

CHAPTER II

REVIEW OF RELATED LITERATURE

A. Previous Research

There are some thesis discuss about HIV test before marriage as follows:

Researchers	Titles of research	Similarities	Differences
Nooryanti ⁸	Urgensi Pemeriksaan Kesehatan Pranikah Bagi Pembentukan Keluarga Sakinah (Studi Di Kua Kec.	Use field research by using qualitative methode	Nooryanti studies about the extent of the bride and groom understanding about physical checkup/examination as their preparation in household to make Sakinah family, while the writer

⁸Nooryanti, *Urgensi Pemeriksaan Kesehatan Pranikah Bagi Pembentukan Keluarga Sakinah (Studi Di Kua Kec. Hanau Kab. Seruyan Kalimantan Tengah)*, Skripsi berbentuk PDF, (Malang: universitas islam negeri maulana malik ibrahim, 2007).

	Hanau Kab. Seruyan Kalimantan Tengah)		studies about Malaysian society responses of HIV test as a requirement of marriage registration in the human rights human right perspective.
Badrul Ikhwan ⁹	Penanggulangan Penularan Virus HIV/Aids Bagi Pasangan Suami-Istri Dalam Perspektif Hukum Islam (Study Terhadap Muzakarah Nasional Ulama Tahun 1995)	Badrul Ikhwan and the writer research about HIV/Aids in marriage.	Badrul Ikhwan studies about the result of Muzakarah Nasional Ulama year 1995 about prevention of HIV /Aids transmission for bride and groom. While, the writer studies about Malaysian society responses about Human Immunodeficiency Virus test as a requirement of marriage registration in the human right perspective.
Ibnu Atoillah ¹⁰	Pemeriksaan Kesehatan Pra-Nikah Dalam Perspektif Hukum Islam (Study Di KUA Jetis Kota Yogyakarta Tahun 2011)	Ibnu Atoillah and the writer research about HIV test before marriage. In both research uses field research by using qualitative method.	Ibnu Atoillah studies in KUA Jetis Kota Yogyakarta about medical examination before marriage in Islamic law perspective. While, the writer studies about Malaysian society responses about HIV test as a requirement of marriage registration in the human right perspective and focus study in Hulu Langat Selangor.

⁹Badrul Ikhwan, *Penanggulangan Penularan Virus HIV/Aids Bagi Pasangan Suami-Istri Dalam Perspektif Hukum Islam (Study Terhadap Muzakarah Nasional Ulama Tahun 1995)*, Skripsi berbentuk PDF, (yogyakarta : Universitas Islam Negeri Sunan Kalijaga ,2010)

¹⁰Ibnu Atoillah, *Pemeriksaan Kesehatan Pra-Nikah Dalam Perspektif Hukum Islam (Study Di KUA Jetis Kota Yogyakarta Tahun 2011)*, skripsi berbentuk PDF, (yogyakarta: Universitas Islam Negeri Sunan Kalijaga, 2012)

Ika Herani ¹¹	Konsep diri orang dengan HIV dan AIDS (ODHA) yang menerima label negatif dan diskriminasi dari lingkungan social.	She uses field research by using qualitative methode.	She studies about examines self-concept of people with HIV and AIDS (ODHA) that experience negative labeling and discrimination by the environment. While, the writer studies about Malaysian society responses about HIV test as a requirement of marriage registration in the human right perspective and focus study in Hulu Langat Selangor.
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Table 1.1 Previous research

The first thesis has been written by Nooryanti, about “Urgensi Pemeriksaan Kesehatan Pranikah Bagi Pembentukan Keluarga Sakinah (Studi Di Kua Kec. Hanau Kab. Seruyan Kalimantan Tengah)”. The conclusion of Nooryanti's research that is most of spouses and society do not know about medical check up before marriage. Because they do not get more information about check up before marriage clearer. Medical Check up before marriage is still new issue in society and there is no explicit recommendation, both in the Qur'an or hadith. So the problem is not known well and understood by bride and groom. The differences between Nooryanti's research with the writer is about Malaysian society responses of hiv test as a requirement of marriage registration in the human rights human right perspective. In this research writer study about selangor societies responses of mandatory HIV test for bridge and groom who will get marry,

¹¹Ika Herani, *Konsep Diri Orang Dengan HIV Dan AIDS (ODHA) Yang Menerima Label Negatif Dan Diskriminasi Dari Lingkungan Social*, Skripsi berbentuk PDF, (Malang: Universitas Brawijaya, 2012).

and in this study focus on human rights. While, Nooryanti studies about the extent of the bride and groom understanding about physical checkup/examination as their preparation in household, and explain the role of physical checkup / examination before marriage to make composure family.

