are: (1) the right to protection of health and safety; (2) the right to protection of economic interest; (3) the right of redress; (4) the right to information and education; (5) the right to representation (the right to be heard). The United Kingdom implements the Consumer Protection Act in 1961 which is later amended in 1971. Mexico issued Federal Consumer Protection Act (FCPA) in 1975. Singapore: The Consumer Protection (Trade Description and Safety Requirement Act), year 1975. Thailand: Consumer Act, year 1979. Japan: The Consumer Protection Fundamental Act, year 1968. Australia: Consumer Affairs Act, year 1978. Ireland: Consumer Information Act, year 1978. Finland: Consumer Protection Act, year 1978. Canada: The Consumer Protection Act and The Consumer Protection Amendment Act, year 1971. See Munir Fuady, *Hukum Bisnis dalam Teori dan Praktek*, Buku Kedua, (Bandung: Citra Aditya Bakti, 1994), p. 187. Inosentius Samsul, *Perlindungan Konsumen, Kemungkinan Penerapan Tanggung Jawab Mutlak*, (Jakarta: Universitas Indonesia, 2004), p. 5. Gunawan Widjaja and Ahmad Yani, *Hukum Tentang Perlindungan Konsumen*, (Jakarta: Gramedia, 2003), p. 15.

⁶⁸ Inosentius Samsul, *op. cit.*, p. 7. Donald P. Rothschild and David W. Carrol, *Consumer Protecting; Reporting Service*, Vol. I (Maryland: National Law Publishing Corporation, 1986), p. 20.

information on the diagnosis, medical treatment, treatment alternatives, risk, complication as well as prognosis on the illness being suffered. The right to be informed is one of the foundations of informed consent for the patient from the perspective of consumer protection law.

3. The right to choose, which could be connected with the principle of autonomy in health law, where the patient has rights upon himself or herself based on the principle of ownership, such that the patient has the freedom of choice to accept or reject the medical treatment, acceptance or rejection being the patient prerogative right. It must be understood that the foundation of the right to be informed is the freedom of choice that the patient could make to determine his or her decision. This right determines whether relationship based on informed consent occurs or not.
4. The right to safety, which is the final result desired by both patient and doctor. However, it must be emphasized that the bond between patient and doctor is *inspanningsverbintenis* bond, a bond based on maximum effort to cure patient, not *resultaatsverbintenis* bond, a bond based on result which could guarantee patient's health. The right to safety could be connected with the principle of beneficence and the principle of non-maleficence. The idea of beneficence is to attempt to cure the patient, while non-maleficence is the duty to do no harm, an obligation not to inflict harm intentionally.

One of the argumentations of Inosentius Samsul on the importance of government intervention for consumer protection is the relationship between consumer and producer is asymmetrical.⁶⁹ This argumentation also supports the idea that the relationship between patient and doctor must be symmetrical in the form of partnership, as elaborated by Daldiono previously. Dungan stated that consumer protection law rest on welfare

⁶⁹ Inosentius Samsul, *op. cit*, p. 30.

consideration,⁷⁰ as is protection to patient who desires benefit (*mashlahat*) to patient.

Based on the above explanation, the principles of (1) autonomy; (2) beneficence; and (3) non-maleficence contained in health law, or universal rights contained in consumer protection law, which are: (1) the right to safety; (2) the right to choose; (3) the right to be informed; and (4) the right to be heard all support the doctrine of informed consent on the relationship between patient and doctor.

4. The Application of the Concept of *Amanah* in Informed Consent

This section is intended not to criticize the Decision of the Supreme Court of the Republic of Indonesia Number 365K/Pid/2012 which is final and binding, but to formulate the concept of *amanah* dalam informed consent. In the Supreme Court decision, there are several legal facts related to informed consent, which are: (1) That the Defendants before performing *cito secasio sesaria* operation on the victim had not conveyed to the victim's family the possibility of event which could befall the victim; (2) That the victim signature contained in the consent form is *spurious signature* according to the analysis result of Criminal Laboratory NO.LAB: 509/DTF/2011.⁷¹ Both facts are sufficient to prove that the implementation of informed consent is closely related to the concept of *amanah*.

