

**PREMARITAL MEDICAL TEST IN BAUCHI STATE:
A STUDY OF ISLAMIC LAW AND PRACTICE**

BY

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**BEING A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE
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DECLARATION

I declare that this research work is the product of my effort under the supervision of Professor JuwairiyyaBadamasuiy and has not been presented anywhere for the award of any certificate.

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CERTIFICATION

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TABLE OF CONTENTS

CONTENTS	PAGE
DECLARATION	i
CERTIFICATION	ii
APPROVAL PAGE	iii
ACKNOWLEDGEMENTS	iv
DEDICATION	vi
TABLE OF CONTENTS.....	vii
ABSTRACT	xii
CHAPTER ONE	1
GENERAL INTRODUCTION.....	1
1.1 Background of Study	1
1.2 Statement of the Problem.....	3
1.3 Research Questions	3
1.4 Aim and Objectives.....	4
1.5 Justification	4
1.6 Scope and Limitation	5
1.7 Methodology	6

1.7.1 Study Area	6
1.7.2 Population and Sampling	7
1.7.3 Method of Data Collection.....	7
1.8 Literature Review.....	7
1.9 Organisational Layout.....	17
CHAPTER TWO	19
CONCEPTUAL CLARIFICATION	19
2.0 Introduction.....	19
2.1 Marriage and <i>Kafa'ah</i> in Islam	19
2.1.1 Marriage and Its Objectives	20
2.1.2 The Essentials of Marriage in Islam	21
2.1.3 Objectives of Marriage in Islam	26
2.2 <i>Kafa'ah</i> in Islam	29
2.2.1 Development of the Concept of <i>Kafa'ah</i>	29
2.2.2 <i>Kafa'ah</i> in the <i>Qur'an</i> and the Sunnah of the Prophet (P.B.U.H).....	30
2.2.3 Factors/Qualities to Consider for Equitability between Spouses according to Islamic Jurist	33
2.2.3.2 Freedom	34
2.2.3.5 Profession.....	36
(b) Defects Peculiar to the Wife.....	40

2.2.4 <i>Kafa'ah</i> as a Condition for Marriage.....	42
2.2.5 Effect of Marrying a Non- <i>Kufu'</i>	43
2.2.6 <i>Kafa'ah</i> as a Ground for Dissolution of Marriage.....	44
2.3 The Concept of Premarital Medical Test.....	46
2.3.1 Medical Test.....	46
2.3.2 Diseases and Types of Diseases.....	46
2.3.3 Premarital Medical Test.....	48
2.4 Conclusion	51
CHAPTER THREE (3)	54
PREMARITAL MEDICAL TEST: BAUCHI STATE LAW AND ISLAMIC POSITION	54
3.0 Introduction.....	54
3.1 An Overview of the Bauchi State Compulsory Genotype, HIV Test and Anti Discrimination Law, 2017	54
3.2 The Bauchi State compulsory Genotype and HIV Test, Anti-Discrimination Law 2017 vis a vis Islamic Law.....	57
3.3 Islamic Position on Premarital Medical Test.....	63
3.3.1 Arguments of Scholars in Support of the Conduct of Premarital Medical Test	63
3.3.2 Argument of Scholars Opposing the Conduct of Premarital Medical Test	65
3.4 Mandatory Conduct and Presentation of Premarital Medical Test Imposed By State	66

3.4.1 Argument of Proponents of Mandatory Premarital Test and Presentation of Premarital Medical Certificate.....	67
3.4.2 Arguments against the Mandatory Conduct of Premarital Medical Test and Presentation of Premarital Medical Certificate.....	68
3.5 Conclusion	69
CHAPTER FOUR.....	71
RESULT AND ANALYSIS.....	71
4.0 Introduction.....	71
4.1 Response to Interview for Imams of Various Mosques in Bauchi State	71
4.2 Response To Interview For Medical Doctors	76
4.3 Analysis on Data Collected Vis a Vis Provision of the Bauchi State Compulsory Genotype, HIV Test, Anti-Discrimination Law 2017: The Gap between the Law and the Practice	81
4.4 Areas of contradiction within the Bauchi state compulsory HIV, Genotype Test and Anti-Discrimination law 2017.....	83
4.5 Analysis of Data from the Islamic law perspective	85
4.6 Conclusion	90
CHAPTER FIVE	91
5.0 SUMMARY, FINDINGS, CONCLUSION AND RECOMMENDATION	91
5.1 Summary.....	91
5.2 Findings.....	95

5.3 Conclusion	96
5.4 Recommendation	98
Bibliography.....	100
APPENDICES	103
Appendix I:	103
Appendix II:	103

ABSTRACT

Marriage as an institution has from time immemorial been a contract which has attracted and embraced a lot of concepts and doctrines for consideration. One which gained recognition and evolved with time is the concept of Kafa'ah (equality). Amongst other factors to consider in measuring Kafa'ah, health condition has been of utmost importance, as it has been discussed by jurists to be one which can affect key objectives of marriage. In our world today, with the gradual upsurge in technology and medical advancement, discoveries have been made as to how man is exposed to various threatening health situations likely to affect the institution of marriage, hence, the need for premarital medical test. This has attracted debate amongst contemporary scholars and also acceptance in various jurisdictions in Nigeria as many states have made laws regarding the compulsory nature of conducting premarital medical test. It is on this note that this research examines premarital medical test in Bauchi state, by carefully studying its practice vis a vis the position of Islamic law with the aim of determining the extent to which the concept of Kafa'ah can accommodate the emerging issues of pre-marital medical tests. The research adopted both doctrinal and empirical methodology. This research found that irregularities as a result of marriage between discordant parties (genotype or HIV/AIDS related) can be seen as an extension of ill health which classical jurists have highlighted. It also found that the purpose of carrying out premarital medical test falls in tandem with the intent and purpose upon which the concept of Kafa'ah is developed which is to ascertain compatibility between partners and avoid infliction of harm from one partner to another or to the offspring. The research recommends for effective compliance with the provision of the Bauchi state compulsory genotype, HIV test and anti-discrimination law, 2017, mandating compulsory premarital medical test and effective punitive measures for defaulters. Thus, the law should be amended to address all areas of contradictions and also include array of other medical conditions which are more deadly than genotype and HIV/AIDS.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of Study

The prosperity and success of a society heavily depends on the strength of the relation of its individual members. Thus family constituting the fundamental unit of the structure of society provides the avenue for initiation of such relation among the individual members. Marriage as a process through which families are brought into existence in Islamic law plays a very significant role in formulation of a good and cordial relation between individual at the micro level in the society, hence, extending it to the macro level. Parity/ equality amongst other things is considered consequential in marriage between intending spouses, be it in terms of wealth, ancestry/descent, freedom, profession, Religion or health.

The word 'equality' has become widespread especially in the human rights community. In the context of Islamic Family Law, social equality between parties to a marital relationship could potentially avert or minimize marital discord and endanger harmony and mutual understanding. This is technically referred to as '*Kafa'ah*'. It is a concept that seeks to balance marital relationships for sustained realization of the objectives of marriage in Islam. This endeared the concept to many jurists because a sustained marital union is desirable under the shari'ah. This is because marriage performs enormous social functions in the society: it legitimizes social interaction, legalizes human procreation and lays the foundation for the overall peace, order and security of human societies. Hence, where this balance in marital relationship is not achieved between partners, its negative effect affects the whole society. Amongst other things, this lack of parity leads to increase in the incidence of divorce which has been discouraged in Islamic law.

Today however, there is a gradual upsurge of factors hindering marriage contracts on account of medical and technological advancement that expose diseases and genetic conditions of parties intending to enter into a marital union. These were erstwhile unknown thereby raising fundamental questions regarding the reinterpretation of the concept of equality beyond the traditional social, economic or financial statuses. Example of those tests carried out include Genotype test, HIV test etc. One of the states in which this has become the general norm is Bauchi state. Thus, “Bauchi State Compulsory Genotype, HIV test, Anti Discrimination law, 2017” was passed to that effect. Research has shown that this concept of premarital medical test has not been addressed and determined by classical jurists as it is a contemporary issue. It is in the same light that today, with the awareness of the concept and its emerging need that series of discourse amongst contemporary jurists and scholars on premarital medical test is ongoing. While some of the contemporary jurists are of the opinion that a state should make mandatory premarital medical test, presentation of premarital medical certificate and also a pre-requisite/condition for contracting a marriage because of a number of highlighted benefits including safeguarding people’s lives and sustaining good health status in the society. Hence, it could be subjected to legislation on the basis of public interest. However, others are of the view that it should not be made mandatory and should not be made a condition/prerequisite for marriage contracts because all traditions of the Prophet which have nexus to the topic at hand recommends as an advice and not make mandatory the test. They also based their argument on confidentiality in Islam. That Islam always tries to protect the secret of people.

It is on the above background that this research analysed the various views of the jurists and contemporary scholars and their argument to find out the extent to which the concept of *Kafa’ah* could be constructed to include this array of pre-marital medical tests. The research also

addressed the issue of premarital medical test under the Bauchi State Compulsory Genotype and HIV test, Anti-Discriminatory law, 2017 vis a vis the position under Islamic law.

1.2 Statement of the Problem

The controversy regarding the nature of equality and the factors that determine same has been raging among classical Islamic jurists and this has been extended to our contemporary period. Technology and modern innovations in science have further made impact on the issue of equality. One's health status is no longer a mystery today. Indeed, in some jurisdictions like Bauchi, Gombe, Taraba, and Jigawa State. It is now a pre-condition for intending spouses to present their medical certificates before the marriage is contracted. In Bauchi State, the Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017, has made it compulsory for parents and guardians to subject their children and wards to HIV and genotype test and must disclose their status before marrying them off. Where the medical certificate is presented and there is any irregularity as to the health condition (Genotype or testing positive to HIV or related ill health) the marriage is refused. Likewise, some health issues like impotency could be a total bar to marriage, while some are not. Requesting for medical certificate, regarding it as a condition for contracting marriage and making it mandatory by the state is not expressly provided for under Islamic law and is a contending issue amongst contemporary jurists.

1.3 Research Questions

Having recourse to the topic at hand and for the purpose of this research work, the basic research questions are:

1. To what extent can lack of *Kafa'ah* on health grounds be a bar to contracting a marriage under Islamic law?

2. What is the position of contemporary scholars as regards premarital medical tests and presenting of premarital medical certificates as a pre-requisite for contracting marriage?
3. What is the position of the law in relation to premarital medical test in Bauchi State?
4. What are the prospects and constraints of the Bauchi State Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

1.4 Aim and Objectives

This research aims at appraising the concept of *Kafa'ah* marriage to see the extent to which it can accommodate the emerging issues of pre-marital medical tests.

The objectives are:

1. To examine whether lack of *Kafa'ah* on health ground can be a bar for contracting marriages under Islamic Law.
2. To examine the position of contemporary scholars as regards premarital medical tests and presenting medical certificate as a pre requisite for contracting marriage.
3. To analyse the position of law in Bauchi State as regards premarital medical test in the light of Islamic law as discussed by the contemporary scholars.
4. To examine prospects and constraints of the Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

1.5 Justification

It is pertinent to conduct this research so as to provide solutions in relation to the presentation of premarital medical certificate in mosques before marriages are contracted. Thus, to address the

grey areas of the Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017, for further and better adjustments for law makers.

This research work will benefit all those interested in knowing what Islamic law contemplates in relation to conducting premarital medical test and the presentation of premarital medical certificates before marriage is contracted.

Hence, the work will serve the purpose of laudable reference to Islamic law students, law and policy makers, would- be spouses, and the entire Muslim world at large as marriage, especially the issue of the requirement for presentation of medical certificate prior to marriage which is an important issue which affects all.

1.6 Scope and Limitation

This work had recourse to Bauchi State jurisdiction in order to ascertain the compliance of the Bauchi State compulsory Genotype and HIV test, Anti-Discrimination law, 2017 of mosques in relation pre-marital medical test and presentation of medical certificates before contracting marriages, also, to ascertain views of people and Muslim clerics in relation to the topic of research.

Also, views of the classical and contemporary jurists and scholars were examined. Hence, this research focused specifically on authorities that are within the ambit of Islamic law and Medicine, Bauchi state in terms of jurisdiction.

Although the research extended its scope to empirical study, it should have considered including data of population who have been subjected to the applicability of the law and also populations

who have not been subjected to the law and also the law makers. This would have increased the quality of the data in the research.

1.7 Methodology

The research adopted both doctrinal and empirical methods of legal research. By doctrinal method, intensive research and examination of relevant written materials which include primary and secondary sources of the law were carefully conducted with a view of answering, explaining as well as clarifying the main research questions.

The relevant materials here include *Qur'anic* provisions and traditions of the Prophet, juristic views of all the schools of law, textbooks, articles, journals, and internet sources. This is to enable us determine the position of the law, the various opinions of jurists and views of authors in relation to the topic at hand.

Hence, by the Empirical method, data from hospitals where tests are carried out and mosques where marriages are contracted were sourced. Data was obtained through interview guided by the use of researcher's designed questions directed to medical doctors and Imams of Mosques where marriages are conducted in Bauchi State. Thus, Qualitative analysis was adopted to analyse the data from the interview scripts.

1.7.1 Study Area

The study population covers some mosques in Bauchi Local Government Area of Bauchi State, Gamawa Local Govt (specifically Udubo Town) and katagum Local Govt (specifically Azare Town). According to the 2006 census, the state has a population of 4,653,066.

1.7.2 Population and Sampling

Having adopted a qualitative method, this research employed a sampling technique for the identification and selection of the research participants. Purposive Sampling technique was used for the purpose of this research. This is a non probability sampling method and it occurs when elements selected for the sample are chosen by the judgement of the researcher. It is often believed that the researcher can obtain a representative sample by using a sound judgement to choose participants that can help answer the research questions, achieve research objectives and also which will result in saving time and money.

1.7.3 Method of Data Collection

For the purpose of this research, data was collected using face to face interview with all respondents. The interview lasted for 15-45 minutes. This method helped the researcher to, in addition to the formulated questions; ask prompt questions based on the response of the respondents. The researcher selected 30 Mosques (20 from the Urban Area and 10 from Rural Area) which equals 30 Imams of each Mosque reached and 10 Medical Doctors. All 30 individuals were interviewed individually.

1.8 Literature Review

In the course of this research, the researcher came across certain materials that are either directly or indirectly relevant to the proposed topic at hand. The most important ones are briefly reviewed as follows:

“A summary of Islamic Jurisprudence” a book authored by Salih al Fawzan¹ addressed on issues of marriage Contract. It addressed “Equivalence in Marriage” and Defects in marriage.

¹Salih Al Fawzan, *‘A Summary of Islamic Jurisprudence’ Volume 2 (Al Maiman Publishing House 2005)*

The author highlighted that Equivalence in marriage is important however to the extent that it can be a condition to the spouse commitment to the marriage agreement, but not as a condition for the validity of marriage. The book, further, in addressing defects in marriage clearly explained that defect if found in any of the spouse gives rise to right to cancel a marriage contract or not. This book is relevant to this research, however, being a classical book, it did not discuss the extent to which the right to cancel marriage extends to defects/diseases such as HIV/Aids and ill health related issues as a result of discordance as to genotype.

“*Minhaj et Talibin, A Manual of Muhammadan Law According to the School of Shafii*”² a book authored by Muhy al-Din Abu Zakaria Yahya Ibn Sharif en Nawawi stated that in marriage it is important that the suitors are a good match for each other. And in determining if they are a good match for each other, amongst other things, there should be absence of redhibitory defects of the body. This book is relevant to this research, however, it did not discussed on *Kafa’ah* in respect of health and has not also discussed in depth defects of the body to consider in determining compatibility of partners.

‘*Marriage according to five schools of Islamic law*’³ a book authored by Muhammad Jawad Al-Mughniyya, discussed in depth on marriage, *kafa’ah* and defects from the views of the various schools of Islamic law. Though very important to this research, however, the discussion is limited to only classical views of classical Islamic scholars which this research addresses beyond.

²Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj et Talibin: A Manual of Muhammadan Law According to the School of Shafii*(E.C Howard, Williams Clowes and Son ltd 1914)

³M. J Maghniyyah, *Marriage according to five schools of Islamic Law* (Department of Translation and Publication, Islamic Culture and Relations Organization 1997) Vol. 5

‘*Tuhfat Al- Fuqaha*⁴, a text in Hanafi Fiqh authored by Muhammad ibn Ahmad ibn Abu Ahmad `Ala' al-Din al-Samarqandi discussed on *kafa'ah* and factors to be considered when determining *kafa'ah* from the Hanafi school of law, amongst which are profession, wealth, religion and freedom. The author also discussed on *kafa'ah* as a condition for marriage and the effect of marrying a non-*kufu'* amongst other issues. This text is beneficial to this research, however, its scope of discussion is limited to classical jurists of the Hanafi School of thought which this research addresses beyond.

‘*Al-Mudawwanah al-Kubra li -Imam Dar al-Hijrah al-Imam Malik ibn Anas al-Ashabi*’⁵ a text in maliki fiqh authored by Muhammad Afandi Sasi al-Magribi al-Tunisi discussed *kafa'ah* from the Mazhab of Malikiyya. The text identified majorly two factors to consider in relation to *kafa'ah* which are of importance in marriage, namely; Religion and health condition. This text is important to this research, however its scope is limited to only maliki school of law and it has not addressed the contemporary views of scholars as regards contemporary health conditions which this research aims at addressing.

“*IbnAshur Treatise on Maqasid-al-shari'ah*”⁶ a book authored by Muhammad Al-TahirIbnAshur discussed on *Maqasid –Al Shari'ah* discussed *Maslaha* and *Mafsadah* in respect of general Islamic legislations. That the general rules of Islamic law and specific proofs indicate that the allpurpose principle of Islamic legislation is to preserve the social order of communities and insure their health. This is relevant to this research as regards guidelines to formulation of

⁴ Ala al Din al-Samarqandi, *Tuhfat al fuqaha*,(Beirut: Dar al-Kutub al Ilmiyah) Vol. 2, 1993

⁵ Muhammad Afandi Sasi al-Magribi al-Tunisi, *al-Mudawwanah al-Kubra li -Imam Dar al-Hijrah al-Imam Malik ibn Anas al-Ashabi*, Vol. 3 (Kairo: Matba'ah al-Saadah, 1323 AH)

⁶ Muhammad Al-TahirIbnAshur, *Treatise on Maqasid al-Shari'ah* (International Institute of Islamic thought 1427/2006)

Islamic legislations. However, it has not made any analysis in respect of any law which this research aims at doing.

*'Kafa'ah in Islam, towards a progressive Interpretation'*⁷ an article written by Iffatin Nur addressed *kafa'ah* from Qur'an and Hadith and the 4 distinct school of laws namely; the *Hanafi*, *Shafi'i*, *Hanbali* and *Maliki* School of laws by looking at their various distinctive views as to factors to consider relating to *kafa'ah* in marriage. This text is important to this research however, it has not addressed the views of contemporary scholars which this research set out to do.

*"Pre-marital Medical Examination as a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective"*⁸ , An article written by MagajiChiroma, LaminuBukar, Umar Suleiman Abbo-Jimeta tried to address the concept of premarital medical test and its implication on children.. The authors also addressed the need for premarital medical test and the need to introduce a new rule that will mandate parents to undergo premarital medical test to reduce high mortality rate of parents and children. The authors stated selected Islamic countries⁹ that have made premarital medical test compulsory.

⁷ N. Iffatin: *Kafa'ah in Islam, Towards a progressive Interpretation* (Episteme, 2004) vol. 1

⁸Chiroma M. Et al, 'Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective'(2014)14 Journal of Law, Policy and Globalization <<http://www.iiste.org/Journals/index.php/JLPG/article/download/13181/13358>> 9th January 2018

⁹ Saudi Arabia, U.A.E, Bahrain, Egypt, Syria, Lebanon, Tunisia and Morocco

The article is important and related to this research, however did not address whether failure to conduct this premarital medical test or to present premarital medical certificate can be a bar to contracting marriage.

