

# 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

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## Abstract

Procreation and establishment of happily and healthy community is among the objectives of marriage in Islam. Establishment of a healthy family is the foundation of having a successful and vibrant community. Obviously, health is an engine room for survival here in the world and as well, a key leading to success in the Day hereafter. Children are product of marriage and indeed assets to the family and the community at large. They require so much parental care in order to become good ambassadors of their communities. Unfortunately, in recent times, such parental care has been taken away by high rate of parental mortality that bedeviled most of the Muslims developing countries. Death of parents has denied children from having access to primary care which they ought to have benefited from their parents during their childhood. Of course, lack of a parental care and moral upbringing of a child will certainly have a consequence and negative impact on the entire community. It is against this backdrop that the paper examines the possibility of accommodating modern developments into Islamic law, thereby making a reflection on the fate of children after birth. Thus, the paper suggests among other things, that there is a need to introduce a new Islamic rule which will mandate prospective spouses to conduct pre-marital medical examination, rather than just leaving it discretionary among the people.

**Keywords:** Pre-marital, Medical Examination, Parental Mortality, Children, Islamic Jurisprudence

## 1. Introduction

Marriage in Islam has been described as an institution that sustains human evolution, procreativity and lineage. It is also one of the signs that reaffirm the supremacy of Allah *subhanahu wa ta'ala- s.w.t.* (The Almighty) over and above any creature. Allah (s.w.t.) creates human beings through the union of male and female (marriage) and also makes them generation upon generation. To this end, He said: "And among His signs is this that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts): Verily in that are Signs for those who reflect."<sup>4</sup> This further indicates that marriage in Islam is not all about enjoyment and satisfaction, but also an act of *ibadah* (worship) that contains other objectives such as protection, procreation and having quantitative and qualitative generations. In view of this,

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<sup>4</sup> Qur'an *Al- Rum*, 30: 21

one can understand that Islam is a religion that does not encourage celibacy or monasticism. This is because; the institution of marriage in Islam and children born there from are highly beneficial to the religion, as children stands to be vicegerents and successors of their parents in promoting the religion of Allah (s.w.t.) here on the earth and also their pride on the Day hereafter. Thus, the Almighty Allah said, "And marry those among you who are single and those who are fit among your male slaves and your female slaves; if they are needy, Allah will make them free from want out of His grace; and Allah is Ample-giving, Knowing."<sup>5</sup> The Prophet *sallallahu alaihi wasallam- s.a.w.* (peace be upon him) was reported to have said, "Mary the affectionate and fertile (woman), for I will compete with the other Prophets with the number of my followers on the Day of Judgment."<sup>6</sup> Another version of the translation (*riwayah*) says "Mary the affectionate and fertile (woman), for I will be proud of you on the Day of Judgment."<sup>7</sup> In yet another Hadith, narrated by Abdullah Ibn Mas'ud, the Prophet (s.a.w) says, "O you young men! Whoever is able to marry should marry, for that will help him to lower his gaze and guard his modesty."<sup>8</sup> He further said that "There is no monasticism in Islam."<sup>9</sup>

The above authorities explained the objectives of marriage in Islam. Therefore, much is needed to make such objectives viable and reality. A proper foundation should be put in place in order to have a qualitative product of marriage (children) that could serve as successors and overseers of the religion and community. To this end, the paper examines the significance of pre-marital medical examination and its effects on the prospective children towards building their future carrier. In doing so, the paper briefly discusses marriage and its objectives in Shari'ah. Reasons will be outlined on why pre-marital medical examination is necessary and why there should be a need to have a new rule on that. The paper will equally highlight the role to be played by muftis (jurist-consults) in explaining the *maqasid ash-Shari'ah* (objectives of Shari'ah) in line with the contemporary developments. Finally, the paper ends with conclusion.

## 2. Marriage and its Objectives under Islamic Law

Marriage under Islamic law can be defined as a lawful union between a male and female in accordance with the formal way prescribed under Islamic family law.<sup>10</sup> It prevents Muslims spiritually, physically, emotionally and psychologically here on the earth, and it is a gate way to *al-jannah* (Paradise) on the Day hereafter.<sup>11</sup> The Almighty Allah says: "It is He Who created you from a single person, and made his mate of like nature, in order that he might dwell with her (in love)."<sup>12</sup> Similarly, the Prophet (s.a.w) was reported to have said:

"O Young people Whoever of you can afford marriage, let him get married, for marriage helps restrain the looks and preserve their chastity, He who cannot afford it, let him observe fasting, for fasting is a deterrent."<sup>13</sup>

Generally, marriage is a form of *Ibadah* (worship) that provides companionship, sexual gratification and

<sup>5</sup> Qur'an 24:32

<sup>6</sup> Muhammad Ibn Isma'il, *Sahih Al Bukhari*, Kitab an Nikah Book 7, Volume 62

<sup>7</sup> Ibid

<sup>8</sup> Muhammad Ibn Isma'il, *Sahih Al Bukhari*, Kitab an Nikah Book 7, Volume 62, Hadith No. 4. See also Muslim Ibn Al-Hajjaj, *Sahih Muslim*, Kitab Al-Nikah, Book 8, Hadith No. 3233

<sup>9</sup> *Wasa'il* Vol. 14, P 10. See also Muhammad Ibn Isma'il, *Sahih Al Bukhari*, Kitab an Nikah Book 7, Volume 62, Hadith No. 1 & 12

<sup>10</sup> See Shahzad Iqbal Sham, Some aspect of Marriage and Divorce in Muslim Family Law, Pp 10-22, available at [http://pu.edu.pk/images/journal/szic/currentissue\\_pdf/E-](http://pu.edu.pk/images/journal/szic/currentissue_pdf/E-), accessed on 27/12/2013

<sup>11</sup> Mahmoud M Istimblli and Abdelhamid Eliwa, *The Brides' Boon- Tuhfat Al- A'rous*, p 14, available at <http://www.islambasics.com>, accessed on 27/12 2013

