

International Human Rights Laws vs. Islamic Religious Values in Mandatory Pre-Marital HIV Screening Programme: Analysing Significant Misconceptions

Rafeah Saidon, Zulaipa Ruzulan and Baterah Alias
Academy of Contemporary Islamic Studies (ACIS), Universiti Teknologi MARA UiTM),
40450 Shah Alam, Selangor, Malaysia

Abstract: The mandatory pre-marital HIV screening programme has been implemented in some Muslim countries. However, the application of such policy has raised several controversial issues surrounding the clash of human right laws and Islamic religious values. It is always argued that Islamic religious values contradict with the international human right laws in some aspect of the mandatory pre-marital HIV screening programme. Therefore, this study aims to clarify some misconceptions relating to such issue. The writing will first examine, the mandatory pre-marital HIV screening programme from both human right laws and Islamic perspective and then elucidate the misconceptions arose. This is a qualitative study using descriptive and explanatory approaches. It employs content analysis to review systematically the facts derived from various literature and documents. Apart from that, evidences from the Quran, Sunnah of the Prophet and an established Shariah principle, namely the qawaid fiqhiyyah will be appraised. Findings of this research shows significant misconceptions relating to the mandatory pre-marital HIV screening programme from international human rights laws and Islamic point of view. This study also clarifies the correct understanding of the implementation of mandatory pre-marital HIV screening programme for muslims.

Key words: Mandatory pre-marital HIV screening, human rights issues, Islamic religious values misconceptions, controversial issues, descriptive, Islamic point

INTRODUCTION

One of the procedures before the solemnisation of marriage in most Muslim countries is the pre-marital HIV screening program which is compulsory for both the prospective husband and wife. In Malaysia, the test was introduced, after the issuance of a fatwa (religious edict) by the Islamic Religious Council of Johor dated 1 November 2001 which requires mandatory HIV/AIDS blood test for Muslim couples prior to registration of marriage. This is followed by three other states which are Malacca, Perlis and Selangor. The fatwa, however, received little consensus, lots of critics and comments (Kamali, 2001). Despite the initial opposition from the Malaysian Ministry of Health and Non-Governmental Organizations (NGOs), mandatory HIV screening is later required in all states in Malaysia except Sarawak (JAKIM: Practical Code for the Management of Muslim, Divorce and Ruju').

MATERIALS AND METHODS

This research adopts a qualitative method using descriptive and explanatory approaches. It employs content analysis to review systematically the facts derived from various literature laws, policies and related documents. Certain issues on human rights and Islamic religious values relating to the mandatory pre-marital HIV screening programme are studied and analysed. Related policies from the international human right laws and Islamic principles and thoroughly examined. Extensive literatures in the form of books, journal articles, acts, policy and procedures were referred to provide insights and information relating to the research topic. Since, the main aim of this study is to examine misconceptions relating to mandatory pre-marital HIV screening, various Islamic principles and laws relating to HIV test is analysed in order to clarify such misunderstandings.

RESULTS AND DISCUSSION

Human rights and mandatory pre-marital HIV screening:

From the perspectives of human rights, the most important issue of this mandatory premarital HIV screening programme is in violation of human rights as enshrined in various international human rights instruments. This is because the protection and promotion of human rights are necessary to the protection of the inherent dignity of the persons affected by HIV. Among the human rights principles relevant to this are the right to privacy, the right to non-discrimination, equal protection and equality before the law and the right to marry and to found a family. In Article 17 of the International Covenant on Civil and Political Rights (ICCPR) 1976 and Article 12 of the Universal Declaration of Human Rights (UDHR) 1948, for example, it is stated that “, ..., no one shall be subjected to arbitrary or unlawful interference with his privacy, ...”. Hence, it can be understood that the mandatory pre-marital HIV testing is inconsistent with this right to privacy as the right includes an obligation to seek informed consent for such test and an obligation to maintain the privacy and confidentiality of all HIV related information. Furthermore, the United Nations guidelines on AIDS (UNAIDS), also, emphasise the importance of avoiding HIV prevention and care programs that contain coercive and punitive measures as such programmes or procedures are likely to reduce the participation of HIV infected person and increase the risk of alienation of those at risk.