“*Mandatory Premarital Medical Examination*”¹⁰ an article authored by Sheikh Abd-Al-Rashid Qasim addressed the topic by trying to outline the benefit, negative consequence and Islamic ruling on mandatory premarital medical test. In highlighting the benefits of conducting the test, the writer stated that partners will beforehand know the possible genetic diseases that their children might inherit and will also deter a partner from contracting contagious disease from the other. The writer further states the various arguments by contemporary scholars as to government’s imposition of compulsory premarital medical test all supporting their arguments with verses of the *Qur’an* and Traditions of the Prophet (P.B.U.H) the writer conclusively held the view that conducting premarital medical test is good to the partners, however, the benefits attached to the imposition of premarital medical test by the government is lesser than the negative consequences, therefore, it should be left as a choice to partners.

The above article is very important to this research, but it has not addressed factors that could serve as a bar to marriages in relation to health issues which are very vital to the topic at hand.

Hence, did not relate premarital medical test to *Kafa’ah*.

“*Premarital Screening Test: An Islamic View*”¹¹ an article written by Hasan Shammout, Moawiahkhatetbah, and Omar al-Omari, in addressing the topic succeeded only in highlighting the importance of premarital screening looking at elementary goals of Shari’ah (*Maqasid-al-*

¹⁰ Sheikh `Abd al-Rashid Qasim, Mandatory Premarital Medical Examinations, Fatwa issued on Thu, 01/01/2004, <<http://en.islamtoday.net/artshow-403-3348.htm>> Accessed 25th December 2017.

¹¹ Shammout H. and others, ‘Premarital Screening Test, Islamic Perspective’ (2017) 12 (13) Euro Mediterranean Biomedical Journal 113 <www.ebmj.org> accessed 27th December 2017

shari'ah), otherwise known as the “five necessities”. That in order to keep up with the five necessities, people need to be healthy, marry healthy partners and also give birth to healthy offspring, thus the need for premarital screening.

Further, within the article the writers tried to establish that it is only right in Islam that people undergo premarital test. They placed reliance on the saying of the Prophet which encourages seeking for counselling and the provision of the *Qur'an* which provides that humans should not throw themselves into destruction. That a partner may have a sexually transmitted disease and only premarital medical examination could expose that.

The writers argue that as opposed to claim that mandatory premarital medical test compromise the freedom of individuals, it protects the individual and the society at large. And concluding, they explained that although results of these tests may result to negative consequences, the juristic principles delineated by Islamic law teaches us to choose the lesser of two evils.

The article is important to this research, however it has not explained what premarital medical test is, and it did not also state the negative consequences which it mentioned in its argument for mandatory premarital medical test.

“Medical Check-Up Before Marriage: Beneficial to Life Partners or Encroachment over their Privacy, A Comparative Study¹²” is a research publication authored by Malik Sakhi Sultan Awan. It also addresses premarital medical testing but from the dimension of human rights’ protection. The author explained what premarital medical checkup is, the types of the tests carried out.

In giving the definition of premarital medical test, the author stated only that it is the most important test which is recommended and suggested by all doctors. And in giving the types of

¹² Malik Sakhi Sultan Awan, ‘Medical Check-up Before Marriage: Beneficial to Life Partners or Encroachment over their Privacy?’ (2015) <https://s3.amazonaws.com/academia.edu.documents/37286758/sakhi_01.docx> Accessed 27th December 2018

tests, the author mentioned urine test to ascertain the efficiency of the kidney, the blood type and Rhesus factor test which determines the blood type of a coming baby, and blood test to check any disease and genotype of the partners amongst others.

The author also highlighted the arguments for the proponents and opponents of premarital medical check up from the Islamic point of view and from the human rights perspective. From the Islamic perspective, the proponents of the premarital medical test are of the view that it is implicitly allowed in the light of Islam. That according to Islamic injunctions, it is allowed and even mandatory if there exists a belief that any of the would-be partners is a victim of any hereditary disease. However, the opponents of premarital medical test from the Islamic perspective are of the opinion that it cannot be made mandatory as all traditions of the Prophet (PBUH) which have nexus with the topic at hand are recommendatory and not mandatory. Hence, that they may demand for it for their safety but declaring it mandatory by the States, will have negative implications and consequences.

The research publication is of relevance to this research, however in its argument; the researcher did not give authorities to the arguments of the proponents and opponents of premarital medical test. Hence, the definition of premarital medical test proffered is vague and only stated how important it is. Furthermore, the research did not address mandatory presentation of premarital medical test and effect of refusal.

“Pre-Marital Screening Against HIV/Aids And Sickle Cell Diseases: Islamic Law Perspective”¹³

An Article Written by M.I Said also examined the practice of premarital medical test from the Islamic law position. In a bid to do so, the writer looked at the position of marriage generally in Islam, highlighting that it is a divine institution from time immemorial for the benefit of

¹³M.I.Sa'id, 'Premarital Screening against HIV/AIDS and Sickle Cell Disease: Islamic Law Perspective' (2010) 1 UDUSJICL

mankind. Hence, amongst the various objectives of marriage is to procreate. He further looked at diseases /defects, their nature and various juristic views. He stated that Muslim jurists are not unanimous in the number of defects that may give rise to dissolution of marriage. Although various schools of law have their opinion as to what constitute defects which could be a ground for the dissolution of marriage, they unanimously agree that any defect which will have effect of defeating the primary or essential obligation of marriage (like procreation) or may render the objective worthless, then that defect will give rise to dissolution of marriage. The writer further opined that, based on the view of the jurists regarding defects, diseases like HIV, VVF which were not known in the time of the classical jurists may provide sufficient ground for the dissolution of marriage.

This article is relevant to this research work; however its analysis is based on the opinion of classical jurists on grounds for dissolution of marriage rather than premarital medical test. Hence it has not addressed the effect of partners not undergoing premarital medical test.

“Juristic Decisions on some Contemporary issues¹⁴”, a book Published by Islamic Fiqh Academy discussed the issue of Genetic Test and its position in Islam and stated the resolution of the Islamic Fiqh Academy following its fifteenth Seminar. The book outlined as part of the resolutions passed, that it is permissible to make use of genetic test for treatment and diagnosis of disease amongst other things. This part of the book is relevant to this research however, the issue of genetic test was briefly discussed and no nexus was made to the concept of *Kafa’ah* or premarital medical test.

¹⁴ Islamic Fiqh Academy (ed.), *Juristic Decisions on some contemporary Issues* (Lebanon, Dar Al Kotob Al-Ilmiyah) 1st Edition, 2009

“Pre-marital Screening Programmes for Haemoglobinopathies HIV and Hepatitis Viruses: Review of Factors affecting the success¹⁵” is an article written by F.M Alswaidi and S.J O’Brien.

It is a medical publication on premarital screening bordering on HIV, Sickle Cell Disease to mention a few. The authors gave a historical background of Premarital Screening and the global aspects of premarital screening programmes. It also looked at the role of culture and education in the success of screening programmes. The authors also discussed premarital testing in Saudi Arabia and other Arabian Countries, positing that genetic disorders are common among Arabs contributing to infant mortality, thus the need for premarital medical test. The negative and positive aspects of premarital medical test were also addressed by the writers in the article.

This article is resourceful to this research but it did not address premarital screening from the Islamic point of view which is a focus in this research work.

“Genetic Counselling in the Muslim World: The Challenges¹⁶” is a paper presented by Aida I. Al Aqeel in the 2nd Pan Arab Human Genetic Conference. The paper dealt with amongst other issues, genetic counselling and Bioethics in Islam, the concept of genetic screening programmes and Islamic Ethics. In the light of this, the presenter, limited his scope and also addressed premarital genetic screening from the medical, social and Islamic perspective. The presenter stated that the birth rate of children born with sickle cell disease has reduced drastically in Cyprus, Italy and Greece as a result of the introduction of national programmes on premarital medical test. The paper also highlighted the outcome of the 17th session of the Islamic Jurisprudence Council of the Islamic World League held in Makkah on the legitimacy of premarital medical screening which reflects that additional conditions to marriage contract such

¹⁵F.M Alswaidi and S.J O’Brien, ‘Pre-marital Screening Programmes for haemoglobinopathies HIV and Hepatitis Viruses: Review of Factors affecting the success’ (2009) 16 (1) Journal of Medical Screening 2009

¹⁶A.A Al Aqeel, ‘Genetic Counseling in the Muslim World: The Challenges’ (Pan Arab Human Genetic Conference, Dubai, November 2007)<<http://www.cags.org.ae/e10alajeel.pdf>> Accessed 25th January 2018

as mandatory premarital medical screening are not permissible under the Shari'ah., however, its awareness should be created on its importance and be recommended for intending couples.

This paper is vital to this research; however its scope covers only genetic screening which is just a part of the scope of this research work. Further, it created no nexus to the concept of *Kafa'ah* which is a major focus to this research work.

“The Attitude of the Muslim Youth towards HIV/AIDS Pre- Marital Test: A Case Study of Ungogo Local Govt of Kano State, Nigeria¹⁷” An article written by Dr. Aisha GarbaHabibdiscussed premarital medical test, however with a view to ascertain the attitude of the Muslim youths. The writer discussed what HIV/ AIDS is, as a disease and every relevant issue such as mode of transmission, symptoms and test and treatment. The writer also addressed the Islamic position of medical examination before marriage, that Muslim jurists are divided into two as regards the permissibility or otherwise of conducting premarital medical test. For the proponents, they highlighted that is allowed even though not necessary. And for the opponents, they argued that it is not allowed as Islam is always trying to protect people's secret. They allargued basing their arguments on the provisions of the *Qur'an* and the traditions of the Prophet (P.B.U.H). The writer in conclusion submitted that conducting premarital medical examination is necessary for the purpose of preventing harm to the society.

This article is also important, however, it left in abeyance the issuance of premarital medical certificate before conducting a marriage. It also did not address effect of refusal to conduct the premarital medical examination which will be addressed by this research work.

¹⁷A.G Habib, 'The Attitude of the Muslim Youth towards HIV/AIDS Pre- Marital Test: A Case Study of Ungogo Local Govt of Kano State, Nigeria'(2013) 1 (14) Research on Humanities and Social Sciences

All aforementioned literatures and reviewed have addressed the topic at hand in one way or the other, however it is worthy to note that none has addressed or focused on the jurisdiction that this research focused on, which is Bauchi State.

1.9 Organisational Layout

This research consists of five (5) chapters.

Chapter One is basically on the introductory aspect of the research work. It entails the background of study, research problem, research questions, aims and objectives, justification, scope, methodology, literature review and this organisational layout.

Chapter Two entails conceptual clarification of the research. it examined the objectives of marriage in Islam. It also addressed *Kafa'ah* under Islamic law; thus, the various *Qur'anic* provisions and traditions of the Prophet (P.B.U.H) and various views of the jurists on *Kafa'ah*. Finally, it clarified on the concept of premarital medical test.

Chapter Three focused on examining premarital medical test, however, in the light of the Bauchi State Compulsory Genotype, HIV Test and Anti Discrimination law , and in the light of Islamic law. It appraised the relevant provisions of the Bauchi State Compulsory Genotype and HIV test, Anti-Discrimination Law, 2017 vis a vis the various opinion of jurists in relation to premarital medical test and presentation of premarital medical certificate.

Chapter Four consists of findings/ results derived from interview conducted with Medical personnel and Muslim clerics in various mosques focusing on the practice of compulsory premarital medical test and presentation of premarital medical certificate. It also made analysis of the findings/ results under Islamic law and the principles of *Kafa'ah* established under chapter

2 of the research work. Hence, it looked at the gap between the practice and the law and the areas of contradiction within the provisions of the Bauchi State Compulsory Genotype and HIV test, Anti-Discrimination Law, 2017.

Chapter Five presents the summary of the study, conclusion, recommendations and suggestions for further study.

CHAPTER TWO

CONCEPTUAL CLARIFICATION

2.0 Introduction

This chapter discussed the major concepts relating to this research. It discussed marriage, its objectives and its essentials in Islam. And, on the other hand, it discussed the concept and development of *Kafa'ah* in Islam with focus on health condition as a factor to consider in *Kafa'ah* amongst other factors. Thus, it discussed *Kafa'ah* as a condition for marriage. The conceptual clarification is to give a clear insight on the topic of research. It is expected that at the end of this chapter, a link will be created with the subsequent chapter which focused on premarital medical Test.

2.1 Marriage and *Kafa'ah* in Islam

Marriage and *Kafa'ah* in Islam are two concepts which have been addressed in the *Qur'an*, *Hadith* of the Prophet (P.B.U.H) and also by Muslim classical and contemporary jurists. As much as Marriage could be discussed distinctively, *Kafa'ah* on the other hand is usually linked to Marriage. This chapter discusses what marriage is, its objectives and also *Kafa'ah* in marriage in the light of Islam.

2.1.1 Marriage and Its Objectives

Marriage in Islam has been ascribed two words, *Ziwaj* and *Nikah* to which each term could be referred to interchangeably. The *Qur'an* uses the term “*Zawj*” which literally means “pairing”. And legally, marriage is referred to as ‘*Nikah*’ which literally means sexual intercourse.¹⁸

Marriage is the union of a man and a woman. It is a religious responsibility to be undertaken by those who are ready to live according to rules guiding the institution. It could also be seen as a lawful union between a male and female in accordance with the formal way prescribed under Islamic family law.¹⁹ The institution of marriage is described as the way of the Prophets. The Prophet Muhammad (P.B.U.H) is reported to have said “Marriage is part of my Sunnah; whoever runs away from my Sunnah is not amongst us. In the *Qur'an* Marriage has been referred to as *Mithaqunghaliz*, meaning strong covenant.²⁰

As a social institution, marriage in Islam is a civil contract. Depending on the circumstance, marriage in Islam may be *Mandub*, *Wajib*, *Mubah*, *Haram* or *Makruh*.²¹

Marriage is *Mandub* (permissible) i.e. laudable act for which reward is due if he does it and there is no punishment whatsoever if he chooses to keep away from it, such as where a Muslim can conveniently restrain from falling prey to adultery. It is *Wajib*, i.e. a duty that a Muslim has to fulfill if he/she is not capable of restraining him/herself from falling prey to adultery while he is capable of coping with the financial responsibility of marriage, such as payment of dower and

¹⁸ Edmore Dube, ‘Reflections on Islamic Marriage as Panacea to the Problems of HIV and AIDS’ (2015) 7(7) Journal of African Studies and Development <<http://www.academicjournals.org/journal/JASD/article-full-text-pdf/7A7691B53623>> Accessed 19th May 2018 p.184

¹⁹ Chiroma M. Et al, ‘Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective’ (2014)14 Journal of Law, Policy and Globalization <<http://www.iiste.org/Journals/index.php/JLPG/article/download/13181/13358>> 9th January 2018 p.48

²⁰ M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p.148

²¹ M.A Ambali, *The Practice of Muslim Family Law in Nigeria* (Tamaza Publishing Co. ltd 2003) p.146

decent maintenance of the family.²² It is *Mubah* i.e. legitimate, if a male Muslim has contracted a subsisting marriage with less than four women and he has enough means to maintain the marriage. It is *Haram* i.e. forbidden, in circumstances where there is no cause to fear falling into the temptation of committing adultery and such marriage will impose seeking means of maintenance through unlawful means, or it will cause hardship or negligence of another responsibility. Finally, marriage is *Makruh* i.e. not encouraged when there is call for, an illustration is where an individual fears being unjust to their spouse²³

2.1.2 The Essentials of Marriage in Islam

Islam has provided for the guiding principles in marriage. Thus, the existences of some essentials are indispensable. What constitutes the essentials of marriage however, differ from one jurist to another. The following essentials are those largely discussed:

(a) *Sadaq* (Dower): In Islam, dower means *Sadaq*, a word coined from the Arabic word “*Sidq*” which means truthfulness and sincerity²⁴. It is also called *Nihlah*²⁵, *Mahr* or *Ijar*²⁶. Dower is said to be either the sum of money or other form of property to which the wife becomes entitled to by marriage.²⁷ It is what the bridegroom gives to his prospective bride for contracting and consummating a marriage with her. Dower is the sole right of the bride which she can dispose of as she wishes. Thus, the majority of Muslim jurists agree that it is one of the basic requirements for the validity of marriage²⁸, while the minority rates it lower i.e. it is not a basic requirement

²² Ibid

²³ ibid

²⁴ Ibid p.162

²⁵ Token

²⁶ Entitlement

²⁷ M.I Siddiqui, *The Family Laws of Islam* (Adam Publishers and Distributors 2005) p.79

²⁸ M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p.148

for the validity of marriage²⁹. The effect of its absence for the jurists, who regard it as a basic requirement, is invalidity.

According to the Holy *Qur'an*, the dower is given as a free gift by the Husband to the wife.

The *Qur'an* states:

“...And give unto women their marriage portions in the spirit of gift”³⁰

Hence, the *Qur'an*, highlighted the compulsory nature of dower thus:

“And those of whom ye seek content (by marrying them), give them their portions as a duty”³¹

The evidence of the compulsory nature of *Sadaq* could also be seen from the practice of the Prophet (P.B.U.H). The prophet (P.B.U.H) paid *Sadaq* to all of his wives, and also all those that married his daughters were made to pay *Sadaq* at the time of their marriage.³²

As a general rule, *Sadaq* has to be an inviolable property, the quantity or of which is known and certain. Hence, it must be lawful, and impliedly, things like Alcohol, pigs, and musical instruments are not fit to be considered as dower. It can be movable or immovable, usufruct or services to be rendered.³³ Thus, Dower may be prompt or deferred.³⁴

All Muslim jurists are unanimous that *Sadaq* has no maximum limit. They rely on the *Qur'anic* verse which states thus:

²⁹ M.A Ambali, *The Practice of Muslim Family Law in Nigeria* (Tamaza Publishing Co. ltd 2003) p. 163

³⁰ Qur'an 4:4

³¹ Qur'an 4:24

³² M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p.148

³³ Ibid p.149

³⁴ M.I Siddiqui, *The Family Laws of Islam* (Adam Publishers and Distributors 2005) p.84

“But if you desire the exchange of a wife in place of a wife, while you have given one of them a whole treasure (qintar, as sadaq. Take not anything of it back. Would you take it by slander and manifest sin?”³⁵

On the minimum limit, however, Muslim Jurists differ. Some jurists like Shafi’I, Ahmad Is’haq, Abu Thaur, IbnWahab and the jurists of Medina are of the opinion that there is no minimum limit. While other jurists are of the view that there is minimum limit, however, they differ on what constitutes the minimum limit.³⁶

(b) Waliy (Guardian): Guardianship in marriage may be said to be the duty imposed on a man, which empowers him to act on behalf of his ward, in the matter of contracting her marriage.³⁷

There are two views of jurists as regards guardianship as a condition for the validity of marriage. One view is that a marriage contracted without a guardian is void. According to those that hold this view³⁸, a woman has no legal right to give out herself out in marriage or to give the hand of another woman in marriage, or to ask another person other than her own legal guardian to represent her in contracting her marriage. They support their view with the following verses of the Holy *Qur’an*:

“And (you ought) to marry the single from among you as well as your male and female slaves as are fit (for marriage)”³⁹

“And do not give your women in marriage to polytheists...”⁴⁰

³⁵ Qur’an 4:20

³⁶M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p. 149

³⁷ Ibid. p.153

³⁸ Umar, Aliy, IbnMas’ud, Ibn Abbas, Abu Huraira, A’isha (Radiyahallahu Anhum), Maliki and Shafi’I Schools of law hold this view.