<sup>12</sup> Qur'an, *Al-A'raf*: 189

<sup>13</sup> Muhammad Ibn Isma'il, *Sahih Al Bukhari*, Kitab an Nikah Book 7, Volume 62, Hadith No. 3 & 4

affection between spouses.<sup>14</sup> Specifically and significantly in relation to this discussion, marriage can be defined as an institution whose mission is to sustain the mankind generations on the earth with a view to serving as vicegerent and good ambassadors of the Almighty Allah here on the earth.<sup>15</sup> Hence, without a successful marriage, the essence of procreation and having a qualitative product (children) will not be accomplished. Among the merits of procreation is to fulfill the will of God; to seek the love of the Prophet Muhammad (s.a.w); to benefit from the prayer of the child; and to have a vibrant community.<sup>16</sup> To this end, the Prophet (s.a.w) was reported to have said, “Marry the loving and the child-bearing, for I shall outstrip the other nations with your numbers on *Qiyamah* (on the Day of Resurrection).”<sup>17</sup> The lesson to be learned from the above Prophetic tradition is not just about the quantity (having a large number of children) but also a qualitative product. That is to say, parents have been cautioned about the moral upbringing of their children, so that in the end, they may become good ambassadors of Allah (s.w.t) and their community at large.<sup>18</sup> They may also serve as a savior to their parents on the Day of Judgment. To this end, the Almighty Allah says, “O ye who believe, [*Qu Anfusakum wa ahleekum naran*] ward off yourselves and your family against hell-fire whose fuel is men and stones...”<sup>19</sup> In this verse, the Almighty Allah commanded the believers to protect themselves and their families against hellfire, because it is the duty of parents to make sure that their families including children are God- fearing and obedient, otherwise it could be detrimental to them and to the society in general. That is to say, parents should do everything possible to guide their families towards the righteous path so that they (parents) could not be queried on the Day of Judgment about the stewardship of their dependents. The above verse could be read alongside with a hadith of the Prophet (s.a.w) that says, “You are all shepherds (*ra'in*) and you should all be accountable for your stewardship. Therefore, a ruler is a guardian and caretaker of his subject; man is a guardian and caretaker of his family ...”<sup>20</sup>

Today, the objective of marriage towards having qualitative children seems to be among the problems bedeviling the Muslim community. It is negligibly possible for children to be brought up in a peaceful and satisfactorily atmosphere under the custody of persons other than their parents. For it is a fact that nobody could be competent to take care of children better than their parents. Therefore, prospective parents are expected to do everything possible to help the situation so that the end will justify the means. Indeed, the success and benefit of children here in the world depends on the commitments put forward by their prospective parents before and after the engagement into the marriage contract.<sup>21</sup>

Thus, in a Hadith narrated by Ka'b ibn Ajura, it was reported that:

“Once a man passed by the Prophet (s.a.w). When the companions

<sup>14</sup> Muhammad Ibn Isma'il, *Sahih Al Bukhari*, Kitab an Nikah Book 7, Volume 62, Hadith No. 4 & 6

<sup>15</sup> Shahzad Iqbal Sham, *Some Aspect of Marriage and Divorce in Islamic Family Law*, P 11, available at [http://pu.edu.pk/images/journal/szic/currentissue\\_pdf/E-](http://pu.edu.pk/images/journal/szic/currentissue_pdf/E-), accessed on 16/02/2014

<sup>16</sup> Dogarawa Ahmad Bello, “Marriage and Divorce in Islam” a paper presented at NTA/FRCN Ramadan Annual Lecture Series, 1430 AH/2009, available at <http://mpr.ub.uni-muenchen.de/23194/> (MPRA Paper No 23194, posted 10/06/2010), accessed on 27/12/2013

<sup>17</sup> Reported by Abu Dawud, *Sunan Abu Dawud, Kitab An- Nikah*, Book 11, Hadith No. 2045 that “...Marry women who are loving and very prolific, for I shall outnumber the people by you.”

<sup>18</sup> Muhammad bin Ibrahim Al-Tuwaijiry, *The Book of Nikah*, (Cooperative Office for Call and Guidance at Buraidah: Riyadh, 2000), 4-5

<sup>19</sup> Qur'an 66: 6

<sup>20</sup> Muhammad Ibn Isma'il, *Sahih Al Bukhari*, 7/128

<sup>21</sup> Dogarawa Ahmad Bello, “Marriage and Divorce in Islam” a paper presented at NTA/FRCN Ramadan Annual Lecture Series, 1430 AH/2009, available at <http://mpr.ub.uni-muenchen.de/23194/> (MPRA Paper No 23194, posted 10/06/2010), accessed on 27/12/2013

of the Prophet (s.a.w) noticed how patient and active he was, they said, If done in the cause of Allah! The Prophet (s.a.w) said, if he (the man) works for maintaining his young children, it is in the cause of Allah. If he works for maintaining his old parents, it is in the cause of Allah. But if he works for ostentation and conceit, it is in the cause of Satan.”<sup>22</sup>

In the above Hadith the Prophet (s.a.w) described the maintenance of children (including giving children the moral upbringing) as an important phenomenon and obligatory act in the side of Allah. Parents should be physically and mentally fit for them to fulfill this obligation. Hence, they need to be fit, proper and in a good health condition in order to struggle for the maintenance of their children. To this end, one may conclude that the health status of the prospective spouses before and after marriage is a fundamental factor in determining the fate and success of their prospective children. By extension, it is the determinant factor for the success of the community at large. Thus, if the future of younger generation is good, it will equally reflect on the society.