The policy of mandatory HIV testing before marriage will only encourage couples to be denied of their fundamental rights to marry and found a family as they are likely to be refused to be wedded in accordance to their wishes should one of the partners is tested positive. This right to marry and found a family is a fundamental right adequately guaranteed under Article 23 of the ICCPR. It recognises the rights of adults of marriageable age to enter into a marriage and found a family, without any limitation as to race, nationality or religion.

Moreover, Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976, enjoins states to provide the widest possible protection and assistance to the family which is the natural and fundamental unit of a society. It states further that marriage must be entered into with the free consent of the parties. A similar provision exists in Article 16 of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). The right to enter into a marriage freely also implies that an individual should not be prevented from exercising this right. Although, in some cases, couples are given the option to either continue or discontinue with the wedding because of the negative impact of stigma and discrimination, most people are forced to opt out of the wedding, especially by the

request and advice of the family members. In addition, there are guidelines for states on the application of international human rights law in the context of HIV/AIDS. According to the international guidelines on HIV/AIDS and human rights, it is clear that the right of people living with HIV is infringed by mandatory pre-marital testing and the requirement of ‘AIDS-free certificate’s as a precondition for the granting of marriage licenses under state laws. Other than human rights issues, it is also argued that the mandatory HIV test is against the prevailing code of ethics in the medical profession which requires prior valid consent from the patient. It is against the ethical conduct as mandatory testing overrules the element of consent (Kamali, 2001). Thus, from the above discussion, it is clear that compulsory HIV testing results in violation of fundamental rights recognised in several international instruments. As such the practice is not acceptable when evaluated in terms of a sound legal basis.

Islam and mandatory pre-marital HIV screening: From the Islamic perspective, the state is the most important authority that uphold the main responsibility in preserving the family institution (Qur’an: al-Nisa’(4): 59). According to Al-Mawardi (1978), the duty of the state is to preserve the religion and to administer the worldly affairs and thus, protecting the family institution is part of such responsibility. Similarly, Maududi (1970) viewed that the aim of the Islamic state is the establishment, maintenance and development of all virtues, the prevention and eradication of evils. In this regard, the state is justified to intervene the family matters by regulating rules for the purpose of maintaining the stability of the marriage institution. One of the examples is by implementing mandatory pre-marital HIV screening.

This mandatory pre-marital HIV screening is in line with the Shariah principle of maqasid al-Shariah which safeguards the five essential values (al-dharuriyyat al-khamsah) of the religion, life, mind, property and descendants (Al Ghazali, 1938). Most importantly, this measure will uphold the wellbeing of the progeny or descendants. The principle of maslahah (public interest) and sad al-dhara’i (blocking the way of evil) is also, used to justify this mandatory screening as the disease will bring harm to the spouse and the future generations (Khallaf, 1978). In this regard, Islam emphasises more on public interest/rights compared to the individual interest or rights. Thus, can we say that individual right is denied by subjecting him to compulsory testing?

It is also, argued that even though marriage in Islam is highly recommended but if the marriage brings more harm than good, then the marriage should be avoided. This is in line with the Islamic ruling which emphasises the importance of removing all kinds of harm onto a

person including in marriage (IbnNujaym, 1980; Majelle, Article: 20). In Islam, prevention of harm takes priority over securing of benefits (IbnNujaym, 1980) and preventing evil from happening is better than to cure it (Al Ghazali, 1938). Even though marriage with HIV partner is beneficial in certain aspects any harm which could arise in the marriage needs to be addressed and acknowledged.

