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A CONDOM VERSUS THE PHILIPPINE AIDS PREVENTION AND CONTROL ACT OF 1998: WHICH HAS HOLES LEAVING FILIPINOS UNPROTECTED?

David M. Iseminger[†]

Abstract: In 1998, the Philippine legislature passed pioneering HIV/AIDS legislation in Southeast Asia called the AIDS Prevention and Control Act (“APCA” or “Act”). This comprehensive legislation sought, in part, to ensure access to health care information and to stop the spread of diseases like HIV/AIDS. Regulations were promulgated by the Philippine National AIDS Council in 1999 to implement the Act. APCA effectively addresses several important HIV/AIDS issues, including prohibiting discrimination and mandatory HIV testing, while ensuring access to basic health care. However, both the regulations and the Act fail to ensure that all scientifically accurate information regarding HIV/AIDS prevention reaches Filipinos. Specifically, the Act and its regulations provide vague guidance on what information may be disseminated lawfully and place restrictions on when and how information can be shared. Additionally, both impose harsh sanctions on health care providers and professionals who supply “misleading information.” However, it is unclear what exactly constitutes “misleading information” within APCA and its accompanying regulations. For this reason, health care providers may avoid discussing HIV/AIDS prevention measures and contraceptives with patients. This lack of information about HIV/AIDS leaves many Filipinos unaware of and vulnerable to the devastation of HIV/AIDS.

I. INTRODUCTION

The World Health Organization (“WHO”) reported that 4.3 million people became infected with HIV and 2.9 million people died of AIDS-related illnesses in 2006 alone.¹ In the Philippines, where the sex trade is thriving and much of the population is uneducated about sexually transmitted diseases, the risk of infection is extremely high. Ignorance about how HIV infection occurs and how to prevent it is rampant. As one nineteen year-old sex worker said, she had heard of HIV, but knew nothing about the disease or how to prevent it.² She did not know what condoms were, never

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¹ Press Release, World Health Organization, Global AIDS Epidemic Continues to Grow (Nov. 21, 2006), available at <http://www.who.int/mediacentre/news/releases/2006/aids.epidemic.update/en/index.html>.

² HUMAN RIGHTS WATCH, UNPROTECTED: SEX, CONDOMS AND THE HUMAN RIGHT TO HEALTH 47, Vol. 16, No. 6 (C), May 2004, available at <http://hrw.org/reports/2004/philippines0504> [hereinafter UNPROTECTED].

used them before, and heard they were something that could be eaten.³ Another sex worker heard that HIV comes only from fellatio or from having sex with handsome men.⁴ Consequently, this worker “protects” herself by limiting these activities.⁵

Sex workers are not the only Filipinos who lack proper education on HIV/AIDS or who have misconceptions about its modes of transmission and infection. Only 30% of men and 36% of women know that neither mosquito bites nor food sharing can transmit HIV.⁶ Many young adults even believe Filipinos their age are immune to the disease and take no precautions to prevent infection.⁷ The pervasiveness of these misconceptions is evidence that Filipinos are not receiving adequate, scientifically⁸ correct information.

Unfortunately, current HIV/AIDS legislation imposes a significant barrier to information distribution that perpetuates inaccurate ideas about the disease. The Philippine legislature passed the AIDS Prevention and Control Act (“APCA” or “Act”)⁹ in 1998 with implementing regulations promulgated by the Philippine National AIDS Council (“PNAC”) in 1999.¹⁰ APCA and its regulations contain several provisions that specifically address public awareness of the transmission and prevention of HIV/AIDS.¹¹ However, they fail to adequately describe what preventive information

³ *Id.* at 47-48.

⁴ *Id.* at 48.

⁵ *Id.*

⁶ See NAT’L STATISTICS OFFICE, SUMMARY OF FINDINGS IN 2003 NATIONAL DEMOGRAPHIC AND HEALTH SURVEY (2003), available at http://www.census.gov.ph/hhld/ndhs_2003.html (Phil.) [hereinafter 2003 NDHS SUMMARY OF FINDINGS]. The two most common misconceptions of HIV/AIDS in the Philippines are transmission by mosquito bites and sharing of food with an infected person. The “summary” mistakenly reported “supernatural means” instead of food sharing as one of the two most common misconceptions. The correct misconceptions are defined in data tables in the full survey results. See Table 11.3.1 and Table 11.3.2, NAT’L STATISTICS OFFICE, 2003 NATIONAL DEMOGRAPHIC AND HEALTH SURVEY (2003), available at <http://www.census.gov.ph/hhld/ndhs03.html#C11> (Phil.) [hereinafter 2003 NDHS TABLES].