Once a marriage has been contracted in accordance with the Islamic injunction, procreation will be expected, and the result could be the establishment of Islamic home and society.<sup>23</sup> Hence, this cannot be achieved except by taking precautionary measures that will lead to a viability of this objective. One of such measures is to ensure that the health status of prospective parents is in good condition, so that they will be able to fulfill the marriage obligations effectively (including the upbringing of their prospective children for better tomorrow). To this end, the Prophet (s.a.w) said, “When a man dies, his acts has been terminated, but three, *Sadaqat al-Jariyyah* (recurring charity), or knowledge (by which people) benefit, or a pious son, who prays for him (for the deceased).”<sup>24</sup> Thus, a piety could not be infiltrated *abinitio* in children unless they have been put on the proper and right direction by their parents. Hence such could be achieved only if the parents are alive or are capable of discharging their responsibilities. In fact, for them to become active in managing and controlling the affairs of their children, they must have a good health condition. In view of this, prospective parents are required to confirm their health status before getting married, so that the fate of their prospective children will not be at stake. In addition, confirmation of health status by the marrying couples does not end only to prevent for deterioration of children future, but also to comply with the religious injunction that prohibits harming one another. This is in line with the principle of Islamic law which states that “*La darara wala Diraran*” (There should be neither harming nor reciprocating harm.)<sup>25</sup>

### 3. Why Pre-marital Medical Examination and the Need to Introduce a New Rule

Pre-marital medical examination is a fundamental phenomenon for the sustainability of marriage between couples. It helps in securing their lives as well as shaping the fate and future of their prospective children. Pre-marital medical examination nowadays goes beyond the doctrine of *darurah* (necessity). It is a mechanism to be used in order to achieve the fundamental objective of Shari‘ah (Islamic law), that is, safeguarding people’s lives and morality. In fact, Islam values human life, health and morality more than anything one can think of. Hence, Islam encourages Muslims to do anything that can prevent loss of human life, or anything that can lead to

<sup>22</sup> Reported by Tabarani

<sup>23</sup> Shahzad Iqbal Sham, Some aspect of Marriage and Divorce in Muslim Family Law, Pp 10-22, available at [http://pu.edu.pk/images/journal/szic/currentissue\\_pdf/E-1%20Shehza%20sham%20%28Islamic%20Law%20of%20Marriage%20and%20Divorce%29.pdf](http://pu.edu.pk/images/journal/szic/currentissue_pdf/E-1%20Shehza%20sham%20%28Islamic%20Law%20of%20Marriage%20and%20Divorce%29.pdf), accessed on 27/12/2013

<sup>24</sup> Reported in *Sahih Muslim*

<sup>25</sup> Jamal Ahmed Badi, *Sharh arba’een an- Nawawi: Commentry of Forty Hadith An – Nawawi*, Hadith No. 32, P 143, available at <http://fortyhadith.iuu.edu.my>, accessed on 16/02/2014

protection and enhancement of people health and morality. To this end, the Almighty Allah said, "...whoever saves a single soul as if he saves the lives of the entire mankind."<sup>26</sup> In view of this, prospective parents should as a matter of obedience to the law of Allah, examine their health status so that they cannot cheat themselves and as well, cheat the younger generations. To this effect, the Prophet (s.a.w) was reported to have said, "A patient will not come closer to a healthy one."<sup>27</sup>

Islam encourages prospective spouses to conduct medical examination prior to their marriage contract, as it is significant to the health sustainability in the community. It is in fact very important to conduct a pre-marital medical examination due to the fact that the rate of incurable and communicable diseases is increasing rapidly in the community, most especially in developing countries. Such diseases include: HIV, HBV, HCV and other infectious diseases that have to do with people's genotype. Although, this concept of pre-marital medical examination is not among the essential elements required for a valid marriage in Islam. However, that does not prevent leaders from making it mandatory rule upon the prospective spouses. One of the features of Islamic law is dynamism, that is to say, Islam always goes with time. Thus, the following points are pertinent in determining the reasons for conducting medical examination before marriage contract:

- (1) ensuring the health status of the marrying couples, as Islam dislike being cheated and it does not allow harming one another;
- (2) sustainability of the Islamic objective of marriage (procreation). As it can only be achieved in a status of a good health condition;
- (3) protection and control of moral decadence of the younger generation against the effect or repercussion of unhealthy parents who may likely not going to survive

The above points have been canvassed in line with the criteria set out by some of the Islamic scholars. Thus, according to Amidi, in making derivation of any rule in Islamic jurisprudence, a statement of the basic issue and valid arguments for the correct or preferred position should be maintained.<sup>28</sup> This of course, has been the case in this paper, where arguments have been canvassed on the effects of parental mortality against the future of younger generations. In the words of Wael, "Devices used to be considered in introducing new rules into Shari'ah *inter alia* include: the principle of "Darurah" (necessity); principle of derivation; *Takhayyur* (selection) and *Talfiq* (amalgamation) approaches; an interpretive approach which sometimes known as neo-*ijtihad*; and adoption of a principle which says any law that does not contradict the principle of Shari'ah may be deemed lawful."<sup>29</sup> He further said, deducing a new rule in Shari'ah should always be in line with the philosophy and objective of Shari'ah, thereby reiterating its dynamism. Scholars can use their talents and available methods such as *Qiyas* (analogical deduction), *istihsan* (equity), *masalih al- mursalah* (public interest) and *ta'liq* (following the doctrines of other jurists) to make their derivations. Thus, they should first of all make reference to the glorious Qur'an, Sunnah of the Prophet (s.a.w) before resorting to any secondary sources of Shari'ah.<sup>30</sup>

Furthermore, an *ijtihad* can be aimed at deducing the law from the evidence in the sources which often

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<sup>26</sup> Qur'an 5: 32

<sup>27</sup> Sahih al Bukhari. Cited in Mahmoud M Istimblli and Abdelhamid Eliwa, *The Brides' Boon- Tuhfat Al- A'rous*, available at <http://www.islambasics.com>, accessed on 17/02/ 2014

<sup>28</sup> Bernard G. Weis, *The Search for God's Law: Islamic Jurisprudence in the writings of Sayf al din al Amidin*, (Turkey: The University of Utah Press, 2010) 48

<sup>29</sup> Hallaq B. Wael, *An Introduction to Islamic law*, (UK: Cambridge University Press, 2009), 115-117

<sup>30</sup> Ibid 327

referred to as *ijtihad mutlaq* (independent *ijtihad*). Similarly, an *ijtihad* can be concerned also with the elaboration and implementation of the law within the confines of a particular *madhhab* (school of thought) which referred to as *ijtihad muqayyad* (dependent or limited *ijtihad*). He cited that Imam Al- Ghazali was the first to divide *ijtihad* into two categories, as mentioned above. He however, affirmed that the latter category of *ijtihad*, after a certain period of time has been wiped away.<sup>31</sup> Thus, according to Imam Al-Ghazali, among the important factors to be considered in extracting judgment in Islamic law are having a knowledge of the evidentiary indications (of thought) and their conditions by which demonstrative proofs and evidences produce meaning.<sup>32</sup> Indeed, such proofs have been exhibited in the paper, to the effect that lack of pre-marital medical examination causes a high rate of parental mortality which will have a repercussion on the future of the younger generation.