Amanah is Islamic law is very closely related to justice,⁷² and justice is indeed one of the criteria of success to fulfill *amanah*. Majid Khadduri stated that "In the Qur'an there are over two hundred admonitions against injustice expressed in such word as *zulm*, *ithm*, *dalal*, and others, and no less than almost a hundred expressions embodying the notion of justice, either

⁷⁰ Stephen Corones and Philip H. Clarke, *Consumer Protection and Product Liability Law, Commentary and Materials*, (Sydney: LawBook Co, 2002, Second Edition), p. 10-12.

⁷¹ See 'Putusan Mahkamah Agung Republik Indonesia Nomor 365K/Pid/2012'.

⁷² Al-Nisa' (4): 58.

directly in such word as '*adl, qist, mizan*, and others as noted before, or in variety of indirect expression."⁷³

Amanah which must be fulfilled by human as *khalifah fil ardhi* to safeguard the universe is quite burdensome, such that there is dialogue between angel and God, in which the angels question the ability of human to fulfill the *amanah*. Even the heavens, the earth, and the mountains are reluctant to fulfill the *amanah* as they are afraid of not fulfilling it.⁷⁴ The burden of *amanah* which must be fulfilled by humans is supported by the human mind, which is also part of the *amanah* of God to be safeguarded..⁷⁵

Related to the philosophy of human creation, this means all parts of humans physically, spiritually or mentally are *amanah* of God, including the task of doctor to provide medical treatment to patients, and the need of patients to get cure for their disease. As such, the concept of *amanah* must be internalized and crystallized in every human movement as a reflection of slavehood to God. Thus, the relationship between doctor and patient based on informed consent is also part of the relationship build on the framework of *amanah*. As informed consent is agreement (*amanah*) given by patient to doctor after obtaining information from the doctor.⁷⁶

Based on this explanation, several levels of the concept of *amanah* could be elaborated in informed consent, which are: (1) That God gives *amanah* to doctor to apply maximum effort to cure patients, not to guarantee the patient's health, as guarantee of health belongs to God's domain; (2) On the other hand, God has given *amanah* to patients to maintain their health and life, not to surrender their health and life to be guaranteed by doctor's

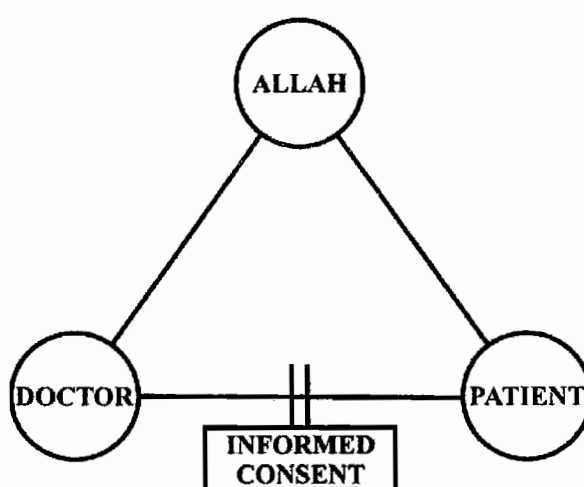
⁷³ Majid Khadduri, *The Islamic Conception of Justice*, (London: The Johns Hopkins University Press, 1984), p. 10. The theory of justice is a hotly debated topic among philosophers, even becoming ideology of the state. John Rawls for example, see justice in duty and obligation of original position where everyone has the same right in obtaining justice without consideration of status. Sayyid Qutb for example, stated that the foundations on which Islamic establishes justice are: (1) Absolute freedom of conscience. (2) The complete equality of all men. (3) The firm mutual responsibility of society. Sayyid Qutb, *Social Justice in Islam*, (New York: Islamic Publication International, 2000), p. 51.

⁷⁴ Al-Ahzab (33): 72.

⁷⁵ One of the purposes of *maqashid syar'i* is preserving the mind. Abu Ishaq Ibrahim Al-Syatibi, *op. cit.*, p. 16-25.