³⁹ Qur’an 24:32

To those that are of the above view, the above verses refer to the guardians regarding the marriage of their wards.

Thus, they relied on the *Hadith* of the Prophet (P.B.U.H) which states that there is no marriage without a guardian. Hence, in buttressing their opinion, they argued that marriage has a number of objectives, and most of the time, women do follow their emotions and sentiments in choosing their partners which may lead them to making wrong choices which serve as a hindrance to attaining the objectives of marriage.⁴¹

On the other hand, Abu Yusuf and Abu Hanifa hold the view that a woman who is of full legal capacity has the right to directly contract her marriage, whether she is a virgin or a matron who married previously.⁴²

The sequence of marriage guardians runs in seven (7) steps /order. The determinant factor in the hierarchy is the closeness of the person to the woman as reflected in the hierarchy of inheritance. A minor, or an insane person or a non Muslim cannot be a guardian.⁴³ Marriage guardianship may either be coercive, where the guardian has the power to compel his ward (*Wali Mujbir*) and guardian (by choice) that has no power of compulsion (*Wali Ghayr Mujbir*). The coercive guardian has the power of *Ijbar* on the following categories of women;

- i. A virgin who is sane and of age and is not an *Anisa* (above 30years)
- ii. A woman of incomplete legal capacity or those who has no legal capacity at all including minors or insane person.

⁴⁰ Qur'an 2:221

⁴¹ M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p.155

⁴² Ibid.

⁴³ M.A Ambali, *The Practice of Muslim Family Law in Nigeria* (Tamaza Publishing Co. ltd 2003) p.147

- iii. Adult sane woman who has lost her virginity through means other than marriage i.e. through illicit sexual intercourse, accident etc
- iv. A Mature matron (a divorcee or widow) whose moral corruption is obvious so as to save her and the society.⁴⁴

The guardian by choice has the following women under him:

- i. A mature matron who lost her virginity through marriage
- ii. A mature virgin whose father attested to her puberty and left her affairs in her hands
- iii. A mature virgin who dwelt in her husband's house for one year but denied him intercourse with her
- iv. A minor girl in whom there is fear regarding her morals.⁴⁵

Where however, there is none to be found or if any guardian unlawfully refuses to act as guardian, the *Qadi* (Judge) is permitted to represent her as her guardian.⁴⁶

(c) Witnesses: According to the majority of Muslim jurists, for marriage to be valid, the presence of at least two witnesses at a marriage contract is essential, failure of which invalidates the marriage.⁴⁷ All jurists are of the view that the witnesses must be Muslims, free, sane and of full legal capacity. In the view of Imam Malik, witnesses need not be present at the time of the contract but must be present when the wife moves to live with the husband in consummation of the marriage. He is also of the opinion that only males can be witnesses of marriage and females

⁴⁴M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p.155

⁴⁵ Ibid p. 156

⁴⁶ M.I Siddiqui, *The Family Laws of Islam* (Adam Publishers and Distributors 2005) p.76

⁴⁷M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p.147

are not allowed.⁴⁸ However, some jurists opine that a male and two females can be witnesses to marriage. Persons ineligible to be witnesses are hermaphrodites, debauchees, the deaf, dumb, or blind and persons who do not understand the language of the offer (words of proposal) and acceptance.⁴⁹

(d) *Seeghah* (The Offer and Acceptance): This is an essential of Marriage in Islam. It involves offer and acceptance. It refers to the expression of offer of marriage by the *waliy* of the bride and its acceptance by the prospective husband.⁵⁰ The offer is the declaration expressed by one of the parties to create a contract of marriage and the acceptance is the response to that declaration made by the other party.⁵¹ There are a variety of opinions as to exactly which phrases are valid in the transaction of the marriage contract. However, it is clear that the best is any wording that makes the intent of the contract clear to all involved should be considered, while the best format would be that actually used by the Prophet (Peace and blessing of Allah be upon him) and his companions. Also, it is considered best if the offer and acceptance is executed in spoken form. However, due to need or necessity, it may be done through writing or through gesture.⁵²

2.1.3 Objectives of Marriage in Islam

The *Qur'an* and the *Sunnah* being the primary sources of Shari'ah have referred to marriage as that which complements one's faith, in the sense that it helps one avoid looking at other women who are not his *Mahram*, hence, preserving his chastity. The Prophet (PBUH) made it clear that:

⁴⁸ Ibid.

⁴⁹ M.I Siddiqui, *The Family Laws of Islam* (Adam Publishers and Distributors 2005) p. 77

⁵⁰ M.A Ambali, *The Practice of Muslim Family Law in Nigeria* (Tamaza Publishing Co. ltd 2003) p.161

⁵¹ M.Tabiu et al, *Principles of Islamic Law* (Ahmadu Bello University Press Ltd 2016) p.146

⁵² A.B Dogarawa, 'Marriage and Divorce in Islam' (NTA/FRCN Ramadan Annual Lecture Series, 9th Ramadan,1430) p.10

"If a Muslim is granted by Allah a righteous wife, this assists him in preserving half of his (faith). Therefore, he should, fear Allah in respect of the other half."⁵³

It is also a union aimed at achieving and maintaining tranquility in the society which enhances and strengthens social bonds among the individual members of society.⁵⁴ To this, the Holy *Qur'an* provides thus;

“And one of Allah’s signs is that He creates for you mates from yourselves, that you may dwell in tranquillity with them, and HE has ordained between you love and mercy”⁵⁵

“It is He who created you from a single soul (*nafs*) and therefrom did he make his mate that he might dwell in tranquillity with her...”⁵⁶

Marriage which is a recommended act in Islam and is recommended for a purpose though some people may marry for several reasons, such as pressure from family members or friends or for financial support. However, the main purpose of marriage in Islam is that it is considered as an act of worshipping Allah. This is because the responsibilities and challenges that come with it require of a couple that fear of Allah to move on and create a happy relationship.⁵⁷ It could also be seen as obedience to the Prophet (P.B.U.H) because he enjoins his *Ummah* to marry.⁵⁸

⁵³ Al-Hafiz IbnHajar Al-Asqalaini, *Bulugh Al-Maram* (Darussalaam Publications 1996) Hadith 824, Book of Marriage.

⁵⁴ Bilkisu Yusuf, ‘Sexuality and the Marriage Institution in Islam, An Appraisal’ (Africa Regional Sexuality Resource Centre 2005)

⁵⁵ Qur’an 30:21

⁵⁶ Qur’an 7:189

⁵⁷ Kautharkhamis, ‘Sustaining Muslim Marriages: The Role of Premarital Counselling in the Nima/Mamobi Muslim Communities’ (M. Phil thesis, University of Ghana 2013) p. 20

⁵⁸ Ibid

Marriage in Islam unites man and woman in a lofty and dignified manner, Allah SWT has created all things and has made them dependent on one another.⁵⁹ It is a highly religious and sacred covenant which legalizes sexual intercourse and, hence, the procreation of children. It gives vent to lawful fulfilment of men and women's sexual desire which is a natural one that needs to be satisfied. By this, it helps one to maintain his/her chastity and guard him/her against committing the prohibited acts.⁶⁰

Marriage naturally results in reproduction which is necessary for the continuity and existence of human generation on earth.⁶¹ This has been provided in the Holy *Qur'an* which states:

“O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women. And fear Allah, through whom you ask one another and the wombs...”⁶²

Also, Prophet Zachariah, peace be upon Him, appealed to Allah (S.W.T) as contained in various verses of the Holy *Qur'an*: “My Lord! Leave me not childless, though Thou art the best of inheritors...”⁶³

“Lo! I fear my kinsfolk after me, since my wife is barren. Oh, my Lord give me a successor. Who should be my inheritor and inheritor (also) of the house of Jacob. And make him, my Lord, acceptable (unto Thee)”⁶⁴

⁵⁹ Qur'an 51:49

⁶⁰ Laluddin Hayatuddeen et al, 'The Contract of Marriage and its Purpose From Islamic Perspective' (2010) 10 (2) Journal of Asian Social Science < <http://www.ccsenet.org/journal/index.php/ass/article/download/33052/19139> > Accessed 2nd January 2018 p.140

⁶¹ Ibid p.141

⁶² Qur'an 4:1

⁶³ Qur'an 21:89

⁶⁴ Qur'an 19: 5&6

The Prophet (P.B.U.H) was reported to have also encouraged the Muslim Ummah to marry and procreate. He was reported to have said: “Marry the loving and the child-bearing, for I shall outstrip the other nations with your numbers on the day *Qiyamah* (Resurrection).”⁶⁵

2.2 *Kafa’ah* in Islam

Kafa’ah in Arabic language means being similar and compatible. In everyday language, you find it is used to describe the two pans (*kiffataani*) on a scale, i.e. the two scales have to be equal in weight. It is a term which in common usage signifies at one and the same time equality, parity and aptitude.⁶⁶

Technically however, in the terminology of *fiqh*, it connotes equivalence of social status, fortune and profession which is peculiar to the husband and the father in law, as well as parity of birth, which should exist between husband and wife. It also means that a prospective husband is expected to be comparable to the prospective bride in terms of religion, education, social status, profession, descent/ ancestry, independence status, physical and spiritual conditions, wealth, position and the likes.⁶⁷

2.2.1 Development of the Concept of *Kafa’ah*

The concept of *Kafa’ah* is majorly ascribed to the Arabs and also finds its root there from. To the pre-Islamic Arabs, the ideal wife was one who had honor and noble ancestry (not necessarily identified with wealth) virtue and good manners, youth and virginity, fecundity and moderate beauty, modesty and chastity, intelligence and affection, integrity and eloquence, energy and

⁶⁵ Al-Hafiz IbnHajar Al-Saqalani, *Bulugh Al-Maram* (Darussalaam Publications 1996) Hadith 825, Book of Marriage

⁶⁶ N. Iffatin, ‘*Kafa’ah* in Islam, Towards a progressive Interpretation’ (2004) 1 *Episteme*

⁶⁷ *ibid*

productivity, grace and cheerfulness. A woman who approximated these standards was considered by men of the highest social standing a most desirable mate.⁶⁸

On the other hand, the ideal husband had to be young and of Arab descent. It was evidenced that young women preferred young mate, however poor and destitute, to old suitors of wealth and fame. It was basically a disgrace for Arabs to marry their women to non-Arabs. The tribe of *Quraysh* in particular, adopted the additional practice that their daughters could only be married to suitors who were of the same tribe with them.⁶⁹

With the advent of Islam however, the ideological situation changed and a new criterion was adopted. Accordingly, every individual was to be ranked first on the basis of religious virtues which may not agree with certain traditional values. Hence, all Muslims were regarded as equals in the sight of God.⁷⁰

2.2.2 *Kafa'ah* in the *Qur'an* and the Sunnah of the Prophet (P.B.U.H)

There are provisions of the Holy *Qur'an* and the traditions of the Prophet (P.B.U.H) that contemplates the concept of *Kafa'ah* generally. These verses and traditions of the Prophet (P.B.U.H) form the basis upon which jurists have based their arguments in relation to *Kafa'ah* in marriage. They include:

⁶⁸ H. Abd al Ali, *The Family Structure in Islam* (Islamic Publications Bureau 1982) p.98

⁶⁹ Ibid

⁷⁰ ibid

2.2.2.1 *Qur'anic Verses*

“Allah has bestowed His gifts of sustenance more free on some of you than others...”⁷¹

“It is He who created man from water: then has He established relationships of lineage and marriage. For thy Lord has power (over all things)”⁷²

“...and when ye are told to rise up, rise up: Allah will raise up, to (suitable) ranks (and degrees) those of you who believe and who have been granted Knowledge...”⁷³

“Do not marry unbelieving woman until they believe: a slave woman who believes is better than a polytheist woman, even though she allure you. Nor marry (your girls) to polytheist until they believe: a man slave who believes is better than an unbeliever even though he allures you...”⁷⁴

“... Say: are those equal, those who know and those who do not know? It is those who are endowed with understanding that receive admonition”⁷⁵

“Those messengers we endowed with gifts, some above others: to some of them Allah spoke; others He raised to degrees (of honor)...”⁷⁶

“Is it they who would portion out the mercy of thy Lord? It is We who portion out between them their livelihood in the life of this world. And we raise some of them above other ranks, so that some may command work from others...”⁷⁷

⁷¹ Qur'an 16 v 71 (Translation by Abdullahi Yusuf Ali)

⁷² Qur'an 25 v 54 (Translation by Abdullahi Yusuf Ali)

⁷³ Qur'an 58 v 11 (Translation by Abdullahi Yusuf Ali)

⁷⁴ Qur'an 2 v 221 (Translation by Abdullahi Yusuf Ali)

⁷⁵ Qur'an 39 v 9 (Translation by Abdullahi Yusuf Ali)

⁷⁶ Qur'an 2 v 253 (Translation by Abdullahi Yusuf Ali)

⁷⁷ Qur'an 43 v 32 (Translation by Abdullahi Yusuf Ali)

“Is then the man who believes not better than the man who is rebellious and wicked? Not equal are they.”⁷⁸

All the above are *Qur’anic* Verses talk on *Kafa’ah* in Islam. The above verses have also been relied upon by jurists in their arguments which shall be seen in later in this Chapter.

2.2.2.2 Traditions of the Prophet (P.B.U.H)

The following were reported to be the sayings of the Prophet in relation to *Kafa’ah*

“All mankind essentially is the same/ equal like the spokes of a comb, the Arabs are not superior to the ‘*Ajam* (non Arab people). Any superiority among them is only due to piety”⁷⁹

“There are three matters that cannot be delayed: performing a prayer when its time comes, caring for the dead body when the death is obvious, and marrying a single (Muslim) woman to someone considered befit (*Kufu*⁸⁰)”⁸¹

“Do not all of you wed (your) women except with befit mates, do not wed them unless with the involvement of their trustees, and the dower for them should be no less than ten dirhams”⁸²

“Ibn Umar (R.A) narrated: Allah’s Messenger (P.B.U.H) said: Arab people are equivalent to each other, the *Mawali*⁸³ are equivalent to the other alike, except a weaver or a cupper”⁸⁴

⁷⁸ Qur’an 32 v 18 (Translation by Abdullahi Yusuf Ali)

⁷⁹ Ahmad Ibn Ali ibn Hajar Asqalani: Fath al Bari bi Sharh Sahih Al-Bukhari (4thedn, Dar Al-Katob Al Ilmiyah 2011) Vol. 10

⁸⁰ Being similar or resembling

⁸¹ Ahmad Ibn Ali ibn Hajar Asqalani: Fath al Bari bi Sharh Sahih Al-Bukhari (4thedn, Dar Al-Katob Al Ilmiyah 2011) Vol. 10

⁸² ibid

⁸³ Non-Arabs and Originally former slaves

⁸⁴ Al-Hafiz Ibn Hajar Al-Asqalani, *Bulugh Al-Maram* (Darussalaam Publications 1996) Hadith 855, Book of Marriage p.353

“A woman is usually married due to four factors, her wealth, or her descent/ lineage, or her beauty or her religion. Choose your wife due to her religion; otherwise you will find a misery.”⁸⁵

“When there comes to you someone you approve of his morals and his religion then marry him! Verily if you do not marry him, then fear defamation arising in the earth and the coming of huge damages”⁸⁶

“Marry them (i.e. Muslim Women) with those of equal quality (*Kufu'*) and marry you all to those of equal quality (*Kufu'*) and seek and choose a (right and comparable) Partner for your sperm”⁸⁷

The above *Qur'anic* Verses and traditions of the Holy *Qur'an* are a clear indication that *Kafa'ah* has basis in Islam and it is an important factor to be considered in issues of marriage.

2.2.3 Factors/Qualities to Consider for Equitability between Spouses according to Islamic Jurist

It should be noted that the factors to be considered in respect of *Kafa'ah* in marriages differ from one school of law to another. However, the following factors are the considerable factors for *Kafa'ah*;

1. Religion
2. Freedom
3. Descent/ Ancestry
4. Wealth

⁸⁵ Ahmad Ibn Ali ibn Hajar Al- Asqalaini: *Fath al Bari bi Sharh Sahih Al-Bukhari* (4thedn, Dar Al-Katob Al Ilmiyah 2011) Vol. 10 p. 165

⁸⁶ Abu Ja'afar Muhammad ibn Al-Hassan, *Tahdhib al-Ahkam fi Sharh al-Mughni'ah Li al Shaykhal- Mufid* (Dar al-Ta'aruf, 1992) Vol. 7 p.352

⁸⁷ Muhammad Baqir al- Majelisi, *Bihar al-Amwar al Jami'ah Li Durar Akhbar al- Aimmah al Athar* (Dar Ihya al Turath al Arabi, 1983) Vol 100 p. 375

5. Profession
6. Being preserved from disgraceful acts.
7. Health

Based on the above factors, jurists have discussed on the concept of *Kafa'ah* in Islam in respect of the choice of a spouse by a believing woman. Their arguments based on each factor / qualities are canvassed as follows:

2.2.3.1 Religion

The Hanafi, the Shafi'i, the Hanbali and the Maliki School of laws all concur that a believing woman or her guardian should ensure *Kafa'ah* in religion (Islam).⁸⁸ They based their argument to the tradition of the prophet (P.B.U.H) which stipulates that when someone, whose faith and conduct is acceptable to you, comes with proposal, then, marry him. They also relied on the *Qur'anic* verse which stipulates that marry your girls to the believing men.⁸⁹

To these jurists, this factor is not limited to being a Muslim only, but must also possess character of piety and kindness as well as commendable manners. He must not have the attitude of being a *fasiq*⁹⁰ person and must not do wicked acts transparently. That a *salihah*⁹¹ is not *kufu'* to a *fasiq* man.⁹²

2.2.3.2 Freedom

Kufu' in marital life implies that a male slave is not *kufu'* to a free woman. A free woman married to a slave is considered reprehensible, even more despicable than the imbalance or less

⁸⁸ N. Iffatin, 'Kafa'ah in Islam, Towards a progressive Interpretation' (2004) 1 Episteme p.93

⁸⁹ Q2:221 (Translation by Abdullahi Yusuf Ali)

⁹⁰ Impious, venial sinner or depraved

⁹¹ Virtuous or righteous(female)

⁹² N. Iffatin, 'Kafa'ah in Islam, Towards a progressive Interpretation' (2004) 1 Episteme p.93

equivalence of the lineage between them. Hence, a lot of deprivation will occur to the woman, bearing in mind that a slave (man) cannot promise good living but poverty and indigence.⁹³

The Hanafi, Shafi'i and Hanbali School of law opine that a free woman is not *Kufu'* to a slave (man). They hold the above view and supported their assertion to the time when the prophet (P.B.U.H) gave an option to one of his companion named Barirah when she was offered to be married by a slave even though she married him based on her willingness and sincerity.⁹⁴

The Maliki jurists however do not subscribe to this view, they rely on the *Hadith* of the prophet where the prophet (P.B.U.H) ordered Fatima Bint Qays to marry Usamah bn Zayd, a slave.⁹⁵

2.2.3.3 Descent/ Ancestry

The equality and balance of the descent factor in marriage suggests being from the same tribe or nation. However, even in practice, there is often found a marriage where the prospective spouse comes from different tribes/ nation. This factor is one which is highly reckoned among the Arabs. The Arab people are *kufu'* to each other. The *Quraysh* is considered *Kufu'* to their fellow Quraysh and the *Ajam* or Non- Arabs (*Al-mawali*) are *kufu'* to each other. On this premise, non-Arab men are not *Kufu'* to Arab women unless they have an intellectual ability in which they are considered *kufu'* to ignorant Arab women.⁹⁶

The above view is the opinion of the Hanafi, Shafi'i and Hanbali Schools of law and not the Maliki School of law as they don't see this factor as one which is vital in marriage.⁹⁷

⁹³ Ibid p.99

⁹⁴ Ibid p. 100

⁹⁵ Al-Hafiz Ibn Hajar Al-Asqalani, *Bulugh Al-Maram* (Darussalaam Publications 1996) Hadith 856, Book of Marriage

⁹⁶ N. Iffatin, 'Kafa'ah in Islam, Towards a progressive Interpretation' (2004) 1 Episteme p.100

⁹⁷ ibid

2.2.3.4 Wealth

In the opinion of the Hanafi and Hanbali Schools of law, wealth is a major factor to consider as a measurement of *Kafa'ah* in marriage. They however clarified that wealth in this context refers to ability to make a daily living and ability to pay dower. They are of the view that any man that will get married must have a dower and a source of maintaining the wife. That any man who does not have a property to pay for dower and maintenance for a living is not considered *kufu'* to the women. This is because the dower is like a consideration for intercourse which has to be fulfilled by the prospective husband while maintenance is necessary to keep the sustainability of the family life. Some jurists of the Hanafi School of law even opined that in fact, wealth is a privilege which is equal to descent.⁹⁸

2.2.3.5 Profession

The Hanafi, Shafi'i, and Hanbali jurists are of the opinion that profession is part of *Kufu'* in marriage. They posited that a woman from a family with a respectable profession is not *kufu'* to a man who works as an unskilled laborer. To these jurists, ideally, being *kufu'* in the profession is when a trader is married to a trader, a laborer to a laborer etc. They suggest that a man with low level job such as a janitor and others which are similar is not comparable to a woman whose job or her father's profession is of higher level.⁹⁹

2.2.3.6 Being Preserved From Disgraceful Acts

This is another factor recognized by the Shafi'i school of law. They opined that a woman who keeps herself away from disgraceful acts is not *kufu'* with a wicked man. Hence, pious women are not *kufu'* with men that are adulterers even after they have repented. They further opined that

⁹⁸Ala al Din al-Samarqandi, *Tuhfat al fuqaha*(Dar al-Kutub al Ilmiyah 1993) Vol. 2 p.300

⁹⁹N. Iffatin, 'Kafa'ah in Islam, Towards a progressive Interpretation' (2004) 1 Episteme p. 101

a *fasiq* is only *kufu'* with a *fasiq* woman when their wickedness is equal. When it is not equal, e.g. both are drinkers but the man also commits fornication, they are not considered *kufu'*.¹⁰⁰

2.2.3.7 Health

This is another factor which the Maliki School of law agrees to for consideration. The definition of health is that the bride and the groom are both mentally and physically fit and they are safe from any disability that can bring up situations that can contemplate whether the marriage should be continued or not. Where after the marriage, the wife realizes a defect on the husband health wise, it can be a ground for her to seek for divorce, therefore, in the opinion of the Maliki school of law, a healthy woman is not *kufu'* to a disabled¹⁰¹ man¹⁰².