The second thesis has been written by Badrul Ikhwan, about "Penanggulangan Penularan Virus HIV/Aids Bagi Pasangan Suami-Istri Dalam Perspektif Hukum Islam (Study Terhadap Muzakarah Nasional Ulama Tahun 1995)". Badrul Ikhwan's research studies about the result of Muzakarah Nasional Ulama year 1995 about prevention of HIV /Aids transmission for bride and groom. While, the writer studies about Malaysian society responses about Human Immunodeficiency Virus test as a requirement of marriage registration in the human right perspective. In this research the writer focus studies in selangor society responses of mandatory HIV test for bride and groom who will get marry, and in this study focus on human rights. Whereas, Badrul Ikhwan's research focus study in islamic law perspective.

The third thesis has been written by Ibnu Atoillah about "Pemeriksaan Kesehatan Pra-Nikah Dalam Perspektif Hukum Islam (Study Di KUA Jetis Kota Yogyakarta Tahun 2011)". He studies about medical examination before marriage in Islamic law perspective, in his research he explains that medical examination before marriage is a part of the preparation before marriage is like seeing a woman who will be married. Therefore, the groom

can see, investigate and know the personality of groom. And he focus studies in KUA Jetis Yogyakarta year 2011. Whereas, the writer studies about Malaysian society responses about Human Immunodeficiency Virus test as a requirement of marriage registration in the human right perspective. In this research the writer focus studies in selangor society responses of mandatory HIV test for bride and groom who will get marry, and in this study focus on human rights.

While, research about HIV/Aids has been written by Ika Herani, in title "Konsep diri orang dengan HIV dan AIDS (ODHA) yang menerima label negatif dan diskriminasi dari lingkungan sosial". She studies about examine's self-concept of people with HIV and AIDS (ODHA) that experience negative labeling and discrimination by the environment. She uses field research by using qualitative method and fenomenological approach. Whereas, the writer studies about Malaysian society responses about Human Immunodeficiency Virus test as a requirement of marriage registration in the human right perspective. In this research the writer also use field research by using qualitative method and focus studies in selangor society. In this study focus on human rights.

Some thesis above explain about medical checkup before marriage, however they do not explain about mandatory of medical checkup (HIV test) as a requirement of marriage in the human rights. They study about extent of medical check up to make *sakinah* family, about prevention of HIV/AIDS transmission for bride and groom in Islamic perspective, and about self-

concept of people with HIV/AIDS that experience negative labeling and discrimination by the environment.

Therefore, the writer research about Malaysian society responses about Human Immunodeficiency virus test as requirement of marriage registration in the human rights perspective (case study of Hulu Langat Selangor Darul Ehsan).

B. Theoretical Framework

1. Marriage

a. Definition and Law of Marriage

In al-Qur'an and hadith, marriage is called as *al-nikah* and *al-zawaj/al-zijah*, the word *an - nikah* it means *wath'u*, *al - dhammu* and *al - jam'u*. *Al - wath'u* is taken from the words *wathi'a - yatha'u - wath'an*, it means that through, step on, enter, go up, and copulate. *Adh - dhammu* is taken from the words *dhamma - yadhummu - dhamman*, literally it means gather, hold, grasp, unite, conscious, hug and add, while, *al - jam'u* is taken from the words *jama'a, yajma'u - jam'an*, it means gather, unite, conscious, add and arrange.¹²

While according to Wahbah al- Zuhailiy marriage is Contract which is containing law provisions on permitting doing sexual intercourse, and its contract are done by using *al-nikah* or *al-ziwaj* word, or by word which has the same meaning.¹³ He defines marriage as a contract which allowing man to

¹²Muhammad Amin Summa, *Hukum Keluarga Islam Di Dunia Islam*,(Jakarta: 2005, Raja Grafindo Persada), h. 42

¹³Sayyid Sabiq, *Fiqih Sunnah*, it is translited by Nor Hasanuddin, (Jakarta: PT. Pena Pundi Aksara, 2007), h. 477-478.

do *wat'i* or *al-istimta'* (sexual intercourse) with a woman, and live together with her. It also can be defined that marriage is a contract which is established by *syari'ah* that has function to give ownership right for man to have a good time with woman, and to allow woman has a good time with man.¹⁴

In the sacred law marriage means the contract held between spouses to make sexual intercourse lawful. It is real when referring to the contract but figurative when referring to the intercourse.¹⁵ So Marriage that is established between a woman and a man is to obtain descent legally.

These five classes of *al-nikah* described by the jurists (*al-fuqaha*) are the following:¹⁶

1. Compulsory (*Fard*)

Where a person has all such resources that are generally necessary for a family life, such as adulthood, earning livelihood, health, having a house to live and is certain that along with the possession of these resources if he remains unmarried, He will indulge in major sin (commission of *Zina*), then it is *fard* (compulsory) for him to contract a marriage. If he does not contract marriage, he will be sinful.