⁷⁶ M. Jusuf Hanafiah and Amri Amir, *op. cit.*, p. 67.

treatment, as the guarantee of health and life belongs to God's domain; (3) In the next level, the patient wishes to cure their illness by presenting their complain and requesting help from God who are considered more knowledgeable in medicine compared to himself or herself, the doctor then provide explanation (information) to patient on the diagnosis, medical treatment, treatment alternatives, risk, complication and prognosis⁷⁷ of the illness being suffered. If the patient agrees⁷⁸ on the medical treatment to be performed, informed consent has been given as *amanah* to the doctor. This explanation could be defined as the trilogy of *amanah* concept in informed consent as could be depicted in the following diagram:



Hence the question arise, can someone guarantee that he or she would always be consistent in fulfilling *amanah* that is his duty? Can a doctor always fulfill the *amanah* given to him in providing medical treatment to patient? As such, could someone's fulfillment of *amanah* be controlled? These questions are difficult to answer precisely, but could be elaborated in stages.

The Supreme Court Decision of dr. Dewa Ayu Sasiary Prawani, dr. Hendry Simanjuntak, and dr. Hendy Siagian in fact is derived from the understanding and implementation of the concept of *amanah* in informed consent. Performing *cito secsio sesaria* operation on the victim without conveying to the family the possibility of events which could befall the victim

⁷⁷ Article 45 Law Number 29 year 2004 on Medical Practice.

⁷⁸ See the principle of prinsip autonomy, Andrew Hockton, *op. cit*, p. 5. See also 'The right to Choose', Inosentius Samsul, *op. cit*, p. 7. Donald P. Rothschild and David W. Carrol, *op. cit*, p. 20.

is not fulfilling *amanah*. Such is the case for faking signature, an act that does not fulfill *amanah*.⁷⁹

Except chosen people such as Prophets, not a single person could guarantee the consistency of fulfilling *amanah* in their course of duty. Abu Bakar who obtained the title As-Shiddiq, in his “inauguration speech” requested to be corrected if he goes in the wrong direction.⁸⁰ The Prophet refused to give any position to Abu Dzar as he is deemed weak⁸¹ in fulfilling *amanah*, which is an indication that academic ability does not necessarily correlate with ability to fulfill *amanah*. Daldiono elaborated that a wise doctor is a smart and kind doctor.⁸² Kind behavior that fulfills *amanah* needs to be controlled such that the consistency is maintained, as the behavior of fulfilling *amanah* could change depending on the condition and situation when *amanah* is being fulfilled.

The trilogy of *amanah* concept in informed consent could be a lens to view the practice of medicine in Indonesia, such as follows:

1. Article 2 of Law on Medical Practice stated: “The practice of medicine is carried out based on Pancasila and the values on science, benefit, justice, humanity, balance, and protection and patient’s safety.”⁸³ Implicitly, the terms of this article has contained the value of *amanah* as it has been based by Pancasila, as the values of humanity, protection, benefit and justice are implicit in Pancasila. However, explicitly the value of *amanah* is not included in this article, a regrettable fact since this article is hoped to be the spirit of the regulation of relationship between doctor and patient.
2. Every doctor which performs medical practice in Indonesia must have practice license, issued by local medical authority in the regency/city where the practice is located, the doctor practice license mentioned

⁷⁹ See ‘Putusan Mahkamah Agung Republik Indonesia Nomor 365K/Pid/2012’.

⁸⁰ Charles Kurzman, *op. cit.*, p. 93-94. Suzanne McIntire, *op. cit.*, p. 81-81.

⁸¹ Nasiruddin Al-Barabbasi, *op. cit.*, p. 54.

⁸² Daldiono, *op. cit.*, p. 199-201.

⁸³ Article 2 Law Number 29 Year 2004 on Medical Practice.

being given at most to 3 (three) places.⁸⁴ The terms of the location of doctor's practice is regulated in more details in Article 4 Minister of Health's Regulation of the Republic of Indonesia Number 512/MENKES/PER/IV/2007 on Practice License and Doctor's Practice Implementation. Article 4 clause (1) states: "Practice License (*Surat Izin Praktik* -SIP) of a doctor or dentist is given at most to 3 (three) practice locations, be it in medical service infrastructure of the government, private or individual practice."⁸⁵ Further in Article 4 clause (3) it is stated: "SIP of 3 (three) practice locations as mentioned in clause (1) could be located in 1 (one) District/City or other District/City be it in the same Province or other Province."⁸⁶ If this philosophical foundation is welfare and benefit for doctors, this regulation is appropriate as it limits the location of doctor's practice. However, if *amanah* is used as the philosophical foundation of this regulation, hence it is not fully appropriate. A doctor who practices in three different provinces, would have to travel a long distance to reach his or her practice place. In a situation where the patient being treated is in emergency condition, but the doctor is practicing in a different province, could *amanah* be performed according to informed consent. Could doctor refer his or her patients to other doctor because he is then practicing in other province, while he or she is still competent to treat the patient?⁸⁷ Isn't that against the *amanah* which has been given by the patient based on informed consent? In the perspective of *amanah*, a doctor must be able to gauge his or her ability to fulfill *amanah* related to practice location. As such, in the

⁸⁴ See Article 36, and 37 clause (1) and (2) Law Number 29 Year 2004 on Medical Practice.

⁸⁵ Article 4 clause (1) Minister of Health Regulation of the Republic of Indonesia Number 512/MENKES/PER/IV/2007 on Practice License and Doctor's Practice Implementation.

⁸⁶ Article 4 clause (3) Minister of Health Regulation of the Republik of Indonesia Number 512/MENKES/PER/IV/2007 on Practice License and Doctor's Practice Implementation.

⁸⁷ Compare with the statement of Article 51 letter b Law Number 29 Year 2004 on Medical Practice which stipulates: "Doctor or dentist when practicing medicine has the obligation to refer a patient to another doctor or dentist who has more expertise or ability, when they could not perform a treatment or provide medication."

perspective of *amanah*, the regulation for location of doctor's practice (not the number of doctor's practice) should be reviewed, by considering distance, condition and situation where in major cities there exists a great number of traffic jams. This review is important to be done based on the philosophy of *amanah* being given to the doctor by the patient based on informed consent.

3. Article 50 Law Number 29 Year 2004 on Medical Practice stated that "Doctor or dentist when performing medical practice has the right: (a) *to obtain legal protection when performing duty based on professional standard and according to standard operational procedure*; (b) to give medical treatment based on professional standard and according to standard operational procedure; (c) to obtain complete and honest information from the patient or his or her family; and (d) to receive pay."⁸⁸ The ambiguity in this article could be found in the order of doctor's rights, where the stipulation of "*to obtain legal protection when performing duty based on professional standard and according to standard operational procedure*" is placed as the first right while the *amanah* given to him or her has not been fulfilled. This stipulation was born out of the defensive attitude of doctor when treating patient, not from his or her offensive attitude in which doctors and patients are both in partnership to fulfill *amanah*. The stipulation of the legal right should be placed after the stipulation of right "to obtain complete and honest information from the patient or his or her family."

C. CONCLUSION

Health is an obligation of every citizen who must be protected by the state. In obtaining their legal rights of health patient has a legal relationship with doctor based on informed consent. The principle of autonomy, beneficence, and non-maleficence in the perspective of health law, as well as the right to safety; the right to choose; the right to be informed; and the right

⁸⁸ Article 50 Law Number 29 Year 2004 on Medical Practice

to be heard in the perspective of consumer protection law supports and becomes the philosophical foundation of informed consent doctrine in the relationship of doctor and patient. Medical treatment given to the patient based on informed consent must be implemented fulfilling *amanah* based on the trilogy of *amanah* concept.

D. DAFTAR PUSTAKA

1. Holy Book

Al-Quran Al-Karim

2. Books

Al-Barry, Zakaria, *Masadir al-Akhkam al-Islamiyah*, (Mesir: Dar al-Ittihad al-Arabi, 1975)

Al-Barabbasi, Nasiruddin, *Kisah-Kisah Islam Anti Korupsi*, (Bandung: Mizania, 2009)

Al-Buti, Muhammad Sa'id Ramadan, *Dawabit al-Maslahah fi as-Syariah al-Islamiyah*, (Beirut: Mu'assasah ar-Risalah, 1977)

Al-Syaikhi, Abdullah bin Muhammad bin Abdurrahman bin Ishaq, *Tafsir Ibnu Katsir Jilid II*, translated by M. Abdul Ghoftar E.M. (Jakarta: Pustaka Imam Syafi'i, 2005)