⁷ Tina Arceo-Dumlao, *3 Out of 5 Youths Think They’re Immune to AIDS*, THE PHIL. DAILY INQUIRER, May 12, 2006, at A1, available at http://news.inq7.net/nation/index.php?index=1&story_id=75523.

⁸ For the purposes of this comment, “science” and “scientifically accurate information” are meant to include only information found within and generated from the biological, chemical, and physical science realms, and excludes social science academic areas.

⁹ An Act Promulgating Policies and Prescribing Measures for the Prevention and Control of HIV/AIDS in the Philippines, Instituting a Nationwide HIV/AIDS Monitoring System, Strengthening the Philippine National AIDS Council, and for Other Purposes, Rep. Act No. 8504 (1998), 94:26 O.G., (June 29, 1998) (Phil.), available at <http://www.chanrobles.com/republicactno8504.htm> [hereinafter Philippine AIDS Prevention and Control Act of 1998].

¹⁰ Philippine National AIDS Council, Rules and Regulations Implementing the Philippine AIDS Prevention and Control Act of 1998 (RA 8504), (Apr. 13, 1999) (Phil.), available at <http://www.chanrobles.com/republicactno8504rules.htm> [hereinafter Implementing Regulations].

¹¹ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, §§ 4-5; Implementing Regulations, *supra* note 10, §§ 5-19.

Filipinos are entitled to as well as what legally acceptable information health care providers may disseminate. APCA and its regulations also prescribe criminal penalties for providing “misleading information,” ranging from revocation of business licenses to up to two years in prison.¹² Therefore, health care providers face a moral dilemma: should they inform their patients about preventive HIV/AIDS measures despite not knowing what constitutes “misleading” information and risk criminal sanctions? Consequently, patients may receive little or no information about how to prevent HIV/AIDS.

Additionally, APCA fails to fulfill the Filipino commitment under the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”),¹³ to reduce the spread of disease and provide access to life-saving technologies such as condoms.¹⁴ The Philippines ratified this treaty in 1974, framing the government’s promise to arrest the spread of HIV/AIDS in the country.¹⁵ The government attempted to fulfill this pledge by passing APCA, but the law’s vagueness frustrates this goal.

This comment identifies the inconsistencies between APCA and its regulatory scheme. Section II elucidates why the extent of the HIV/AIDS epidemic is uncertain and why the rate of HIV/AIDS is likely to increase. Section III outlines the goals of APCA and its accompanying regulatory scheme. This section also discusses the importance of ICESCR. Section IV argues that internal inconsistencies undermine the purported goals of APCA and that criminal sanctions inhibit information sharing. The final section recommends that APCA and its implementing regulations include specific criteria for determining what information is legally acceptable for health care providers to share. It also recommends the removal of criminal penalties from the statute and accompanying regulations. Finally, this last section explores the policy reasons compelling such changes.

¹² Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, § 11; Implementing Regulations, *supra* note 10, § 20.

¹³ International Covenant on Economic, Social and Cultural Rights art. 12 § 2(c), Jan. 3, 1976, 999 U.N.T.S. 3.

¹⁴ UNPROTECTED, *supra* note 2, at 3-4.

¹⁵ CHRISTOF HEYNS & FRANS VILJOEN, THE IMPACT OF UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL 451 (Kluwer Law International 2002).

II. MYRIAD FACTORS SUGGEST AN IMPENDING HIV/AIDS EPIDEMIC IN THE PHILIPPINES

The HIV/AIDS rates in the Philippines have perplexed public health officials for over a decade.¹⁶ The country first identified an HIV case over twenty-two years ago.¹⁷ The Philippines was the first country to record an incident of HIV in the Association of Southeast Asian Nations, a regional association of ten countries including Indonesia, Thailand, and Vietnam where HIV is now rampant.¹⁸ From 1984 through December of 2005, official documents recorded a *total* of 2410 cases of HIV, from which 718 AIDS cases have developed and with only 281 deaths among them.¹⁹ In 2006, supposedly less than 0.1% of the entire adult population of the Philippines was HIV positive.²⁰ With an estimated population of almost 89.5 million people,²¹ the twelfth most populous country in the world,²² this prevalence seems peculiarly low. This is an anomaly considering the explosion of HIV/AIDS cases occurring over shorter time frames in neighboring countries.²³

Low estimated HIV/AIDS prevalence levels in the Philippines likely exist because of underreporting by health care providers. HIV/AIDS is a complex disease with many risk factors that contribute to susceptibility and infection.²⁴ A variety of factors, including widespread, inaccurate beliefs

¹⁶ See *Global Challenges - Health Official 'Stumped' by Philippines' Contradiction of Low HIV Prevalence Rate, Low Condom Use*, The Global Fund to Fight AIDS, Tuberculosis and Malaria, Apr. 22, 2003, available at <http://www.theglobalfund.org/programs/news.aspx?countryid=PHL&lang>.