2. Sunnah

When all the requirements of a marital life are available, such as a man is adult, of sound mind, and there is no *zann* or *yaqin* of any injustice with

¹⁴ Wahbah az-Zuhaili, *Fiqh Islam (al-Fiqh al-Islam Wa Adillatuhu>*), it is translated by Abdul Hayyie al-Kattani, vol. 9, (Depok: Gema Insani, 2011), h. 41.

¹⁵ Hassan Ayyoub, *Fiqh Of The Muslim Family*, (Cairo : Islamic INC, 2013), h. 1

¹⁶ Nj. Aisjah Dachlan, *Membina Rumah Tangga Bahagia Dan Peranan Agama Dalam Rumah Tangga*, (Jakarta: Jamunu, 1969), h. 53

the wife, *al-nikah* is *Sunnah*. There is a saying of the Messenger of Allah: “To contract a marriage is my *Sunnah*.”

3. Obligatory (*Wajib*)

In the presence of the aforesaid circumstance if such a person instead of having a certainty (*yaqin*) he has a probability (*zann*) that it is possible that he may commit a major sin, then to contract a marriage (*al-nikah*) is obligatory (*wajib*) for him.

4. Disliked (*Makruh*)

Where a person has a probability (*zann*) that after his marriage (*al-nikah*) he instead of doing justice with his wife shall do injustice or he has the probability (*zann*) that he would commit major sin after marriage, then in such a circumstance the marriage is disliked (*makruh*).

5. Unlawful (*Haram*)

In the following two circumstances the contract of marriage is unlawful (*haram*): Firstly, requirements of marriage are not existing. Secondly, Where an individual is certain that after marriage he/she commits major sin. In such a circumstance to contract a marriage becomes unlawful. For example, a person is inclined (has deep secret interest) in a particular woman but he cannot marry her and if he contracts the marriage with some one else his inclination in the former remains in tact and he is certain that he would commit major sin. In such a circumstance his contracting a marriage with this second woman is unlawful.

b. Requirements and pillars of Marriage

A marriage can be implemented if the requirements and the pillars of marriage are fulfilled. While, fiqh scholars has different opinion about the matter of essential of pillars and requirements of marriage.

According to scholars of fiqh the pillars of marriage there are five, each pillars has certain requirements. Those as follows :¹⁷

a. Bride

b. Groom

The requirements of bride and groom:

- a) Bride or groom has a clear identity and can be distinguished from the others, both the name, gender, presence.
- b) Muslim.
- c) Bride and groom are permitted to get marriage.
- d) Bride and groom agree to married.
- e) Bride and groom have age enough to marry.

c. Guardians

Marriage contract is valid if there are a guardian and two fair witnesses.

As Rasulullah SAW said:¹⁸

لا نكاح إلا بولي وشاهدي عدل, و ما كان من نكاح على غير ذلك فهو باطل

“Marriage is not valid without the guardian and two fair witnesses...”

¹⁷ Abdurrahman Al-Jaziri, *Fiqh 'Ala Madzahib Al-'Arba'ah* (Mesir: al-Maktab Attijariyyati al-Qubro), h. 20

¹⁸ Nj. Aisjah Dachlan, *Membina Rumah Tangga Bahagia*. h. 67

The requirement of guardian :

- 1) adult and sensible
 - 2) A man
 - 3) Muslim
 - 4) Independen man
 - 5) Not in guardianship
 - 6) Fair
 - 7) they are not performing hajj or umroh.
- d. Two witnesses

The requirement of the witness :¹⁹

- 1) There are two witnesses
- 2) Moslem
- 3) Independen man
- 4) A man
- 5) Fair
- 6) the witness is clear.

e. *Ijab* and *Qabul*

The requirement of *ijab* and *qabul*:

- 1) Contract must be preceded by *ijab* and *qabul*
- 2) *Ijab* and *qabul* must be pronounced concurrently

¹⁹Mustafa Di'ib al-Bugha, *Fikih Islam Lengkap Penjelasan Hukum-Hukum Islam Madzhab Syafi'ie*, (Surakarta: Media zikir, 2009), h. 351

3) The words of *Ijab* and *qabul* spoken clearly.

Whereas according to Wahbah Zuhaili, the pillar of marriage are four: *shîghat*, bride, groom, and guardian. While, the requirements of marriage are ten. Namely: (1) Bride and groom are permitted to marry, (2) Sighat (*ijab* and *qabul*), (3) Witnesses, (4) Liberality and desire of spouse, (5) The spouse who wants to marry is clear, (6) A couple, either bride or groom is not performing hajj or *umrah*, (7) Dowry, (8) Marriage is not hidden, (9) A couple, either wife or husband could not have dangerous diseases, (10) Guardian.²⁰

Wahbah al-Zuhailiy explain that A couple who wants to marry could have a good health. because, it is influential to family life in the future. so that they must prepare for all matters before marriage, such as healthy in order to have harmonious family.

2. Human Right

a. 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 in the Western world is known as "natural right" and then it is changed with the term "rights of man". Nevertheless, the word is not directly accommodate the sense which includes the "right of women", then the term changed with the term "human rights".

²⁰ Khoiruddin Nasution, *Hukum Perkawinan I*, h. 34.

The United Nations Centre for Human Rights defines human rights as those rights which are inherent in our nature, without rights we cannot live as human beings.²¹

As explained in article 2 United Nations Universal Declaration of Human Rights that "Everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on 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".²²

In efforts to combat HIV/AIDS cannot be separated from the legal aspects and Human rights. The main problem about the law that is related to the development of HIV/AIDS cases is how to balance between the protection of the public interest and individual interests that live with HIV/AIDS.

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.

²¹Masyhur Effendi Dan Taufani S. Evandri, *HAM Dalam Dinamika/Dimensi Hukum, Politik, Ekonomi, Dan Sosial*, (Bogor: Ghalia Indonesia, 2010), h. 56

²²United Nations Universal Declaration of Human Rights 1948 (article 2)

There are fundamental rights related with HIV / AIDS problem, such as healthy rights and non-discrimination rights. The solution of the problem of discrimination against with HIV / AIDS is more complex and difficult than the healthy rights.

Mandatory of HIV test before marriage can take human rights. It is closely related to Medical Secrets of a personal nature, the relationship between doctor and patient. It means a physician should not reveal the secret of the patient's disease to others, without the permission of the patient. HIV / AIDS highly related with Medical Secrets so we must be careful in handling it. If related to culture, a lot of expulsion that are done by the society towards people living with HIV infection from their home. Now it must also be deprived of the right to marry, and other rights such as the right to education, there are people living with HIV that removed from the school. While right to get a job, where many companies and the Department, which requires the workers to be free of HIV, and related to the healthy rights where they found the circulation of *antiretroviral* (drug of HIV therapy) expired.

Therefore, confidentiality of obligation of premarital HIV test results is extremely challenging to maintain. In some cases, couples are required to disclose their results to the religious or state authorities who perform the marriage ceremony or issue the marriage license. for instance, in Malaysia, Muslim couples submit a certificate disclosing their HIV status to state religious departments when applying for a marriage license.

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".²³ 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.

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 second, by reason of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status disclosed.

In international commission on human rights guarantees the rights to equal protection and freedom from discrimination on any ground such as race, colour, sex, language, religion. Discrimination on any of these grounds is not only itself but also creates and sustains conditions leading to societal vulnerability to infection by HIV, including lack of access to an enabling environment that will promote behavioural change and enable people to cope with HIV/AIDS.²⁴ This mean that states should not discriminate againts people living with HIV or members of groups perceived to be risk of infection on the basis of their actual or presumed HIV status.

²³*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

²⁴*HIV/AIDS And Human Rights International Guidelines*.h. 41

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.²⁵

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.²⁶

In fact, human right has two basic principle that fundamental, namely equality and freedom that hoped can justice for every one. Equality in modern concept is idea about equality of oportunity. According to this doctrin, equality prosecution is equality before the law and aboliton of other

²⁵Adnan Buyung Nasution Dan A. Patra M. Zen, *Intrumen Pokok Hak Asasi Manusia*, (Jakarta: Yayasan Obor Indonesia, 2006), h. 576

²⁶Sayed Hassan Amin. *Islamic Law And Its Implications For Modern World*. (scotland, U.K, Royston Ltd: 1989), h. 55

special rights that agreed, is more concerned social, economic, politic, ras or gender.²⁷

While, the mind principle of freedom dose not hide and force human right. But, in some intervention of state are needed to reach equality and protection of other human rights that is one of princilpe of human rights.²⁸

The key of human rights principles of HIV/AIDS are existing in international intruments, such as the universal declaration of human rights, American convention on human rights, International covenant on civil and political rights, the european convention for the protection of human rights and fundamental freedoms and the african charter on human rights also enshrine state obligation applicable to HIV/AIDS.

In addition, a number of conventions and recommendations of the international labour organization are particularly relevant to the problem of HIV/AIDS, such as International labour organization intruments concerning discrimination in employment and accupation, termination of employment, protection of workers' privacy, and safety and health at work. Among the human rights princilpes relevant to HIV/AIDS are:²⁹

- a. The rights to non-discrimination, equal protection and equality before the law;
- b. The rights to life;

²⁷Masykuri Abdillah, *Demokrasi Di Persimpangan Makna: Respon Intelektual Muslim Indonesia Terhadap Konsep Demokrasi (1966-1993)*, Alih Bahasa. Wahib Wahab, (Yogyakarta:Tiara Wacana Yogya, 1999), h. 113-114

²⁸Masykuri Abdillah, *Demokrasi Di Persimpangan Makna*, h. 135-136

²⁹*HIV/AIDS And Human Rights International Guidelines*, h. 39

- c. The rights to the highest attainable standard of physical and mental health;
- d. The rights to liberty and security of person;
- e. The rights to freedom of movement;
- f. The rights to seek and enjoy asylum;
- g. The rights to privacy
- h. The rights to freedom of opinion and expression and the right to freely receive and impart information;
- i. The rights to work;
- j. The rights to marry and to found a family;
- k. The rights to equal access to education;
- l. The rights to an adequate standard of living;
- m. The rights to social security, assistance and welfare;
- n. The rights to share in scientific advancement and its benefits;
- o. The rights to participate in public and cultural life;
- p. The rights to be free from torture and cruel, inhuman or degrading treatment or punishment.