In the view of the Shafi'i school, however, they term the health factor as "not being disabled". They also consider it as a factor to be considered in *Kafa'ah*. There should be no disability that may cause it permissible to take an option either to cancel the marriage or to continue with it. They opined further that any man who has a glaring physical disability is not *kufu'* to a woman who is healthy and normal. In the opinion of Al Rahwani, a jurist of the Shafi'i school, even if the disability is not so obvious but the man is looking less favored such as being blind, having maimed hands, such man is also not *kufu'* to a normal and healthy woman.¹⁰³

2.2.7.1 Defects/ Health Conditions As Debated By Classical Jurists Which May Affect Marriage in Islam

Jurists have outlined considerable number of defects/ health conditions which affects marriages. Although the jurists are not unanimous, these health conditions are mostly looked upon to

¹⁰⁰ ibid p.98

¹⁰¹ Disabled in this context may be mental I.e. madness or physical e.g Leprosy.

¹⁰² Abu Zakariyya Yahya, *Rawlat al Talaibin* (Beirut : Dar al Kutub al Ilmiyah 1992) Vol.5 p.424

¹⁰³ ibid

determine the *Kafa'ah* of partners and could be a ground for the dissolution of marriages in Islam. Some jurists classify defects into peculiar and common defects and some do not consider the classification worthwhile.¹⁰⁴

To those jurists that classify these defects, they further classified them into three; the defects common to both spouses, the defects peculiar to the husband and those peculiar to the wife.¹⁰⁵

(a) Defects Peculiar to the Husband

- i. *Anan* (Impotence): Al-'Anan is a disease which renders a man incapable of sexual intercourse. All the five schools give the wife the right to dissolve the marriage in such a situation.¹⁰⁶ A husband shall be considered impotent (*'anīnor 'unnah*) if he is incapable of intercourse with the wife either due to the small size of the penis or due to his incapability to penetrate.¹⁰⁷ According to the Hanafi School, even a man who suffers the flow of semen at the contact of his wife so that his erection collapses before intercourse is also deemed to be impotent.¹⁰⁸ According to jurists, impotency could be as a result natural causes such as old age or otherwise such as black spell inflicted by man.¹⁰⁹

¹⁰⁴ M.I Sa'id, 'Premarital Screening against HIV/AIDS and Sickle Cell Diseases: Islamic Law Perspective' (2010)1 Journal of Islamic and Comparative Law 44

¹⁰⁵ Tengku Fatima MulianaTengkMuda et al, 'Protecting the Spouses' Interest (*Maslahah*) in Cases of Defects through the Application of the Islamic Principle of Harm' (2017) 7 (4) *International Journal of Academic Research in Business and Social Sciences* <<http://hrmars.com>> Accessed 15th March 2019 p. 348

¹⁰⁶ M. JMaghniyyah, *Marriage according to five schools of Islamic Law* (Department of Translation and Publication, Islamic Culture and Relations Organization 1997) Vol. 5<<https://www.al-islam.org/marriage-according-five-schools-islamic-law-allah-muhammad-jawad-maghniyyah>> Accessed 15th March 2019 p.30

¹⁰⁷ Tengku Fatima MulianaTengkMuda et al, 'Protecting the Spouses' Interest (*Maslahah*) in Cases of Defects through the Application of the Islamic Principle of Harm' (2017) 7 (4) *International Journal of Academic Research in Business and Social Sciences* <<http://hrmars.com>> Accessed 15th March 2019 p. 348

¹⁰⁸ Ibid

¹⁰⁹ Ibid

All jurists are unanimous that this could be a ground or dissolution of marriage. To the *Imam* Maliki School, for impotence to be a ground for dissolution of marriage, then it must be one that the man is incapable of having intercourse with any woman whatsoever. Other jurists¹¹⁰ however are of the opinion that a person's inability to copulate with his wife gives her the right to dissolve the marriage despite his being capable of it with other women, because in such a case he will be considered impotent with respect to her. The jurists also unanimously agree that a wife is entitled to apply for dissolution of marriage in the case of impotency of the husband since it prevents the high intent of marriage which is enjoyment towards one another.¹¹¹

ii. *Al-Jabb*¹¹² and *Al Khisa*¹¹³

Al Jabb is a situation where the male organ is missing or where, better put, there is mutilation of the male organ. This condition may be natural i.e. where he is created that way or caused by accident or surgery or in circumstances where the male organ is very short in length as to be unfit for penetration. All jurists are unanimous on the permissibility of dissolution of marriage in cases of *Al-jabb* for reasons which prevent enjoyment of intercourse and procreation.¹¹⁴

Al Khisa on the other hand means castration either by removal or crushing of both testicles. It could be explained further as where he has no testicles but his penis remains or the testicles are damaged due to accident or are non active since time of birth, or caused by disease or surgical operation. It also applies to a person whose testicles have been so crushed or mutilated as to

¹¹⁰Hanafi, Shafi'i and Hanbali

¹¹¹M. J Maghniyyah, *Marriage according to five schools of Islamic Law* (Department of Translation and Publication, Islamic Culture and Relations Organization 1997) Vol. 5<<https://www.al-islam.org/marriage-according-five-schools-islamic-law-allamah-muhammad-jawad-maghniyyah>> Accessed 15th March 2019 p.32

¹¹² Mutilation of Male Organ

¹¹³ Castration

¹¹⁴M. J Maghniyyah, *Marriage according to five schools of Islamic Law* (Department of Translation and Publication, Islamic Culture and Relations Organization 1997) Vol. 5<<https://www.al-islam.org/marriage-according-five-schools-islamic-law-allamah-muhammad-jawad-maghniyyah>> Accessed 15th March 2019 p.33

render them dead or useless.¹¹⁵ These jurists are divided into two opinions on the permissibility of dissolution of marriage in cases of (*al-khiṣa'*). The *Shāfi'is* and the *Hanbalis* opine that in such condition, the wife is not permitted to apply to dissolve the marriage since she is not deprived from enjoyment of sexual intercourse. The *Malikis* and *Hanafis* on the other hand opined that just as others (*Anan* and *Al Jabb*), it can serve as a ground for dissolution of marriage.¹¹⁶

(b) Defects Peculiar to the Wife

Four major defects have been outlined namely' *Al-Ratq*, *al-Qarn*, *al-'Afal* & *al-'Ijda*¹¹⁷

Al-Ratq means the presence of obstruction in the vaginal opening making intercourse difficult.

Al-qarn (lit. horn) means the presence of a horn-like protrusion inside the vaginal passage,

Al-'afal means a fleshy obstruction in it and *Al-'ifda* means the condition of merging of anal and vaginal passages. Where the above defects exist, the *Mālikis*, the *Shāfi'īs* and the *Hanbalis* are of the view that it is permissible for the husband to dissolve the marriage since it prevents the enjoyment of intercourse which serves as one of the purpose of marriage.¹¹⁸

¹¹⁵Tengku Fatima MulianaTengkMuda et al, 'Protecting the Spouses' Interest (*Maslahah*) in Cases of Defects through the Application of the Islamic Principle of Harm' (2017) 7 (4) *International Journal of Academic Research in Business and Social Sciences* <<http://hrmars.com>> Accessed 15th March 2019p.349

¹¹⁶Tengku Fatima MulianaTengkMuda et al, 'Protecting the Spouses' Interest (*Maslahah*) in Cases of Defects through the Application of the Islamic Principle of Harm' (2017) 7 (4) *International Journal of Academic Research in Business and Social Sciences* <<http://hrmars.com>> Accessed 15th March 2019 p. 348

¹¹⁷M. J Maghniyyah, *Marriage according to five schools of Islamic Law* (Department of Translation and Publication, Islamic Culture and Relations Organization 1997) Vol. 5<<https://www.al-islam.org/marriage-according-five-schools-islamic-law-allah-muhammad-jawad-maghniyyah>> Accessed 15th March 2019 p.35

¹¹⁸Ibn Quddama Al Mughni, Vol. 5 (1stedn ,Maktabat al Jabira 1969-89) 1st ed. P.185

(c) Defects Common to both the Husband and Wife

These set of defects are those that is not gender related. Among the defects common to both spouses is leprosy (*judhām*), vitiligo (*baras*), insanity (*junūn*), sterility, barrenness or infertility (*'aqum*) and halitosis a very foul smell from mouth, body or private part which is extreme until it is intolerable.¹¹⁹

According to Jurists, in cases of Leprosy and Vitiligo, these defects give rise to the annulment of marriage. The permissibility is due to the reason that a marriage is based on affection and happiness, but such disease will cause abhorance and avoidance from the other spouse for fear of being contagious. They also relied on the *Hadith* of the Prophet (P.B.U.H) which stated that “One should run away from the lepers as one runs away from a lion”¹²⁰. However, to the *Imamiyyah*, leprosy and Vitiligo are among defects that give the husband, not the wife, the right to annul the marriage on condition that such disease is antecedent to the marriage without the husband's knowledge. The right to annul the marriage does not exist for the wife if her husband suffers from any of these two diseases.

As regards Insanity (*junūn*), the Malikis, Shāfiīs and Hanbalis concur that either spouse is allowed to request dissolution of marriage where the other spouse is suffering from insanity. This is because an insane spouse may threaten the life of the other partner as he or she may tend to commit an act of crime. According to the Malikis, if the insanity occurs before marriage, the right to annul the contract results for the sane spouse, on the condition that he or she suffers harm in living with the other. But if the insanity results after marriage, only the wife has the right to

¹¹⁹Tengku Fatima MulianaTengkMuda et al, ‘Protecting the Spouses’ Interest (*Maslahah*) in Cases of Defects through the Application of the Islamic Principle of Harm’ (2017) 7 (4) *International Journal of Academic Research in Business and Social Sciences* <<http://hrmars.com>> Accessed 15th March 2019 p.351

¹²⁰Muhammad Ibn Isma’el al Bukhari, *Sahih Al Bukhari* 5707, Book 76, Hadith 27.

annul the marriage after a probationary period of a year granted by the judge. The husband cannot annul the marriage if his wife loses sanity after marriage.¹²¹

In relation to other ill health conditions, such as blindness, amputated body or lameness, the Hanbali jurists agree that it does not qualify a spouse to apply for dissolution of marriage.¹²²

Sequel to all the above discussions, these defects are not exhaustive, and mostly, discussion is based on defects which were known and discussed by the classical jurists. It could also be seen that from all discussions, even though they were areas of divergence by the four schools of thought as regards to nature of defects which may result to the rejection of one partner by the other on the basis of ill health condition, they all move towards one direction which is to the effect that the defect/ health condition must not be one which will affect the primary objectives of marriage ranging from procreation, peaceful coexistence, derivation of pleasure. More so, it should not be one which will endanger the health condition of the other spouse.

2.2.4 *Kafa'ah* as a Condition for Marriage

There have been arguments by Muslim jurists as to whether *Kafa'ah* is a condition in marriage or not. The majority of the jurists (Maliki, Shafi'i, Hanbali and Hanafi) opine that *Kafa'ah* is a condition to be considered in marriage however differing in the factors to consider as a scale for measuring the *Kafa'ah* or otherwise of spouses.¹²³ Sufyan Al Thawri, Al-Hasan- Al- Basri and Al-kharki of the Hanafi School and Abu Bakr al-Jassas and their followers, however, have

¹²¹M. JMaghniyyah, *Marriage according to five schools of Islamic Law* (Department of Translation and Publication, Islamic Culture and Relations Organization 1997) Vol. 5<<https://www.al-islam.org/marriage-according-five-schools-islamic-law-allamah-muhammad-jawad-maghniyyah>> Accessed 15th March 2019 p.34

¹²²Tengku Fatima MulianaTengkmuda et al, 'Protecting the Spouses' Interest (*Maslahah*) in Cases of Defects through the Application of the Islamic Principle of Harm' (2017) 7 (4) *International Journal of Academic Research in Business and Social Sciences* <<http://hrmars.com>> Accessed 15th March 2019p. 351

¹²³ A. Hussein: *Freedom of a Marital Choice in the Light of the Qur'an and ahadith and its Relevance to Muslim Civil Laws*, 2015

disregarded the notion of *Kafa'ah* as a condition in marriage¹²⁴. They placed their reliance on the *Qur'anic* verse which provides thus:

“Marry those among you who are single (i.e. a man who has no wife and a woman who has no husband) or the virtuous ones (*Salihun*) among your slaves, male or female”¹²⁵

They argued further that the condition of *Kafa'ah* in marriage does not harmonize with this verse of the *Qur'an*:

“...Surely the most honorable amongst you in God's sight is the most pious amongst you...”¹²⁶

And also, the practice of the Prophet (P.B.U.H) who ordered Fatima Bint Qays to marry Usamah bn Zayd, his freed slave and ordered BanuBayadah to Marry Abu Hind, who was a cupper.¹²⁷

In their opinion, the above verse of the Holy *Qur'an* has discarded the notion of *Kafa'ah* entirely in marriage.

2.2.5 Effect of Marrying a Non- *Kufu'*

Where a woman marries a man who is non *kufu'*, does it render the marriage invalid?

The Prophet (P.B.U.H) has advised the guardians of the female to consider her best interest from all angles. Jurists however differ as to whether such kind of marriage is invalid.¹²⁸

¹²⁴ ibid

¹²⁵ Qur'an 24 v 32 (Translation by Abdullahi Yusuf Ali)

¹²⁶ Qur'an 49:13 (Translation by Abdullahi Yusuf Ali)

¹²⁷ M. J Maghniyyah, *Marriage according to five schools of Islamic Law* (Department of Translation and Publication, Islamic Culture and Relations Organization 1997) Vol. 5 <<https://www.al-islam.org/marriage-according-five-schools-islamic-law-allamah-muhammad-jawad-maghniyyah>> Accessed 15th March 2019 p.229

¹²⁸ S.F Jafri, *The Doctrine of Kafa'ah (Social Equality of Spouses) under Islamic Law* (Indian Journal of Legal Philosophy, 2015) Vol. 3 p. 199

In the opinion of the Hanafi School of law, if a sane and adult female marries a non- *kufu'* without the consent of her guardian (neither her father nor her grandfather), then, the marriage will be void. Similarly, if the guardian has the marriage of a minor female performed with a man who is non-*Kufu'*, the marriage is void.¹²⁹

However, if the guardian is the father or the grandfather of the minor female, and he marries her off to a non-*kufu'*, the marriage will be valid and binding. This is because, in their view, the affection of the father or the grandfather will not allow him dispensing with the issue of *Kafa'ah* for any greater benefit. Hence, If a sane and adult female consents to a marriage with a non-*Kufu'*, the marriage will be valid and binding even if it is unsuitable in consideration of future benefits.¹³⁰

2.2.6 *Kafa'ah* as a Ground for Dissolution of Marriage

Muslim jurists have argued that a Muslim Woman has the right to repudiate a marriage on the ground of inequality. They opined that if the marriage has not been contracted, she has the right of refusal, but if the marriage has been contracted, she has the right to dissolve the marriage on the ground of inequality.¹³¹

On the right to refuse the marriage, they have supported their argument with a *Hadith* that narrates, that the Holy Prophet (P.B.U.H) proposed to Zainab, a cousin to his, to marry Hazrat Zaid who was a free slave, and she refused to marry him due to the fact that she was from

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ *Ibid* 200

the superior *Nasab* and she did not consider him equal to her being the daughter of the *Quraysh*, the noblest family. And it was reported that the Prophet conceded to her reply.¹³²

On the right to dissolve the marriage, they opined that if subsequent to her marriage, she comes to know that she had been married to an unequal person, she has right to dissolve the marriage. However, if the guardian married her off with her consent, and thereafter the guardian comes to know that the husband is not equal to the bride, then neither the bride nor the guardian has the right to dissolve the marriage. But if the husband deliberately concealed the fact of being unequal to the bride, then both the bride and the guardian have the right to dissolve the marriage.¹³³

¹³² *ibid*

¹³³ *Ibid*

2.3 The Concept of Premarital Medical Test

2.3.1 Medical Test

Medical test can interchangeably be referred to as Medical screening. The WHO Cancer Programme website and the Conference on preventive aspects of chronic disease held in 1951 defines screening as the “presumptive identification of unrecognized disease or defects by means of tests, examinations, or other procedures that can be applied rapidly”¹³⁴ It is also defined as the active search for a disease (or a pre-disease condition) in patients who are presumed and presume themselves to be healthy.¹³⁵

In the strictest sense, medical screening is a method for detecting disease or body dysfunction before an individual would normally seek medical care. The fundamental purpose of screening is early diagnosis and treatment of the individual and, thus, it has a clinical focus. Screening tests are usually administered to individuals in a larger population who have not yet sought medical care, but who may be at high risk for certain adverse health outcomes. In essence, it involves detection of individuals with an elevated probability of having the disorder in question.¹³⁶

2.3.2 Diseases and Types of Diseases

Medical screening as highlighted above involves detecting diseases in the human system. It is therefore paramount to know what diseases are and the types of diseases humans may be exposed to. A disease has been defined to be an abnormal condition affecting a living organism. They are seen as medical conditions that involve a pathological process associated with a specific set of symptoms. They can either be localised which affects specific part of the body or

¹³⁴ World Health Organisation, ‘Screening for various cancers’ (2005)

¹³⁵ Franz Hackl et al, ‘The effectiveness of health screening’ (2012) IZA Discussion Paper no: 6310 <<http://ftp.iza.org/dp6310>> accessed 27th December 2019

¹³⁶ Dennis Wilken and others, ‘What are the benefits of medical screening and surveillance?’ (2012) 12 (124) European Respiratory review <www.researchgate.net/publication/225086411> Accessed 15th December 2019

disseminated which spreads to other parts of the body or even, systemic which affects the entire body. Categories of disease may include autoimmune, bacterial, blood, cancer, digestive, heart, nerve, or even sexually transmitted.¹³⁷

Diseases are classified basically into two (2), namely; Communicable and non communicable.