¹⁷ The first case of HIV in the Philippines was documented in June of 1984. ASS'N OF S.E. ASIAN NATIONS, THE ASEAN WORK PROGRAMME ON HIV/AIDS II (2002-2005) 94 (2003) [hereinafter ASEAN REPORT] (report of 7th annual summit, held on Nov. 5, 2001).

¹⁸ See *id.* at 13.

¹⁹ PHIL. NAT'L AIDS COUNCIL, SCALING UP TOWARDS UNIVERSAL ACCESS BY 2010: A RENEWED COMMITMENT TO HIV AND AIDS PREVENTION, TREATMENT, CARE AND SUPPORT, PART I: CHARACTERISTICS OF THE PHILIPPINE NATIONALS HIV EPIDEMIC (Mar. 10, 2006), available at http://www.remedios.com.ph/fhtml/country_report_2006_i.htm.

²⁰ JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS & WORLD HEALTH ORGANIZATION [WHO], EPIDEMIC UPDATE: DECEMBER 2006 36 (Dec. 2006), available at http://data.unaids.org/pub/EpiReport/2006/2006_EpiUpdate_en.pdf.

²¹ U.S. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: PHILIPPINES, <https://www.cia.gov/cia/publications/factbook/geos/rp.html> (last visited Jan. 11, 2007) (providing estimates as of July 2006).

²² The Philippines ranks twelfth in estimated total population when "World" (estimated total global population) and "European Union" figures are not considered. U.S. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: RANK ORDER - POPULATION, <https://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html> (last visited Jan. 11, 2007).

²³ See, e.g., ASEAN REPORT, *supra* 17, at app. 2 (reviewing the historical spread and trends of HIV infection in each of the ASEAN's ten countries).

²⁴ See, e.g., Nancy Mock, et al, *Conflict and HIV: A Framework for Risk Assessment to Prevent HIV in Conflict-Affected Settings in Africa*, 1:6 EMERGING THEMES IN EPIDEMIOLOGY, Oct. 29, 2004 (outlining

about HIV/AIDS transmission and an inaccessibility to health care, are present in the Philippines suggesting current infection levels will likely increase. This risk is exacerbated by the Catholic Church's strong anti-contraception views and the Church's significant influence on Filipino beliefs.

A. *HIV/AIDS Infection Is Likely More Pervasive than Current Statistics Indicate*

The low number and isolation of testing facilities in the Philippines limits the number of reported HIV/AIDS cases and distorts data about the real rate of infection. There are very few testing facilities throughout the country, with even fewer in rural areas where people are more isolated.²⁵ Additionally, there are relatively few laboratories accredited to perform the analysis of gathered HIV specimens, which limits the volume of tests that can be performed.²⁶

Furthermore, inaccurate figures occur because health care providers often are inadequately trained to recognize and diagnose the disease. Some doctors lack personal experience with the disease due to minimal interaction with HIV/AIDS patients.²⁷ In addition, because AIDS is caused by an "opportunistic infection,"²⁸ some providers miss the underlying immune-suppression and only identify the secondary opportunistic infection.²⁹ For

nine different factors that can increase susceptibility to HIV infection, including decreased availability of health services, malnutrition, and decreased use of preventive measures).

²⁵ See MICHAEL L. TAN, SHATTERING THE MYTHS: A PRIMER ON HIV, AIDS & THE FILIPINO 4-5 (1997). It is estimated that two-fifths of Filipinos reside in rural areas of the country. Philippines: Urban and Rural Areas, <http://www.britannica.com/ebi/article-206403> (last visited Feb. 27, 2007).

²⁶ See DEP'T OF HEALTH, LIST OF ACCREDITED HIV TESTING LABORATORY LABORATORIES (Dec. 31, 2003), http://www.doh.gov.ph/BHFS/hiv_lab2003.pdf (last visited Jan. 11, 2007) (listing all accredited testing laboratories by region with the vast majority concentrated in the capital Manila area).

²⁷ TAN, *supra* note 25, at 4-5; UNICEF Study: *Filipino Youth Engaged in Sex Getting Younger*, UNITED NATIONS CHILDREN FUND, Oct. 25, 2006, <http://www.unicef.org/philippines/news/061003.html> (last visited Mar. 5, 2007).