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.

The right to marry and to found a family in Article 16 of the Universal Declaration of Human Rights encompasses the right of “men and women of

full age, without any limitation due to race, nationality or religion to marry and to found a family, entitled to equal rights as to marriage, during marriage and at its dissolution” and to protection by society and the State of the family as “the natural and fundamental group unit of society.”³⁰ Therefore, it is clear that the right of people living with HIV is infringed by mandatory premarital testing or the requirement of “AIDS certificates” as a precondition for the grant of marriage licences under State laws.

b. 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. This terms that distinguishes between the Western concept of human rights with the Islamic concept of human rights.

Al-Qur'an as sources of law in Islam gives high respect for human rights. Qur'an as the first source of law for Muslims has put the basics of human rights, truth and justice.

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

³⁰Katya Burns, *Mandator Premarital HIV Testing*, (New York, Open Society Institute, 2006), h. 3

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'* 161.³¹

Islam is a religion with a universal and comprehensive teaching. Islamic teachings such faith, worship, and morals *mu'amalah* each containing the doctrine of the faith; religious dimension contains the teachings of the mechanisms of devotion to God and contains the doctrine of man's relationship with others humans and the environment. All the dimensions are based on the teachings of the provisions that are called by the term *shari'ah* or jurisprudence. In the context of the *shari'ah* and *fiqh* are discussed about human rights.

In Islam there are two concepts of rights, i.e human rights (*huququ al-insaniyah*) and the right of Allah (*haqullah*). Each of these rights underlies each other. In its application, there is no rights separated of both right, for example, prayer, human do not need to force someone to pray, because prayer is the right of God, it do not have a relationship with the world, both countries, organizations and friend who can urge someone to prayers. Prayers is a personal matter that is concerned with God.

While the human rights such as the right of ownership, the right to life, the right to safety, rights protection from any violation. So every human being has the right to get their rights, however, in human rights there are rights of God which is the basis. As explain in article 2 of the cairo

³¹Shohib, *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>

declaration on human rights in islam that rights to life is guaranteed to every human being. It is the duty of individuals, society and states to protect this rights from any violation, and it is prohibited to take away life except for a shari'ah prescribed reason.³²

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).³³ 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. To realize the goodness, justice and the public interest through the protection and guarantee of *al-daruriyyah* needs is the goal of Islamic law (*maqashid al-Shari'ah*) that are contained in the Qur'an and hadith.³⁴ 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 justice become one of the main principles in the application of Islamic law to uphold human rights.

³²Ann Elizabeth Mayer, *Islam And Human Rights Tradition And Politics* Third Edition, (United States of America: Westview Press, 1999), h. 204

³³Muhammad Alim, *Demokrasi Dan HAM Dalam Konstitusi Madinah Dan UUD 1945*, (Yogyakarta, UII Press, 2001), h. 50-51

³⁴Masykuri Abdillah, *Demokrasi Dan Persimpangan Makna: Respon Intelektual Muslim Indonesia Terhadap Konsep Demokrasi*, alih bahasa, Wahib Wahab (Yogyakarta: Tiara Wacana Yogya, 1999), h. 113

Islamic Doctrine on human rights can be found in the primary sources of Islam, Al-Qur'an and Al-Hadith, which are a source of normative teachings and also contained in the practice of Muslim life. In the history, Islam strongly enforce human rights, namely in declaration of the "Charter of Medina", followed by Cairo Declaration.

In the Charter of Medina, there are two principal of teaching, namely: All Muslims are one community even though they are different tribes and the relation between Muslim and non-Muslim communities are based on the principles of, including:

- a. Have good Interact with neighbors;
- b. Help each other to face enemies;
- c. Defend them who are persecuted;
- d. Edify each other;
- e. Respect to religious freedom;

There are 24 article in Cairo Declaration that refers to verses of Al-Quran as follows:³⁵

- a. Equality and freedom rights
- b. Life rights
- c. Self protection rights
- d. Personal distinction rights
- e. Right to marry
- f. Equality rights between men and women.

