

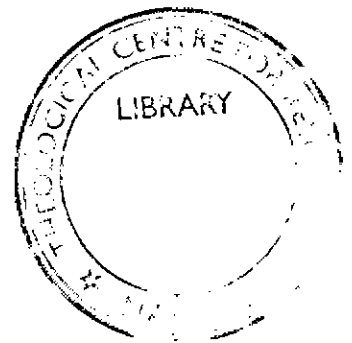
TANGAZA COLLEGE

THE CATHOLIC UNIVERSITY OF EASTERN AFRICA

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**Canonical Implication of Contraceptives among Discordant Couples on a
Canonical Marriage: A Case Study in Kibera Slums of Nairobi**

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Dr. Andrew Lujuo, STD.**



**A Long Essay Submitted to the Faculty of Theology in Partial Fulfillment of
the Requirements for the Ecclesiastical Degree of Baccalaureate in Sacred
Theology**

Nairobi, 2009

DECLARATION

I hereby declare that the materials used in this work have not been submitted for any other academic Institution. All sources have been cited.

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This thesis has been submitted for examination with my approval as the college supervisor.

Signed..... *Andrew*

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“He kept the law of the Most High, and was taken into covenant with him;
he established the covenant in his flesh, and when he was tested he was
found faithful”.

(Sirach 44:20)

DEDICATION

To my beloved family, relatives, friends and all people of good will.

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ABRIVIATIONS

FC	Familiaris Consortio
GS	Gaudium et Spes
HV	Humanae Vitae
HIV	Human immunodeficiency virus
AIDS	Acquired immune deficiency syndrome
Gen	Genesis
Mat	Matthew
Jn	John

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GENERAL INTRODUCTION

This essay is situated in an African context particularly in Kibera Slums of Nairobi. Life in the slum is stricken with socio-economic hardships with ever growing poverty, which may accelerate some moral and legal problems like prostitution and drug abuse. In my visit to Kibera slum in the year 2009, I came across one Christian family who wedded in the Church in 2005 (names are reserved). The spouses now have two children whom they are bringing up with tremendous hardships because none of the spouse has a reliable source of income. This couple had promised to be faithful to each other from the very beginning of their marriage. Unfortunately, the husband was found to be HIV positive three years later. He was not ready to disclose to me how he was infected but from his way of living it could suggest some sort of marital unfaithfulness. I was able to arrive at this conclusion because there was a moment when the wife had to go home during her early days of maternity of their second child. She had to go home because the husband could not help her as he was busy engaged in his daily work in a certain factory in Nairobi. During this time, the husband associated himself with some women who happen to be his neighbors. This was known because when the wife returned, she learned of it and forced the husband to go for the HIV test who was then found to be HIV positive.

The term “discordant” originates from the Latin word *discordare* which simply means to disagree or be in disagreement¹. Discordant couple refers to two sexual partners in usually a stable monogamous relationship, in which one person is a HIV positive while the other is not.² This follows from a medical procedure whereby one of the partners happens to be HIV positive and notifies his or her partner. After the identification, actions must be taken to reduce the likelihood of transmission of the virus to the negative tested partner.

These partners are now facing a serious problem which has disrupted peace in their family at a very early stage of their marital relationship. Lawfully and sacramentally they are perpetually bound together by their marital covenant which of its own nature is permanent and exclusive (*Canon, 1134*). The life of the wife is at risk in case they are to continue with their conjugal life posing a bigger challenge on the good of the children.

The threats of HIV/AIDS have become a great problem to marriages as it poses a challenge on the very nature of marriage - the good of the children (*bonum prolis*) and the good of the spouses (*bonum coniugum*). It becomes more problematic when only one of the couple is affected. The two are faced with more challenges and more moral decisions to undertake. The central questions which this essay intends to answer are: *What is marriage according to Canon law? What effect do the uses of condoms have to the nature of this canonical marriage? Are there any other possibilities to sustain a discordant marriage other than the use of condoms?*

In attempting to answer these questions, I will use different tools and sources but relying more on the Church’s Magisterium and the 1983 Code of Canon Law of the Latin

¹ BROWN, L., *The New Shorter Oxford English Dictionary*, 687.

² www.medical-dictionary.thefreedictionary.com

Rite. I will explore in details the Church's understanding of marriage in the light of Canon law. In addition, I will examine the notion of contraceptives like condoms and show why the Church is against the use of such contraceptives. Due to the fragility of this topic, I will at the end offer my views and the views of some outstanding Catholic theologians as a tentative solution to the many pastoral challenges on this area in marriage.

The term contraceptive originates from two Latin words: *contra* and *concept* which simply means against and conceive respectively³. It is a means or a device used to prevent union between an ovum and the sperm during or before sexual act⁴. Contraceptives, therefore, interfere with procreation in the conjugal act. These render sexual act not to be open to procreation. Such means attempt to suppress some or all of the essential ends of marriage like upbringing and education of the children (Canon, 1055.1). The Church considers marriage as a natural institution and for this reason refuses any act that attempts to suppress the upbringing of children (HV, 10/14).

By canonical form of marriage we refer to the marriage celebrated in the presence of an ordinary or a parish priest or a delegated priest or deacon and officiated before two witnesses⁵. It is an external legal prerequisite for the validity of a given Catholic marriage. Thus a Canonical form of marriage has two elements which are: authorized witnesses and two witnesses. The exchange of the matrimonial consent must take place in front of an authorized minister of the Roman Catholic Church and of two witnesses. Authorized ministers comprise of an ordinary, a parish priest or any priest or deacon but

³ BROWN, L., *The New Shorter Oxford English Dictionary*, 496.

⁴ P.S.KEANE, *Sexual Morality*, 123.

⁵ JOHN B., JAMES C., THOMAS G., *New commentary on the code of canon law*, 1327.

delegated by the two above. But for the witnesses, it is just anybody present who can see, hear and understand what is taking place.

Chapter I

The Notion of Marriage in Canon Law

1.0 Introduction

In this preliminary chapter, the notion of marriage will be explained in detail. I shall base my arguments in the juridical perspective of marriage. By the end of this chapter, we shall be able to understand what constitute marriage from the canonical perspective. Thus, our main source will be the 1983 code of Canon law as well as the Church's Magisterium. We will explain the nature, meaning and scope of marriage in accordance with the principles of the Canon law. The current pastoral situation will also be examined especially some of the main challenges to marriage in our African context.

In short, chapter one of this essay intends to give the meaning of marriage basing on the canonical understanding. This chapter will give a detailed answer to the question posed in the introduction, "*what is marriage according to Canon law?*" It will give a juridical perspective of marriage as well as showing how such marriages are protected by the Canon law.

1.1 Canonical marriage

Canonical marriage simply refers to a marriage which is recognized in the sphere of Canon Law in the Catholic Church. This presupposes other types of marriage that are outside the Latin rite. It is clearly indicated that the code of Canon law concerns only the Latin Church (*Canon*, 1). Thus a canonical marriage refers to a legally recognized Christian marriage within the Latin Rite of the Roman Catholic Church. It is a marriage celebrated in the legal context of the Latin Roman Catholic Church.

The code of Canon law defines marriage as a covenant by which a man and a woman establishes between themselves a partnership of their whole life and which is ordered by its nature to the good of the spouses, procreation and the education of the offspring (*Canon* 1055§1). The term *Covenant* brings in marriage the aspects of mutual rights and obligations as well as the sacredness of marriage. A covenant is for life as opposed to a contract which is temporary. Thus, marriage once entered and consummated becomes indissoluble and firm but can only be terminated by death. By consummation we refer to the conjugal act between the spouses which must be done in a human manner, that is with that understanding and freedom which is necessary for a morally responsible person.⁶ A consented marriage is said to be a ratified marriage only when it is not yet consummated. But, lawfully, marriage is referred to as a canonical marriage when it is validly ratified and consummated.

Canon lawyers used the term *covenant* purposely to offer us a description of the marital agreement and its responsibilities. The term covenant is borrowed from the scriptures to denote the relationship between Israel and Yahweh, (Exod. 19:5). Some Canon lawyers like Ladislaus Örsy supports this idea by saying that the term covenant

⁶ L. ÖRSY, *Marriage in Canon Law*, 68.

was eminently suitable for bringing up the sacred dimension to the juridical spheres⁷. Marriage is not merely a secular reality but it has also some divine elements. It is even by God's command that a man and a woman are given a divine vocation to multiply and fill the earth (Gen. 1:22). The two fulfill this obligation by having a stable and suitable environment where together they will bring up their offspring.