²⁸ An opportunistic infection is "an infection by a microorganism that normally does not cause disease but does so when lowered resistance to infection is caused by the impairment of the body's immune system." THE AMERICAN HERITAGE SCIENCE DICTIONARY (Houghton Mifflin Company 2002), available at <http://dictionary.reference.com/browse/opportunistic%20infection>.

²⁹ By definition, an AIDS case is identified when 1) the presence of HIV antibodies is positively confirmed by testing, and 2) the presence of an opportunistic infection from a pre-determined list of diseases (very low CD4+ cell counts). Theresa McGovern and Raymond A. Smith, *AIDS, Case Definition of*, in ENCYCLOPEDIA OF AIDS: A SOCIAL, POLITICAL, AND SCIENTIFIC RECORD OF THE HIV EPIDEMIC 59 (Raymond A. Smith ed., 1998), available at <http://www.thebody.com/encyclo/aids.html>. The definition of AIDS then is arguably a cultural one, because over time the list of opportunistic infections that comprises AIDS when present with immune suppression has been expanded. The expanded list sometimes includes infections that do cause disease without immune suppression, like tuberculosis, resulting in instances where someone with AIDS is mislabeled as just having a particular disease. *Id.* at 58-60; See also Mireya

example, medical professionals are failing to diagnose AIDS cases because of the prevalence of tuberculosis, which is classified as an opportunistic infection.³⁰ When a patient dies of tuberculosis it may appear that this was the sole cause of death, but this disease may have developed only as a result of HIV immune suppression.³¹ Doctors simply classify these deaths as caused by tuberculosis, most likely because there are no quick or inexpensive ways to identify if immune suppression also exists.³²

B. Widespread, Inaccurate Beliefs About HIV/AIDS Transmission Increase Filipinos' Risk

Many Filipinos have inaccurate beliefs about HIV/AIDS.³³ The 2003 National Demographic and Health Survey made some startling revelations about continued widespread misconceptions.³⁴ Just under one quarter of Filipino men and women know that limiting sex to one partner minimizes the risk of transmission.³⁵ More than half of women and about 40% of men

Navarro, *AIDS Definition Is Widened To Include Blood Cell Count*, N.Y. TIMES, Aug. 8, 1991, at D21 (highlighting a controversy in previous AIDS definition that conditions in women and intravenous drug users were not included).

³⁰ Tuberculosis was one of the leading causes of death in the Philippines during the 1990s. PHIL. DEP'T OF HEALTH, HEALTH INDICATORS, http://www.doh.gov.ph/healthsit/health_indicators.htm (last visited Jan. 30, 2007). Tuberculosis is classified as an opportunistic infection that coupled with immune-suppression is classified as AIDS. McGovern, *supra* note 29, at 59.

³¹ TAN, *supra* note 25, at 5.

³² See EARL K. WILKINSON, AIDS FAILURE: PHILIPPINES? 28 (Dreams Verlag 2002). In the United States, testing in 2005 ranged in price from \$6-\$12 per test; one state agency in Ohio spends over \$350,000 on testing annually. *Cleveland Agencies, Groups Frustrated by Delays in Receiving HIV Test Results, People Not Returning for Results*, The Henry J. Kaiser Family Foundation, Sept. 14, 2005, http://www.kaisernet.org/daily_reports/rep_index.cfm?DR_ID=32543 (last visited Feb. 27, 2007). The state of Ohio has approximately 11.46 million people, just over 1/9 of the estimated population of the Philippines. Compare U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: OHIO (2005), <http://quickfacts.census.gov/qfd/states/39000.html> (last visited Feb. 27, 2007), with U.S. CENT. INTELLIGENCE AGENCY, *supra* note 21 (listing the populations of each geographic area allowing the creation of a relative standard for per capita expenditures). Thus, comparable levels of testing would necessitate a budget over \$3.1 million United States dollars. The entire current budget for the Philippines Department of Health is only the equivalent of 264 million United States dollars. Willie T. Ong, *The Philippine Health Budget: From Marcos to Macapagal-Arroyo*, Feb. 28, 2007, <http://www.procor.org/story.asp?section=S123&sitecode=procor&storyid=Web677540181procor72031391&pn=1&parentsec=S119>.

³³ *Global Challenges - Filipinos Uneducated About HIV/AIDS, Spread of Disease, Government Survey Says*, The Global Fund to Fight AIDS, Tuberculosis and Malaria, May 18, 2005, available at <http://www.theglobalfund.org/programs/news.aspx?countryid=PHL&lang>.

³⁴ 2003 NDHS SUMMARY OF FINDINGS, *supra* note 6. This survey is performed every five years by the Department of Health and was last administered in 2003. NAT'L STATISTICS OFFICE, TECHNICAL NOTES ON THE 2003 NATIONAL DEMOGRAPHIC AND HEALTH SURVEY, (2003), available at <http://www.census.gov.ph/data/technotes/notendhs03.html> (Phil.).

³⁵ See 2003 NDHS SUMMARY OF FINDINGS, *supra* note 6.

do not know that condoms can prevent HIV infection.³⁶ Only about half of all men and women know that a combination of these two aforementioned measures dramatically reduces infection risks.³⁷ Only 36% of women and 30% of men know that neither mosquito bites nor sharing food with an infected individual transmits HIV/AIDS.³⁸ Moreover, this survey revealed that 19.1% of men and 20.3% of women believe that supernatural means can lead to infection.³⁹ As recently as May 2006, three-fifths of young Filipino adults, the most at-risk population, held the belief that Filipinos were immune to HIV infection.⁴⁰

Raising awareness of scientifically accurate information about HIV/AIDS can decrease the risk of infection for Filipinos. Many Filipinos may choose to have sex without condoms because they are ill-informed about the reasons for and effectiveness of using condoms to prevent HIV infection. Some believe that men who have sex exclusively with women do not need to worry about HIV infection⁴¹, and that condoms have holes and do not prevent the transmission of HIV.⁴²

In other countries, scientific studies show correlations between an increase in information about a disease and a decrease of high-risk behaviors. In Finland, a study performed in the late 1980s analyzed data before and after a public HIV awareness campaign concerning participants' knowledge of HIV and their sexual behaviors, including condom usage.⁴³ As the public became more informed about HIV/AIDS, condoms were more likely to be used by Finns.⁴⁴ Similar results were found in a study of

³⁶ See *id.*

³⁷ See *id.*

³⁸ *Id.*

³⁹ See 2003 NDHS TABLES, *supra* note 6.

⁴⁰ Arceo-Dumlao, *supra* note 7.

⁴¹ TAN, *supra* note 25, at 28. In actuality, individuals engaging exclusively in heterosexual sexual contact (self-reported) can become infected with HIV. Center for Disease Control and Prevention, *Heterosexual Transmission of HIV – 29 States, 1999-2002*, 53 Morbidity and Mortality Weekly Report 125 (Feb. 20, 2004), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5306.pdf>.

⁴² TAN, *supra* note 25, at 65-66. Condoms have been scientifically proven to be impermeable to the HIV virus. EUROPEAN COMMISSION, *HIV/AIDS: European Research provides clear proof that HIV virus cannot pass through condoms*, Nov. 20, 2003, <http://ec.europa.eu/research/press/2003/pr2010-hiv-en.html> (last visited Jan. 11, 2007); See CENTER FOR DISEASE CONTROL AND PREVENTION, FACT SHEET FOR PUBLIC HEALTH PERSONNEL: MALE LATEX CONDOMS AND SEXUALLY TRANSMITTED DISEASES, <http://www.cdc.gov/nchstp/od/condoms.pdf> (last visited Mar. 5, 2007).

⁴³ See J. Tikkanen & K. Koskela, Abstract, *Finland's Attitude to HIV-Infection – a 5-year follow-up study*, 106 *Nordisk Medicin* 8-9, 224-27 (1991), available at www.pubmed.gov (search PubMed ID 1923739).

⁴⁴ *Id.*

Zimbabwean adolescent males.⁴⁵ In this study, school children reported lower levels of high-risk behavior based on how much information they were exposed to by HIV media campaigns.⁴⁶ These studies suggest that governments should sponsor media campaigns disseminating information about HIV/AIDS transmission methods. Information alone may promote behavioral changes in individuals, and provide a foundation for critical thinking and smarter decision-making in others.⁴⁷

C. *Lack of Access to Health Care and Contraceptives Exacerbates the Potential for an Epidemic*

Widespread poverty often translates into varying levels of access to health care and general health information.⁴⁸ Assuming an international poverty line equivalent of living on less than two United States dollars per day, more than 44% of Filipinos were living below the poverty line in 2003.⁴⁹ Given such differences in income, it can be inferred that some Filipinos can access vital health services while others simply cannot. Inaccessibility to health care is particularly devastating for HIV/AIDS. For example, the transmission rate of HIV/AIDS from mother to child in developing countries, where sterilized facilities are harder to access, is 30-40%, compared to 15% in the developed world.⁵⁰ General health care inaccessibility also will worsen as the national population grows and the demand for services increases.⁵¹ Those who are unable to pay will continue to receive less and less care as demand for limited health services increases.⁵²

⁴⁵ B. