

## Pre-Marital Testing for HIV: Should it be Mandatory or Voluntary?

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It is not at all surprising that the Church which, in the words of Pope John Paul II, is “expert in humanity”<sup>i</sup> and which, in the words of the Fathers of the Second Vatican Council knows shares the “joys and hopes, the griefs and the anxieties of the men of this age”<sup>ii</sup> would turn its concern and interest to the issue of pre-marital testing for the Human Immunodeficiency virus.

From the earliest manifestation of this new pandemic upon earth, the Church’s initial, and perhaps strongest, reaction to HIV and AIDS has been one of mobilizing heroic services to those infected with – or otherwise affected with – HIV. The Church also has responded with excellent education programmes to alert both the faithful and the general public to the risk of HIV transmission, especially through sexual intercourse, and to promote once again the Church’s traditional teaching as well as the only 100% “safe” means of HIV prevention – sexual abstinence before marriage and mutual faithfulness between two uninfected spouses.

Pastors of souls are sadly aware of the human weakness that often results in transgressions against the Church’s commandments with regard to sexual activity. For that reason, many such pastors have raised the question about whether or not the Church should require mandatory pre-marital HIV testing before allowing a couple to enter into the state of matrimony with full recognition and sanction by the Catholic Church and with the consequent dignity and grace that is conferred by the sacrament of marriage.

This topic requires much more analysis, debate, and reflection than can justifiably be offered within the confines of a brief article. The issues it raises, however, must at least be introduced within both secular and ecclesial contexts. Thus this writer sees his task more as describing the state of the question than as finding solutions or answers to the many-faceted and ramifications of mandatory pre-marital testing policies.

On the secular scene, there have been many attempts, within diverse cultural contexts, to mandate pre-marital HIV testing or, even more radically, to prevent those living HIV from entering into marriage. Most of those attempts failed miserably but, worse yet, left in their wake the scars of discrimination toward those affected by the pandemic. From a purely economic point of view, such mandatory testing policies should be subjected to a cost-benefit analysis. For example, when the state of Illinois, to be found within the United States of America, enacted legislation to require pre-marital HIV testing, candidates for marriage were forced to spend approximately U.S. \$20 million in order to contract for the tests at private laboratories. During the one and one-half years that this policy was in effect, only 52 HIV-infected persons were identified among the 250,000 people who were tested. Simply mathematical calculations would tell us that nearly \$500,000 was spent for each HIV-positive person found.<sup>iii</sup>

The legal relationship between HIV testing and a person's right to marry came under scrutiny in India between 1998 and 2002, when Mr. X petitioned the court to clarify its previous judgment that suspended his right to marry in view of his positive HIV status. In December 2002, the Supreme Court of India reversed its previous finding and recognized that those already known to be infected with HIV could marry provided that such persons revealed their HIV status, when known, to his/her prospective spouse.<sup>iv</sup>

The ecclesial aspects of the pre-marital HIV testing debate require even greater discernment than those of the secular arena. The Church deals not only with legal and social institution of marriage but the sacred reality that the sacrament of matrimony creates “a covenant by which a man and a woman establish between themselves a partnership of the whole of life” and “is by its nature ordered toward the good of the spouses and the procreation and education of offspring”.<sup>v</sup> Neither *The Code of Canon Law* nor *The Catechism of the Catholic Church* make specific reference to HIV and AIDS in their respective treatments of marriage. In view of the absence of specific teaching or law in this regard, and of the fact that the priest (or deacon) is not the minister of the sacrament of matrimony<sup>vi</sup>, it is quite perplexing to hear that, of their own accord, some members of the clergy have enacted their own mandatory pre-marital HIV testing policies. On numerous occasions, this writer has heard the following remarks from priests (and deacons): “I insist that couples contemplating marriage to be tested for HIV, because I am not going to ‘marry’ them, if one of them is infected with this virus!”

One final canonical consideration should be mentioned here. Canon 220 states explicitly that “no one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy.”<sup>vii</sup> Thus it appears that, while a priest (or deacon) rightfully may be motivated, out of pastoral solicitude, to encourage a couple preparing for marriage to voluntarily submit to HIV testing (and to receive the result of that testing as their own unique property), he has no right to require or mandate such pre-marital testing.

This writer fully recognizes and respects the fact the bishops of the Church have the right and duty, handed on to them by apostolic succession, to define doctrine, set ecclesiastical policies and determine advocacy on public policy with regard to this and many other human concerns. Some bishops already have grappled with the issues related to pre-marital HIV testing; in so doing, they listened, with keen intellect and pastoral sensitivity, to the medical and scientific experts, the guardians of public health, and the lived experience of those living with or otherwise affected by HIV and AIDS. Thus it seems appropriate to share the wisdom of some individual bishops and episcopal conferences in this regard:

?? The bishops of the United States wrote: “With respect to HIV/AIDS, it is important to infringe as little as possible, in light of community needs, on individual liberty, privacy and confidentiality ... Although specific exceptions might be made, universal mandatory testing does not seem justified at this time.”<sup>viii</sup>

- ?? The bishops Uganda counseled the following: “Before marriage, each member of a prospective couple should be encouraged to choose wisely and look into his or her past. If there has been risky behaviour, the couple should be advised of the **optional** pre-marital HIV test, clearly pointing out the pros and cons and the consequences of the test result.”<sup>ix</sup>
- ?? The Social Commission of the bishops of France maintained: “It is asserted that testing is most effective when it is willingly sought and not undergone because it is mandated. The effectiveness of testing is based on trust.”<sup>x</sup>

Whatever ecclesiastical policies are enacted or public policy is advocated by the respective hierarchies of the world with regard pre-marital HIV testing, all Catholics, but most especially those engaged in the Church’s health care, social service and pastoral ministry, need always to keep before us the “roadmap” for a response to HIV and AIDS that is filled with both charity and justice, as Pope John Paul II taught:

Besides your professional contribution and your human sensitivities toward all affected by the disease, you are called to show the love and compassion of Christ and his Church ... to express love, solidarity, and service and to exclude selfishness, discrimination, and neglect.<sup>xi</sup>

<sup>i</sup> Pope John Paul II, Address to Vatican AIDS Conference, November 1989.

<sup>ii</sup> Church in the Modern World, n. 1

<sup>iii</sup> Michael Closen, et al. “Mandatory Premarital HIV Testing: Political Exploitation of the AIDS Epidemic,” *Tulane Law Review* 71, 98 (1994).

<sup>iv</sup> “Mandatory Pre-Marital Testing,” *Positive Dialogue*, Newsletter #15, Lawyers Collective HIV/AIDS Unit.

<sup>v</sup> *Catechism of the Catholic Church (CCC)*, 2<sup>nd</sup> edition, 1994, Libreria Editrice Vaticana, n.1602.

<sup>vi</sup> “... the spouses as ministers of Christ’s grace mutually confer upon each other the sacrament of Matrimony by expressing their consent before the Church”, CCC, n.1623.

<sup>vii</sup> *Code of Canon Law*, canon 620.

<sup>viii</sup> United States Conference of Catholic Bishops, *Called to Compassion and Responsibility: A Response to the HIV/AIDS Crisis*, November 1989.

<sup>ix</sup> *The AIDS Epidemic: Message of the Catholic Bishops of Uganda*, 8 September 1989.

<sup>x</sup> *SIDA: La Société En Question*, Commission Sociale de l’épiscopat. Bayard editions, 1996, n. 44.

<sup>xi</sup> Pope John Paul II, November 1987.