Since for Christians marriage has been raised to a dignity of a sacrament by Christ, then the covenant is between God and the couples,⁸ just as there is a union between Christ and the Church (Eph 5:32). As Christ and the Church constitute one body, so also the two partners become one body. Their oneness here is not numerical but the inseparable unity that is established between them. This union is of mind, heart and body. There has to be knowledge of one another, love to each other and sharing of conjugal gifts. Therefore, this mystery calls for fidelity and responsibility from the spouses as they freely express in their matrimonial consent.

Furthermore, a canonical marriage consists of a life-long-partnership. Life long partnership or consortium remains a key term in legal marriages. It denotes an intimate relationship between the couples which has a nuance of sharing and possessing all they have and what they are in common throughout their life. Theodore Mackin affirms that it seems fair to say that in the code of canon law the essence of marriage is therefore the right to canal copula which is ordered for procreation and it has the qualities of permanence and exclusivity.⁹ Permanency denotes a life-long commitment to one another while exclusivity implies fidelity and amicability. The right to procreation is not to be

⁷ L. ÖRSY, *Marriage in Canon Law*, 50.

⁸ L. ÖRSY, *Marriage in Canon Law*, 51.

⁹ T.MACKIN, *What is Marriage*, 211.

interfered with by any means and the couples should share whatever they have and what they are in common.

Marriage bond or covenant cannot be terminated and it is for life. Marriage is to be located within the categories of being of the couples.¹⁰ The fact of Christ raising marriage to a level of a sacrament, it becomes indissoluble. This is affirmed in the code, "...a valid matrimonial contract between the baptized cannot exist without being by that fact a sacrament" (Canon 1055§2). In the matrimonial consent of the two, faith is essential among the baptized. If the two lack faith, as Pope John Paul II said, the pastor of soul cannot admit them to the celebration of marriage (FC, 68). Thus, it can be affirmed that all marriages between the baptized which are legally contracted have been raised by Christ into a dignity of a sacrament which cannot be dissolved.

Marriage is also ordered for the wellbeing of both the spouses and their children. The spouse's tendencies to wishing and intend good to one another is an expression of their deep love to each other. The goodness of spouses includes physical, emotional, intellectual and spiritual welfare which is their common good.¹¹ Anything which is contrary to this may be considered as an illicit practice within the spheres of a legal marriage. Moreover, the couples have a legal demand to care for and educate their offspring in an integral manner (Canon, 1055). It is however, the mission and a task of the spouses to transmit human life in a human and Christian way (GS, 50). It is the right of the children to be cared for by their parents and be brought up in a family.

Marriage in the code of Canon Law is considered valid between a man and a woman who intend to marry and exchange their matrimonial consent by observing the

¹⁰ T.MACKIN, *What is Marriage*, 203.

¹¹ L. ÓRSY, *Marriage in Canon Law*, 53.

canonical form of marriage. The Canonical form required here is that any catholic marriage must be contracted in the presence of the local bishop or the parish priest or any priest or deacon delegated by either of them, with the presence of two witnesses (Canon 1108§1). This should be within the territory of a particular ordinary for the validity of the act. Here the terms "valid" and "validity" implies that the Catholic Church will not recognize as substantially adequate marriages contracted outside this canonical form. The presence of either a bishop or a parish priest needs an appointment while the witnesses are just anybody present who can see, hear and understand what is happening.

Most canonists agree that the procreation and upbringing of children is a unique element in marital union which distinguishes it from all other unions.¹² This union is between those who, when united and give one another to each other can promote the human race by upbringing of offspring. Marriage is an essential part of God's plan for humanity in which a man and a woman, exclusively and faithfully love each other in participating in God's creating design for the world. It is only a union between a man and a woman who are legally capable of contracting marriage.

Marriage has in it another character: indissolubility. Indissolubility refers to that moral obligation to uphold the permanency of marriage.¹³ Moreover, this mutual gift of two persons, this intimate union, as well as the good of the children, imposes a total fidelity on the spouses and argues for an unbreakable oneness between them (FC, 20). This implies that marriage by its very nature once entered cannot be dissolved. It is only death of one of the parties, as Bernard Siegal states, which can dissolve marriage.¹⁴

¹² T.MACKIN, *What is marriage*, 203.

¹³ L. ÖRSY, *Marriage in Canon Law*, 58.

¹⁴ B. SIEGAL, *Marriage according to the New Code of Canon Law*, 13.

Marriage is for life. Marriage in this case is not a contract for any contract has a time limit.

1.2 The nature of marriage

The term nature is derived from a Latin word *natura* which means birth or that which makes something what it is. It refers to that which makes something to be what it is. It is a condition without which a being cannot avoid for it to be. In talking of the nature of marriage we refer to that which makes marriage to be marriage. It is not sharing of life which makes marriage because if this sharing of life is absent, still the marriage stands. What constitutes the nature of marriage is its covenantal and sacramental aspects. If the two are eliminated, for the baptized, then there is no marriage. This is because, as some Canonists hold, the nature of this existence is a juridical bond which is created by the parties' mutual consent¹⁵. Pope Paul VI further said,

Marriage to be sure is not instituted solely for procreation; rather, its very nature as an unbreakable compact between persons, and the welfare of the children, both demand that the mutual love of the spouses be embodied in a rightly ordered manner that it grow and ripen. Therefore, marriage persists as a whole manner and communion of life, and maintains its value and indissolubility, even when despite the often intense desire of the couple, offspring are lacking (GS, 50)

The marital covenant in the Code of Canon law is strictly ordered to the well being of the spouses and upbringing and education of children (Canon 1055). Here there is no sense of hierarchy but the two ends are of the same importance. Ladislaus Örsy writes, "The enumeration, however, does not imply ranking: the two ends are joined into a unity; they are of equal importance, together they make up the integral purpose of

¹⁵ T. MACKIN, *What is marriage*, 334.

marriage,... the term end or *finis* is not used, but the verb ordered or *ordinatus* expresses the same thought.”¹⁶ Thus the conjugal love is ordered towards begetting and education of children and the wellbeing of the parents.

The good of the parents or *bonum coniugum* embraces physical, emotion, intellectual and spiritual welfare of the spouses throughout their life. This end is only achieved by the contribution of both especially in fulfilling their exchanged consent and wishing good to each other by their loving of one another. This love, as *Gaudium et Spes* stresses, “is uniquely expressed and perfected through the marital act,... expressed in a manner which is truly human, this actions signify and promote that mutual self giving by which spouses enrich each other with a joyful and thankful will” (GS, 49). Thus the intention of the spouses to love and accept each other in a loving relationship as a husband and wife is a precondition for the valid marriage otherwise the union become flawed or invalid from its very beginning.

Marriage is also ordered to the procreation and education of children. This is to say that by the reason of its very nature, marriage is invalidated by an antecedent and perpetual impotence whether on the part of man or on the part of the woman, whether absolute or relative (Canon 1084§1). If one or both of them had an antecedent impotence before the moment of consent then the marriage is rendered invalid. This implies that a post-matrimonial incurrance of impotence does not affect the validity of marriage. Impotence refers to the incapacity of a spouse to perform a complete conjugal act.¹⁷ It can be either organic or functional. An invalid marriage means that the actual marriage never took place. Thus, an invalid marriage is not recognized in the spheres of Canon law.

¹⁶ L. ÖRSY, *Marriage in Canon Law*, 52.

¹⁷ JOHN B., JAMES C., THOMAS G., *New commentary on the code of canon law*, 1284.

1.3 Essential properties of marriage

The essence of something refers to a quality which is inherent in that thing so much so that without it, the thing cannot be what it is. Unity and indissolubility are so essential to marriage that without them, we cannot have a true canonical marriage. The code of Canon law states, “The essential properties of marriage are unity and indissolubility, which in Christian marriage obtain a special firmness by reason of the sacrament” (Canon 1056). This canon draws an assumption that marriage has an essence which includes in its very nature, unity and indissolubility,¹⁸ that shares in a special way the union of Christ and the Church. The symbolism here is brought into its completion by the act of consummation rendering marriage absolutely indissoluble.

Unity implies union of one man with one woman excluding all other persons. Such union excludes polygamy, polyandry and extra-marital sexual relations but exalting monogamy and faithfulness to one another as long as both parties are alive. Fidelity cannot be divided, for despite many other reasons our human nature is too limited to carry out more than one relationship with the depth of love that a true marriage requires.¹⁹ There is a Swahili proverb: “*huwezi kutumikia mabwana wawili*” which literally translates: “*You cannot serve two masters*”. This saying demands for a commitment to any activity we decided to undertake. In the same way, in marriage we have to be faithfulness to one another by a total self giving to one another in love. In other words, it can be affirmed that marital love is absolutely indivisible though its unity can be destroyed or weakened by such acts of unfaithfulness among spouses.