A. Communicable Diseases (CD)

These are illnesses that are rapidly spread from one person to another; they can also be a spread from an animal to a human being. The spread can occur through a direct contact with contaminated water, faeces; infected body fluids e.g. blood urine e.t.c. Transmission can also be through the air like in tuberculosis, examples of Communicable diseases include the common cold, rabies, chicken pox, HIV/AIDS, measles, sore eyes, influenza, and measles. They can easily be prevented through proper hygiene and sanitation, or through vaccination. Communicable diseases still represent the major public health problems leading to high morbidity and mortality rates among the population, particularly among children under 5 years old. Natural disasters often faced by undeveloped and developing countries turn the population vulnerable to water borne and drought related disease outbreaks such as cholera, dysentery, and meningococcal meningitis. The major causes of morbidity and mortality are AIDS, malaria, tuberculosis, respiratory infections, diarrhoea, and meningitis.¹³⁸

¹³⁷Morakinyo Ayo Ogunbayode, 'Strategic Management of the Epidemiology of Communicable and Non-Communicable Diseases' (2019) *Texilaintl Journal of Public Health* <https://s3.amazonaws.com/academia.edu.documents/59154125/Public_health_Special_Edition> Accessed 28th December 2019

¹³⁸ *ibid*

B. Non Communicable Diseases (NCD)

These are illnesses that cannot be transmitted from one individual to another. NCDs are not caused by infectious agents as in the case of communicable diseases. They are medical conditions that are both non-infectious and non-transmittable. They are chronic in nature that progress slowly and persist for a long time; examples of NCDs are heart diseases, diabetes, kidney failure, hypertension, Alzheimer's disease, various types of cancers and stroke. These conditions need prolonged care management since they develop slowly to levels that might be toxic and dangerous to the body. NCDs can be avoided by educating the society via health talks on a healthy lifestyle. Cardiovascular diseases, chronic respiratory diseases, cancers and diabetes are the four most prevalent NCDs, and the four biggest risk factors are alcohol use, tobacco use, unhealthy diets and a less active lifestyle¹³⁹

2.3.3 Premarital Medical Test

Historically, the idea of pre-marital medical Test was forwarded in 1930s and 1940s, especially in United States of America to detect Syphilis and other sexually-transmitted /transferred diseases and disorders. These diseases were prevalent in major cities and it was a major health issue, thus, the need for introduction of premarital medical test to better determine the possibility and probability of these diseases.¹⁴⁰

Pre-marital medical test is one of the most important and recommended tests by Medical doctors. It reduces the level of health dangers and risk amongst spouses after marriage. This is because it is a test carried out to determine the health status of intending couples. This test can be done at

¹³⁹ ibid

¹⁴⁰ M.S.S.Awan, 'Medical Check-up Before Marriage: Beneficial to life partners or Encroachment over their privacy, A comparative Study' (2015)

any time before marriage but is usually highly recommended within six (6) months before marriage by Medical experts. This type of test includes the blood test to know whether there exist any blood disease and genotype of the intending partners, blood type and Rhesus factor test which determines the blood group of the coming baby, HBsAG (Hepatitis B Surface Antigens) Test to determine if any is suffering from Hepatitis or HIV/Aids, VDRL/RPR Test to check the possibility of syphilis disease among others¹⁴¹. The aim of such tests is to serve as an early diagnosis to medical disorders with a view to preventing or ameliorating their effect.¹⁴² Also, in another view, the aim of premarital medical test is to reduce the number of children with inherited disease¹⁴³ and parent mortality.¹⁴⁴ It is a comprehensive group of tests for those who are planning to get married and highly beneficial for the couples.

For genetic screening, which helps determine genetic disorders such as sickle cell anemia, this test is important. If either/both have a family history of a serious genetic condition or if they are carriers of the same faulty gene.¹⁴⁵ The objective of such test is to identify carriers among prospective couples to enable carriers to be better informed about genetic risks and reproductive options, and to prevent morbidity due to genetic disease and alleviation of the suffering that this would impose.¹⁴⁶ For HIV (Human Immune Deficiency Virus) on the other hand, in respect of premarital medical test, the objective of such test is not farfetched from preventing uninfected

¹⁴¹ Ibid.

¹⁴² A.A Al Aqeel, 'Genetic Counseling in the Muslim World: The Challenges' (Pan Arab Human Genetic Conference, Dubai, November 2007) <<http://www.cags.org/ae/e10alageel.pdf>> Accessed 25th January 2018 p.37

¹⁴³ Odelola J.O et al, 'Attitude towards pre-marital genetic screening among students of Osun State Polytechnics in Nigeria' (2013) 5(4) International Journal of Educational Administration and Policy Studies <<https://files.eric.ed.gov/fulltext/EJ1084162.pdf>> Accessed 25th January 2018 p.54

¹⁴⁴ Chiroma M. Et al, 'Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective' (2014) 25 Journal of Law, Policy and Globalization <www.iiste.org> Accessed 19th December 2017 p.52

¹⁴⁵ Odelola J.O et al, 'Attitude towards pre-marital genetic screening among students of Osun State Polytechnics in Nigeria' (2013) 5(4) International Journal of Educational Administration and Policy Studies <<https://files.eric.ed.gov/fulltext/EJ1084162.pdf>> Accessed 25th January 2018 p.54

¹⁴⁶ Ibid

people from being infected. It is also carried out to monitor/curtail the trends of HIV infection in a population or subgroup.¹⁴⁷

A. Benefits of the Premarital Medical Test

The conduct of premarital medical test is said to be beneficial as it becomes possible to give prospective marriage partners valuable medical advice on the basis of their past medical histories, the results of the clinical examination, and the differences in their blood types. It also protects people from contracting from their prospective partners contagious diseases that they might have. It also allows each party to the marriage to be certain whether his or her prospective partner is fertile and able to produce children. It also allows each of them to know their prospective partner's ability to have intimate relations. Hence, Premarital medical examinations helps to prevent the spread of contagious diseases and reduce the number of children born with debilitating genetic diseases that are costly to both the family and to society at large.¹⁴⁸ It also reduces dishonesty and concealment of any material fact/reality on part of any of the partner before marriage.¹⁴⁹ On a specific medical ground, it is beneficial to women undergo such test, in order to check her menstrual cycle. It also helps her to make plans for contraception i.e. whether it is feasible for her to use contraceptives or not. It is said to reduce the risk of genetic incompatibility and reduces the possibility of thalassemia and other diseases.¹⁵⁰ Most important to

¹⁴⁷ A.G Habib, 'The Attitude of the Muslim Youth towards HIV/AIDS Pre- Marital Test: A Case Study of Ungoggo Local Govt of Kano State, Nigeria' (2013) 3 (14) Research on Humanities and Social Sciences <<http://www.iiste.org/Journals/index.php/RHSS/article/viewFile/7920/7673>> Accessed 25th January 2018 p.24

¹⁴⁸ Sheikh `Abd al-Rashîd Qasim, Mandatory Premarital Medical Examinations, Fatwa issued on Thu, 01/01/2004, <<http://en.islamtoday.net/artshow-403-3348.htm>> Accessed 25th December 2017

¹⁴⁹ Malik Sakhi Sultan Awan, 'Medical Check-up Before Marriage: Beneficial to Life Partners or Encroachment over their Privacy?' (2015) <https://s3.amazonaws.com/academia.edu.documents/37286758/sakhi_01.docx> Accessed 27th December 2018

¹⁵⁰ ibid

this research, the test makes intending spouses know their medical status and whether or not they are medically compatible.

B. Negative Consequences of Premarital Medical Test

On the negative consequence of premarital medical test, it is stated that results of test might become public thereby infringing on the right to privacy of individuals. Also, the results of the test can ruin some people's lives and cause them to despair. More so, considering how easy it is to secure medical certificates from some public and private hospitals, trafficking in false documents could easily become a black market industry, thereby getting a false medical status of the bearer of the certificate.¹⁵¹

2.4 Conclusion

This chapter discussed what marriage is in the light of the Holy *Qur'an* and the *Hadith* of the Prophet (P.B.U.H) positing that marriage is a religious responsibility and a union between man and woman. It also discussed the essentials of marriage which includes Dower, Guardian, Two witnesses and offer and acceptance. Thus it also provided for the objectives of marriage in Islam amongst others, majorly, being an act of worship and a legal means for procreation/reproduction as have been highlighted also in various aforementioned provisions of the *Qur'an* and *Hadith* of the Prophet (P.B.U.H). In a *Hadith* of the Prophet (P.B.U.H), he is reported to have encouraged the Muslim Ummah to marry and so procreate, that he will be proud of his Ummah on the day of Judgment.

It also provided for the meaning of *Kafa'ah* literally which means compatibility or being similar and the technical meaning of *Kafa'ah* connoting social equivalence. Historically, *Kafa'ah* is

¹⁵¹ *ibid*

linked to the Arab people, and a person is only considered compatible with the other if he is of Arab descent. However, with the advent of Islam, it was modified; with verses of the Holy *Qur'an* and various *Hadith* of the prophet (P.B.U.H) addressing the concept of *Kafa'ah*. Hence, every person is to be ranked first according to his/her religious status. All the aforementioned were provided for in this chapter.

This chapter also highlighted various juristic opinions in relation to *Kafa'ah*. The factors to consider for *Kafa'ah* differ from one jurist to another, however, all views ranging from descent, freedom, health status, profession, wealth and Religion, with a uniform view that religion is a basic factor to be considered. It extensively discussed the various types of health defects classified by classical jurists according to their effect on marriage. While some of the defects are peculiar to the man alone, some to the woman alone and some peculiar to both the man and woman. More so, some of these defects highlighted can be a ground for dissolution of marriage.

Furthermore, while some are of the view that *Kafa'ah* is a condition for marriage, others are of the opinion that it is not a condition for marriage. Thus the effect of marrying a non-*kufu'* may be that it renders the marriage void and may be valid depending on the maturity and consent of the female partner involved. Outlined also is that lack of *Kafa'ah* could be a ground for refusal of marriage if the marriage has not been contracted and a ground for dissolution of marriage if the marriage has been contracted.

The chapter discussed the concept of premarital medical test by discussing what medical test is, diseases and its types. In discussing diseases, it was classified into two; While some are communicable, others are non communicable. It also went further to give a historical background of how premarital medical test came about in the 1900 and discussed on the benefits and

negative consequences of conducting premarital medical test. It is however clear that the benefits of conducting premarital medical test outweigh the negative which hovers mostly around likelihood of breach of individual right to privacy. This position has been an argument for opponents of the conduct of premarital medical test by under Islamic law which however is discussed succinctly in the next chapter.

CHAPTER THREE

PREMARITAL MEDICAL TEST: BAUCHI STATE LAW AND ISLAMIC POSITION

3.0 Introduction

In our world today, with the Gradual upsurge of technological and medical advancement and the spread of diseases and genetically related health conditions, intending spouses have been subjected to tests/screenings. This practice has been made optional and also mandatory depending on the jurisdiction. This chapter gave an overview of Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law 2017 and discussed it in the light of Islamic law. It also discusses premarital medical test in the light of Islamic Law by analyzing the views of contemporary scholars as regards premarital medical test and presentation of premarital medical certificate. It also appraises the relevant provisions of the Bauchi State compulsory Genotype and HIV Test, Anti-Discrimination Law 2017 as regards premarital medical test.

3.1An Overview of the Bauchi State Compulsory Genotype, HIV Test and Anti Discrimination Law, 2017

The Bauchi state compulsory genotype, HIV Test and anti-discrimination law, is the law, passed by the Bauchi state house of Assembly in 2017 in an effort to prevent the spread of Human Immune deficiency virus (HIV) and sickle cell diseases among its citizens and the unborn generation. The government of Bauchi State enacted this law with a view to make mandatory premarital medical test, specifically HIV and Genotype test and to also prohibit stigmatization/discrimination of HIV victims. The law has a cumulative of 25 Sections and 3 parts.

The purpose of the law is to protect the rights and dignity of intending couples, people living with HIV or affected by AIDS and Sickle cell disease.¹⁵² And in the bid to do so, the law provides for ways to ensure the rights and dignity of intending spouses are protected. These ways as provided by the law include, amongst others, ensuring that every parent /guardian submits their child/ward to HIV and Genotype test prior to contracting a marriage¹⁵³, ensuring the disclosure of HIV and genotype status of intending spouses¹⁵⁴ and eliminating all forms of discrimination based on HIV or Genotype status.¹⁵⁵

The law generally applies to all intending couples, persons living with HIV or affected by AIDS, Sickle Cell Victims, Parents, all religious bodies and employers of labor in Bauchi State.¹⁵⁶ It also applies to all individuals living and operating within Bauchi State, including places of worship, parents/ guardians, employers of labor and employees in the public and private sectors including public and private hospital/ health facilities.¹⁵⁷ The law in bid to address the issue of confidentiality highlighted that all persons living with HIV or AIDS shall have the right to privacy with respect to their health and medical records.¹⁵⁸

The law also provides that any parent/guardian that refuses/fails to submit medical certificate prior to contracting a marriage shall be held liable for contravening the provisions of the

¹⁵² Section 1 of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁵³ Section 1(a) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁵⁴ Section 1(b) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁵⁵ Section 1(c) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁵⁶ Section 2(a) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁵⁷ Section 2(b) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁵⁸ Section 12(1) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

Bauchi State Compulsory genotype, HIV Test and Anti-Discrimination Law, 2017.¹⁵⁹ And subject to the provisions of the law, any person or institution that breaches the provision of the law shall be guilty of an offence and liable on conviction to a fine not less than N150, 000 for individuals and N500, 000 for organizations or imprisonment for a period not less than one year or both.¹⁶⁰

Thus, any marriage contracted by a legal or religious institution without the presentation of the HIV and Genotype Test Certificate from recognized Government Hospital or approved private Hospital or registered Diagnostic Centre indicating the HIV and Genotype status of the Couple, or in disregard of the diagnostic results, contravenes the provisions of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017.¹⁶¹ The law also makes it a contravention of the law for any government hospital or private Hospital or registered Diagnostic Centre to produce a fake report.¹⁶² Thus, any man diagnosed of HIV and Sickle Cell positive shall not be married to a woman that is diagnosed as negative and vice versa.¹⁶³

On a final note, the law gives the Honorable Attorney General and Commissioner for Justice the power to ensure compliance with and enforcement of the provisions of the law.¹⁶⁴

¹⁵⁹ Section 16 (2) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁶⁰ Section 16(1) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁶¹ Section 18(a) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁶² Section 18(b) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁶³ Section 18(c) of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

¹⁶⁴ Section 19 of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017

3.2 The Bauchi State compulsory Genotype and HIV Test, Anti-Discrimination Law

2017vis a vis Islamic Law

Islam is seen as a complete way of life; it guides, directs and addresses every aspect of the life of a Muslim and the Islamic society as a whole. This guide ranges from marriage to financial transactions, to travelling, to partnership and to making rules and drawing up legislations.

Laws are derived in Islam looking at the sources of *Shari'ah*. The foundational sources of *Shari'ah* which is also seen as the primary Source are the *Qur'an*, which contains the sacred words of Allah (SWT) in form of obligations, admonition, direction and injunction amongst other things and the *Sunnah* of the Prophet which is basically Prophet Muhammad's (S.A.W) actions and precepts. The *Sunnah* confirmed the rulings of the *Qur'an*, detailed some of the concepts, laws, and rulings on practical matters, which are briefly stated in the *Qur'an*, and outlined some rules regarding matters not explicitly stated in the *Qur'an*. Legal conclusions by the four schools of law are based on these provisions of the *Qur'an* and *Sunnah* of the Prophet (P.B.U.H).¹⁶⁵ Thus, all laws to be made on emerging issues are expected to be in the light of the Holy *Qur'an* and the *Sunnah* of the Prophet (P.B.U.H). Where however, an issue is not directly addressed in the *Qur'an* and the *Sunnah*, recourse is had to the third source of *Shari'ah*, being *Ijma'*, meaning Universal conclusion of *Mujtahids* (independent jurists) from the *Ummah* of the Prophet Muhammad (P.B.U.H) in respect of legal matters. This however is not feasible in our world today because of the vast number of scholars.¹⁶⁶

In these contemporary times, new issues are emerging. In addition to the *Qur'an*, the *Sunnah* and *Ijma'*, *Qiyas* which means analogical deduction, *Istihsan* (juristic preference) and

¹⁶⁵ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Selangor, Mutiara Majestic 2000) 156

¹⁶⁶ Ibid 157

Maslaha(benefit or interest) are other sources of *Shari'ah* upon which laws are derived and which Islamic Countries draw up legislations. It is pertinent to note that most legislations today, in Islamic states are drawn up using the concept of *Maslaha*.¹⁶⁷

The important question to ask at this juncture is what is ***Maslaha***?

Literally, *Maslaha* means benefit or interest. It could also mean advantage, prosperity, success or the antithesis of that which is harmful. It is seen as a juristic device used in Islamic legal theory to promote the public good and prevent social evil or corruption. Muslim jurists defined *Maslaha* as seeking benefit and repelling harm, as directed by God or the *Shariah*.

In the opinion of Al-Ghazali, *maslaha* consists of considerations which secure a benefit or prevent harm, hence, Protection of life, religion, intellect, lineage, and property is *maslaha*¹⁶⁸.

Al Shawkani divided *Maslaha* into three (3) broad categories, namely; *Maslaha Daruriyah* (Necessity), *Maslaha Hajiyah* (Complementary) and *Maslaha Tahsinyah* (Embellishment).

Maslaha Daruriyah is of the utmost importance of existence of human life and society. It is seen as public interests of all human beings upon which people essentially depend. It entails the following elements;

- a. maintenance or preservation of religion (*hifz al-din*)
- b. Maintenance or preservation of life (*hifz al-nafs*)
- c. Maintenance or preservation intellect (*hifz al-aql*)
- d. Maintenance or preservation of progeny (*hifz al-nasl*)
- e. Maintenance or preservation of property (*hifz al-mal*).

¹⁶⁷ S Aksoy, 'Making regulations and drawing up legislation in Islamic countries under conditions of uncertainty, with special reference to embryonic stem cell research' (2005) JMED Ethics <<http://jme.bmj.com/>> Accessed 27th December 2019

¹⁶⁸ Muhammad Al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah* (International Institute of Islamic thought 1427/2006) 118

Anything that is deleterious to the above should be avoided, and anything that will preserve the above is meritorious and should be done. In the absence of these things the continuity of mundane life is impossible.¹⁶⁹ In Islamic law, the above elements are the values that are taken into account when making Islamic rulings and legislations. The usual concern is whether the issue in question which needs ruling or legislation can be covered by any of the elements above. They are extensively interlinked with the corpus of Islamic law and cannot be ignored at any cost.