Al-Syatibi, Abu Ishaq Ibrahim, *al-Muwafaqat fi Usul al-Syari'ah* (Bairut: Daar Kutub al-ilmiyah, Juz II, no date)

Ameln, Fred, *Kapita Selektu Hukum Kedokteran*, (Jakarta: Grafitama Jaya, 1991)

Arabi, Ibnu, *Ahkamu Al-Quran*, Juz I, (Beirut: Daar al-Kutub al-'Ilmiyyah, 2003)

_____, *Ahkamu Al-Quran*, Juz III, (Beirut: Daar al-Kutub al-'Ilmiyyah, 2003)

Arai-Takahashi, Yutaka, *The Right to Health in International Law, A Critical Appraisal*, in Robyn Martin and Linda Johnson (ed), *Law and the Public Dimension of Health*, (London: Cavendish Publishing Limited, 2001)

Arda, Berna, *"Informed Consent Right and Children"*, (Beijing: Book of Abstracts, 17th World Congress on Medical Law, 2008)

Asshiddiqie, Jimly, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006)

- Chand, Hari, *Modern Jurisprudence*, (Kuala Lumpur: International Law Book Services: 1994)
- Chongqi, Wu, *Law, Health Law and Science of Health Law*, (World Association for Medical Law, August-December 2012, Vol. 4)
- Colin, Peter, *Business English Dictionary*, (London: Linguaphone Institute Limited)
- Corones, Stephen, and Philip H. Clarke, *Consumer Protection and Product Liability Law, Commentary and Materials*, (Sydney: LawBook Co, 2002, Second Edition)
- Daldiono, *Pasien Pintar dan Dokter Bijak, Buku Wajib bagi Pasien dan Dokter*, (Jakarta; Bhuana Ilmu Populer, 2007)
- Davies, Michael, *Textbook on Medical Law*, (London: Blackstone Press Limited, 1998)
- Devereux, John, *Medical Law*, (London: Cavendish Publishing, 2002)
- Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, (Indianapolis: Liberty Fund, 1982)
- Feldman, Laurence P., *Consumer Protection, Problems and Prospect*, (St. Paul, West Publishing, 1977)
- Foster, Peggy, *Informed Consent in Practice*, in Sally Sheldon and Michael Thomson (ed), *Feminist Perspectives on Health Care Law*, (London: Cavendish Publishing Limited, 1998)
- Fuady, Munir, *Hukum Bisnis dalam Teori dan Praktek, Buku Kedua*, (Bandung: Citra Adtya Bakti, 1994)
- Garner, Bryan A., *Black's Law Dictionary*, Eight Edition, (St. Paul, Minn, West Publishing, 2004)
- Hanafiah, M. Jusuf, and Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, (Jakarta: Penerbit Buku Kedokteran, 1999)
- Hockton, Andrew, *The Law of Consent to Medical Treatment*, (London: Sweet & Maxwell, 2002)
- Jr., Joseph H. King, *The Law of Medical Malpractice*, (St. Paul, Minnesota: West Publishing Company, 1986)
- Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, (Kuala Lumpur: Ilmiah Publisher Sdn., 1998)
- Khadduri, Majid, *The Islamic Conception of Justice*, (London: The Johns Hopkins University Press, 1984)
- Kian, Catherine Tay Swee, *Medical Negligence, Get the Law on Your Side*, (Singapore: Times Books International, 2001)

- Kurzman, Charles, *Modernist Islam 1840-1940*, (New York: Oxford University Press, 2002)
- Ma'luf, Lois, *Al-Munjid fi al-Lughah*, (Beirut-Lebanon: Dar El-Machreq Sarl Publisher, 1986)
- McIntire, Suzanne, *Speeches in World History*, (New York: An Imprint of Infobase Publishing 2009)
- MD, Moh. Mahfud, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi*, (Jakarta: LP3ES, 2007)
- Mason, J.K., and R.A. McCall Smith, *Law and Medical Ethic*, (London: Butterworths, 1991)
- Morgan, Derek, *Issues in Medical Law and Ethics*, (London: Cavendish Publishing Limited, 2001)
- Oughton, David, and John Lowry, *Textbook on Consumer Law*, (London: Blackstone Press Limited, 1997)
- Picard, Ellen I., and Gerald B. Robertson, *Legal Liability of Doctors and Hospital in Canada*, (Canada: Carswell Thompson Professional Publishing, 1996)
- Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, (Jakarta: Balai Pustaka, 2005)
- Qutb, Sayyid, *Social Justice in Islam*, (New York: Islamic Publication International, 2000)
- Rahardjo, Dawam, *Ensiklopedia Al-Qur'an Tafsir Sosial Berdasarkan Konsep-Konsep Kunci*, (Jakarta: Paramadina, 1996)
- Rawls, John, *A heory of Justice*, (Harvard University Press, 1999)
- Rothschild, Donald P., dan David W. Carrol, *Consumer Protecting; Reporting Service*, Vol. I (Maryland: National Law Publishing Corporation, 1986)
- Samsul, Inosentius, *Perlindungan Konsumen, Kemungkinan Penerapan Tanggung Jawab Mutlak*, (Jakarta: Universitas Indonesia, 2004)
- United Nations Resolution Number A/RES/39/248 date 16 April 1985 on the Guidelines for Consumer Protection
- Widjaja, Gunawan, and Ahmad Yani, *Hukum Tentang Perlindungan Konsumen*, (Jakarta: Gramedia, 2003)

3. Regulation and Court Decision

The Republic of Indonesia, The Constitution of The Republic of Indonesia Year 1945

_____, Civil Code

- ____, Penal Code
- ____, Law Number 8 Year 1999 on Consumer Protection
- ____, Law Number 29 Year 2004 on Medical Practice
- ____, Law Number 36 Year 2009 on Health
- ____, Minister of Health Regulation Number 512/MENKES/PER/IV/2007 on Practice License and Doctor's Practice Implementation.
- ____, Constitutional Court Decision Number 4/PUU-V/2007
- ____, Supreme Court Decision Number 365K/Pid/2012
- ____, Manado State Court Decision Number 90/PID.B/2011/PN.MDO

4. Electronic Media and Internet

IDI Sesalkan Penggunaan KUHP pada Kasus Tindakan Medis Dokter,
<http://health.okezone.com/read/2013/11/18/482/898643/idi-sesalkan-penggunaan-kuhp-pada-kasus-tindakan-medis-dokter>,
 accessed on 06 December 2013.

<http://isugiarti.blogspot.com/2010/01/sejarah-hukum-doktrin-informed-consent.html>, accessed on 06 Desember 2013.

<http://www.who.int/hhr/en>, accessed on 06 December 2013.

<http://www.who.int/about/history/en/index.html>, accessed on 06 December 2013.

<http://quran.javakedaton.com/kata/amanat>, diunduh 06 Desember 2013.

Republikaonline, *Politikus Minta Kriminalisasi Dokter Disikapi secara Arif*,
 Wednesday, 27 November 2013,
<http://www.republika.co.id/berita/nasional/hukum/13/11/27/mwx6ux-politikus-minta-kriminalisasi-dokter-disikapi-secara-arif>,
 accessed on 06 Desember 2013.

Sindonews.com, *Demo Dokter*, Wednesday, 27 November 2013,
<http://daerah.sindonews.com/read/2013/11/27/16/810501/demo-dokter>, accessed on 06 Desember 2013.

Tempo.co, Kolom, *Menyoal Demosntrasi Dokter*, Friday, 29 November 2013,
<http://www.tempo.co/read/kolom/2013/11/29/937/Menyoal-Demonstrasi-Dokter>, accessed on 06 Desember 2013.

Tribunnews.com, *Dokter Mogok nasional*, Tuesday, 26 November 2013,
<http://www.tribunnews.com/kesehatan/2013/11/26/jakarta-diperkirakan-paling-heboh-dalam-demonstrasi-dokter-mogok-kerja-besok>, accessed on 06 Desember 2013.

Zainal Abidin, *Bisakah Dokter Dipenjarakan?*, Indonesia Lawyer Club talk show, tvOne, Tuesday, 03 December 2013.



Universitas Islam Negeri
SYARIF HIDAYATULLAH JAKARTA