³⁵Masyhur Effendi Dan Taufani S. Evandri, *HAM Dalam Dinamika/Dimensi Hukum, Politik, Ekonomi, Dan Sosial*, h. 127

- g. Rights of the child from the parents.
- h. Education rights.
- i. Rights of religious freedom.
- j. Right to get a job.
- k. Rights to get equal treatment.
- l. Ownership rights.
- m. Rights of prisoner.

In Cairo Declaration also explains about the rights to marry. Everyone is free to marriages without any limitation, as long as he meets the pillars and requirements of marriage. So people live with HIV can marriage as long as he/she tells to his spouse that he/she has HIV, if he/she can accept the condition they can marriage.

3. HUMAN IMMUNODEFICIENCY VIRUS TEST

a. HIV (*Human Immunodeficiency Virus*)

Human Immunodeficiency Virus is a type of virus called a retrovirus, which infects the human immune system (the system in the body which is in charge of fighting off illness). HIV may cause AIDS (a collection of diseases and symptoms, or problems in the body) by eventually killing the white blood cells.³⁶

HIV / AIDS is a health issue that sufficiently sensitive to be discussed. It is related to unique nature of this disease. Discrimination is experienced by patients and their families. The high social stigma against

³⁶Mufidah, *Psikologi Keluarga Islam Berwawasan Gender*, (Malang: UIN-Maliki Press, 2013), h. 153

people living with HIV / AIDS causes many discriminatory treatment such as in terms of family, work, care, treatment, education or other matters.

Acquired Immune Deficiency Syndrome (AIDS) is a collection of symptoms that are caused by the Human Immunodeficiency Virus (HIV). This virus damages the human immune system, reducing / loss of endurance, so easy to infection and illness. HIV is found in body fluids, especially semen, vaginal fluids and blood. HIV transmission occurs through unprotected sexual intercourse, blood transfusion, use of unsterile needles, organ transplant and transmission from a pregnant mother to her baby.

This virus is spread easily to every one through semen and blood, the virus can be transmitted through saliva, sweat and tears. Even in middle of Africa this disease transmission by mosquitos and tattoo on the skin.³⁷ According to Mervyn Silverman that HIV / AIDS disease become epidemic which most destructive in this age.³⁸ This disease attacks the immune system, so that people who are affected with this disease are weak and sick.

According to Dr. James Curran, HIV / AIDS is not only experienced by gay but also the disease has spread and anyone can be infected.³⁹ So far, HIV/AIDS is not found the medicine, a thousand people die because of this disease. This disease can be contracted through sexual intercourse, injection, blood transfusion, and mother transmission to her child during childbirth.

This virus attacks the immune system of body that would get rid of a virus. It particularly attacks a special type of immune system cell known as a

³⁷Willy F. Pasuhuk, *Aids*, (Jakarta: Indonesia Publishing House:2000), h. 31

³⁸Sri Esti Wuryani, *Pendidikan Seks Keluarga*, (Jakarta: PT Indeks, 2008), h. 231

³⁹Sri Esti Wuryani, *Pendidikan Seks Keluarga*,h. 231

CD4 lymphocyte, and on top of this, HIV has a number of tricks that help to evade the body's defenses, including very rapid mutation. This means that if HIV has taken hold in a body, the immune system can never fully get rid of it.

This virus can destroy all the immune systems if this virus is not treated rapidly. This is a serious problem in the world because there is no cure for this disease until now. HIV can spread easily. It can be transmitted through sexual intercourse, contact with an infected person's blood and from the mother-to-child. HIV-infected women can transmit the virus to baby during birth or breastfeeding. As well, a man who contracted HIV positive can infect his baby indirectly through his wife.⁴⁰

b. Human Immunodeficiency Virus Test

HIV test is used to detect the presence of the human immunodeficiency virus (HIV), the virus that causes acquired immunodeficiency syndrome (AIDS), in serum, saliva, or urine. Such tests may detect antibodies, and antigens.⁴¹

Antibodies are protein molecules that produced by the immune system in response to allergens, infectious organisms (including viruses, bacteria, fungi and parasites), and sometimes (in autoimmune disorders) the body's own components. Infectious organisms and allergens display characteristic proteins called antigens. The immune system recognizes and responds to antigens by generating corresponding antibodies. An antibody is designed to

⁴⁰Joel Gallant, *100 Question & Answers About HIV And Aids*, (Jakarta: Permata Puri Media, 2010), h. 24

⁴¹http://en.wikipedia.org/wiki/Diagnosis_of_HIV/AIDS, Accessed on 12.12.2014 at 6:43

'fit' only one particular antigen, rather like a key in a lock. (The word 'antigen' in fact derives from antibody generation.) By locking on to the antigen-bearing intruders, antibodies aim to render them harmless, to kill them outright, or to 'tag' them for destruction by other components of the immune system.

Antibodies against HIV antigens appear in the blood after two weeks of early exposure to HIV, at concentrations which continue to increase for several more months. These antibodies persist for life, providing distinctive markers which can be identified by HIV screening tests.