It was against the above backdrop that in some of the Muslim and Muslims dominated countries such as Saudi Arabia, U.A.E, Bahrain, Egypt, Syria, Lebanon, Tunisia and Morocco, a pre-marital medical examination has been considered as an avenue for protecting people against the effect of genetic and congenital disorder, as it is common in such societies. Most of those countries began with encouragement to conduct an optional pre-marital medical examination, so that citizens may reflect over its significance in their marital life. When the problems of contagious diseases continue to escalate among their people,<sup>33</sup> they did not relent in taking necessary action in order to counter the menace. Thus, for instance, the Kingdom of Saudi Arabia in 2004 has further stepped forward to make pre-marital medical examination compulsory on spouses. The implementation of such Decree was first preceded by making provision of complete health facilities affordable to the citizens by the government.<sup>34</sup> This has reiterates the government commitments towards ensuring the successful implementation of it policies in line with the principles of Shari'ah in the country.

The essence of pre-marital medical examination in addition to the prevention of parental mortality is to also prevent a prenatal transmission and inflectional diseases which mostly affect the fetus or unborn child. In fact, even if the child has been luckily born, there is every tendency for him to be infected with his parents inherited disease in the future.<sup>35</sup> In view of this, one may conclude that the conduct of pre-marital medical examination is not all about the concept of *darurah* (necessity) but it is also a religious obligation. Explicitly, Islam does not make pre-marital medical examination as mandatory on spouses, and at the same time it does not prevent Muslims from checking their health status before delving into a marriage contract. Although, there are some *muftis* who do not agree *in toto* with any attempt to make it mandatory upon spouses due to the fact that none of the Qur'an or Sunnah declares it as such. To this end, when Shaykh Ibn Jibrin was asked about the issue of making a pre-marital examination a condition precedent for a marriage contract in Islam, he had this to say:

“All perfect praise be to Allah, The Lord of the Worlds. I testify that there is none worthy of worship except Allah, and that Muhammad

<sup>31</sup> Ibid,333

<sup>32</sup> Abdullahi bin Hamid Ali, Al- Ghazali on the Essentials of Interpretive Autonomy (Ijtihad), P 2, available at <http://www.lamppostproductions.com/> Lamppost Educational Initiative, accessed on 15/02/2014

<sup>33</sup> Such as HIV, HBV and HCV

<sup>34</sup> Fahad M Alswaidi and Sarah J O'Brienl, Premarital Screening Programme for Haemoglobinopathies, HIV and Hepatitis Viruses: Review and Factors affecting their Success, available at <http://msc.sagepub.com/content/16/1/22.full>, accessed on 25/12/2013

<sup>35</sup> Fahad M Alswaidi and Sarah J O'Brienl, Premarital Screening Programme for Haemoglobinopathies, HIV and Hepatitis Viruses: Review and Factors affecting their Success, available at <http://msc.sagepub.com/content/16/1/22.full>, accessed on 25/12/2013

(s.a.w) is His slave and Messenger. It is permissible, if Allah wills, to carry out a medical examination before marriage. This becomes even more confirmed if it is predominantly believed that there are hereditary diseases in the family.”<sup>36</sup>

However, when he was asked further about its legal position in Shari‘ah, then he said:

“It is permissible to do so if an internal disease is feared which would affect one’s health, prevent the comfort of the spouses and the stability and tranquility of life. As it might be that one of them is possessed [by *jinn*] or has epilepsy, or he/she has a chronic disease even though the disease may be a simple one, like asthma, diabetes, bilharzias, or rheumatism. The same thing applies to being sterile and not being able to have children. However, if the spouses appear to be in good health and the environment and the society where they live has no such diseases or similar ones, then, in principle, they are not affected with any disease and one should not fear anything about them. In which case, there is no need for a medical examination for both spouses. Allah Knows best.”<sup>37</sup>

The first statement quoted above implies that nobody is allowed to impose something which Allah (s.w.t) did not make it mandatory on people. Had he wish, he would have made it so, but out of his mercy he overlooked it. To supplement this idea further, the Prophet (s.a.w) was reported to have said:

"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 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." [Related by Al-Daraqutni and others - Al-Nawawi said this is a *hasan* (fine) hadith]<sup>38</sup>

The second Quotation implies that, despite the implicit nature of a mandatory pre-marital medical examination under Shari‘ah, still there is also no explicit provision in the Qur’an and Sunnah that prohibits for decreeing pre-marital medical examination as mandatory. Therefore, it is not permissible for Muslims to forbid what Allah has not made forbidden, as he might have left it silent as an act of mercy upon the believers.<sup>39</sup>To this end, the

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<sup>36</sup> Shaykh Ibn Jibrin, Medical Examination Before Marriage, Fatwa No : 173423, issued in Rabee' Al-Awwal 20, 1433 / 13-2-2012, Available at <http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=173423>, accessed on 25/12/2013

<sup>37</sup> Ibid

<sup>38</sup> Jamal Ahmed Badi, *Sharh Arba'in An-Nawawi, Commentary of Forty Hadith An Nawawi*, Hadith No. 30, p 155, available at <http://fortyhadith.iu.edu.my/2002fortyhadith.com>, accessed on 07/02/2014

<sup>39</sup> Ibid

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 *istihsan* (equity) while introducing a new rule in Shari'ah? What is the objective of Shari'ah (*maqasid ash-Shari'ah*) for mandating Muslims to conduct medical examination before marriage? The above questions are fundamental in determining the legal position of pre-medical examination in Islam. Scholars have different opinions regarding the mandatory pre-marital medical examination; some have been supporting the notion while some have not, except only on optional and recommendable grounds. The former opinion (those who declared it as mandatory)<sup>40</sup> is based on the powers given to Islamic constituted authority to issue Islamic verdict (fatwa) within its domain for the purpose of tackling the contemporary challenges. At the same time, it has been based on the command made by Allah (s.w.t) in the Qur'an, that the believers should obey their leaders (*Ulul- amri*).<sup>41</sup> 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. Similarly, those who support the mandatory rule for the pre-marital medical examination have also rely on the verse that says "Do not throw yourselves into destruction by your own hands."<sup>42</sup> In yet another verse, Allah (s.w.t) said, "Then Zachariah prayed unto his Lord and said: My Lord! Bestow upon me of Thy bounty goodly offspring. Lo! Thou art the Hearer of Prayer."<sup>43</sup> To this end, decreeing a compulsory pre-marital medical examination can be considered as a requirement of Shari'ah and does not in any way violate an individual freedom of private life as used to be perceived by some people. Although, as it provides some benefits to an individual or the society, it may at the same time occasion an injury to spouses, thereby restricting them from benefitting out of the fruit of getting married. Therefore, spouses are normally faced by such challenges, and it is thus expected of them to invoke the principles of Islamic jurisprudence that instruct Muslims to seek out the lesser of two evils, thereby allowing for individual injury to occur in order to prevent harm from befalling the general public. Such a policy is also in conformity with the Islamic legal axiom that if it is possible to prevent something harmful from taking place, then this is preferable than waiting for it to happen.

Furthermore, the decree is also in line with the principle of Shari'ah that says: 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. Pre-marital medical examinations promote the wellbeing of future offspring as well as the welfare of the family and society.<sup>44</sup> They spare a society from social problems and economic burdens. The notion of pre-marital medical examination is among the matters that have been introduced into Islamic *fiqh* (jurisprudence) in recent times as a matter of necessity. The rulings on the issue are usually based on the popular principle in the study of *fiqh* called "*Muwazanat*" (balancing benefits and harms). The principle enables jurists to examine the benefits of conducting medical examination by prospective spouses prior to marriage contract on one hand, and the harm that it may cause to the parties as a result of doing that on the other hand.<sup>45</sup> The adoption of the principle is to accomplish the objective of marriage in line with the requirements of Shari'ah. According to Dr Hassam affanah,<sup>46</sup> among the objectives of marriage in Islam is to

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<sup>40</sup> This is the opinion of Muhammad al-Zuhayli, Nâsir al-Mayman, Hamad â îM â al-Aynayn Shab ħun â Abd Allah Ibr ħ ĩn M ũs â Muhammad Shabir, Arif Ali Arif, and Usamah al-Ashqar.

<sup>41</sup> Qur'an 4:59

<sup>42</sup> Qur'an 2:195

<sup>43</sup> Qur'an 3:38

<sup>44</sup> Rajab Abu Maleeh (consultant), Pre-marriage Medical Checkup: Islamic Perspective? Issued 21/06/2009, Available at <http://www.onislam.net/english/ask-the-scholar/family/178232.html>, accessed on 25/12/2013

<sup>45</sup> Ibid

<sup>46</sup> A Professor of Fiqh and its Fundamentals in Al-Quds University, Palestine



have children who should be healthy and productive.<sup>47</sup> To this end, Allah (s.w.t) said through the words of Zakariyyah (a.s), "O my Lord! Grant me from You, a good offspring. You are indeed the All-Hearer of invocation."<sup>48</sup> Therefore, offspring could not be good unless their parents have also lay a proper foundation for them, such as the conduct of pre-marital medical examination. In yet another verse, the believers invoke their Lord saying, "Our Lord! Bestow on us from our wives and our offspring who will be the comfort of our eyes, and make us leaders for the *Muttaqun* (pious)."<sup>49</sup> In addition, the Prophet (s.a.w) said, "Select (good wives) for your sperm, and marry the competent (husbands) and get (your progeny) married to them."<sup>50</sup> Umar Ibn al-Khattab (r.a) was asked, "What is the right of the child over his father?" He replied, "It is that he selects his mother well, gives him a proper name and teaches him the Qur'an."<sup>51</sup> Hence it is the duty of father to teach his children the religion of Allah, but then how such duty can be guaranteed if he is not alive or if he is not fit, proper and in good condition to handle and manage the situation? Some jurists who have been supporting the notion for the conduct of pre-marital medical examination, are at the same time of the view that the government should not compel prospective spouses to do so, but they should only be encouraged.<sup>52</sup> To this end, they reiterates on the fact that the pillars and conditions for a valid marriage are clearly laid out in the Shari'ah. Hence, adding any other condition precedent to the marriage contract is like an alteration of Allah's revealed injunctions. Thus they said, the Prophet (s.a.w) was reported to have said: "every condition that is not found in Allah's book is invalid."<sup>53</sup> Meanwhile according to them, marriage in Islam does not necessarily be centered on having children. A person might have been married just to enjoy the other's companionship. In this circumstance, there is no point for decreeing a mandatory pre-marital medical examination on such a person especially to undergo a genetic testing. In contrast, some other Muslim countries despite the controversy involved, have issued a ruling mandating prospective spouses to undergo medical examination before marriage contract. For instance in Kuwait, the government has maintained that, decreeing such rule can go far as preventing children who are to be born out of marriage, from being affected by any disease suffered by either of their parents.<sup>54</sup> Thus, the Prophet (s.a.w) said, "the Religion is sincere advice. The Prophets' companions asked, to whom? To Allah, to Messenger of Allah and to the Muslim leadership."<sup>55</sup> In the same vein, in Saudi Arabia, the notion of a pre-marital medical

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<sup>47</sup> Rajab Abu Maleeh (consultant), Pre-marriage Medical Checkup: Islamic Perspective? Issued 21/06/2009, Available at <http://www.onislam.net/english/ask-the-scholar/family/178232.html>, accessed on 25/12/2013

<sup>48</sup> Qur'an 3:38

<sup>49</sup> Qur'an 25:74

<sup>50</sup> Ibn Majah, *Sahih Sunan Ibn Majah*, Hadith 1/333

<sup>51</sup> Shabina Arafat, "Islamic Perspective of the Children's Right: An Overview" *Asian Journal of Social Sciences and Humanity*, Vol. 2, No. 1, February 2013, 299-300. See also Ali, Hammudah Abd al, *The Right of Pure Lineage: The Family Structure in Islam* (USA: American Trust Publications 1977), p.196

<sup>52</sup> This is the opinion of Abd al-Aziz b. Baz, Abd al-Karim Zaydân, Muhammad Ra'fat Uthman, and Muhammad Abd al-Sattar al-Sharif.

<sup>53</sup> Muhammad Ibn Ismail, *Sahih Al-Bukhari*. Reported by Aishah in an issue of ransoming Barira, then the Prophet (s.a.w) was asked as follows: "Why is it that some men make conditions which are not in the Book of Allah? Any condition which is not in the Book of Allah is invalid even if it is stipulated a hundred times. The decision of Allah is more binding and the condition of Allah is firmer. The wala' (loyalty) belongs to the one who sets free." Available at [http://www.hizb-ut-tahrir.org/PDF/EN/en\\_polyc\\_pdf/2013\\_04\\_06\\_Jawab\\_Eng.pdf](http://www.hizb-ut-tahrir.org/PDF/EN/en_polyc_pdf/2013_04_06_Jawab_Eng.pdf), accessed on 20/02/2014

<sup>54</sup> Sheikh Abd al-Rashid Qasim, Mandatory Premarital Medical Examinations, issued on Thu, 01/01/2004, available at <http://en.islamtoday.net/artshow-403-3348.htm>, accessed on 25/12/2013

<sup>55</sup> Jamal Ahmed Badi, *Sharh Arba'in An-Nawawi, Commentary of Forty Hadith An Nawawi*, Hadith No. 7, p 155, available at <http://fortyhadith.iuu.edu.my/2002fortyhadith.com>, accessed on 07/02/2014

examination has been made mandatory by the authority especially in states where a disease is suspected to be prevalent.<sup>56</sup>

To sum up, the concept of pre-marital medical examination is not all about the protection of spouses, but it can still have an impact on the right of children. Islam provides for the children rights such as a child's right to healthcare and proper nutrition; a child's right to education and the acquisition of talents; a child's right to live in security and peace, and enjoy human dignity and protection under the responsibility of the parents.<sup>57</sup> These are the general responsibility and caring role of parents (as the primary providers). It is also the responsibility of the society and state to make sure that such rights are protected. Children rights in Islam are not just issues of jurisprudence, but also matters of the law. Thus, the rights have been also recognized in the Quran and Sunnah of the Prophet Muhammad (s.a.w).<sup>58</sup> Such rights *inter alia* includes: right to life skills, that is to say, they should have a right to be trained by their parents to perform the rituals of his or her religion. The importance of early training is that it allows religious practice to become an easy and acceptable habit that children will maintain and preserve. Of course, parents should be the role models for their children in terms of moral behavior. They also have the obligation to provide for their children with love, kindness and mercy and to avoid harshness and cruelty. But such can only be viable if the parents are alive or are fit to face the task.<sup>59</sup> If for any reason children have lost the parental care which is ought to have been catered for by their parents, certainly such children would be sponsored by people other than their parents, and probably may not be suitable for their upbringing.

Notwithstanding, Shari'ah on the other hand encourages Muslims to take up sponsorship and to provide care for those children in need. In compensating for the loss incurred through providing such care, sponsors are promised the great reward of being in the company of the Prophet himself in Paradise. The Prophet (s.a.w) to this effect said: "I shall be in Paradise together with the sponsor of the orphan just as they two are. And he pointed his index and middle finger. There should be no discrimination between an orphan whose father is known and an orphan picked up without known ancestry."<sup>60</sup> Negligence in carrying this out compromises the parent's responsibility, leading to possible further negligence later on for their children. Once the foundation is lost, nothing remains to build on afterwards. It is reported that Imam Ali (r.a) said: "Teach your children things you did not learn when you were their age for they have been created for a time that is different from your time."<sup>61</sup> Therefore, based on the above prophetic traditions, one may conclude that the children fate and morality depends on the capability of their parents. If the parents are alive and medically fit to carry out their responsibility, the future prospect of the children will be bright.

#### **4. The Role of a Mufti (Islamic legal expert or jurist-consult) in explaining the *Maqasid Ash-Shari'ah* (objectives of Shari'ah)**

The concept of *Maqasid ash-Shari'ah* simply explains the wisdom behind a ruling in Shari'ah. It is a methodology 'within' the Islamic scholarship that addresses the Islamic mind and Islamic concerns.<sup>62</sup> Hence, the concept is indeed significant to the rules of interpretation in Islamic jurisprudence, more especially in this

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<sup>56</sup> Sheikh `Abd al-Rashid Qâsim, Mandatory Premarital Medical Examinations, issued on Thu, 01/01/2004, available at <http://en.islamtoday.net/artshow-403-3348.htm>, accessed on 25/12/2013

<sup>57</sup> UNICEF, Children in Islam: Their Care, Development and Protection, summary, (UNICEF, 2005), 2

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Ibid, 7-8

<sup>61</sup> Ibid, 10

<sup>62</sup> Jasser Auda, *Maqasid al-Shari'ah: an Introductory Guide* (International Institute for Islamic Thought IIIT, 2008), 1-52

contemporary society where issues are recurrent. In fact, *maqasid ash-Shari'ah* can assist muftis to clarify and resolve a particular problem within the actual intent of Shari'ah.<sup>63</sup> However, making resort to *maqasid ash-Shari'ah* by a mufti should not be a license for him to deviate from the basic principles of Shari'ah.<sup>64</sup> Issuance of fatwa in line with the *maqasid ash-Shari'ah* can be considered in Islam as a kind of making an independent effort (*ijtihad*) to resolve or clarify a matter within the context of Shari'ah. Thus, in the Qur'an the Almighty Allah has described such effort as *jihad al kabir* (the great struggle). To this end, Allah (s.w.t) said, "wa jahidhum bihi jihadan kabiran- ...but strive against them (by preaching) with the utmost endeavor with it (the Qur'an)." That is to say, by making effort to understand a divine revelation and to impact same on others, one is said to have been participated in a great jihad.<sup>65</sup> In yet another verse, the Almighty Allah said, "ina fi dhalika la' ayatin bil mutawasimin. Surely! In this are signs for those who see (or understand or learn the lessons from the signs of Allah.)"<sup>66</sup> The Almighty Allah also says: "...Fa tabiru ya ulil absar- Then takes admonition, O you with eyes (to see)."<sup>67</sup>

*Ijtihad* therefore, plays a significant role in developing a positive law through extraction of new rules from the Shari'ah sources.<sup>68</sup> To this end, Imam Al Ghazali pinpointed out three essential elements as significant to development of new rules in Islamic jurisprudence, namely: *ahkam* (rules), *adilla* (sources) and the means by which the rules are extracted from these sources which ultimately includes the examination of the qualifications of the extractor i.e the *mujtahid* (jurist).<sup>69</sup>

The term *maqasid* is therefore a subjective phenomenon, which according to Al- Shatibi, cannot be unanimously agreed upon. It is dynamic and subject to change in accordance with changing of times and cultures.<sup>70</sup> Therefore, it is the responsibility of muftis or jurists to examine and consider the *maqasid ash-Shari'ah* for each and every case based on the objective that is to be achieved. The fundamental role of a mufti (a specialist in handling every problems falling within the purview of the Shari'ah) is the issuance of Islamic legal opinion to either the *mustafti* (questioner) or entire public.<sup>71</sup> Muftis are among the Islamic jurists who played a fundamental role in the construction, elaboration and continued operation of Shari'ah.<sup>72</sup> A mufti is a specialist who is legally and morally responsible to the society in which he lives in.<sup>73</sup> He plays some roles which *inter alia* include: issuing a legal answer to a question asked by people, as well as a legal answer to a question asked by judges in respect of cases brought before them.<sup>74</sup> Meanwhile, in exercising his role, he must be able to investigate the textual sources of the law by means of the proper tools of legal reasoning, and as well,

<sup>63</sup> Ibid

<sup>64</sup> Asyraf Wajdi Dasuki and Nurdianawati Irwani Abdullah, "Maqasid Al- Shari'ah, Maslaha and Corporate Social Responsibility", *The American Journal of Islamic Social Sciences* 24:1 P30-31

<sup>65</sup> Qur'an 25: 52

<sup>66</sup> Qur'an 15:75

<sup>67</sup> Qur'an 59:2

<sup>68</sup> Wael B. Hallaq, Was the Gate of Ijtihad Close, *International Journal of Middle-East Studies*, Vol. 16 No. 1 (March 1984), 18-19

<sup>69</sup> Cited in Ahmad Zaki Hammad, Ghazali's Juristic Treatment of the Shari'ah Rules in Al- Mustasfa, available at <http://i-epistemology.net/philosophy/309-ghazalis-juristic-treatment-of-the-shariah-rules-in-al-mustasfa.html>, accessed on 15/02/2014

<sup>70</sup> Robert T. Crane, Maqasid al- Shari'ah: A Strategy to Rehabilitate Religion in America, Eightieth Birthday Celebration, IIIT, available at <http://www.iiit.org/Portals/0/pdf/Maqasid%20al%20Sharia.pdf>, accessed on 27/12/2013

<sup>71</sup> Sayyid Muhammad Yunus Gilani, "Jurists and Legislators in Islam: Origins and Classification of the 'Ulama'", in *Contemporary issues in Islamic Law*, Abdul Haseeb Ansari (ed), (New Delhi: India, Serial Publications, 2011), 3

<sup>72</sup> Hallaq B. Wael, *An Introduction to Islamic law*, (UK: Cambridge University Press, 2009), 8

<sup>73</sup> Ibid, 9

<sup>74</sup> Ibid

he must be capable of doing *ijtihad* irrespective of his *Madhhab*.<sup>75</sup> To this end, in examining the role of mufti in Islam, Abu Amr Uthman bn al Salah, (a Shafi'ite jurist d. 643 AH/1245 AD) has divided the role of mufti into two, namely: there are muftis who played an independent role (*mustaqill*) and there are those whose roles depend on the others (*ghayr mustaqill*). The former (*mustaqill*) category has been identified as an absolute role which derived from the expert knowledge of the mufti, such as his knowledge of *Usul al- fiqh*, Qur'an, Sunnah, reams of positive law (having mastered its difficulties and its precedents) and as well as the science of disagreement (*masa'il al- khilaf*) and arithmetics.<sup>76</sup> Whereas, the latter category (*ghayr mustaqill*) has been divided into four, namely: *muqallid*, one whose role follow the positive doctrine of the founding master or absolute *mujtahid*; a limited *mujtahid* (*muqayyad*), who is fully qualified to confirm and enhance the doctrines of the absolute *mujtahid*; the third division is those whose role is articulated within the confine of *wujuh* and *turuq* (*as'hab al wujuh and turuq*). This division is inferior to the previous one; the role of the mufti in this category is known by heart based on the doctrines of his imam (*Ala madhhab imamihi*) and his qualification fall short of his predecessor; and the role of the last division is strictly based on *madhhab* because they are the carriers and transmitters of the *madhhab*, their knowledge does not go beyond the stage of competence, for they are weak in establishing textual evidence and in legal reasoning.<sup>77</sup>

Among the important job of muftis is to transmit the knowledge of law and practice to the entire public.<sup>78</sup> The place of *muftis* and their significant roles are regarded very highly in Islamic law. To this end, Imam Shatibi stated that "the *mufti*, stands before the Muslim community in the same place as the Prophet stood" for the purpose of transmitting knowledge to the community. The Prophet (s.a.w) was sent to all mankind and *jinn*<sup>79</sup> for guidance, as they (mankind and *jinn*) are created purposely to serve Allah.<sup>80</sup> Hence, no act of worship shall be considered valid unless it is done with the knowledge and in accordance with the Shari'ah.<sup>81</sup> That is the fundamental reason why the Almighty Allah commanded the believers to seek for knowledge. Thus, He said: "And We sent not (as our messengers) before you (O Muhammad s.a.w) any but men whom We sent revelation. So ask of those who know the scripture, if you know not."<sup>82</sup> The verse provides that Muslims are under obligation to consult with and seek advice from individuals known to possess knowledge and moral probity.<sup>83</sup> By virtue of this therefore, a mufti has also been obliged not to conceal the knowledge, as it is part of his responsibility to make the public to be enlightened. Furthermore, due to the significance of acquisition of knowledge in Islam, the Prophet (s.a.w) decreed it as mandatory upon Muslims male and female to seek for it. Thus, he said, "the acquisition of knowledge is obligatory upon every Muslim."<sup>84</sup> In yet another Hadith, the

<sup>75</sup> Hallaq, Wael B. *Authority, Continuity and Change in Islamic Law* (UK: Cambridge University Press, 2004), 5

<sup>76</sup> *Ibid*, 8

<sup>77</sup> *Ibid*, Pp 9-12

<sup>78</sup> Amalia Zomeno, "The Stories in the fatwas and the fatwas in History", in *Narratives of truth in Islamic law*, Boudouin Dupret, Barbara Driessens, Annelies Moors (eds), (UK: London, I.B. Touris & Co. Ltd., 2008), 25

<sup>79</sup> See Qur'an *Al-Jinn* 72: 1 where the Almighty said : "Say O Muhammad PBUH, it has been revealed to me that a group from (three to ten in number) of *Jinn* listened to this Qur'an. They said: Verily' we have heard a wonderful Recitation (this Qur'an)!" And also Qur'an *Saba* '34: 28 in which He said: "And We have not sent you (O Muhammad PBUH) except as giver of glad tidings and a Warner to all mankind, but most of men Know not."

*Jinn* are neither mankind nor animal but created out of fire. See Qur'an *Al- Hijr* 15:27 in which the Almighty Allah affirmed: "And the Jinn, We created aforetime from the smokeless flame of fire"

<sup>80</sup> Qura'an *Adh-Dhariyat* 51: 56 in which the Almighty Allah said: "And I (Allah) created not the *Jinn* and mankind except that they should worship Me (alone)."

<sup>81</sup> Ibn Arabi, M., Divine sayings: 101 Hadith Qudsi, *Mishkat al- Anwar*, Hadith 9, available at <http://www.mysticsaint.info/2011/03/divine-sayings-from-101-hadith-qudsi-html>, accessed on 30/11/2013

<sup>82</sup> Qur'an *An- Nahl* 16:43

<sup>83</sup> Amalia Zomeno, 25

<sup>84</sup> Ibn Majah, *Sunan Ibn Majah* Volume 1, Hadith No.337. in the Hadith the Prophet (s.a.w) was reported to have

Prophet (s.a.w) said: “whoever set his foot on a track for the acquisition of knowledge, Allah will pave the way to *Al-jjannah* (Paradise) easy for him.”<sup>85</sup>

## 5. Conclusion

The institution of marriage in Islam has been considered as a vital instrument for procreation, human evolution, human civilization and development. Thus, Islam does not take the issue of marriage less important, as it is a determinant factor for the fate and future of the younger generation. The objective of marriage is not all about giving birth to children, but to have qualitative children who can act as vicegerents and ambassadors of Allah and the community here on the earth. This could not be simply achieved unless children are been put on a proper and right track. Of course, it is the primary responsibility of parents to ensure the moral upbringing of their children so that in the end, they become the pride of the community. One of the fundamental factors that can lead to a successful marriage and sustenance of children moral behavior is to lay a proper foundation for them to survive in a peaceful and conducive atmosphere. Hence it shall be primarily the duty of their parents. To this end, prospective spouses should be medically fit and proper so that they may have an opportunity or will be able to take good care of their prospective children. The paper has identified that, among the major factors causing the high rate of the parental mortality in Muslims developing countries to the detriment of the prospective children, is due to nonchalant attitude of the would be parents concerning about their health status, especially before the marriage contract.

As the menace of the high rate of parental mortality continued to increase in the society, the children will certainly be the major victims. In view of this, the paper concludes that the pre-marital medical examination is the solution to such problem. Hence the concept of pre-marital medical examination should not be under estimated; neither should it be considered lightly just as a mere concept of *darurah* (necessity), but it shall be taken with all kind of seriousness, for it is a commandment from Allah (s.w.t). In fact, decreeing it as a pre-requisite to marriage contract is lawful, as it is a matter of derivation of the law from its source. To this end, the paper suggests the following:

- (1) governments should utilize the value of fatwa in line with the principles of Islamic jurisprudence in order to reaffirm the dynamism of Islamic law;
- (2) governments should introduce new rules that will mandate prospective spouses to conduct medical examination prior to their marriage, other than leaving it discretionary;
- (3) Spouses should always be fair and honest to themselves, thereby disclosing their problems to one another. In addition, parents and guardians should also fear Allah and also be honest in such circumstance;
- (4) governments should create an enabling environment for citizens to have access to at least the primary health care. This is to ensure and enhance the smooth implementation of the law;
- (5) governments should establish a strong body that can be saddled with the responsibility of educating public about the significance of pre-marital medical examination. This will make people to appreciate its significance better;
- (6) governments should establish a powerful institution that can oversee the affairs of orphans and parentless children. This could enable them have at least what they ought to have benefited from their parents had they been alive.

## Summary

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said that the acquisition of knowledge is obligatory upon every Muslim male and Female.

<sup>85</sup> Abu Dawud, *Sunan Abu Dawud*, Hadith No. 3634

In the paper, arguments have been canvassed and proofs have also been displayed as to the requirement for having a mandatory rule in Shari'ah regarding pre-marital medical examination among spouses in the society. In doing so, the paper has, beyond the classical understanding of Islamic jurisprudence, explained the concept of marriage and its objectives in Islam. This has indeed paved a way for a discussion to link the argument canvassed in the paper with the objectives of marriage under Shari'ah. The paper has further explained both the legal and jurisprudential evidences on the legality of pre-marital medical examination, and why there should be a need to introduce a new Islamic rule in order to make it mandatory on spouses. It has also been explained in the paper that Islamic injunctions should not be narrowly viewed, as Islam is a dynamic religion that accommodates new developments all the times. Of course, the role of muftis and jurists has been highlighted in that regards. In the end, based on the proofs outlined from the revealed sources, the paper concludes that the notion of pre-marital medical examination is beyond the concept of *darurah* (necessity). Hence, it is part and parcel of the Islamic injunctions formulated based on the principles of Islamic jurisprudence. Thus, the paper has finally suggests among other things that, governments should utilize the value of fatwa in line with the principles of Islamic jurisprudence in order to reiterate and reaffirm the dynamism of Islamic law.

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