The Second Classification which is *MaslahaHajiyah* by nature supplements *MaslahaDaruriyah*. This type of *Maslaha* is meant to avoid difficulties and to also procure ease and more convenience in life. It is different from *MaslahaDaruriyah* because its absence does not obstruct peace in social life but it can lead to hardship and inconvenience. By implication therefore, it is needed to bring more ease to humans and human activities ranging from worship to crime and contracts just to mention a few. An example of this is permissible activities in business transactions such as advance payment to facilitate transactions.¹⁷⁰

The third classification is *MaslahaTahsiniyyah*. This is related with something which promotes refinement and perfection in the customs and conduct of people's at all social interaction. An example is the Shari'ah encourages charity in addition to *Zakkahto* those in need.

According to Al Shatibi, it is 'practices that are carried out in the best manners, complying with standard of good morality, and is free from things, disapproved by a person of sound mind. As a whole, it constitutes part of noble morality'.

It should be noted that the above classifications are highlighted in order of priority with *MaslahaDaruriyah* taking the lead, followed by *Maslaha Hajiyah* and *MaslahaTahsiniyyah*.

¹⁶⁹H. Azmat, and others 'The Nature of Public Interest in Muslim and Non Muslim Writers' (2019) MPRA Paper No 94153 , <<https://mpra.ub.uni-muenches.de/94153>> accessed 27 December 2019

¹⁷⁰Ghani, Nik Abdul, 'Maslahah as source of Islamic Transaction Islamiyyat' (UKM press 2011) 33

Scholars have further classified *Maslaha* in to three within the range of *usul al-fiqh* and from the view point of availability of textual authority.¹⁷¹ The first of the classification is *Maslaha Mu'tabarah* (accredited *Maslaha*). This is one which the *Qur'an* or the *Sunnah* have upheld expressly and has enacted a law for its realization. And for the fact that it has been upheld by the *Qur'an* or the *Sunnah*, it cannot be rejected. A typical example is on the consumption of liquor. The *Qur'an* and the *Sunnah* has clearly forbidden the consumption of alcohol and on that basis, no matter its acceptability in a place, the culture or the norm of the society which validates that consumption, it will still be forbidden as it is against the *Maslaha* that was forbidden by the *Qur'an* and *Sunnah*. The validity of *Maslaha* in this case is definite and shall not be questioned. Scholars are in agreement that promoting and protecting this and other similar values constitutes a proper ground for legislation. The fact that Allah has upheld them is equivalent to his permission and approval for all measures, including legislation, that aim at their realization.¹⁷²

The Second type of *Maslaha* is *Maslaha Mulgha* (invalidated *Maslaha*). This is one which the *Qur'an* or the *Sunnah* clearly nullifies/invalidates either clearly or by implication. By implication, any legislation made based on such interest is invalid and no judicial ruling can be made to warrant its acceptability. A practical example is the practice of usury in transactions, even though it is common among the people, is invalid because the *Maslaha* in this case is clearly nullified.¹⁷³

The third and final type is the *Maslaha Mursalah*. This is one which has been validated after the divine revelation came to an end. For this, there is *Qur'anic* provision or *Sunnah* of the Prophet (P.B.U.H) which validates or invalidates it. A lot of legislations have been made on the basis of this type of *maslaha*. A typical example is the compilation of the Holy *Qur'an* by the

¹⁷¹ Elvan Syaputra and others, 'Maslaha as an Islamic Source and its Application in Financial Transactions (2014) 1(5) Journal of Research in Humanities and Social Science <www.questjournals.org> accessed 27th December 2019

¹⁷² Ibid

¹⁷³ ibid

Companions of the Prophet (P.B.U.H) after his death.¹⁷⁴ Contemporary scholars and Islamic countries have utilized this type of *Maslaha* in enacting legislations on contemporary issues cutting across family matters, financial matters and health matters to mention a few.

From the above explanations on *Maslaha* as a basis for drawing up Legislations in the contemporary society and in Islamic countries, to what extent can the Bauchi State Compulsory HIV and Genotype Test Anti Discrimination Law 2017 be said to be shielded by the Concept of *Maslaha*?

The above poser will be best addressed by looking at the purpose for which the Bauchi State compulsory Genotype and HIV Test, Anti-Discrimination Law 2017 was promulgated.

Part 1 of the Bauchi State Compulsory Genotype and HIV Test, Anti-Discrimination Law 2017 provides for the Purpose Objectives and Application of the law. The law specifically provides for the Purpose:

“The purpose of this law is to protect the rights and dignity of intending couples, people living with HIV or affected by AIDS and Sickle Cell Disease by:¹⁷⁵

- a. Ensuring that every parent/ Guardian submit their Child/Ward to HIV and Genotype test prior to contracting a marriage.¹⁷⁶
- b. Ensuring the disclosure of HIV and genotype status of intending spouses;¹⁷⁷
- c. Eliminating all forms of discrimination based on HIV or Genotype Status¹⁷⁸

¹⁷⁴ Muhammad Al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah* (International Institute of Islamic thought 1427/2006) 125

¹⁷⁵ Section 1 of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

¹⁷⁶ Section 1 (a) of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

¹⁷⁷ Section 1 (b) of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

¹⁷⁸ Section 1 © of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

- d. Creating a supportive environment so that people living with HIV or sickle cell are able to continue working and living under normal conditions for as long as they are medically fit to do so;¹⁷⁹
- e. Promoting appropriate and effective ways of managing HIV or sickle disease in the work place, community, institution and other fields of human endeavor;¹⁸⁰
- f. Creating a safe and enabling working and learning environment for all persons;¹⁸¹
- g. Creating a balance between the rights and responsibilities of all persons in the society and
- h. Giving effect to the human rights guaranteed as contained in Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria as amended and International and Regional Human Rights instruments.¹⁸²

From the above provisions of the law, Section 1 paragraphs a, b, c, e, f, and g are all geared towards ensuring avoidance of spread of diseases in cases of HIV, avoidance of giving birth to off springs that could be sickle cell patients and ensuring a saner and healthier society.

Earlier, the elements of *Maslaha* were mentioned which cuts across preservation and maintenance of religion, life, intellect, progeny and property. And in making rules or legislations, these elements are taken into cognizance to determine what the legislation seeks to achieve.

The intention of law makers from the relevant provisions of the law aforementioned is to first, avoid spread of disease, thus the need to subject every partner to premarital medical test as provided under Section 1(a) of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017. This could be seen as preservation of life as infecting the other partner maybe a threat to life.

¹⁷⁹ Section 1(d) of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

¹⁸⁰ Section 1 (e) of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

¹⁸¹ Section 1(f) of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

¹⁸² Section 1(g) of the Bauchi State Compulsory Genotype and HIV Test and Anti Discrimination Law, 2017

Secondly, to avoid giving birth to sickle cell patients in the case of parents who are sickle cell carriers and also avoid HIV positive off springs in the case of discordant partners. This could on the other hand be seen as preservation of progeny.

In the light of Islam and Islamic law, it is safe to say that the Bauchi State compulsory Genotype and HIV Test, Anti-Discrimination Law 2017 is one legislated on the basis of public interest and in a bid to preserve life and progeny. Thus, a law made on the basis of *Maslaha*.

3.3 Islamic Position on Premarital Medical Test

The issue of premarital medical test is one which is new. As such, opinions and arguments on the subject are debated amongst contemporary scholars. Contemporary scholars are divided into two on the conduct of premarital medical test and mandatory presentation of medical certificates as imposed by states.

On the permissibility or otherwise of the conduct of premarital medical test, some are of the opinion that it is permissible and some are of the opinion that it is not permissible in Islam.

3.3.1 Arguments of Scholars in Support of the Conduct of Premarital Medical Test

The proponents of the view that it is allowed to conduct premarital medical test stated the following reasons to support their opinion that;

1. Islam encourages having pure offspring as it was prayed for by prophet Zakariyya (A.S) and one of the ways of ensuring so is through medical test by parents, prior to the marriage contract. This will establish whether the parents are free from defect or ailment capable of affecting the health condition of their offspring.¹⁸³

¹⁸³ A.G Habib, 'The Attitude of the Muslim Youth towards HIV/AIDS Pre- Marital Test: A Case Study of Ungogo Local Govt of Kano State, Nigeria'(2013) 1 (14) Research on Humanities and Social Sciences 25

2. The Prophet (P.B.U.H) in a *Hadith* reported by Abu Huraira (May Allah be pleased with him) encouraged a man to look at the woman he intends to marry¹⁸⁴. In the opinion of the proponents, by this *Hadith*, the Prophet allows Muslims to look at the partner they intend to marry to determine the presence or otherwise of defect in them. It is allowed for men to look at the face and palms of the woman to ascertain the presence or otherwise of any defect. Thus, by extension, the permissibility of the conduct of premarital medical test.¹⁸⁵
3. In one of the tradition of the Prophet (P.B.U.H), he admonished his Ummah not to put a patient with a healthy person. Also, in another *Hadith*, the Prophet was reported to have said "...and one should run away from the leper as one runs away from a lion" ¹⁸⁶

Therefore, by these *Hadiths*, they argue that a healthy person should not marry one whose health condition is bad. And that one of the ways to ascertain whether a person is healthy or not is through medical test.¹⁸⁷

4. Also, following a *Hadith* reported by Umar (R.A), which states that If a man marries a woman and she is suffering from insanity or leprosy and the husband cohabits without knowing about her condition, he should pay her the full dower (*Mahr*) and take penalty compensation from the *Wali* (Guardian) (But this is in case where the guardian is the woman's father, brother or a very near relative, who knows the condition of the woman).¹⁸⁸

¹⁸⁴ Al-Hafiz IbnHajar Al-Saqalani, *Bulugh Al-Maram* (Darussalaam Publications 1996) Hadith 831

¹⁸⁵ A.G Habib, 'The Attitude of the Muslim Youth towards HIV/AIDS Pre- Marital Test: A Case Study of Ungogo Local Govt of Kano State, Nigeria'(2013) 1 (14) Research on Humanities and Social Sciences 25

¹⁸⁶Sahih Al Bukhari 5707, Book 76, Hadith 27.

¹⁸⁷ *ibid*

¹⁸⁸ Al-Hafiz Ibn Hajar Al-Saqalani, *Bulugh Al-Maram* (Darussalaam Publications 1996) Hadith 865, Book of Marriage.

To the proponents of this view, they said that by the import of this *Hadith*, if a man can repudiate a marriage on the basis mentioned above, substantially, a man can investigate on the health condition of his partner to be before marriage.

5. It is a risky behaviour for intending couples to get married without undergoing test. In supporting this, they relied on the *Qur'anic* verse which states thus;

“Do not throw yourselves into destruction by your own hands”¹⁸⁹

To them, one of the partners may have a sexually transmitted disease and the only way to prevent the transmission of such disease is when it is identified through medical test before marriage.¹⁹⁰

3.3.2 Argument of Scholars Opposing the Conduct of Premarital Medical Test

The opposition, on the other hand, are of the opinion that the conduct of premarital medical test should not be carried out based on the dictates in Islam. They posit that Islam is always trying to protect the secret of people. They placed their reliance on the *Hadith* of the Prophet (P.B.U.H) in which the Prophet was reported to have said that whoever conceals the secret of another, Allah (SWT) will conceal his secret in this world and in the hereafter. By this *Hadith*, to them, the act of conducting premarital medical test is will only expose the secret of individuals which Islam is against.¹⁹¹ They also opined that the Prophet (P.B.U.H) said: “If a man comes to you whose religion and character pleases you, then let him marry.” The Prophet (P.B.U.H) did not speak about his health. It is to be assumed barring any visible evidence to the contrary that a person is

¹⁸⁹ Qur'an 2:195

¹⁹⁰Shammout H. and others,'Premarital Screening Test, Islamic Perspective'(2017) 12 (13) Euro Mediterranean Biomedical Journal 113 <www.ebmj.org> accessed 27th December 2017

¹⁹¹ A.G Habib, 'The Attitude of the Muslim Youth towards HIV/AIDS Pre- Marital Test: A Case Study of Ungogo Local Govt of Kano State, Nigeria'(2013) 1 (14) Research on Humanities and Social Sciences 25

healthy. The Prophet (P.B.U.H) therefore sufficed with mentioning a person's religion and character.¹⁹²

3.4 Mandatory Conduct and Presentation of Premarital Medical Test Imposed By State

There have been series of arguments and opinions by scholars as to the imposition of mandatory premarital test and the presentation of premarital medical certificate before a marriage is contracted. Scholars are divided into two on this.

The proponents¹⁹³ of this are of the opinion that it is within the jurisdiction of the state to pass a law to subject intending spouses to undergo premarital medical test and to present such medical certificate before they are permitted to contract the marriage. By extension, undergoing premarital medical test and presentation of premarital medical test is a legal requirement for contracting a marriage.¹⁹⁴ On the other hand however, other scholars¹⁹⁵ oppose this view; they are of the opinion that it is unlawful under Islamic law for the state to subject intending spouses to mandatory premarital medical test. Thus, the state is merely allowed to encourage people to do so and to enlighten them about the advantages.¹⁹⁶

¹⁹² Sheikh `Abd al-Rashîd Qasim, 'Mandatory Premarital Medical Examinations' (2004) <<http://en.islamtoday.net/artshow-403-3348.htm>> accessed on 25/12/2017

¹⁹³ Muhammad al-Zuhaylî, Nâsir al-Maymân, HamadâtîMâ' al-`AynaynShabîhunâ, `Abd Allah IbrâhîmMûsâ, Muhammad Shabîr, `Ârif `Alî `Ârif, and Usâmah al-Ashqar

¹⁹⁴ Sheikh `Abd al-Rashîd Qasim, 'Mandatory Premarital Medical Examinations' (2004) 2 <<http://en.islamtoday.net/artshow-403-3348.htm>> accessed on 25/12/2017

¹⁹⁵ `Abd al-`Azîz b. Bâz, `Abd al-KarîmZaydân, Muhammad Ra'fat `Uthmân, and Muhammad `Abd al-Sattâr al-Sharîf

¹⁹⁶ Ibid.

3.4.1 Argument of Proponents of Mandatory Premarital Test and Presentation of Premarital Medical Certificate

1. Anything that is in itself permissible can be made mandatory by the Muslim ruler if it is determined to be in the public interests. They relied on the verse of the Holy *Qur'an* which states that the Ummah should obey Allah and His messenger and those in authority among you.¹⁹⁷ Therefore, whatever verdicts they issue in their jurisdiction, people are bound to follow except if the verdicts have contravened the explicit provisions of the *Qur'an* and Sunnah.¹⁹⁸
2. Some diseases are sexually transmitted and since a medical examination can prevent the spread of such diseases to a prospective spouse, it becomes necessary. They relied on the verse of the Holy *Qur'an* which states that one should not throw himself into destruction by his own hands.¹⁹⁹ To this end, decreeing a compulsory pre-marital medical examination can be considered as a requirement of Shari'ah.²⁰⁰
3. The policy of making mandatory premarital medical test by states is in tandem with the Islamic axiom which posits that if it is possible to prevent something harmful from taking place, then this is preferable to waiting for it to happen and then having to remove it.²⁰¹

¹⁹⁷ Qur'an 4:59

¹⁹⁸ Chiroma Magaji and others, 'Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective' (2014) 2 Journal of Law, Policy and Globalization 54

¹⁹⁹ Qur'an 2:195

²⁰⁰ Chiroma Magaji and others, 'Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective' (2014) 2 Journal of Law, Policy and Globalization 54

²⁰¹ Sheikh `Abd Al-Rashîd Qasim, 'Mandatory Premarital Medical Examinations' (2004) <<http://en.islamtoday.net/artshow-403-3348.htm>> accessed on 25/12/2017

4. Mandatory premarital medical is of benefit to the individuals involved and the society as a whole. That even though it is argued that it affects individual's freedom and sometimes causes injury to individuals, the juristic principle of Islamic law instructs to choose a lesser evil. Thus by this, it is better for injury to befall on an individual who refused marriage on the basis of his health status than to the other party, their offspring and the society at large.²⁰²

5. It is also in conformity with the legal principle that the means take the same ruling as the objectives they are employed to reach. Since the objective in this case is people's physical and mental wellbeing, the means enacted to attain it should be considered lawful. Premarital medical examinations promote the wellbeing of future offspring as well as the welfare of the family and society. They spare society social problems and economic burdens. These are all goals that we are commanded by Islamic Law to try and realize.²⁰³

3.4.2 Arguments against the Mandatory Conduct of Premarital Medical Test and Presentation of Premarital Medical Certificate

1. The pillars and essentials of a valid marriage are clearly spelt out in the Shari'ah. Thus, adding any other condition precedent to the marriage contract is like an alteration of Allah's revealed injunctions.²⁰⁴ They relied on the *Hadith* of the Prophet which states that any condition not found in Allah's book is invalid. The *Hadith* provides thus:

"Verily Allah the Almighty has prescribed the obligatory deeds, so do not neglect them; He has set certain limits, so do not go beyond them; He has forbidden certain

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ ChiromaMagaji and others, 'Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective' (2014) 2 Journal of Law, Policy and Globalization 53

things, so do not indulge in them; and He has said nothing about certain things, as an act of mercy to you, not out of forgetfulness, so do not go enquiring into these."²⁰⁵

2. A ruler is allowed to decree matters which are permissible, mandatory, only in cases where there is clear benefit to the public. Thus, making mandatory premarital medical test has more negative effects to the public. One of which is resulting in high rate of fornication for those hindered lawfully getting married to each other.²⁰⁶
3. Some tests such as genetic test, which is one of the tests being carried out and a major reason why some states make mandatory premarital medical test is not of any importance for those whose focus is on enjoying each other's companionship and not procreation.²⁰⁷
4. Premarital medical testing usually tests for one or two diseases. Thus, since there are more than 8000 known hereditary diseases and more are being discovered every day, if prospective spouses are subjected to be tested for all of these diseases, marriage would become extremely difficult and moral decline would result.²⁰⁸

3.5 Conclusion

The chapter gave an overview of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017. The law major gives protection to people that test positive to HIV/Aids by making provisions that will ensure elimination of all forms of discrimination. The law also makes compulsory genotype and HIV tests to be carried out before marriage is

²⁰⁵Jamal Ahmed Badi, *SharhArba'inAn-Nawawi, Commentary of Forty Hadith An Nawawi*, Hadith No. 30, p.155

²⁰⁶Sheikh `Abd al-RashîdQasim, 'Mandatory Premarital Medical Examinations'(2004) <<http://en.islamtoday.net/artshow-403-3348.htm>> accessed on 25/12/2017

²⁰⁷Chiroma Magaji and others, 'Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective' (2014) 2 Journal of Law, Policy and Globalization 55

²⁰⁸Sheikh `Abd al-RashîdQasim, 'Mandatory Premarital Medical Examinations'(2004) <<http://en.islamtoday.net/artshow-403-3348.htm>> accessed on 25/12/2017

contracted. Hence, any individual or institution found guilty of breaching any provision of the law shall be liable to a fine of N150, 000 and N500, 000 respectively.

It also discussed the Bauchi State compulsory Genotype, HIV test and Anti-Discrimination law, 2017 in the light of Islamic law by looking at the various ways legislations are drawn up. The purpose for which laws are made under Islamic law in this contemporary world is not farfetched that it is done on the basis of Maslaha, in a bid to preserve the religion of Islam, the life, intellect, progeny and property of individuals in the Muslim society. The law was put to a litmus test to ascertain whether truly, it was made in the interest of the public by looking at the purpose for which the law makers made that law.

The chapter finally discussed premarital medical test in the light of Islam. Premarital medical test being a contemporary issue attracts various views of contemporary scholars. And the wide range of arguments starts from the permissibility or otherwise of the conduct of premarital medical test in Islam. These arguments were majorly canvassed in the light of the provisions of the Holy *Qur'an* and the traditions of the prophet (P.B.U.H). Some of these Scholars are of the opinion that the conduct of premarital medical test is permissible in Islam while other scholars view that the conduct of premarital medical test has no basis in Islam. The argument was further extended to the situation where a state makes it mandatory the conduct of premarital medical test like it is obtainable in Bauchi state. The scholars are also divided into two on this. While some scholars posit that a state shall not impose on its subjects a law that makes provision of something which Allah (SWT) has not made mandatory, thus, premarital medical test should only be encouraged. Others on the other side are of the view that a state can make mandatory premarital medical test as it is in the interest of the general public which Islam allows.