Islam supports the mandatory pre-marital HIV test as it is held for sound purposes. The purpose is to have an early detection of HIV infection and to enable the management of HIV patients program to be started with immediacy. It also, aims for the general population to be made aware of the importance of HIV prevention and subsequently reduce the possibility of sexually transmitted diseases to the offspring (Khebir *et al.*, 2007). This test is invaluable for couples who plan to get married to know their HIV status and to make informed choice if detected positively for HIV in planning their future life as married couples. Furthermore, it is the partner's mutual rights and responsibilities for their own and their partner's sexual health and wellbeing. Everyone needs to know their own HIV status and that of their sexual partner's to make informed sexual and reproductive decisions and all have an obligation to respect a partner's need to know and the right to decide (Dixon-Mueller and Germain, 2007).

Human rights vs. religious values; Some misconceptions: From the above discussion, it seems that there is a great conflict between human rights and religious values relating to pre-marital HIV screening programme. However, thorough research done by the researchers found that there are misconceptions relating to such issue in certain aspects. Followings are the discussion.

Privacy and confidentiality: Confidentiality in health care refers to the obligation of professionals who have access to patient's record or communication to hold that information in confidence. On the other hand, privacy is viewed as the rights of the individual client or patient to be alone and to make decisions about how personal information is shared (Prater, 2014). Confidentiality and privacy are among the familiar controversial issues relating to mandatory pre-marital HIV test as it is inconsistent with the human right laws. It should be understood that Islam strongly emphasizes the necessity of confidentiality in which the disclosure of other's secret would be committing sin and deserves punishments in the hereafter.

There is a misconception saying that Islam does not allow people to have privacy or to enjoy their private life. The basic evident from the Quran is stated in Chapter 24

Verse 27 as Allah said "O Believers, do not enter other houses than your own until you have the approval of the inmates and have wished them peace: this is the best way for you; it is expected that you will observe it".

In the above verse Allah enjoins everybody to have the rights to privacy in his house and no one is entitled to force his entry unannounced and without permission of the inmates. It is to note that the right of privacy was not merely confined to entering the house but it was declared as a common right according to which it is also forbidden to peep into a house, glance from outside or even read the other person's letter without his permission. According to Abdullah ibn Abbas, the Holy Prophet said, "Whoever glances through the letter of his brother without his permission, glances into fire" (Abu Daud, Book 8, No. 1480). "If someone peeps into your house, it will be no sin if you injure his eye with a piece of stone" (Abu Daud, Book 41, No. 5153)

Thus, the above evidences infer that the privacy system in Islam does not allow anyone to interrupt in the private life of another person. This certainly does not confine to the issue of entering the house of another but it should be extended to any conducts for the purpose of intruding other people's privacy. With regard to the issue of pre-marital HIV test, the problem is that for Muslim marriage, women must obtain the consent of their wali (guardian) to marry. It is certainly that this guardian will want to know the results of the HIV test. Then, the result will definitely be shared/known among the family members. So, the question is how to ensure that the confidentiality be maintained. Another question is that can the marriage registrar or guardian (wali) reveal the HIV result to other officers, guardians of the bride to be or the parents of both parties? If one of the partners turns out to be HIV positive and the marriage is cancelled on that account, there is high possibility that it may result in the breaching of confidentiality as it may no longer be possible to maintain such secrecy. It is because the whole process of marriage in the Muslim culture is initiated at the family level from the beginning, thus, it becomes complicated and difficult not to tell their families regarding such issue.

Discrimination: Justice (Adalah) is one of the fundamental principles of governance in Islam. The purpose is to guide humankind as God's vicegerent and to establish social justice as Islam emphasizes justice among human beings (Quran, Al-Nisa' (4): 58, Al Nahl (16):90, Al Nisa' (4): 135, Al-Maidah (5): 8, Shad (38): 26). To treat people equally is a pre-requisite of fairness and justice. The administration of justice should be impartial, without regard to one's social status, class, race

and religious belief. Al-Buraey (1990) and Jabnoun (2008). The governors should try to eliminate any possibility of injustice which may take place in any affairs. This principle of al-Adalah implies a duty to live by the shariah rule and avoid any form of injustice, oppression inequality and exploitation (Sadeq, 1996).

