

## CHAPTER I

In Islamic law study there are a lot of problems which are not explained in al-Qur'an, hadith, and scholar agreement. One of the problems is about marriage requirements. Marriage can be implemented if the requirements and the pillars of marriage are fulfilled. However, fiqh scholars have different opinions in determining requirements and pillars of marriage. According to classic scholars the pillars of marriage are four, i.e. (1) *sighat* (ijab and qabul), (2) bride, (3) groom, (4) guardian.<sup>1</sup>

In addition, according to Wahbah Zuhaili, contemporary scholar, the pillars of marriage are four: *shighat*, bride, groom, and guardian. Dowry is like a witness in marriage, it is as requirements to undertake marriage.<sup>2</sup> While, the requirements of marriage are ten. Namely: (1) Bride and groom are permitted to get married, (2) *Sighat* (ijab and qabul), (3) Witnesses, (4) Liberality and desire of spouse, (5) The spouse that will perform marriage is clear, (6) A couple, either wife or husband is not performing hajj or umrah, (7) Dowry, (8) Marriage is not hidden, (9) A couple, either wife or husband could not have a dangerous disease, (10) Guardian.<sup>3</sup>

On December 2013 there were 101,672 people living with HIV including 1,076 children under 13 years. The trend of HIV infection in Malaysia is in fact mainly attributed by injecting drug users and free sex. However, the trend has presently changed. Women are now the vulnerable population on contracting the HIV infection through their spouse. Most HIV infections among women in Malaysia have occurred through heterosexual activities, a large number of whom are housewives.

HIV test is obligated to every Muslim spouse before marriage. This regulation is established by the State Religious Department in Malaysia. Muslim spouse just can take this test in a hospital and a clinic. This test is

<sup>1</sup>Khoiruddin Nasution, *Hukum Perkawinan I*, (Yogyakarta: Academia Tazaffa, 2004), h. 34.

<sup>2</sup>Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh* (Damaskus: Dar al-Fikr, 2004), vol. 9, h. 6521

<sup>3</sup>Khoiruddin Nasution, *Hukum Perkawinan I*, h. 35.

not accepted if they take in private hospital and private clinic. The result of this test is taken in State Religious Department.

In obligation of HIV test must consider Human Rights aspect. It is influence component for implementation HIV test program. Human Rights should be protected and be respected by everyone and government. Therefore, the government must consider Human Rights aspect. A lot of reprobation of Human Rights such as right to get honor protection, right to marry and found a family. Because many people living with HIV are frequently alienated from their own society.

In islamic Fiqh, scholars agree that the pillars and requirements of marriage are five, such as: bride, groom, guardians, two fair witness and ijab-qabul. marriage is valid if the spouse fullfilled the requirements. However, in Malaysia everyone who will marry is obgated to take HIV test. Moreover, it is as a requirment of marriage registration. A couple cannot register to marry if they do not have HIV test certificate. Whereas, in fiqh Munakahat, everyone who wants to marry is not obligated to take this test. Therefore, what are Malaysian society responses about regulation of obligation of HIV test before marriage.

## **CHAPTER II**

### **REVIEW OF RELATED LITERATUR**

#### **1. Human Rights In The International Perspective**

The existence of human rights in the history of law cannot be separated from the idea of the existence of natural law which contains general principles and eternal justice system that applies to all mankind.

Human rights aspect is influence component, it is for implementation of HIV testing program. One of the main characteristics of the phenomenon of HIV & AIDS is unique in its transmission and prevention. This disease is different with some other infectious diseases, the transmission of other

infectious disease is influenced by the environment, but the transmission and prevention of HIV & AIDS are related to human behavior.

However, in article 17 of international commission on human rights explained that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".<sup>4</sup> The right to privacy encompasses obligations to respect physical privacy, including the obligation to seek informed consent to HIV testing and privacy of information, including the need to respect confidentiality of all information relating to a person's HIV status.

All human beings have rights to determine their life without any limitation because they are born to be free and be equal in dignity and rights, as well as the right to marry and found a family. This case, as described in article 16 (1) United Nation Universal Declaration of Human Rights that Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights to marriage, during marriage and at its dissolution. And in article 2 explained that the marriage could be implemented if approved by bride and groom.<sup>5</sup>

So, as explained in article 2 United Nation Universal Declaration of Human Rights this human rights is not distinction the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Because this rights is individuals rights which cannot be taken away by any legislature or any act of government.<sup>6</sup>

So, in international human rights law explained that everyone both HIV positive or negative have the right to be free from discrimination, have the

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<sup>4</sup>*HIV/AIDS And Human Rights International Guidelines*, (office of the united nation high commissioner for human rights and the joint United Nations Programme on HIV/AIDS), h. 44

<sup>5</sup>Adnan Buyung Nasution Dan A. Patra M. Zen, *Intrumen Pokok Hak Asasi Manusia*, (Jakarta: Yayasan Obor Indonesia, 2006), h. 576

<sup>6</sup>Sayed Hassan Amin. *Islamic Law And Its Implications For Modern World*. (scotland, U.K, Royston Ltd: 1989), h. 55

rights to life, have the right to privacy, have the rights to marry and found a family. In this rule there is no limitation rights to everyone.

## 2. Human Rights in Islam

Human Rights in Islam is known by the word "*huquq al-insaniyah al-dharuriyyah*" and "*huququllah*". *Huquq al-insan al-dharuriyyah* and "*huququllah*" cannot be separated from one another. In Al-Qur'an there are 80 verses in line with the human rights Such as about the right to life. Preservation of life and the provision of equipment of life. It explains in surah *Al-Maidah* verse 32. Also there are 10 verses that discuss about prohibition to force. Freedom of thought, conscience and to express aspirations, it stated in surah *Al-Kahf* verse 29. And also the rights to married and found a family in *Al-Baqarah* verse 221 and to get Equal Rights described in *QS. Al-Baqarah* verse 275-278, *Al-Nisa'* 161.<sup>7</sup>

Islamic concept of human life based on a theocentric approach which puts God in central position (Theocentric) as a measure of good or bad human life, whereas in the western concept of view that human occupy in central position (anthropocentric).<sup>8</sup> Thus the Islamic concept of human rights rests on the doctrine *tawhid*. The concept of *tawhid* contains the idea of equality and brotherhood.

The maintenance of Human Rights in Islam is to the good of humanity all the world. The goal of Islamic law (*maqashid al-Shari'ah*) that are contained in the Qur'an and hadith.<sup>9</sup> Therefore, there are five basic elements that must be maintained to make the goodness, such as keep faith (*hifdzu al-diin*), keep soul (*hifdzun al-Nafs*), keep mind (*hifdzul al-Aql*), keep Descendent (*Hifdzu al-Nasl*), and keep property (*Hifdzul al-maal*). Theory of *maslahah* and

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<sup>7</sup>Shohib, *Hak Asasi Manusia Dalam Perspektif Al Qur'an Al Hadits Dan Ijtihad Ulama*, Balai Diklat Keagamaan Bandung, file ini dalam bentuk PDF.(article)  
<http://bdkbandung.kemenag.go.id/jurnal/259-hak-asasi-manusia-dalam-perspektif-alqur-an-alhadits-dan-ijtihad-ulama>

<sup>8</sup>Muhammad Alim, *Demokrasi Dan HAM Dalam Konstitusi Madinah Dan UUD 1945*, (Yogyakarta, UII Press, 2001), h. 50-51

<sup>9</sup>Masykuri Abdillah, *Demokrasi Dan Persimpangan Makna: Respon Intelektual Muslim Indonesia Terhadap Konsep Demokrasi*, alih bahasa, Wahib Wahab (Yogyakarta: Tiara Wacana Yogya, 1999), h.

justice become one of the main principles in the application of Islamic law to uphold human rights.

### **CHAPTER III**

#### **RESEARCH METHOD**

This type of research is empirical research that uses field research (fieldwork) by using qualitative methods, this study focused on data collection (interviews) of informants who have been determined in this research. This research uses case approach. From the cases that are happen in Hulu Langat Selangor about HIV infected. The writer will analyze in line with the reality.

This research undertakes in Malaysia State, exactly in Hulu Langat Selangor Darul Ehsan states. Hulu Langat Selangor is states that has the largest population in Malaysia.

The primary data source in this research uses field research. The secondary data source in this research such as the regulation of the State Religious Department Of Selangor No. 1 In 2005), religion, health and nursing book is written by Zaidin Ali, and others book related to human rights and HIV test.

In this case the writer undertakes interview directly with some parties through via e-mail, they are: Siti Nur Adibah, Sakinah Muhammad, Nur Hazriani Razali, Su'aida Ismail, Azizul Zaisara, Ahmad uzairi, Muhammad bin Wahid, Faza Farizan, and Nur Hayati Sabri.

The data obtained from the interviews collected completely. In a research, there are several methods to manage the data Such as Editing, classifying, verifying, analyzing, and concluding.

### **CHAPTER VI**

#### **FINDINGS AND DISCUSSION**

HIV test is used to detect the presence of the human immunodeficiency virus, the virus that is caused by acquired immunodeficiency syndrome, in serum, saliva, or urine. Such test may detect antibodies, and antigens.

The State Religious Department of Malaysia obligate HIV test to bride and groom before marriage. This program can be imitated to anticipate the spread of HIV-AIDS for Muslim spouse who will marry.

Most of the people in Hulu Langat Selangor assume that HIV testing before marriage is a good program and they agree with this program. However, they have different reasons in response this problem. Such as: to ensure the health of spouse, to ensure the health of descendent, to ensure the welfare of family and to reduce divorce cases.

Human rights aspect is influence component for implementation of HIV testing program. Premarital HIV testing program is good. It is in line with the content of *maqashid as-syari'ah*, one of *maqashid as-syari'ah* is *Hifdzun Nasl* (keep descendent). Premarital HIV testing is to *maslahat* (goodness) for human being, all dengerous are *mudharat* or *mafsadah* and it must be avoided.

Everyone has diffrent opinion about Mandatory of HIV test before marriage. There are some people who argue that Mandatory of HIV test before marriage can take human rights. However, There are some people who argue that Mandatory of HIV test before marriage is good, it is for welfare and harmony in family.

From 10 informants in selangor, There are eight persons assume that there are no human rights issues in obligations of the HIV test. It is one of the programs that keep human rights. There are two persons assume that this programe is in line with the purpose of Islam (Maqashid Syariah), It is for the common good so that each partner knows the health status of their partner before married. So that, they assume that this program does not agints human rights.

### **HIV Test as a Requirement of Marriage Registration.**

Obligation of HIV testing as a requirement of marriage registration is good. Most of People in Selangor agree with the obligation of this rule. However, they have diffrent reasons in respond this problems. They consider

that obligation of HIV testing has become a necessity for them, even though the government does not require it. It is to protect themselves from harmful.

Hulu Langat Selangor society said that the HIV test is good for the health of spouse to be free from disease before marriage and to keep from *madharat* (damage) after marriage. To prevent a *madharat* (damage) is better, Such as infect a healthy spouses. This HIV test also to improve the quality of life.

The obligation of HIV test is in line with Wahbah Zuhaili's opinion. He determines that the requirements of marriage are: (1) bride and groom permitted to get married, (2) sighthat (ijab and qabul), (3) witnees, (4) liberality and desire of spouse, (5) the spouse that will perform marriage is clear, (6) A couple, either wife or husband is not performing hajj or umrah,(7) dowry, (8)marriage is not hidden, (9) A couple, either wife or husband could not have dangerous disease, (10) guardian.<sup>10</sup>

So, Healthy is important in a marriage in order to have health family and to have children. Such as HIV, Identification of this disease is very important to prevent the transmission. Therefore, Islam suggest to carry out *ta'aruf* (enggagment) before marriage. It is to know the spouse who will married (such as biography, character and health), and to the benefit in marriage.

Implementation of medical check is *ijtihadīyyah*, where the implementation determined as necessary and welfare of humans. As social dynamics in Malaysia, many Moslem people are contaminated by HIV. Therefore, to prevent the spread of this virus, the government obligate HIV test to each person who will marry. It is for the common good.

### **Human Rights on Obligation of HIV Test as a Requirement of Marriage Registration.**

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<sup>10</sup> Khoiruddin Nasution, *Hukum Perkawinan I*,h. 34.

In Hulu Langat Selangor agree about the obligation of this rule. There are eight persons said that the obligation of HIV test before marriage does not against human rights. there are two persons said that human rights in obligation of HIV test before marriage is in line with the purpose or the teachings of Islam (*maqashid syari'ah*) suah as to preserve the descent and to preserve human life. To preserve human life, such as preventing life from being destroyed in the form dangerous disease.

They said that obligation of HIV test before marriage is obligaton of everyone. Therefore, there is no human rights issues in this programe. Because it is the goals of *Maqashid Shariah*, Such as preservation of life and pereservation of descent.

It is in line with the purpose of maqashid syari'ah, suah as *Hifdzun Nasl* (keep offspring) and *hifdzun Nafs* (keep soul). Something that can guarantee the sheltered of five matters, one of the matter is maslahat for human being, everything that dengerous is *mudharat* or *mafsadah*, it must avoided.

*Maqashid Syari'ah* approach explain about law of the case by consideration of the purposes of *syara'* to establish the law that is not clearly mentioned in the Qur'an. Such as HIV disease, the statistic of HIV cases in Malaysia is high, especially in Hulu Langat Selangor, therefore the Government of Malaysia (State Religious Department) requires the couple who will marry in order to prevent the spread of this virus, and to keep the benefit of community in the long-term. From the cases found a solution in the form of *sad az-zdari'ah* (close the damage).

To prevent the spread of HIV recommended in Islam. If it aims to create general welfare, in order not to endanger ourselves and others. But people are required to pay attention to those who are sick, and provide them with assistance, both morally and materially. So they do not feel isolated. Especially, morally from the community.

The obligation of HIV test is for the goodness of couple and to create human welfare generally. This test is obligated to everyone who wants to mariage in Selangor. While. Every one has the right to life. So in the *maqashid*



*syari'a* approach about the obligation of HIV testing is also something that maintain human rights. Because prevent the spread of HIV is to preserve common good and to preserve descendants.

However, in article 17 of international commission on human rights explained that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".<sup>11</sup> The individual interest in his/her privacy is particularly compelling in the context of HIV/AIDS, firstly, in view of the invasive character of obligation of HIV test, and the second, by reason of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status disclosed.

So, in international human rights law explained that everyone both HIV positive or negative have the right to be free from discrimination, have the rights to life, have the right to privacy, have the rights to marry and found a family. In this rule there is no limitation rights to everyone.

## CHAPTER V

### CONCLUSIONS

Society of Hulu Langat Selangor Darul Ehsan responses of HIV test as a requirement of marriage registration that they agree to obligation of HIV test before marriage. However they have different reasons in respond this problem, such as to ensure the health of spouse, to ensure the health of descendent, to ensure the welfare of family and to reduce divorce cases. HIV test is obligation of everyone who wants to marry, although the government does not require it. This is to prevent *mudharatan* (damage) after marriage, in order that their marriage be prosperous and harmony. Because the transmission of HIV is caused by many factors, it is not only caused by sexual intercourse but also can be transmitted by blood transfusions contaminated with the AIDS virus, and through a needle which is used by people living with HIV. So they are required

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<sup>11</sup>HIV/AIDS And Human Rights International Guidelines, h. 44

to take precautions before infected this disease. Hence, to refuse *mafsadah* (damage) is more precedence than to take serious benefits. To prevent *mafsadah* (damage) with every effort is recommended by Shari'ah of Islam when it aimed to create general welfare.

Some of Society of Hulu Langat Selangor Darul Ehsan Respond that obligation of HIV Test as a requirement of marriage registration does not against Human Rights and it is in line with the purpose or the Islamic teachings, namely *maqashid syari'ah* such as to preserve the descent and to preserve human life. They consider that in the *maqashid syari'a* approach about the obligation of HIV testing also maintain human rights. Because to HIV transmission is to implement common good and to preserve descendants. In international human rights law everyone has rights to life, has right to privacy, has rights to marry and found a family. In this rule there is no limitation rights for everyone. So everyone both HIV positive and negative have rights to be free from discrimination, and they have right to marry as long as they explain about his/her disease to their spouse.