CHAPTER FOUR

RESULT AND ANALYSIS

4.0 Introduction

This Chapter presents the information gathered through interviews conducted with the target audience. A total number of 10 Medical Doctors were interviewed and 30 Imams from various Mosques within and outside Bauchi State. The purpose was to ascertain the practice in Bauchi State regarding the conduct of premarital medical test vis a vis the provisions of Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017 and its effect on Marriages contracted in various mosques in Bauchi State. This chapter further states the gap between the practice in Bauchi and the law, the areas of contrast in the law and analyses the data gathered from the Islamic perspective by carefully looking at it from the major concepts which this research addresses. The Statistical package for the social sciences (SPSS) software was used to get accurate percentage based on frequency for every table in this chapter.

4.1 Response to Interview for Imams of Various Mosques in Bauchi State

4.1.1 Have Marriages Been Refused on the Basis of Lack of Presentation of Medical Certificate?

There were two major responses from all the Mosques which interviews were carried out. For some mosques, marriages have been refused on the basis of lack of presentation of medical certificate and for some mosques; it has never been a basis for refusal of marriage. In the Rural areas, lack of presentation of medical certificates has not been a reason to refuse contracting marriage. While in the urban area, the response is in two folds, while some refuse, others do not.

Below shows the Classification of mosques, number and percentage of mosques reached out for the purpose of this research.

Table 1: Classification of Mosques based on Jurisdiction

SN	Mosques(Classification)	No of Mosques	Percentage
1.	Urban Area	20	66.7%
2.	Rural Area	10	33.3%
	Total	30	100%

The above table shows that 20 mosques were reached out to in the Urban Area and 10 mosques were reached out to in the Rural Area. Of the 20 mosques reached out in the Urban area, Three (3) central mosques were visited in addition to other mosques in the Urban area namely; The Emirates Central Mosque, the Gwallaga Central Mosque and Sheikh DahiruUsman Central Mosque.

Below shows the mosques and percentage of mosques that refuse contracting marriage for lack of presentation of medical certificates by intending spouses:

Table 2: Data on Refusal to Contract Marriage for Lack of Pre-Marital Medical Certificate

SN	Responses	FREQUENCY	Percentage
1.	Yes	10	33.3%
2.	No	20	66.7%
	Total	30	100%

The table above shows that a total number of 10 Mosques were accessed , which includes Gwallaga Central Mosque , the Central Mosque and all mosques under the leadership of

Jama'atulIzalatulBid'ahwaIqamatusSunnah always refuse contracting any marriage where a pre-marital medical certificate is not presented. The table also shows a total number 20 mosques do not refuse contracting marriage based on refusal to present premarital medical certificate. This includes 10 mosques which include the Sheikh Dahiru Central Mosque, all other Mosques under the Leadership of the Tijjaniyamovement and additional 10 mosques accessed in the rural areas of Bauchi State.

The Emirate's Central Mosque, Gwallaga Central Mosque, and all the mosques managed by Jama'atulIzalatulBid'awaIqamatusSunnah denominationhave made it compulsory that all marriage shall be contracted in their mosques with the presentation of Premarital Medical Certificate. To a specific mosque²⁰⁹, they highlighted that the practice has been so to them even prior to the time the existing law²¹⁰ was enacted. What necessitated that practice to them is, during marriage contract, guardians attest to the fact that their wards are healthy, so the only way to ascertain so is through the medical test.

The Sheikh DahiruUsman central mosques and all mosques reached in the urban area under the Tijjaniya movement, no marriage has ever been refused on the basis of lack of presentation of premarital medical certificate. They do no request for that, except in circumstances where one guardian requests from the other or both request from each other or there is a reason to doubt any of the partners involved. To them, they presume everyone to be healthy so no need for any test.²¹¹

²⁰⁹Gwallaga Mosque

²¹⁰Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

²¹¹ Interview with Imam, Sheikh DahiruUsmanMakera Mosque (Bauchi, 19th of November, 2018)

4.1.2 Have There Been Circumstances Where Marriage is Refused after Presentation of Premarital Medical Test?

There have been situations where marriage has been refused after premarital medical certificate has been presented on health grounds. Majority of instances are on differences in HIV Status. The practice is where one of the partners is positive and the other is negative, the marriage is refused even if there is consensus by the partners to marry irrespective of the HIV Status. Where such instance occurs, advice is given by the mosque authority that the marriage be conducted in the court.

Table 3: Data on Refusal Based on Outcome of Test

S/N	Responses	Frequency	Percentage
1.	Yes	2	20%
2.	No	8	80%
	Total	10	100%

Table 3 shows the response, frequency and percentage of the mosques on whether marriage has been refused even after premarital medical test has been carried out and certificate presented to the mosque. Out of the 10 mosques that make premarital medical certificate compulsory to the contract of marriage, only 2 of the Mosques have acceded to the fact that on several occasions marriages have been refused based on the discordance of the intending spouses as regards their health status. *Gwallaga* mosque²¹² and also the Bauchi State Central Mosque²¹³ under the Emirate gave this response. One of the respondents clearly highlighted that in an incidence, the

²¹² Interview with Usamatu Muhammad, Secretary GwallagaJuma'at Mosque, (Gwallaga Street, Bauchi State, 19th November, 2018)

²¹³ Interview with Chief Imam, Bauchi State Central Mosque(Bauchi, 19th November, 2018)

parties despite being discordant (one HIV Positive and the other HIV Negative) have agreed that the marriage be contracted. However, the Mosque refused contracting the marriage. In an incidence also, some parties tested positive to HIV were referred to the court for the marriage to be contracted.

Table 4: Data on Reasons for Refusal of Marriage

S/N	Reasons for marriage Refusal	Frequency	Percentage
1.	HIV Status	6	60%
2.	Genotypes	4	40%
	Total	10	100%

Table 4 shows data of grounds upon which marriages have been refused in the 2 mosques that refused contracting marriage even after marriage certificate has been presented as outlined in Table 3 above. Majorly, marriage has been refused on health grounds namely: HIV Status and Genotype. This happens in situations where the parties are discordant. And parties are said to be discordant where, in the case of HIV, one is tested positive and the other party negative. While in the case of Genotype, where there is likelihood that the Genotype of the intending spouses may result in a sickle cell patient offspring. This table outlined that in those 2 Mosques, the frequency of marriages refused in a case of ten (10) marriages, HIV Status takes cumulative percentage of 60, genotype, takes a percentage of 40.

4.1.3 Is there any Specified Verifier or Evaluator of the Premarital Medical Certificate who verifies/ Evaluates the Premarital Medical Certificate brought to the Mosque? Who?

Table 5 Data on Availability of a Specified Evaluator/Verifier of Premarital Medical Certificate

Response	Frequency	Percentage
Yes	1	10%
No	9	90%
Total	10	100%

Table 5 shows data of Mosques that have a specified Verifier/ Evaluator of Premarital Medical Certificates. In all the 10 Mosques reached that request for premarital Medical certificate, only one Mosque²¹⁴ gave a different response to the effect that they have a medical doctor amongst the team who evaluates and verifies the result brought by partners. They have no specified qualified evaluator or verifier of the medical certificate. The practice is on the day of the wedding Fatiha, the guardians present the certificate to the Imam who in turn exchanges the certificate of each ward to the respective families. And also, the certificate gets handed over to few witnesses in the gathering to testify.

4.2 RESPONSE TO INTERVIEW FOR MEDICAL DOCTORS

A total number of 10 medical Doctors were interviewed.

Table 6 Data of Medical Doctors Interviewed

Gender	Frequency	Percentage
Male	4	40%
Female	6	60%
Total	10	100%

²¹⁴Jama'atul Izalatil Bid'ah wa Ikamatus Sunnah, JIBWIS MAJLIS Juma'at Gwallaga, Murtala Muhammad Way, Bauchi Town, Bauchi Local Government Area, Bauchi State.

4.2.1 At What time do People Come for Premarital Medical Test?

Intending partners come for premarital Medical Test when the marriage is near. Usually days or weeks before marriage, this is however not the ideal way. Medically, it is encouraged that it is done timely, at least 6months before marriage.

Table 7: Time Range for Conduct of Pre-Marital Test

Time Range	Frequency	Percentage
2-3 Days	4	40%
4-7 Days	3	30%
2weeks	3	30%
Total	10	100%

Table 7 above shows the frequency of the time range that intending spouse usually go for the premarital medical screening. While 4 of the Medical Doctors said they come within 2-3days before the marriage is to be contracted, 3 said within 4-7 days and 3 others highlighted within 2weeks before the stipulated time for the marriage to be contracted.

4.2.2 Medically, are Discordant Partners Allowed to Get Married?

Table 8: Data on Possibility of Discordant Partners Infecting each other

Response	Frequency	Percentage
Yes	10	100%
No	0	0%
Total	10	100%

Table 8 shows data of Medical Doctors that accede to the fact that discordant Parties in respect of HIV Status can get married without the other infecting the other party or infecting their offspring. To the 10 Medical Doctors interviewed, they highlighted that the world is developed,

discordant partners can get married. Just that the one positive In the case of HIV will have to be on Anti-retroviral drugs every day. Thus, when they are going to have intercourse, they must have protection but where they want to have babies, the partners who are negative will have to start taking drugs to prevent him from being infected. This is because there is no protection and there will be exchange of body fluids. However, once the woman gets pregnant, they continue with the protective intercourse while the negative partner continues taking the drugs for a specified time before he/ she stops. Thus in these circumstances, extra care is taken in times of delivery where it is the mother that is positive to prevent the child from being infected. Also, after the delivery, the mother is prevented from breastfeeding the baby who is to be fed with fortified milk. Where the parent cannot afford the fortified milk, the mother is advised to breastfeed the baby but the baby too will be placed on medication.

4.2.3 Can You Encourage Them to Get Married if after the Test, Discordant Partners (HIV Status And Genotype) Still Want to Carry on with the Marriage?

Table 9 Data on Discordant Partners (HIV Status)

Response	Frequency	Percentage
Yes	10	100%
No	0	0%
Total	10	100%

Table 9 shows data on whether intending spouses can be encouraged to get married despite being discordant. A total of the 10 Medical Doctors are of the view that they can encourage, however, highlighting that theirs is to provide counselling while the decision is for the parties to make. One of the doctors²¹⁵ highlighted that the practice is that before the test, we counsel and also

²¹⁵ Interview with Dr. UmmiHabiba Mahmoud, Resident Doctor, Bauchi State Specialist Hospital (Bauchi State Specialist Hospital, 13th November 2018)

after the test when the result is out we counsel. In situations where the parties are discordant, we counsel them further individually. In most discussions, we dig into the history of the partners. If he/she got it through promiscuity, and there are chances that the partner may continue with his/her ways, we strongly go against it. However, ours is to counsel, the decision is theirs to make.

Table 10 Data on Discordant Partners (Genotype)

Response	Frequency	Percentage
Yes	0	0%
No	10	100%
Total	10	100%

Table 10 shows the data for response from Medical Doctors as to whether they can encourage discordant partners (Genotype) to get married. All 10 of the Doctors are of the view that if the partners discordant in relation to Genotype should avoid getting married to avoid bringing to the world a Sickle Cell Patient. One of the Medical Doctors²¹⁶ said he strongly advises them not to marry and stated the likely issues that may arise if they marry (likelihood of giving birth to Sickle Cell offspring). But as medical personnel we can only counsel, but the decision is for the partners to make.²¹⁷

²¹⁶ Interview with DrYahyaYaxeed, Medical Doctor, FHI360 (Kano, 25th March 2019)

²¹⁷ Interview with DrUmmiMagaji, Medical Doctor, Bauchi State Specialist Hospital (Bauchi State Specialist Hospital, 13th November, 2018)

4.2.4 Do You Think Medical Certificates Can Possibly Be Forged?

Medical certificates are forged on a daily basis. Record service departments of Hospitals handle the papers. Ideally the doctors do the assessment of the patient physically and also get the history of the patient, then investigate the patient. All tests carried out by the patient are to be in papers which are handled by the record service department officers. The result is only brought to the Doctor who in turn counsels the partners again before signing on the certificate. So for the fact that the record officers handle the papers, people go through the back door and request for improvised medical certificates signed and stamped by the record service department rather than the Medical Doctors. Some go to the extent of keeping pre-typed copies and mostly just change the name, sign and stamp when the need arises.

4.2.5 Are There Measures to Avoid Forgery?

There are no strict measures currently in place to avoid forgery. However, there are prospective arrangements to reduce to the barest minimum issues of forgery of medical certificates. One step which the Medical and Dental Council of Nigeria (MDCN) is trying to put in place is the use of seal by every medical doctor to be affixed on all documents which the doctor needs to sign. Most especially on medical certificates. This will put a stop to issues of forgery and impersonation alike.

4.2.6 The Law²¹⁸ Only Mentioned HIV/Aids And Genotype Test Only, are there no Other Medical Conditions that are More Critical and of more Concern than them?

Table 11: Data on Existence of other Medical Conditions

Response	Frequency	Percentage
Yes	10	100%
No	0	0%
Total	10	100%

Table 11 Shows that all doctors are in consensus that medically, there are medical conditions which are of more concern in matters of marriage than HIV and Genotype related issues. These include sexually transmitted diseases such as Syphilis, gonorrhoea, and Hepatitis B (also sexually transmitted) and Hepatitis C (not sexually transmitted). These mentioned diseases are curable. The law needs to include them categorically so as to enable the partners know their health condition and be able to receive medical care before marriage so as not to affect the other partner.

4.3 Analysis on Data Collected Vis a Vis Provision of the Bauchi State Compulsory Genotype, HIV Test, Anti-Discrimination Law 2017: The Gap between the Law and the Practice

1. The law provides for compulsory premarital medical test, mandating every guardian to submit their ward/child to HIV and Genotype test prior to contracting marriage.²¹⁹ It also provides that any institution that contracts a marriage without presentation of HIV and genotype test certificate contravenes the provisions of the law²²⁰ However, the practice

²¹⁸Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

²¹⁹ S1(1)a Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

²²⁰ S18 (1)a Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

from the data gathered shows only 10 out of the 30 mosques reached out to comply with this provision of the law.

2. The law provides that religious institutions can contract the marriage of partners diagnosed as HIV positive.²²¹ However the practice is that even if they are both positive, the parties are referred to the court.
3. The law provides that it shall be an offense amounting to discrimination if persons who test positive are prohibited from marrying anyone of their choice provided the other person who tests negative is duly informed and agrees to marry him/her.²²² The practice in mosques however is to the effect that marriages of such nature are refused even if parties duly agree to marry despite their discordance.
4. The law provides for confidentiality for all health and medical records of persons living with HIV at every time.²²³ The practice, however, shows that the medical records of individuals go through the hands of many individuals, thus, of all the 30 mosques reached and the 10 who request for medical certificate, only one mosque has a verifier/evaluator who handles the records to avoid spread of confidential information of individuals.
5. The law provides that any person who contravenes the provision of the law shall be guilty of an offence and be liable on conviction. However, the practice shows that, although the level of contravention of the law is high, there has been no punishment meted on any person or institution contravening the law

²²¹ S18(1)c Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

²²² S6(1)j

²²³ S12(1) Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

4.4 Areas of contradiction within the Bauchi state compulsory HIV, Genotype Test and Anti-Discrimination law 2017

As a background, the Bauchi State Compulsory HIV, Genotype Test and Anti-Discriminatory Law provided the following provisions of the law to prevent all forms of discrimination based on one's HIV status;

Section 1 of the law provides:

“The purpose of this law is to protect the rights and dignity of intending couples, people living with HIV or affected by AIDS and Sickle Cell disease by:

(c) Eliminating all forms of discrimination based on HIV or Genotype status

(d) Giving effect to the Human rights guaranteed as contained in Chapter 4 of the 1999 Constitution of the Federal Republic of Nigeria as amended and international and Regional human rights instruments.

Also the law, in a bid to further protect the rights of individuals affected by HIV/ AIDS, further provides in Section 4 that:

“(a) Every individual, community, employer shall take steps to protect the Human rights of people living with and affected by HIV and AIDS by eliminating HIV and AIDS based discrimination in all settings including employment policies and or practices.

(b) Every individual, community, employer, religious or traditional body shall take steps to promote the equality and non discrimination on the basis of HIV status and other related diseases.

More important to this research, the law provides in section 6, specifically sub section 1 paragraph J thus:

“It shall be an offence to discriminate any person on grounds of actual or perceived HIV status by:

(j) prohibiting such persons from marrying anyone of their choice provided the latter’s consent is obtained and he/she is informed by his/her partner’s HIV status provided that the status, nature or conduct of the person so concerned is not such as may expose other persons to the danger of contracting virus”

By the above provision, it is evidently clear that the practice which is in place in Bauchi state is not in tandem with the provisions of the law as highlighted. First the law stated that parties shall not be subjected to any form of discrimination by any reason of their HIV status and also that all rights of individuals as stated in Chapter 4 of the 1999 Constitution as amended are guaranteed in addition to all civil rights as enshrined in international instruments guaranteeing the right of the individual. The law further guaranteed the right of individuals affected by HIV to marry anybody of their own choice provided the consent of the other partner is sought and obtained.²²⁴ However, by the data obtained, the major practice, even where discordant parties agree to get married, it is for the *Imams* and the authority of the mosque to refuse to officiate over the marriage. This practice is tantamount to infringement of the recognized right against discrimination and freedom to marry of their choice and is deemed as an offence under the law as provided under Section 17(1)(a)(ii) which provides that:

“It shall be an offence under this law to-

²²⁴ Section 6(1) j of the Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

(ii) Threaten to, or prevent any person from exercising any right under this law”

Contradicting to the above highlighted provisions of the law and also backing the majority practice in Bauchi State is the provision of the same Bauchi State Compulsory Genotype and HIV, Anti Discrimination law, specifically Section 18(1) (c). It provides thus:

“Any man who is diagnosed as HIV and Sickle Cell positive shall not be married to a woman that is diagnosed negative and vice versa”

While the law recognizes that one shall not be subjected to discrimination on the ground of one’s health status²²⁵, this same law refused the exercise of such right by preventing discordant partners from marrying people of their choice.²²⁶

4.5 Analysis of Data from the Islamic law perspective

From the Islamic law perspective, when *Kafa’ah* is discussed, it is always seen as a guide to partners and the guardians of intending spouses, majorly to ascertain the compatibility or otherwise of partners. Thus, the compatibility or otherwise of the partners may be waived by the accord of the partners.

Also, as earlier discussed in this research, in terms of *Kafa’ah* as discussed by classical jurists, marriage be refused on the basis that it is going to be against the objective and high intent of marriage, which is procreation and enjoyment towards one another, as discussed under

²²⁵ Sections 3, 4 & 5 of the Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

²²⁶ Section 18 (1) c of the Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

impotence as an ill health, hence, from another angle, avoidance of causing harm to the other partner in cases like leprosy²²⁷.