The mandatory pre-marital HIV testing also, raises critical issue of discrimination as the policy is under inclusive that it targets only individuals who are preparing to get married. While other members of society could be equally at risk of transmitting the HIV virus to others, they are not compelled to undergo the same medical scrutiny. A good example is HIV testing for people who inject drug in which it is argued that that HIV testing for them is recommended at least annually as they are among high risk population Bazazi *et al.* (2018). This pre-mandatory test that affects only a certain category of people such as those who want to marry reinforces prejudice, stigma and discrimination against that particular group (Mekonnen, 2010). A distinction on the basis of marital status nullifies the recognition, enjoyment or exercise of fundamental rights by members of the said group.

Moreover, the mandatory testing for HIV before marriage does not really serve the purpose of preventing the spread of the disease as such a policy does not consider sexual relations prior to marriage and extramarital relations. As the compulsory HIV test for Muslim aims to prevent the transmission from spouse to spouse or to future offspring, unfortunately it is only useful at that time only, it does not guarantee one or both parties will not be exposed to future risk of HIV (Tan and Koh, 2008).

To avoid discrimination, it is suggested that mandatory premarital HIV test should not targets only individuals who are preparing to get married. The other members of society could be equally at risk of transmitting the HIV virus to others, especially for high risk group and they should also, be compelled to undergo the same medical scrutiny.

Right to know other illnesses: If the purpose of the mandatory pre-marital HIV test is to know that the HIV status of one's future husband or wife, how about other illnesses? The person also has a right to know the health condition of his/her partner before marriage. This is to avoid the ignorance of the other party of the particular health condition of his/her partner. Good examples can be seen from other Muslim countries where by the tests done are not only limited to HIV but also, to other illnesses. In Iraq, for example, medical report required for the purpose of registration should confirm that the couple is free from communicable diseases and health impediments. It is

further elaborated that the medical report covers both physical and mental impediment. Physical impediments includes contagious venereal diseases, leprosy and active pulmonary tuberculosis while mental impediments include mental illness and mental handicap (Article 10 (2), the Iraqi Personal Status 1959; El-Alami and Hinchcliffe, 1996).

Similarly, Syrian Code requires the submission of a certificate from a doctor confirming that the couple are free of contagious diseases and medical impediments to marriage (Article 40 (c), Syrian Code of Personal Status 1975). Saudi Arabia on the other hand, has implemented compulsory premarital testing for haemoglobinopathies. The screening aims to identify carriers of the hemoglobin disorders in order to access the risk of having children with a severe form of disease (Alswaidi and O'brien, 2009). The premarital screening of Hepatitis B (HBV), Hepatitis C (HCV) and HIV, even though, it is said that the prevalence of these diseases in Saudi Arabia are among the lowest worldwide was still made mandatory in the beginning of 2008 (Alswaidi and O'brien, 2009; 2010).

In the UAE, the law requires attestation from the "appropriate committee established by the Ministry of Health" that the parties are free of "conditions on the basis of which this law allows a petition for judicial divorce" in which it refers to genetic disorders, conditions preventing consummation or those that stand to "affect future generation" (Article 27 (2), UAE Law of Personal Status). It is to be noted that the UAE, the mandatory HIV screening for couples about to marry has existed for more than 20 years along with the testing for syphilis, hepatitis B and in the cases of a family history, certain genetic diseases (Ganczak, 2009). Another good example is the Tunisian Code of Personal Status which requires a pre-marriage medical certificate as it is a guarantee against any venereal diseases in order to protect the physical and mental health of the woman, her children and her husband.