The antibodies test are:

1. ELISA

The enzyme linked immune sorbent assay or enzyme immunoassay (EIA), was the first screening test commonly employed for HIV. It has a high sensitivity.⁴²

In an ELISA test, a person's serum is diluted 400 fold and applied to a plate to which HIV antigens have been attached. If antibodies to HIV are present in the serum, they may bind to these HIV antigens. Then the plate is washed to remove all other components of the serum. A specially prepared "secondary antibody" an antibody that binds to human antibodies is applied to the plate, followed by another wash. This secondary antibody is chemically linked in advance to an enzyme. Thus the plate will contain enzyme in proportion to the amount of secondary antibody bound to the

⁴²Medline Plus, <http://www.nlm.nih.gov/medlineplus/ency/article/003538.htm> Accessed on 12.12.2014 at 07:20.

plate. A substrate for the enzyme is applied, and catalysis by the enzyme leads to a change in color or fluorescence. ELISA results are reported as a number; the most controversial aspect of this test is determining the "cut-off" point between a positive and negative result.

2. Western Blot

The western blot is an antibody detection test. However, unlike the ELISA method, the viral proteins are separated first and immobilized. In subsequent steps, the binding of serum antibodies to specific HIV proteins is visualized.

There are no universal criteria for interpreting the western blot test: The number of viral bands that must be present may vary. Test which less than the required number of viral bands that detected are reported as indeterminate: a person who has an indeterminate result should be retested, as later tests may be more conclusive. Almost all HIV infected persons with indeterminate western blot results will develop a positive result when tested in one month; persistently indeterminate results over a period of six months suggests the results are not due to HIV infection. In a generally healthy low-risk population, indeterminate results on western blot occur on the order of 1 in 5,000 patients.⁴³ However for those individuals that have had high-risk as in Western Africa, an inconclusive western blot test may prove infection with HIV.

3. Rapid antibody

⁴³Bartlett, JG. Serologic tests for the diagnosis of HIV infection, in Up To Date. Accessed 12.12.2014 at 07:45

Rapid antibody tests are qualitative immunoassays intended for use to aid in the diagnosis of HIV infection. These tests should be used in conjunction with the clinical status, history, and risk factors of the person being tested. The positive predictive value of Rapid Antibody Tests in low-risk populations has not been evaluated. These tests should be used in appropriate multi-test algorithms designed for statistical validation of rapid HIV test results.

If there are no antibodies of HIV are detected, this does not mean the person has not been infected with HIV. It may takes several months after HIV infection for the antibody response to reach detectable levels, during which time rapid testing for antibodies to HIV will not be indicative of true infection status. For most people, HIV antibodies reach a detectable level after two to six weeks. Although these tests have high specificity, false positives do occur. Any positive test result should be confirmed by a lab using the western blot.

Antibody tests may give false negative (no antibodies were detected despite the presence of HIV) results during the window period, an interval of three weeks to six months between the time of HIV infection and the production of measurable antibodies to HIV. Most people develop detectable antibodies approximately 30 days after infection, although some seroconvert later. The vast majority of people (97%) have detectable antibodies by three months after HIV infection; a six-month window is extremely rare with modern antibody testing.

This test is undertaken to Muslim couples as the requirement of approval of their wedding from their respective state religious departments. They are required to undergo HIV tests in local government clinics, and the results must be declared in a HIV test form to be submitted together with other required documentation to the department.

If one or both are found to be positive, the department will only notify both families of their HIV status with consent. Subsequently, they will be referred to a doctor for post-test counselling and the state religious departments will provide counselling on religious matters in the marriage.

A negative test before marriage may foster a false sense of security throughout the marriage although it could not guarantee that a person would stay HIV-free if he or she continues to practice high-risk behavior such as sharing needles in drug use and practicing unsafe sex.

If a person is already engaging in such behavior, he or she might be infected but is in the window period (about three to six months). Without specific interventions (such as education and harm reduction programs) to prevent transmission of these infections, mandatory HIV testing has also been shown to have limited impact on controlling the spread of HIV infection.

This test is mandatory for the bride who wants to marry. They take the tests at the clinic kingdom. If the result of a negative test, bride and groom can continue the application of marriage registration process. But if the result of the test is positive, so the bride and groom must undergo the

next tests for HIV endorsement. The decision of the test is released within two weeks. Each case of HIV positive, should be referred to specialists or Family Medicine Clinic infectious diseases. That decision apply for 6 months from the submission of the results of the test.

Bride and groom just can undertake this test in empire health clinic with pay in accordance with the provisions of each country. Before undertake this test bride and groom must complete the HIV test data taken from the state religious department and brought to empire health clinic. The result of this test taken for two weeks. An employee the treatment will note decision on the test results in the data, and included in the letter's cover.