¹⁸ L ÖRSY, *Marriage in Canon Law*, 58.

¹⁹ L. ÖRSY, *Marriage in Canon Law*, 204.

Infidelity in our world today is evident. There are many incidents of sexually transmitted diseases like HIV/AIDS among married couples which is a result of unfaithfulness on either of the parties. It is true that there are many ways in which people become infected by HIV virus but a big percentage is via sexual intercourse. This gratefully reflects that there is after all a lot to be said for the faithful, monogamous marriages.²⁰ Where is the faithfulness expressed in the marital consent? Are the couples just acting a drama during their moment of consenting having their witnesses as mere onlookers? This is the reason that we have these marriage laws to protect and harmonize the existing marriages. The laws are there to help the couples and not to limit them. They help them in their daily struggle to grow in their marriages.

1.4 Some Pastoral Challenges to Canonical Marriages in the Kibera Slum

Kibera slum is situated in Kenya in the province of Nairobi. It is the largest slum in Kenya but the second largest in Africa after Soweto of South Africa. It is situated in the south west of Nairobi encompassing a total area of 2.5 square kilometers. The slum is highly populated with an estimation of between 600,000 and 1.2 million inhabitants²¹. Thus, the living standards are very low with inadequate social services like poor housing and poor sewerage systems.

In reality, there are so many challenges to marriage in general. The challenges are even more when it comes to the Catholic marriage which has more demands than other forms of marriages. Therefore, it is in line with this demands that I have chosen five main

²⁰ D.LODGE, *Tablet. Humanae Vitae 40 years on How far have we come? Sex Love and the Modern Catholic*, 16-17.

²¹ <http://en.wikipedia.org/wiki/Kibera>

challenges which are more connected to unity and indissolubility of marriage. These challenges in fact, when faced with courage and faithfulness, do help to strengthen marriage either during preparations for marriage or even when marriage lasts.

1.4.1 Pre-ceremonial sex

In African context, it is a normal practice for a man to identify and even to live with his spouse before marriage. It is still common to hear many youths who are about to marry saying that they prefer to live for a while with their spouses before getting married. The rationale behind this practice is that some fear to marry women who are infertile. Right from the very beginning there is a sense of mistrust at least from one part. In such unions in a way, two people are telling each other: "I am neither sure of myself neither of you and I am not ready nor do I know how to give you the whole of myself".²² Here there is fusion but with confusion. This implies, according to such people, that fecundity is a precondition of marriage. This is unlawful because in a Christian marriage children are considered to be the fruits and gifts.

With the coming of Christianity to Africa and especially the emphasis reinforced by the code of Canon law, two aspects are emphasized - unity and indissolubility in marriage. On the contrary, the fact of indissolubility brought with it another threat among the youths - the fear of childlessness. The fear or doubtfulness of childlessness, rather than the fear of indissolubility, is one of the reasons for delaying Church marriages.²³ This brings in what most youths refer to as "*fecundity test*" by attempting extra marital relation so that when they discover the woman is pregnant then they plan to marry.

²² J. DOMINIAN, *The Church and Sexual Revolution*, 34.

²³ J. DOMINIAN, *The Church and Sexual Revolution*, 24.

This practice brings tension and suspicion among the partners putting trust and true love at stake. However, such practices may cause more problems like poverty, lack of proper commitment, unfaithfulness and even the problems of sexually transmitted diseases (STD's). Some African scholars and other Christian moralists agree that,

A marriage which begins on the basis of a trial becomes a different kind of relationship from one which begins on the basis of mutual commitment and responsibility. Both may achieve stability, but the first type rests on a nice equilibrium of input and output, on respect for each other's independence in certain spheres, provided certain minimal, mutual expectations are fulfilled. Each holds the other at a distance, imposing limits on the development of the relationship and accepting the limits imposed by the other.²⁴

Love cannot be experimented but can only be experienced and lived. Such extramarital unions are rejected by the code because they lack the canonical form, unity and indissolubility elements.

Moreover, the Church's tradition teaches that all sexual activities must be within the marital sphere. She considers all extramarital sexual relations as immoral acts. The reasons presented are that extramarital intercourse bruises human persons, their intimate relationships, and their personal integrity.²⁵ Sexual relations should signify Christ's union with the Church. Moreover, "sexual acts outside marriage cannot be authentic expressions of human love, for authentic love finds a valid full sexual expression only within the marriage covenant"²⁶. In practice, such relationships would seem to contradict many of the characteristics of wholesome sexual interrelatedness, and above all, to compromise the covenant fidelity presented by the Scriptures as an ideal.²⁷ Thus, there has to be a mutual consent between the man and the woman as well as enjoying the favor of the canonical form.

²⁴ J. DOMINIAN, *The Church and Sexual Revolution*, 27.

²⁵ R. LAWLER, J. BOYLE, *Catholic Sexual Ethics*, 181.

²⁶ J. KIPPLEY, *Birth Control and Marriage Covenant*, 114.

²⁷ A. KOSNIK, *Human Sexuality*, 149.

1.4.2 HIV/ AIDS pandemic

Another pastoral hardship experienced by some marriages is the problem of HIV/AIDS especially in the African countries. The pandemic is so severe that it poses a life and death challenge. This pandemic has rendered some couples to remain widows or widowers while in other instances children are left orphans. Any marital union which has become infected and affected directly by this pandemic, the good of the parents and the good of the children might be compromised. There are in fact many children suffering as a result of losing either one or both parents. Couples are called to fidelity in their marriages as a way to counter attack this disease and to stabilize their unions.

Most people think that the risk of contracting the HIV virus ends when someone gets married. In reality, with one getting married the risk doubles because the possibility of contracting has also doubled. It has doubled in the sense that the virus has now two entries: contracting it by ones infidelity or contracting it from one's partner in case one is unfaithful to the other. In any marriage, the couples promise fidelity and they must live it. Pastors of soul must care and nourish marriages which are under their care. They have to educate and direct their married flocks towards the true way of living their covenant of marriage.

1.4.3 Polygamy

The code of Canon law faces sharp challenges especially in Africa, where traditionally polygamy was practiced. Polygamy is against the aspects of unity and indissolubility in marriage. Marrying more than one wife was a common phenomenon in

traditional Africa. By traditional Africa we refer to the pre-Christian Africa. The polygamous marriages were guided by customs of the respective societies. The immediate problem with such customary marriages is that people in such unions do not want a stable, Church marriage.²⁸ In such situation, there is no security and even the sharing of responsibility is at risk without mentioning the true loving of one another. The code calls for a stable and exclusive relation.

Polygamy refers to marrying more than one wife. The implication of having many wives was to have many children. Traditional Africans embraced the value of procreation. Polygamy was therefore seen as a source of power and prestige. For example among the agrarian societies, many children and wives would in return provide labour hence maximization of production. Wives and children were almost reduced to a source of labour. Moreover, women were objects of pleasure and procreation.

This practice was totally incompatible with Christianity. The early missionaries especially from the 18th century strongly condemned polygamy and viewed it as evil. Wives were there to satisfy their husband's needs. Here the aspects of mutual love and respect were lacking. This is also unaccepted in our present code which view marriage as a covenant by which a man and a woman establish between themselves a partnership of their whole life (Canon 1055). This totally contradicts the practice of polygamy.

The Church's Magisterium further teaches that polygamy directly negates the plan of God which was revealed from the beginning, because it is contrary to the equal personal dignity of men and women, who in matrimony give themselves with a love that is total and therefore unique and exclusive (FC 19). The two are no longer two but one (Mat 19:6). The oneness which exists between the married couples was willed by the

²⁸ B. KISEMBO, L. MAGESA, *African Christian Marriage*, 23.

Divine from the very beginning, (Gen 2:24). Complimentarity can only exist between equals and not between the un-equals. “From any valid marriage arises a bond between the spouses, perpetual and exclusive by its nature; ...” (Canon 1134). The exclusivity and perpetuity here recalls canon 1056 which highlights the properties of marriage which are unity and indissolubility. One person cannot be bound to several persons whether simultaneously or successively. The conjugal communion can never be divided, but only be shared between the couples.