Therefore, in Malaysia, it is suggested that the test should cover any other illnesses as this will fulfil the maqasid Shariah in marriage, i.e., to preserve lineage from any dangerous diseases. It is also, considered as an individual right to know the health condition of his/her future bride or bridegroom.

Cost-effectiveness: The cost-effectiveness issue is another critique for this mandatory testing as it would involve many new couples with immense financial implications and thus, depriving their personal rights (Peterson and White, 1990). For example, the research done by Petersen and White on premarital HIV screening in eight areas of the USA concluded that the mandatory

premarital HIV screening would be more expensive than other HIV prevention programmes and has a limited impact on the plague. The researcher proposed some other alternatives which are more effective and economical such as HIV screening for pregnant women or treatment HIV affected fetus (Peterson and White, 1990).

This mandatory pre-marital screening for HIV has been tried out in some countries such as the USA, Malaysia and Saudi Arabia but with very limited success in the USA. In the USA, for example, it is reported that after the screening was made mandatory in 1988, 9 and 16% (other reported 14%) fewer marriage licenses than in the previous 2 years were issued in Louisiana and Illinois, respectively. It means that marriage rate decreased in Louisiana and Illinois in the USA, after the mandatory screening laws took effect as the couples planning to marry could not bear the high expenses (McKillip, 1991; Peterson and White, 1990).

As the mandatory screening is done in a low prevalence population, research should be carried out to examine its cost effectiveness. This is because since the implementation of this programme, the cost-effectiveness is not proven as the analysis has yet been performed. In regard to this, the Centres of Disease Control (CDC) of The United States in 1993, made a recommendation for the hospital to adopt a policy of offering voluntary HIV counselling and testing, if the HIV prevalence in the general population rate is 1% or the AIDS diagnosis rates is 1/1000. In 2009, a total of 179 268 Muslim men and women were screened through this programme out of which 67 were confirmed to be with HIV, i.e., the HIV prevalence was only 0.04% (UNGASS Country Report, 2010, 23). Pre-marital screenings in Johor from 2000-2004 reported HIV prevalence of only 0.17% (Khebir *et al.*, 2007) This low prevalence of HIV in our general population raises sufficient doubt about the cost-effectiveness of the current pre-marital HIV screening programme for Muslim couples (Tan and Koh, 2008).

One of the principles that can be referred to is the doctrine of *maslahah*. According to Al Ghazali (1938) *maslahah* consists of considerations which secure a benefit or prevent harm but is in the meantime, harmonious with the objectives (*maqasid*) of the *Shari'ah*. Even though pre-marital HIV test is very important for *maslahah* i.e., to preserve future generations, it is considered not cost-effective as the money can be spent for some other alternatives which are more effective as the money and economical like the such as HIV prevention programmes or HIV screening for pregnant woman, etc.

The most relevant Islamic legal maxim that can be referred to is *al Darar al asaddu Yuzalu Bil Ahaffu*, i.e., "a greater *darar* is eliminated by tolerating a lesser one" or "the greater harm is removed by a lesser one" (Ibn Nujaym, 1980). This maxim provides that whenever there is a clash between greater harm and lesser harm, the lesser harm should be tolerated as it has lesser impacts compared to the greater harm. The maxim recommends the authorities to take precautionary measures in introducing any policy, so as to avoid greater effects or long-term effects. As the health care funds are limited, it may be better used for screening target populations with high risk as well as having more effective health education or it should be channelled to other programmes that are proven to be more effective.

CONCLUSION

From the above discussion, it can be concluded that even though it is said that mandatory pre-marital HIV test is in contradiction with fundamental rights as recognised in several international instruments, thorough research shows that there are a number of misconceptions relating to this issue. This study proves that Islamic religious values are not in contradiction with the international human right laws in four aspects as discussed, i.e., privacy and confidentiality, discrimination, cost effectiveness and the right to know other illnesses. It also highlights various proofs from *Shariah* sources and principles to support the arguments.

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