One important question to be asked is, looking at the discussion of *Kafa'ah*, specifically defects/diseases discussed under Chapter Two of this research, where will HIV/AIDS and the issue of incompatibility as to Genotype be placed? As a background already highlighted in this research, Bauchi State Law on Compulsory Pre marital Medical Test Focused specifically on HIV/AIDS and Genotype test as the main contention in respect of health Conditions/ status to be ascertained before marriage. Thus, Ill health such as HIV/AIDS and those related to Genotype are diseases which were alien to classical jurists. However, to this end, the words of IbnQayyim are handy. He belongs to the group of jurists that has the view that defects are not exhaustive as highlighted specifically by the four main schools of law. IbnQayyim stated thus:

“To limit the defects to two, six seven or eight is uncalled for. Defects such as blindness, dumbness, or one of them is having one leg or one arm, are defects that will make the life of the other miserable at the matrimonial home.”²²⁸

Thus, any health condition which is capable of or has the tendency of obstructing or inhibiting the most important objectives of marriage and also capable of placing a healthy spouse in a detrimental situation should be seen as a defect capable of being a ground for dissolution of marriage.

IbnQayyim further states;

²²⁷M. J Maghniyyah, *Marriage according to five schools of Islamic Law* Vol.5 (Islamic Culture and Relations Organization 1997) 30

²²⁸ I.Q Aljauziyyah, *Fad-ma'd fi HadyiKhairullbad* Vol 4 (Madba' atilMisriyya 1379) 30

“Any defect in the husband or wife which may be repulsive to the other spouse so that happiness, sympathy and affection, which are the aims of marriage, are not achieved on that account, is a ground for dissolution of the marriage.”²²⁹

From the above, it will be apt to say that although HIV/Aids and ill health related to Genotype were not discussed by classical jurists, they are issues whose negative impact gained awareness in later times. It can be encompassed as defects to be considered in measuring up the *Kafa'ah* of intending spouses and thus a ground for the dissolution of marriage. This research has shown that these defects have passed the litmus test taking into cognizance the fact that both can affect peaceful cohabitation, affect the happiness of the spouses, and likely put off springs in danger of being sickle cell patients in the case of incompatibility as to genotype, and is capable of placing a healthy spouse into danger in the case of HIV/AIDs. It is on the above import as discussed in Chapter three of this research that contemporary scholars moving for mandatory premarital medical Test posit that it helps in securing their lives as well as shaping the fate and future of prospective children.

The scholars, as regards new rules; have placed some devices to be put into consideration when introducing new rules. These include the principle of “*Darurah*” (necessity); principle of derivation; *Takhayyur*(selection) and *Talfiq*(amalgamation) approaches; an interpretive approach which sometimes called neo-ijtihad; and most important to this research ,adoption of the principle which says any law that does not contradict the principle of *Shari'ah* may be deemed lawful²³⁰. For the purpose of this research, this law does not contradict the principle of Shari'ah as it is made in the interest of the public. And under Islamic law, legislations can validly be made

²²⁹M.I.Sa'id, 'Premarital Screening against HIV/AIDS and Sickle Cell Disease: Islamic Law Perspective' (2010) 1 UDUSJICL 39, 48

²³⁰ Ibid 51

on the basis of *maslaha* as seen and discussed earlier in this research. From the above line of argument, it can be safely said that the law has a place under Islamic Law. Further, in the article written by MagajiChiroma et al²³¹, the authors in addressing the concept of premarital test and the need to introduce new rules highlighted the following questions regarding new issues in Islam most especially in respect of the topic at hand.

“The following questions are important in determining whether or not a pre-marital medical examination can be made mandatory under Islamic law: what is the position of Islam about the protection and saving of human life? Does Islam condemn harming one another? What does Islam say about the concepts of *istislah*(public interest) and *distihsan*(equity) while introducing a new rule in the *Shari‘ah*? What is the objective of *Shari‘ah* (*maqasidash-Shari‘ah*) for mandating Muslims to conduct medical examination before marriage?²³²

In trying to understand the rationale behind the provision of 18 (1) (c) as written by the law makers, it can be argued and one would analogically come to the conclusion that it was provided to avoid harming the other partner who is Negative (in respect of HIV/AIDS), to avoid giving birth to offspring infected with HIV and to avoid having sickle cell children (in respect of Genotype). It could also be concluded that it is geared towards a healthier society, thus in the interest of the society at large.

If seen from this perspective, then it could be said that the intent and purpose of carrying out premarital medical test falls in tandem with the intent and purpose upon which the concept of *Kafa‘ah* is developed as discussed by classical jurists. This is because the concept of *Kafa‘ah* is

²³¹Chiroma M. and others, ‘Pre-marital Medical Examination is a Panacea to the High Rate of Parental Mortality in the Society; A Reflection on its Implication towards Children Upbringing: An Islamic Jurisprudence Perspective’ (2014) 25 Journal of Law, Policy and Globalization 54

²³² Ibid.

established for a better marital union, to avoid factors that will affect the objectives of marriage, to avoid causing harm to the other partner, thus, in the interest of partners, their offspring and the society at large.

However, it could be seen from another perspective bearing in mind the specific provisions of the law. An interesting poser to this research at this point is, will the law have been different if the law makers were aware that it is medically possible to marry a partner who is positive and yet not contract HIV or infect the offspring of the discordant partners? Or will the law be different if the law makers had in mind that the provisions of the law will amount to infringing the rights of individuals involved as against the import of the law which is to prevent discrimination of persons infected with HIV/AIDS?

On confidentiality, the Bauchi State Law in Section 12 provides that all persons living with HIV or affected by AIDS shall have the right to privacy with respect to their health and medical records. Thus any health worker who intentionally or carelessly or negligently reveals the health status of any person with HIV/AIDS has breached the rule of confidentiality except where disclosure is required by law. It could be said that disclosure of such status is required by the law in terms of marriage. However, to what extent can disclosure be made?

The law is silent as to the extent to which disclosure can be made. It is evident however in practice that ensuring the confidentiality in respect of medical certificates of intending partners is not widely considered. Of all mosques which this research has covered only one ensures that medical certificates are evaluated and verified by one individual who is a medical doctor to avoid breach of privacy of individuals. However other mosques engage in transferring medical certificates from the hands of authorities to that of guardians and relatives and even extending it

to witnesses in the marriage. The argument of the opponents of the conduct of premarital medical test could be considered here. Islam strives to protect the secrets of people and in their opinion; the conduct of premarital medical test will expose the secrets of individuals which Islam is against. The practice involves transferring premarital medical certificate from one hand to another, it could be said to be a clear breach of the rule of confidentiality in Islam and right to privacy in the international sphere. The law should for a start provide for an evaluator and verifier. This will serve as one measure to ensure a considerable level of confidentiality and by extension, right to privacy of individuals.

4.6 Conclusion

This Chapter assessed the responses received from interviews conducted and analyzed based on the position obtainable in medicine and under Islamic law. Irregularities as a result of marriage between discordant parties (Genotype or HIV/Aids related) can be seen as an extension of ill health which Classical Jurists have highlighted. The intent and purpose of carrying out premarital medical test falls in tandem with the intent and purpose upon which the concept of *Kafa'ah* is developed. That is to ascertain compatibility between partners and avoid infliction of harm from one partner to another or to the offspring. The chapter also looked at the gap between the provision of the Bauchi State Compulsory Genotype, HIV Test and Anti Discrimination Law, 2017 and the practice in Bauchi State and the areas of contrast within the content of the law.

CHAPTER FIVE

5.0 SUMMARY, FINDINGS, CONCLUSION AND RECOMMENDATION

This chapter brings the brief summary of the entire research work, the findings of the research, the final conclusion and the possible and workable recommendations to curb the outstanding issues in relation to the topic at hand.

5.1 Summary

The main purpose of this research work is to make an analysis focusing on *Kafa'ah* and premarital medical test. Specifically to appraise the concept of *Kafa'ah* and to see the extent to which it can accommodate the emerging issues of pre-marital medical tests. The work examined the legality or otherwise of refusal to contract marriages because of the refusal of both parties or either of the parties to the marriage contract to present pre-marital medical certificate or where there is irregularity as to health condition. On a final note, the work examined the extent to which it can serve as a basis for refusal of marriages under Islamic law.

In trying to achieve this aim, the research work was divided into five chapters in an effort to answer the research questions raised.

The first chapter which was the introductory part of the dissertation was centered on bringing out the preliminary issues of the dissertation, by giving a general background. The chapter also provided the statement of problem which brought about the research work and from which the research questions were formed. The aims and objectives which the dissertation seeks to achieve were also set out in this chapter, coupled with a justification for the research. The chapter also included the scope of the research; the methodologies adopted which are doctrinal and empirical,

as well as reviews of various literatures. The chapter ended with an outline of the research work i.e. the organizational layout which was used in the course of the research.

Chapter two (2) discussed what marriage is in the light of the Holy *Qur'an* and the *Sunnah* of the Prophet (P.B.U.H) positing that marriage is a religious responsibility and a union between man and woman. It also discussed the essentials of marriage which includes Dower, Guardian, Two witnesses and offer and acceptance. Thus it also provided for the objectives of marriage in Islam amongst others, majorly, being an act of worship and a legal means for procreation/reproduction as have been highlighted also in various aforementioned provisions of the *Qur'an* and *Sunnah* of the Prophet (P.B.U.H).

It also provided for the meaning of *Kafa'ah* literally which means compatibility or being similar and the technical meaning of *Kafa'ah* connoting social equivalence. *Kafa'ah* was also discussed historically, and from the *Qur'an* and the traditions of the Prophet (P.B.U.H) .The chapter also highlighted various juristic opinions in relation to *Kafa'ah*. The factors to consider for *Kafa'ah* differ from one jurist to another, however, all views ranging from descent, freedom, health status, profession, wealth and Religion, with a uniform view that religion is a basic factor to be considered. It extensively discussed the various types of health defects classified by classical jurists according to their effect on marriage. While some of the defects are peculiar to the man alone, some to the woman alone and some peculiar to both the man and woman. More so, some of these defects highlighted can be a ground for dissolution of marriage.

Furthermore, while some are of the view that *Kafa'ah* is a condition for marriage, others are of the opinion that it is not a condition for marriage. Thus the effect of marrying a non-*kufu'* may be that it renders the marriage void and may be valid depending on the maturity and consent of

the female partner involved. Outlined also is that lack of *Kafa'ah* could be a ground for refusal of marriage if the marriage has not been contracted and a ground for dissolution of marriage if the marriage has been contracted.

The chapter discussed the concept of premarital medical test by discussing what medical test is, diseases and its types. In discussing diseases, it was classified into two; While some are communicable, others are non communicable. It also went further to give a historical background of how premarital medical test came about in the 1900 and discussed on the benefits and negative consequences of conducting premarital medical test. It is however clear that the benefits of conducting premarital medical test outweighs the negative which hovers mostly around likelihood of breach of individual right to privacy.

Chapter three (3) gave an overview of the Bauchi State Compulsory Genotype, HIV Test and Anti Discrimination Law, 2017. The law major gives protection to people that test positive to HIV/Aids by making provisions that will ensure elimination of all forms of discrimination and also makes compulsory premarital medical test in Bauchi State, the major tests also being Genotype and HIV/ Aids test.

It also discussed the Bauchi State compulsory Genotype, HIV test and Anti Discrimination law, 2017 in the light of Islamic law by looking at the various ways legislations are drawn up. The purpose for which laws are made under Islamic law in this contemporary world is not farfetched that it is done on the basis of Maslaha, in a bid to preserve the religion of Islam, the life, intellect, progeny and property of individuals in the Muslim society. The law was put to a litmus test to ascertain whether truly, it was made in the interest of the public by looking at the purpose for which the law makers made that law.

The chapter finally discussed premarital medical test in the light of Islam. Premarital medical test being a contemporary issue attracts various views of contemporary scholars. And the wide range of arguments starts from the permissibility or otherwise of the conduct of premarital medical test in Islam. These arguments were majorly canvassed in the light of the provisions of the Holy *Qur'an* and the traditions of the prophet (P.B.U.H). Some of these Scholars are of the opinion that the conduct of premarital medical test is permissible in Islam while other scholars view that the conduct of premarital medical test has no basis in Islam. The argument was further extended to the situation where a state makes it mandatory the conduct of premarital medical test like it is obtainable in Bauchi state. The scholars are also divided into two on this. While some scholars posit that a state cannot impose on its subjects a law that makes provision of something which Allah (SWT) has not made mandatory, thus, premarital medical test should only be encouraged. Others on the other side are of the view that a state can make mandatory premarital medical test as it is in the interest of the general public which Islam allows.

Chapter four of this research looked at the response received from interview conducted and analyzed it based on the position obtainable in medicine and under Islamic law. Irregularities as a result of marriage between discordant parties (Genotype or HIV/Aids related) can be seen as an extension of ill health which Classical Jurists have highlighted and the intent and purpose of carrying out premarital medical test falls in tandem with the intent and purpose upon which the concept of *Kafa'ah* is developed which is to ascertain compatibility between partners and avoid infliction of harm from one partner to another or to the offspring. Hence, the chapter also looked at the gap between the provision of the Bauchi State Compulsory Genotype, HIV Test and Anti Discrimination Law, 2017 and the practice in Bauchi State and the areas of contrast within the content of the law.

5.2 Findings

The following are the findings of this research:

1. The Bauchi State Compulsory Genotype and HIV test, Anti-Discrimination Law, 2017 which is meant to apply to all individuals living and operating within Bauchi State is not widely applied. All mosques manned by the Tijjaniya sect do not consider the provisions of the law which makes mandatory premarital medical Test and presentation of premarital medical Test Certificate before marriage is contracted.
2. There are more daring health conditions deadlier than HIV and Sickle Cell such as Hepatitis, which the Bauchi State Compulsory Genotype and HIV test, Anti-Discrimination Law, 2017 does not provide.
3. The law provides that religious institutions can contract the marriage of partners diagnosed as HIV positive.²³³ However the practice is that even if they are both positive, the parties are referred to the court.
4. The law provides for confidentiality for all health and medical records of persons living with HIV at every time.²³⁴ The practice, however, shows that the medical records of individuals go through the hands of many individuals, thus, of all the 30 mosques reached and the 10 who request for medical certificate, only one mosque has a verifier/evaluator who handles the records to avoid spread of confidential information of individuals.
5. The law provides that any person who contravenes the provision of the law shall be guilty of an offence and be liable on conviction. However, the practice shows that, although the level of contravention of the law is high, there has been no punishment meted on any person or institution contravening the law

²³³ S18(1)c Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

²³⁴ S12(1) Bauchi State Compulsory Genotype, HIV test, Anti- Discrimination Law, 2017

6. The law recognizes that one shall not be subjected to discrimination on the ground of one's health status, this same law refused the exercise of such right by preventing discordant partners from marrying people of their choice.
7. Medically it is possible for discordant partners to marry without being infected in respect of HIV/AIDS but by the import of the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, no marriage between discordant parties is allowed.

5.3 Conclusion

From the foregoing, attempts have been made to answer the research questions raised in the course of the research.

It can be said at this juncture that, although there are divergent views on the conduct of Premarital Medical Test, argument of the proponents of Scholars for Premarital Medical Test holds more water, thus, premarital medical test has a place in Islam. It is clear that marriage is a sacred institution and at all instances, the health of the partners is of utmost importance. This has necessitated and highlighted the importance of carrying out Premarital Medical Test. It is to ensure the health of partners, and also to curb among other problems, lingering health conditions such as HIV and Genotype related ill health issues. It is also to promote a more healthy generation in the society. It is on this note that various states both secular and non-secular states have recognized its importance to the society, thus, incorporated the exercise of such test in its laws, a typical point of reference is the law analyzed by this research, the Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017.

It is also clear that the issue of premarital medical test is an extension of means to determine the *Kafa'ah* of individuals who are willing to contract marriage in line with the Islamic rules. Lack

of *Kafa'ah* on health grounds can be a ground for the refusal of marriage. This is to the extent that it will go against the objectives of marriage. The health ground of any of the partners is one which will likely endanger the life and well being of the other partner involved. Thus, Health conditions such as HIV/AIDS and issues relating to discordance in Genotype have been seen to fall within the category of health conditions which will likely go against the objectives of marriage and endanger the well being of a partner.

Furthermore, marriages have been refused due to lack of presentation of premarital medical certificates in marriages. Various scholars have taken a stand as to this controversy. While some view it as being in tandem with Islamic dictates, others even though are not against it being carried out by partners intending to get married, however, opine it should not be made an essential requirement for contracting a marriage. It should be noted that each of the arguments is based on the sources of Islamic Law. What stands valid however looking at this research and its peculiarity is to the effect that since the Bauchi State Law on compulsory HIV/Aids and Genotype test is in place, by virtue of the fact that anything which is permissible may be made mandatory by a state if it is determined to be of public interest, the arguments against making presentation of marital medical certificate as a pre requisite for every marriage in Bauchi State will not stand. The major concern however could be tilted towards necessary corrections which the law makers ought to address looking at the contradictions the law creates as highlighted in the previous chapter and the enforcement of the law.

5.4 Recommendation

Undoubtedly, the idea of premarital medical test is one which is good to would be partners and also to the society. Thus, recommendations as far as this research is concerned, centers on the provisions Bauchi State Compulsory Genotype, HIV Test and Anti-Discrimination Law, 2017.

To start with, the law succeeded in giving and at the same time retrieving rights of all that the law applies to.

1. There is need for an adjustment as to the modus of evaluating medical certificates and limiting the hands through which certificates of partners pass through. The law guarantees for right to privacy as seen under section 12 of the law; however, there are no strict measures to ensure that. This is why, it is the majority practice that certificates which are meant to be strictly confidential, get to be seen by so many and in most instances exposing people who have tested positive to HIV/AIDs. The lawmakers may look into adding a provision for a specified evaluator of every certificate in every mosque to avoid breaching the individual's right to privacy.
2. The law specifically focused on Genotype and HIV/Aids test, which however are two out of the numerous threatening diseases to the society as stated by medical doctors. These diseases include amongst others, Syphilis, gonorrhea, Hepatitis B and Hepatitis C amongst others. The law should include an encompassing term which will cover all known diseases which is vital to the partners and which might be a threat to the society at large.
3. More so, the practice in Bauchi state has shown that even where partners who both test positive to HIV/AIDs are willing to marry, mosques do not tie the knot. This act is against the general principle of *Kafa'ah* and also an infringement of the rights of

individuals involved which the law seeks to protect. The state may enlighten places of worship on the need to adjust on this practice and also incorporate clearly within the law, that partners who both test positive to HIV should not be discriminated, hence, marriage be contracted by the Mosque authorities as against the practice.

4. It is suggested that the issue of premarital medical Test shouldn't be one which should be carried out a month or weeks to marriage. If carried out at the beginning of the courtship, it will curb exposure of people's privacy in situation of discordance as to HIV since the practice and the law does not ensure that. Thus, in discordance as to Genotype, it will enable the parties make informed decisions. Also, the conduct of the medical test should be carried out twice. First stage at the early time of courtship and second stage at least a month to marriage to curb irregularities as to medical results.
5. While the law provides for offences and penalties for breach of the law in respect of non compliance with the provisions of the law, enforcement measures are not effective. This research has shown that the law is not generally applied. Thus, the need to set up grass root checks and balances to ensure general applicability. The state may start first with sensitization to all, before taking on observation and punitive measures.

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APPENDICES

Appendix I:

Questionnaire for Imams:

1. Have Marriages Been Refused On The Basis Of Lack Of Presentation Of Medical Certificate?
2. Have There Been Circumstances Where Marriage Is Refused After Presentation Of Premarital Medical Test?
3. Is there any Specified Verifier or Evaluator of the Premarital Medical Certificate who verifies/ Evaluates the Premarital Medical Certificate brought to the Mosque? Who?

Appendix II:

Questionnaire for Medical Personnel

1. At what time do people come for premarital medical test?
2. Medically, are discordant partners allowed to get married?
3. Can you encourage them to get married if after the test, discordant partners (HIV status and Genotype) still want to carry on with the marriage?
4. Do you think medical certificates can possibly be forged?
5. Are there measures to avoid forgery?
6. The law only mentioned HIV/AIDS and Genotype test only, are there no other medical conditions that are more critical and of concern than them?