The couples who has gotten an endorsement letter from empire of medicine employees about HIV decisions submitted to office of the state Islamic religion department. If the result of this test is negative, so the bride and groom can continue the marriage application process. But if the result is positive, so the bride and groom should conduct further tests for validation of HIV and then be referred to a family physicians. In state religious department the spouse and their family is given advice by a judge about the implications of HIV, and guardians also perform counseling about HIV.

All pregnant women should get tested for HIV as early as possible during pregnancy. Women who test HIV positive take HIV medicines during pregnancy and childbirth to reduce the risk of mother-to-child

transmission of HIV. HIV medicines used as recommended during pregnancy can reduce the risk of mother-to-child transmission of HIV to less than 1%.

c. HIV test before marriage in islam

Married is a *Sunnah* and a worship, as well as ligature of *ukhuwah al-Islamiyah* and gathering between the two of big families. It would require good preparation, began from material readiness, the status of law, and physical preparation.

Physical preparation is important before married. Because couples in family life want to get good descendents. In medical perspective there is no formula that make descendent will be born healthy and strong. Therefore, before marriage a couples required to prepare a healthy of physical condition. Healthy physical condition will give birth strong descendent. As explained in al-Qur'an surat an-Nisa' verse 9:

وَلْيَخْشَ الَّذِينَ لَوْ تَرَكَوْا مِنْ خَلْفِهِمْ ذُرِّيَّةً ضِعَافًا خَافُوا عَلَيْهِمْ فَلْيَتَّقُوا اللَّهَ وَلْيَقُولُوا
قَوْلًا سَدِيدًا.

"And let those (executors and guardians) have the same fear in their minds as they would have for their own if they had left a helpless family behind: let them fear Allah and speak words of appropriate (comfort)". (QR. Surah Al-Nisa' verse 9).⁴⁴

In this verse explained that we are required to do not have a weak descendent, and it is recommended to have a healthy and strong offspring.

⁴⁴*The Noble Qur'an*, Translated by Dr. Muhammad Taqi-ud-din al-Hilal and Dr. Muhammad Muhsin Khan, (Riyadh Saudi Arabia: 2007 Darussalam), h. 119

In this verse is preferred healthy children both physical and spiritual. So married couples aimed to get healthy offspring, both mental and physical.

A healthy offspring is given birth from healthy couples, both husband and wife. So in this case, is closely related to marriage preparation, both economic and physical preparation. Physical preparation is important in marriage. Wedding preparation which include physical aspects (biological) among others are:⁴⁵

a. The ideal age

The ideal age according to health is between 20-25 years of age for women, and between 25-30 years of age for men. Because this period is an excellent time to establish marriage.

b. Physical Condition

Couples who will carry out the marriage is recommended to maintain health, physical health among others are:

- 1) The couple who wants to marry dose not have infectious diseases, one of infection diseases is HIV / AIDS, and free from inherited diseases.
- 2) The couple who wants to marry is not a close family.

Fiqh scholars explain about the importance of fertility test before marriage in contemporary fiqh books, even a husband or wife may file for divorce / *khulu'* if one of spouse is known infectious diseases who do not know before first marriage, such as HIV / AIDS, impotence, and stripes

⁴⁵Ahsin W. Al- Hafidz, *Fikih Kesehatan*, (Jakarta: 2007, Amzah) h. 236

disease that is considered to give a bad influence for the survival of reproduction. However, fiqh scholars do not obligate to perform healthy check before married, and they do not make this HIV test as a requirement of marriage. Health Check just recommended in Islam for someone who will get marry, they are demanded to know the medical history of the prospective husband / wife and his family as anticipate if one day bride or groom get the disease.

Family is the smallest institution in society that have right to get protection from all forms of the disease. This protection is to develop healthy reproduction in the family. Awareness of reproduction should be instilled in the family both for men or women. Know the problem of HIV / AIDS, its causes, shape its spread, and its impact on reproductive health, social impact, psychological impact, and how to avoid it is a precautionary measure in the family.

A family should to support government programs and international commitment in the prevention of HIV / AIDS, through education, prevention, CIE (Communication, Information, Education), religious education. It becomes a moral movement for HIV / AIDS cases that still occur in the community.

Premarital HIV testing program is in line with the content of *maqasyid al-syari'ah*, one of *maqasyid al-syari'ah* is *Hifdzu al-Nasl* (keep descendent), something that can guarantee the sheltered of five matters,

one of the matter is maslahat for human being, everything that dengerous is *mudharah* or *mafsadah* and it must avoided.

Religion is very important factor in choosing a partner before marry, however physical health aspect is also important for those who will marry. Even the Prophet Muhammad also recommend for a man to choose bride who is lovingly and fertile, to know the aspect of this affection and fertile, one of them is look at the history of his/her family, especially her/his mother and father, aunt and her/his brothers and sisters. It is in line with the purpose of marriage is to maintain generation, maintaining the gene, and in order to the husband and wife get peace of mind.