1.4.4 The Western Sexual Revolution

The 18th century enlightenment ideologies had the traditional Christian morality as one of its targets of attack. This was the beginning of ideas like utilitarianism, liberalism and geocentricism. This can be seen as the beginning of the sexual revolution which reached its climax in the mid 1900’s with the introduction of some contraceptives for example the *pill*. The revolution no longer consider sexual matters as something private but something which could now be discussed openly among the married and even the unmarried. The revolution brought with it sexual permissiveness in both extramarital sexual relations and multiple sexual partners.²⁹ In the wave of the revolution, sexual matters do not just end up with discussion but conjugal relations are being practiced among the youths as well as multiple marital infidelities. There are also some incidents of infidelity among the married which results from the wave of sexual revolution which brought with it *sexual permissiveness*³⁰. This was opposed to the traditional Africa where sexual purity was glorified.

²⁹ B. BUJO, M. CZERNY, *AIDS in Africa*, 21.

³⁰ B. BUJO, M. CZERNY, *AIDS in Africa*, 21.

As most youths are swept away by this sexual revolution, there are also a number of mal-practices like putting on miniskirts, tight clothes, and pornographic videos among many others which pose lots of questions on marriage. Many parents reduce the upbringing of children to only feeding and taking them to school but parents must attend also the emotional and spiritual needs for their children³¹. They have forgotten their role to bring up their children into a Christian manner. The Church teaches, “The task of giving education is rooted in the primary vocation of married couples to participate in God's creative activity ...since parents have conferred life on their children, they have a most solemn obligation to educate their offspring” (FC, 36). This is to bring up their children in an integral manner.

1.4.5 The Use of Contraceptives

This is another challenge to most people especially in Africa. The challenge is both on the education on how to use them as well as the effectiveness and the effects of such contraceptives. Furthermore, in another sense, the challenges are also moral and social as the Church's teaching which is against the use of contraceptives (HV, 14). Any sexual act which is intended with the use of contraceptives is never justified.

The presence and authorization of contraceptives may have some other challenges to especially Christian marriages. With the use of contraceptives like the male condoms or even the oral pills which impede conception may encourage sexual promiscuity and marital infidelities. Most people will agree that there is a need for the Church to put more emphasis on her teaching on Catholic marriages as been a sacrament as well as a social reality.

³¹ L ÖRSY, *Marriage in Canon La*, 53.

Despite the fact that contraceptives are forbidden, there is a serious question on their effectiveness. Most of these contraceptives are stored in bad conditions hence even adding more problems on their users. A good example is the condom which is supposed to be stored in a certain degree of temperature for it to maintain its already limited effectiveness of preventing the HIV and other sexually transmitted diseases. In most Africa's rural population where living standards are very low and even the climatical conditions are terribly hot, it becomes very hard to have condoms withstanding the climate. Furthermore, in urban or even in rural clinics condoms storage in cool places is very hard due to the tropical heat.³² There exposure to higher temperatures than required may damage them hence maximizing their risks on the users.

Conclusion

In a concluding remark, marriage is an institution with its own kind of demands. In marriage, there exist some juridical procedures which render marriage to become ecclesiastically controlled. Marriages are not private issues but both personal and communal realities hence they should be guided by the society. So to enjoy the favor of law, couples have to observe what the Church teaches both by the Magisterium as well as the code of Canon law. What is prohibited is not for private reasons but for the common good of the members. What contradicts the law should not be advocated for. This is because laws originate from God Himself. Who is man to contradict God? Thus, pastors of souls have the task to be heralds and shepherds in guiding the faithful towards the

³² R. NICOLSON, *God in AIDS*, 148.

truth. They should be able to teach the couples the truth about marriage and responsibilities attached to it.

Conjugal act within marriage should be natural and open to life and should be done in a human manner. Anything which jeopardizes this should be rejected. However, every concrete situation has to be studied carefully and always the good of the person has to prevail. Laws are there to help humanity reach their common goal. Laws in a way facilitate our daily living and daily practices. Laws are not to be seen as mere prohibitions but they have to be seen also as guiding principles.

The following chapter will deal with the notion of contraceptives. This chapter will examine the meaning and the use of contraceptives like condoms. The aim here is to be able to show illicitness and the effects of condoms use among married couples on the canonical marriage. Due to this illicitness, we will also propose some alternatives which are in turn licit practices which enhance the canonical marriage.

*This is supposed to be a
summary of the chapter.*

Chapter II

The Christian View of Contraceptives

2.0 Introduction

In this chapter, the notion of contraceptives will be examined in view of the Church's teaching. We shall examine some of contraceptives especially condoms and establish their effects on the users. Thus, at the end of the chapter, we shall be able to establish beyond reasonable doubt the morality or immorality of contraceptives.

2.1 The Notion of contraceptives

A contraceptive is a method, a device or a pharmaceutical drug that prevents pregnancy. They act as a barrier to prevent the male sperm from meeting the ovum. Contraceptives as the word itself suggests, is actively aimed at preventing conception. It is therefore any act of coition which is intended precisely to act against the procreative good.³³ Thus, contraceptives intercourse impedes procreation in any conjugal act among the spouses.

³³ R. LAWLER, J. BOYLE, W. MAY, *Catholic Sexual Ethics*, 153.

Contraceptives can be practiced either mechanically or chemically. Examples of mechanical contraceptives are devices like condoms or diaphragms, while those about chemicals deal with the use of biological chemicals like the morning after pill and the spermicides. All these methods aim at preventing conception. The use of contraceptives like condoms for instance, interferes totally with the unity and openness to procreation of the conjugal act. For this reason, it is unaccepted by the Church.

Apart from this act of separating the aspect of unity and procreativity, contraceptives also have lots of side effects to the human body as it will be pointed below. But in my treatment of contraceptives, I will narrow myself in the use of condoms relative to the discordant couples.

2.2 Contraceptives and the Canonical marriage

Contraceptive intercourse refers to any sexual intercourse where a physical or chemical barrier is used to prevent the meeting of spermatozoa with an ovum.³⁴ Contraceptives in general have the following as their end: countering over population, eugenic reasons, pregnancy control and prevention of sexually transmitted diseases (HV, 14). They therefore impede procreation whether in anticipation of the conjugal act, during it or while it is having its natural proceeding. Because one does not want intercourse to lead to the generation of life and one believes that the intercourse one has freely chosen is aimed at getting only pleasure, then one opts for contraceptives.³⁵ This implies a free choice to get rid of procreative aspect during the conjugal act. Here I will speculate more on the use of condoms.

³⁴ J. NNOONAN, *Contraception*, 1.

³⁵ W. MAY, *Sex and Sanctity of Human Life*, 79.

A condom is a sheath made of a thin latex rubber or polyurethane, which is worn during sexual intercourse to prevent male sperm from reaching the woman's body. It also prevents, to some extent, the sexually transmitted diseases. There are two types of condoms: male condoms and female condoms. Both do the same function but their difference is only on the usage. Condoms therefore render a sexual act impossible for procreation. Anthony Cosnik says further that "...contraceptives lead to greater self-centeredness, preoccupation with pleasure, manipulation and exploitation of the other, a break down of the moral character and infidelity"³⁶. The partners only aim at getting pleasure from such acts.

The use of condoms has some limitation in consummating marriage. Marriage ceremony is canonically brought into completion by an act of consummation by the partners. By consummation we refer to man's erected penis penetrating the woman's vagina, whether complete or partially and deposit some semen there.³⁷ The two elements here have to be noted: penetration and ejaculation inside the vagina. It is further agreed that any act performed while practicing some form of artificial birth control does not result in the consummation of a marriage.³⁸ In case one element is not fulfilled then we cannot talk of the ratified marriage as been consummated. This implies that one cannot use condom in the conjugal act during consummation. Even if one of the couples is a HIV positive, if they want to consummate their marriage they cannot canonically use condoms.

Again, condom use, even after consummation to some women can result to some biological and psychological problems on the side of the woman. The code tells us that

³⁶ A. KOSNIK, *Human Sexuality*, 127.

³⁷ J. BEAL, J. CORIDEN, *The New Comentary on the Code of Canon Law*, 1258.

³⁸ J. BEAL, J. CORIDEN, *The New Comentary on the Code of Canon Law*, 1258.

“matrimony is a covenant by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses ...”(Canon 1055§1). The good of the spouses refers to the sum of all the goods which flow from the interpersonal relationship of the spouses, which, at least as to their substance, bring about and promote the spiritual, intellectual, physical, moral and social good of the spouses.³⁹ Due to the problems like irritation and cervix cancer which may be caused by the use of condoms in the sexual act, the good of the spouses is affected negatively. Canonically, therefore, they are illicit means as they interfere with the natural marriage.

Furthermore, condoms have a big effect on the nature of marriage. They affect and damage the very core of marriage. This is affirmed by some theologians like John Kippley who says, “Contraceptives damages the marriage covenant in that they positively exclude in such relations all of the negative elements of marriage covenant. Those elements which call for a genuine self giving in love, those elements that requires that they put their faith and their life together in the hands of God”.⁴⁰ By the use of condoms the couples try to dodge responsibilities and cooperation with the creator. The use of condoms in the conjugal act, the couple eliminates the potential to procreation from the exercise of the marital act; they attribute to themselves a task that belongs to God alone.

2.3 The Church’s teaching on contraceptives

The Catholic Church view contraceptives as evil. The Church here bases herself on the original Divine law as well as the effects caused by these contraceptives on the

³⁹ J. BEAL, J. CORIDEN, *The Comentary on the Code of Canon Law*, 1245.

⁴⁰ J.KIPPLEY, *Birth Control and the Marriage Covenant*, 108.

human person. There are, however, a number of reasons as to why the Church is against the use of contraceptives in general. The reasons are as follow:

Firstly, the use of contraceptives is viewed as a way of using each other for selfish reasons. A partner is reduced to a merely instrument of pleasure. This is not the original purpose of the gift of sexuality. The husband and wife through the gift of their sexuality which is specific and exclusive to them develop that union of two persons in which they perfect one another, cooperating with God in the generation and rearing of new lives (HV, 8). Anything that jeopardizes the unity and procreativity of the sexual act is legally unacceptable in any Christian marriage. There is a higher end in a conjugal act than merely pleasure. God intended humanity to procreate through conjugal act though He also attached pleasure to it. Pleasure is merely an attachment.

Secondly, theologians argue that the choice to use artificial contraceptives can result in the dehumanization of the sexual intimacy and the trivialization of sex.⁴¹ Contraceptives put a lot of threats on the sexual intimacy. Through conjugal act, the spouses express their love and offer themselves to one another. Condoms for instance, put a barrier to this intimacy. Undoubtedly, the use of condoms on the part of males interferes to a greater degree with the intactness of the physical exchange.⁴² Pope Paul VI further argued that we must also recognize that an act of mutual love which impairs the capacity to transmit life which God the Creator, through specific laws, has built into it, frustrates His design which constitutes the norm of marriage, and contradicts the will of the Author of life (HV, 13). Our bodies are created by God in such a way that we are called to cooperate with the Creator in some aspects.

⁴¹ W. MAY, *Sex and Sanctity of Human Life*, 72.

⁴² J. DOMINIAN, *Christian Marriage*, 209.

Thirdly, marital infidelity and immoral behaviors can arise from the use of condoms. Condoms require neither self control nor self sacrifice. Any moment the couples need sexual intercourse they can have it even if the woman happen to be in her fertile days and avoid the responsibility of conception. The fear of responsibility in case of pregnancy is eliminated hence sexual promiscuity is accelerated. Even among the youths, sexual intercourse will be practiced without any fear of pregnancy or sexually transmitted diseases.

What will be the fate of the discordant couples? When one partner is affected, the whole marriage is weakened. It is weakened because there is no more peace in the family. This was the same case which was noticed on the discordant couple I visited in Kibera slum. There was a sense of despair and anger in their faces especially on the life of the HIV positive partner. Both the lives of their two children and the life of the mother were at risk. The use of condom will not help for it is morally wrong and canonically illicit. If they were to embark on the use of condoms, still there will be unrestlessness in their conscience. This is because the Church teaches that it is never lawful, even for the gravest reasons, to do evil that good may come of it (HV, 14). We further read from the scriptures, “and let us say, ‘Let us do evil so that a good may come’, their condemnation is just” (Rom 3:8).

There is no any circumstance where condoms are legalized just for the sake of pleasure. They are both immoral practices and illegitimate in any Christian marriage. Some African theologians like Bénézet Bujo and Michael Czerny agree that “for married couples in which one partner has been infected, the only solution is total abstinence”⁴³. Total abstinence implies self sacrifice for the sake of the other. In this situation, the

⁴³ B. BUJO, M. CZERNY, *AIDS in Africa*, 64.

discordant couples continue loving one another and though they do not practice their conjugal life.

2.4 Faithfulness, abstinence, self control and family planning

The Church is aware of the reality of over-population as well as the presence of sexually transmitted diseases. She has then come up with an alternative and acceptable means which should be adopted. This means is generally known as the Natural Family Planning. It is accepted that the Natural family planning is a genuine, practicable option which avoids the harmful physical and moral effects of contraceptives and it has many important good effects of its own.⁴⁴ Natural family planning differs from contraception in the sense that Natural family planning do not directly act against the procreative good. One of the natural planning methods is called the Rhythm Method which is based on observation of the monthly fertility periods of the woman. It rather acts on observation of the natural women's menstrual cycles. The couples make a choice to have sexual intercourse during fertile periods of a partner or refrain from sexual intercourse during the fertile periods of a partner if at all they have serious reason to avoid pregnancy.

Among the married couples, there is neither moral nor legal obligation that every time they have sexual intercourse the woman must conceive. If one refrain from sexual intercourse which would result into conception, one is not acting against the good itself but only one is refraining from acting.⁴⁵ Refraining from acting for some reasons is not against conception. This in fact, can be for the good of the children for instance spacing

⁴⁴ R. LAWLER, J. BOYLE, *Catholic Sexual Ethics*, 167.

⁴⁵ R. LAWLER, J. BOYLE, *Catholic Sexual Ethics*, 167.

their age or even educating the ones couples already have. To practice the rhythm method, the couples must be people with self control and able to abstain from the conjugal act periodically. The Church teaches that faithfulness is an interior requirement of the covenant of conjugal love which is publicly affirmed as unique and exclusive in order to live in complete fidelity to the plan of God, the creator (FC, 11).

This method regulates the family size through the practice of deliberately restricting marital relations to the assumed sterile periods of the menstrual cycle in order to avoid conception.⁴⁶ The rhythm method is based on three main assumptions. These assumptions are: *that the average life of spermatozoa is 72 hours, that each new ovum is released from the ovaries once a month and that the ovum lives only for 24 hours.* This method calls for the wife to be more observant to her own body and be ready and open in sharing with her husband. Under normal circumstances, she should be able to determine when she is about to become fertile through a long term observation of her body behavior and condition. However, this method has its limitation when menstruation is irregular. It is only applicable to women with regular cycles.

There is no juridical restriction on when the married couples to have sexual relations. The code of Canon law does not state exactly when couples should or should not have sex. It is left to the discretion of the couples so that they can also decide on the size of the family they can manage to bring up without much difficulties. Sexual abstinence during fertile periods does not violate the integrity of the marital act. This method intrinsically respects the natural structure of the conjugal act and it hinges itself on the natural law as it follows what nature dictates. The nature of marriage is not

⁴⁶ J. J. KUHN, "Rhythm (Periodic Abstinence)", 464.

interfered with nor are there any impediments to conception. Thus, this method is licit in marriage and in fact it enhances more dialogue among the couples.

Generally, it has to be noted that the natural family planning methods are only effective on the area of family planning. For the case of sexually transmitted diseases, the method is not practical. Unless the couples decide to abstain from the conjugal acts in order to avoid infecting the partner who is healthy until the sickness is cured. For example, for the case of the discordant couples, there is a call for permanent abstinence from sexual relations so that the uninfected partner may not be infected. This is the only and only licit and moral practice to be adopted.

2.5 Threats of HIV/AIDS to Canonical Marriage

In the contemporary world especially in Sub-Sahara Africa, HIV/AIDS is ever becoming a threat to human life. Whenever a threat arises, there should as well be some precautions and some responses to such horrors. There is a great rate of people been infected with the virus as well as a great number of people dying of HIV/AIDS. This threat is both on the unmarried as well as those who are married. Infection can happen prior to marriage or while the marriage lasts. A challenge remains as to how an AIDS-infected person could be sincere in affirming his or her love for the intended spouse, when their marital-love relationship would carry the deadly threats of communicating AIDS?⁴⁷ This is more of a moral and socio-cultural problem than a legal issue. The pandemic is spreading rapidly due to the large scale of breakdown of family life. The sense of sexual responsibility has been replaced by sexual permissiveness and selfishness.

⁴⁷ O. GRIESE, E. DIAMOND, *The AIDS crisis and the contraceptive mentality*, 35.

Despite the presence of the AIDS pandemic, marriage remains a natural right for those who are not prohibited by law (Canon, 1058). When a family becomes directly affected by this threat the stability and sacramentality of such marriage remains unshaken. The two are still regarded as a husband and wife. The love they had for one another from the very beginning should be retained while thinking on how to stop further infections in the case of the discordant couples. It is unlawful for a partner to start thinking of divorce. This is because the institution of marriage enjoys a favor of the law (Canon 1060). Hence until proved otherwise that its stability can be terminated.

Christian marriages should also be liberated from the yoke of some cultural practices which are not in line with the human dignity. There are many cultural practices in some place which are contrary to the principles in the code of Canon law. Such practices imply a sort of inequality between a wife and the husband. The code states openly that according to their own vocation, those who live in the marital state are bound by a special duty to work through marriage and family to build up the people of God (Canon 226§1). This duty is for them to complete each other through their loving of one another and then procreation and education of their forthcoming children. This is because; the family is considered to be a basic unity of the Church. Thus, the presence of a HIV/AIDS victim among the spouses will put a threat on this very basic unity of the Church because the spouses might not get even a chance to educate their children apart from leaving them orphans.

Furthermore, women emancipation from such oppressive and suppressive cultural practices is important in this HIV/AIDS era. Women need to be empowered especially in making certain decisions concerning marriage. For example here in Kenya there are some

ethnic communities still practicing widow inheritance and ritual of cleansing ceremony after husband's death which accelerate the risks and vulnerabilities for women to become infected. In such circumstances, women are most of the time overlooked and considered to be merely subjects to men. Husbands think that they can do anything without any person to questioning them hence exposing women to the risks of contracting AIDS from their unfaithful husbands. Hug Slattery says, "Among themselves, married women frequently talk about their great fear for themselves and for their children and their sense of helplessness to avoid getting AIDS from infected husbands. It is not surprising therefore to find women in this country describing marriage as the most dangerous place in the world for women".⁴⁸

Lastly, the life of children is put under danger of either contracting AIDS from their mothers during pregnancy or been left orphans. Children miss the chance to be brought up in a family environment and instead are brought up by their grand parents and at other times by some orphanage institutions. This most of the time come as a result of their parents' marital infidelity and carelessness of not observing the marriage rules.

It is accepted that sexual behaviors should be in accordance with God's law imprinted in our hearts and taught not only by Christianity but also by the other great religions of the world.⁴⁹ We are to live and demonstrate our humanness by showing our differences from other animals. Instincts and passions should never take control of us. We should rather, by our intellect take control of ourselves including our sexual behaviors. For those who are married should live truly as married couples by observing

⁴⁸ H. SLATTERY, *HIV/AIDS. A Call to Action*, 75.

⁴⁹ H. SLATTERY, *HIV/AIDS. A Call to Action*, 75.

their marital responsibilities of fidelity and mutual love. The fruit of mutual love of parents is happiness of the children as well as fulfillment of the parents themselves.

Conclusion

In a nut shell, the contemporary world is under great tension of different diseases. Some of these diseases are curable while others are totally incurable. HIV/AIDS, one the incurable diseases, has a greater connection with the conjugal act as its principle way of spreading the disease. In the traditional Christian era as well as the pre-colonial Africa, sex was considered as something strictly restricted to those who were married. But in our contemporary world, sex is approached with the spirit of permissiveness and selfishness. Sex is seen by others are something necessary for life.

As a result, there are lots of sexual promiscuities rendering many people vulnerable to the dangers of HIV virus. Many marriages are been broken down as a result of infidelity of either one of the partners or both of them. Sexual intercourse is no longer viewed as an act which is exclusively restricted to those who are married but now is seen as something which is inclusively restricted to the freedom and choice of an individual. People are then faced with choices to make: either to be carried away by the wave of HIV/AIDS or employ some means which will minimize or reduce the chances of been infected. Both premarital sex and marital infidelities are no long seen as illegal and immoral because people think that they are free to do what pleases them at their own time.

Nevertheless, one evident fact remains that there is a great fear of HIV/AIDS among people. The solution to this fear, as many think, is the use of condom in every sexual act. A condom is seen as an accompaniment of the sexual act. As a result of the effects of condom, there is no more of responsibilities of conception since condoms to a great extent prevents the possibility of fertilization. Condoms are sold in many places and even in some places are provided freely for the people to use. This implies that people are encouraged to have sexual relations provided they use condoms. Adultery and fornication become glorified and infidelity and promiscuity are exalted.

There are some few cases whereby one of the couples is infected with the HIV virus. Such couples are referred to as discordant couples. This can also happen as a result of infidelity of one of them unless the infection is obtained through some means other than via sexual intercourse. Other means are like sharing sharp items like raze blades or knives without sterilization in cutting some parts of our bodies. For example, during traditional circumcision where knives are shared without been sterilized, there is a great danger of infecting others in case one of the victims is HIV positive. In the case of discordant couple, there are many moral and legal questions to be examined for the sake of sustaining the marriage as well as the well-being of the spouses and of their children.

In the following chapter, we shall examine the case of a discordant couple of Kibera slums of Nairobi. We shall make a synthesis of the above two chapters and show how effective the canon law is in helping the Catholic faithful in their daily concrete living. We will have to strike a balance among two main challenges: the threats of HIV/AIDS and moral issue of contraception. In so doing therefore, we shall have attempted to answer the third question posed at the general introduction concerning the

discordant couples and their marriage. Any solution provided should be both morally sound and legally founded.

✓ But your work
must include a summary of the
chapter concluded.

Chapter III

A Concrete Case of a Discordant Couple in Kibera

3.0 Introduction

In this chapter, we shall consider a concrete case of a discordant couple. We shall also examine all the possibilities to sustain their marriage but keeping in mind all the dangers and threats posed by the HIV virus to life. At the end, we shall at least be able to offer a tentative solution or advice to such couples.

3.1 A Discordant couple in the Kibera slums in Nairobi

Marriage is a life long commitment which is shared between husband and wife. The husband has his duties to play as well as the wife. The two complement each other in their daily living and daily responsibilities. Pope John Paul II said that God inscribed in the heart of man and woman the vocation, and thus the capacity and commitment, of love and communion which is to be fulfilled in their community (FC, 11). This vocation is ordered for the good of both spouses and their offsprings. Within the scope of daily living, the two encounter difficulties and challenges which they ought to help and

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encourage each other to come out of such difficulties. They should be made to understand from the very beginning that marriage life has its ups and downs.

One of the challenges of marriage in the contemporary world is the intensive and extensive social problem of HIV/AIDS. Many people are suffering from this disease and the main means of infection is through sexual relations with an infected person. However, people in marriage are not immune from this disease. Once a member of the family has been infected by AIDS, it becomes a social problem while the children are likely to be left orphans. Both the couples and the children suffer seriously and rigorously of the consequences of the disease hence putting the canonical marriage at risk. In a way, AIDS affects family life as well as posing death threats to the victims.

A clear example is the family I encountered in Kibera Slum recently whereby the husband is HIV positive and the wife is negative. This marriage is only four years old and is blessed with two children. The wife doubted her husband after having heard a rumor that her husband was having some extramarital relations with a neighboring woman when she was away for some three months. As a result, the wife persuaded the husband to go for HIV test. The husband complied and was found to be HIV positive. Due to this, the wife was shocked and is restless whether they should continue with their marriage or not. The husband, on the other hand, is highly disappointed and confused of his present situation. It should be noted that, the husband until now has not yet confessed to have had any extramarital affairs. But whenever he was asked about his marital faithfulness he is defensive and uncomfortable with the question. This marriage rests on a cross road.

It is from such a situation that the two are referred to as discordant couples. In such a moment, there is no peace in the family for anger and hatred prevails. After some

dialogue and counseling, the husband still does not accept his situation while the wife is not ready to engage in any sexual relations with him. The husband comes up with an option that he should use condoms but the wife is not ready. The wife gives an option of divorcing from her husband. What could be the way forward for this family?

A quick solution would be that the couples engage in the use of condoms whenever they want to have conjugal love. But the question remains whether such a practice is legal or illegal. Unfortunately, the 1983 Code of Canon law does not mention contraceptives directly. Canonically condom use as such, is not an illicit practice but the illicitness of this practice may be inferred from both the intentionality and from the side effects of condoms.

The aim of using condoms here is to prevent the wife from contracting the virus assuming that condoms prevent the virus from reaching the wife's body hence protecting her life. Therefore, the two will reduce sexual act as a mere act of giving each other pleasure since conception is impeded by the condoms during sexual act. It is very clear that the Church is against the exclusiveness choice of pleasure derived from the conjugal act without taking on the responsibility of offspring.⁵⁰ It is further stated by the Church's Magisterium that contraceptive, like condoms could be used for therapeutic reasons only (HV, 15). It is clearly implied by the Church that condoms are not to be used among her faithful. So the idea of the husband is in conflict with the mind of the Church.

Condoms use in marriage also incapacitates the greatest possible gift - the gift by which a husband and wife become cooperators with God for giving life to a new human person (FC, 14). In other words, condom prevents the male sperms from reaching the reproductive organs of the woman rendering conception impossible. This contradicts the

⁵⁰ C. MALLIA, *The Sacrament of Matrimony*, 48.

creator's original intention that mutual union between a man and a woman is by nature ordained to the procreation of offspring⁵¹. As a result, we can infer that the good of the offspring is affected (Canon 1055§1), when couples engage in the use of condoms. Thus, condom use may be rendered incompatible with the Canonical marriage.

3.2 Pastoral approach to this discordant couple

The Church teaching is very precise that it is never lawful, even for the gravest reasons, to do evil that good may come out of it (HV, 14). Both the act and the intention must be good or at least indifferent to comprise a morally good act. Yes it is a wish of many to say that discordant couples have to use condoms in every conjugal act. But it is clearly stated that anything which impede procreative aspect in the conjugal act is immoral. It is further stated in the code of Canon law that both the wife and husband have to completely and mutually give and accept one another in love through the conjugal act (Canon 1057§2). There is no room for compromise for the act to be lawful and morally good.

Furthermore, we have to take into consideration the conscience of every part. In this case, the woman had stated clearly that it is against her conscience⁵² and the teaching of the Church for her to engage in the use of condoms with her HIV positive husband. The woman's conscience has to be respected all the time and everywhere. The Magisterium teaches that "Deep within his conscience a man discovers a law inscribed within his heart by the creator...which he must obey" (GS 16). Furthermore, the teaching of the Church from the early times concerning sexual act has been that conjugal act must

⁵¹ G. LOBO, *The New Marriage Law*, 17.

⁵² L. ALEXANDER, *Foundations of Moral Theology*, 54.

be within the marriage lock and contraceptives should not be used.⁵³ This is how the conscience of the faithful Catholics has been formed. Such a conscience must be respected at all times.

As pastors of souls, we have an obligation to educate our faithful in different socio-economic and cultural matters. We need to explain to our people on the important moral principles. Normally, “in any human act, three factors have to be considered: the act itself, the intention and the circumstances. Any deficiency in one of the three factors spoils the action rendering it immoral.”⁵⁴ It is further stated that “sexual intercourse is good and holy when its manner is natural and human, when it expresses the marriage love of a husband and a wife and when it promotes their bodily and spiritual well-being”⁵⁵. An act is human if the act itself is good or at least indifferent and performed with freedom.

The first morally accepted stand to be looked at is the fact of *abstaining* from sexual relations. This is what the couples are to be advised for it is 100% clear that the wife will not be easily infected by the virus from her husband. In the discordance circumstances, it may be possible to motivate the couple to postpone marriage plans indefinitely, or to agree to abstain completely from conjugal relations and reject sinful substitutions for sexual satisfaction.”⁵⁶ The couples should now be ready to postpone any of their marital plans and concentrate on two issues: how to bring up their children and taking care of the husband who is HIV positive. It has to be noted here that the right to

⁵³ R. WESTHEIMER, L. LIEBBERMAN, *Sex and Morality*, 134.

⁵⁴ T. WAYNE, *Morals and Marriage. The Catholic Background to Sex*, 37.

⁵⁵ T. WAYNE, *Morals and Marriage. The Catholic Background to Sex*, 42.

⁵⁶ O. GRIESE, E. DIAMOND, *The AIDS crisis and the contraceptive mentality*, 35.

conjugal act is not excluded but only suspended as long as the crisis lasts. This option has to be given to the couples as a suggestion for them to think of.

It is easy to talk of abstinence among the married couples but its practice could be very difficult. It needs a lot of sacrifice and commitment as well as cooperation among the couples. As offering a blessing to God not avoiding an evil, married people may occasionally or perpetually abstain from sexual intercourse for religious reasons⁵⁷ or other health reasons. Abstaining from that which is very central in marriage, the couples will be reminded of their very matrimonial consent. By abstaining from conjugal act, the two are still in love to one another and they live together as a husband and wife. The two have to agree for some health reasons to give up sex for the sake of the wife's life and to prevent the children from becoming orphans. They should be encouraged to see abstinence as something possible.

In such situations, pastors of souls have to offer advice and guidance to see that the marriage as a sacrament is sustained and at the same time, life is protected. The husband has to be directed for proper medication and proper diet. This is the moment when the couples need guidance and encouragement so that they can cope up with life again. This has been stated in other words by Ronald Nicolson that the Church's role towards this epidemic is to be compassionate, to support, to care as well as to warn.⁵⁸ The Church should be pastorally oriented not only during crisis but even continually emphasizing to her faithful on the dangers of HIV/AIDS pandemic. This can be done through organizing some seminars and some marriage workshops at different levels.

⁵⁷ T. WAYNE, *Morals and Marriage .The Catholic Background to Sex*, 48.

⁵⁸ R. NICOLSON, *God in AIDS*, 176.

3.3 Canonical approach to this discordant couple

The code of Canon law rests on the principle that any marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death (Canon, 1141). This canon is both doctrinal and legal eliminating any possibility to dissolve a sacramental and consummated marriage. It is stating a statement of faith that there is something more than human powers in marriage. Despite the situation of the husband having been infected by the HIV virus, the wife has all the legal rights to consider him to as her husband. In the same way, the husband has all legal rights to consider his wife, who is HIV negative as his wife. This is because the love is central in marriage and not conjugal act. For example very old couples live together and love keeps them united. This has to be very clear among the couples so that it can be a starting point for their dialogue as they must take a particular decision in their life as pertaining to the existing problem amongst them.

HIV/AIDS puts a life or death threat on a partner who is not HIV positive. In the circumstance of discordant couples, lawyers and theologians advice not to engage in sexual relation until the threat disappears. "It is wrong also when it is harmful to the health of one or both to keep engaging in sexual act."⁵⁹ Life always has to be given a priority then other things follow later. If the two decide not to engage in sexual relations still they can live very well as a husband and wife. There are other instances when couples are forced by circumstances to stop engaging in sexual intercourse whether by free choice or by force. Take an example of a legally contracted marriage then later on faced with the fact of an organic impotence on the side of husband whose sexual organ

⁵⁹ T. WAYNE, *Morals and Marriage .The Catholic Background to Sex*, 48.

had to be removed due to cancer problems. In such situation sexual intercourse is rendered impossible but the stability of the marriage remains unaffected (Canon 1084§2). Love is still maintained and the two share and love each other as a husband and wife.

In the same way, the discordant couples have to be informed about the stability and indissolubility of their marriage. Their choice to engage in the use of condoms is morally wrong for it is against the very nature and purpose of the creator. Moral standards do not depend entirely on the individual's judgment. Contraceptives or the use of condoms in the sexual act is wrong in itself and no motive can justify it; and it is gravely wrong because of the action which is spoilt.⁶⁰ This can be deducted both from revelation as well as from correct human reasoning. This has been the teaching of the Catholic Church for long and it is well known to people though it may not be widely accepted. But the Christian faithful are called to live a moral life according to the purpose of the creator. The code, in a way, cares for the Christian faithful to live morally because this law keeps in mind salvation of souls (Canon 1752).

Furthermore, the effectiveness of condom as a means to prevent the HIV virus is under strict questioning. It is widely accepted that condoms do not prevent HIV virus by 100%. There is still a risk of infecting one another, however small it may be, when discordant couples use condoms in sexual acts. Now, for the husband to engage in the use of condoms, still the life of his wife is at risk. The two will be engaging in a contradicting act since their conjugal act may bring with it results which are life threatening. This option has to be dropped since it is not all that effective in producing the intended protection. The intimacy of marriage should not be compromised for any private reasons or pleasures.

⁶⁰ T. WAYNE, *Morals and Marriage .The Catholic Background to Sex*, 62.

Another option which the discordant couples may be tempted to do is divorce. Due to anger and hatred the couples may rush to file a process of divorce. The wife might be thinking of divorce so as to sustain her health from the threats of the HIV. Again divorce is implicitly mentioned in the code of Canon law when emphasizing on the fact of indissolubility. We read from the code that a ratified and consummated marriage cannot be dissolved by any human power (Canon 1141). The marital bond cannot be terminated by any person. Jesus taught further that “What God has united, let no man separate” (Mat 19:6). Christopher Mallia, one of the moral theologians, supports this idea by saying that divorce in the Catholic Church is not an option since a man and woman are married to each other until death.⁶¹ Any act of divorce is therefore an illegal act.

However, when living together becomes impossible, there is one lawful act and morally accepted option – separation. Ladislaus Örsy explicitly mentions that if one of the spouses is guilty of adultery, the other has a strict right to terminate their conjugal life.⁶² However, this is to be done when it is seen that reconciliation has failed as well as presence of grave “dangers of soul or body to the other or to the children” (Canon 1153§1) in case the common life is to be continued. At this stage, due procedures ought to be followed as the case of separation is been filed.

Adultery is ground for separation by which the innocent partner initiates an action of formal separation to a competent authority within the period of six months (Canon 1152§2). It has to be proved beyond doubt that the husband engaged in an adulterous act. In commenting on Canon 1152, lawyers agree that only actual adultery, which is a completed act of sexual intercourse with a third party, gives rise to the innocent spouse’s

⁶¹ R. NICOLSON, *God in AIDS*, 44.

⁶² L. ÖRSY, *Marriage in Canon Law*, 235.

right to separate.⁶³ However, this is grounded on the fact that the wife is not responsible whatsoever for the infidelity character of her husband. This is because, the husband himself requested the wife to go home to the village since he could not be able to offer enough care and support to his wife during her early days of her maternity. Thus, the husband is highly culpable of what has become of him and so he has to be held responsible by allowing her wife, in case separation is granted by the competent authorities.

Furthermore, if either of the spouses causes grave mental or physical danger to the other spouse or the offspring or otherwise rendering common life too difficult, that spouse gives the other a legitimate cause for leaving, either by decree of the local ordinary or even on his or her own authority if there is a danger in delay (Canon 1163§1). This is another instance in which the Canon law offers a legal chance for separation. However separation is not permanent but when the situation is calmed the two go back to their normal life. In our case, the wife is probably in a danger of even been raped by her husband and in so doing he may infect her with the virus. The wife is in an immanent physical danger. She has all the rights to file an act of separation so as to give them a good environment for dialogue and reach a consensus.

If separation is granted and effected, the question will remain about the caring for the children. Since they are still young, below the age of seven years, the children need a total parental care and support. In fact, the law demands an adequate support and education of children be suitably provided for (Canon 1154). The pastoral aspect of the Church has now to strongly emerge especially to make sure that the children are brought up and educated in a proper manner. Where necessary, depending on the economic

⁶³ J. BEAL, J. CORIDEN, *New Commentary on the Code of Canon Law*, 1376.

situations of the parents, the Church may provide some material support. Like the case we are examining, the economic capacity of the parents, who are now subjected under many problems, cannot in any way support the two children. As a pastor, we need to look for the means to bring up and sustain the two innocent children either by bringing them to the centers responsible for such children or even by providing for them out of our own charity. ✓

Conclusion

In our today's world, especially in the developing countries the HIV pandemic has become a great threat to human life. Many lives have been taken away leaving others in bad conditions. It is now a time when we need to observe our laws and rules which guide us as they lead us towards what is good for us and for the community. If one is married, he or she has to remain faithful to his or her partner. For those who are not yet married, there is only one option which is abstinence. Let us be faithful to whatever state of life we are in and know that we have a duty to control our bodies. Let us not allow our instincts control us as they do in the lower animals.

We have to take into consideration that as human beings we have obligations to follow as well as to obey our conscience. Furthermore, as Catholics, our conscience have been formed in such a way that it is like a rule for our lives taking us towards a proper direction. In case of mistakes, still evil ways cannot be admitted in since they will worsen the matter. What is intrinsically evil, cannot be opted for so as good may come out of it. This is totally against moral code as well as contrary to the code of Canon law itself.

It is affirmed strongly that it is never lawful, even for the gravest reasons, to do evil that good may come of it (HV, 14). Lawfully, if the spouses agree to separate, their act is both lawful and valid in accordance with the Canon law. The aim of separating should, in fact, be a creation of a free environment for reflection and dialogue between the two and come out with a decision which would be most accommodative for the three parties: the husband, the wife and the children. Charity and forgiveness should take presidency. At the same time, the life of the wife should never be exposed to any risks of contracting the virus. The decision to be taken by the spouses should satisfy these conditions.

*Spouses
be
informed*



GENERAL CONCLUSION

In this presentation, we aimed at showing the legal aspects of a Canonical marriage in relation to the discordant couples. It has to be noted that the issue of contraceptives is a very fragile topic to deal with. Questions arising from contraceptives do not have clear cut answers. However, each case has to be treated as it comes. The life of an individual has to be considered all the time and we should always protect life from the threats of the HIV virus.


It is true that marriage is not a private matter but social issue hence the need for laws to protect it and guide it. However, such laws should not be too legalistic without any limitation. A good example is the use of condoms among married couples as a means to protect themselves from certain diseases. In such situations, could the couples use condoms and still express their love to one another? This remains a question for discussion by both Canon lawyers and the theologians. But as for now, we have the obligation to observe what in been taught by the Church.

Discordant couples apart from the challenge of transmitting the HIV virus to the uninfected partner, face the challenge of transmitting life. In case they wish to have a child, what would they do in order not to infect the wife who is not HIV positive? It is

well stated by Pope Paul VI that any direct interruption of the generative aspect in the conjugal act is unlawful and immoral (HV, 16). But again, when the encyclical was written, it was a HIV/AIDS free era. The contemporary challenges of discordant couples did not exist by then. The major concern of the encyclical *Humanae Vitae* was conception. This encyclical was trying to respond to the then issues of contraception methods which were mushrooming by then. Safeguarding the health of the spouses was not the concern of the *Humanae Vitae*. ✓

Furthermore, if the discordant couples desire to have a child they should consider two moral questions: The risk of infecting themselves with the virus during sexual intercourse and the risk of the child to be infected by the HIV virus. These two questions are to be reflected by the couples alone and they are to come up with free choices. The couples could only be advised about not getting children anymore but if they want to bring up an offspring they cannot be prohibited. ✓

As we have stated above, we have given two legal and moral options: separation and abstinence from sexual intercourse. These two have to be viewed as possibilities. It is the couples themselves take up a final decision. They should be judges for their own lives but guided through this process by those who are competent and relevant. As a pastor, what we have to insist upon, then, is to be charitable to one another. The spirit of forgiveness and charity should prevail then together see what could be the best possibility as a way forward. They have to take into consideration that despite the present problem, still marriage is possible. The nature of such marriage has not been destroyed hence common life and mutual love can still be practiced.



Again, it is true that condoms to a big extent reduce the risk of been infected by the HIV virus during sexual act. The Church holds that the use of condoms is not a means to eradicate AIDS but only accept the change of attitude of the society towards sex to be the most important instrument to fight the HIV/AIDS pandemic.⁶⁴ Yes, it is true that there is a need for the society to change the sexual attitude. This is a remote solution to the problem. We also need to have some immediate solutions even if they may not be very effective but at least can minimize. For instance abstinence could be an immediate solution to these spouses.

The Church has a duty to direct her faithful towards life, life to the full, (Jn 10:10). The Church has to be a conscience of her faithful also through her teaching which in turn has to be followed by the faithful. As a pastor in the parish setting, we encounter and share in the problems of our faithful. We should be able to offer them proper guidance and not to make them sink deeper in their respective problems.

Upon our topic, as a pastor we should guide the spouses towards the good and the practically sounding solution. As many people are ignorant of the whole issue of condoms, we should educate them and expose to them the reality of condoms. For example a recent study of a number of discordant couples who used condoms showed that one in four non-positive partners became infected⁶⁵. This is clear evidence that condoms are not all that effective as they are thought by many to be. Thus, the discordant couple has to be aware of this knowledge. As a pastor, we have the obligation to tell them that they are faced with decisions to make in their lives whether to choose life or death.

⁶⁴ R. NICOLSON, *God in AIDS*, 148.

⁶⁵ R. NICOLSON, *God in AIDS*, 146.

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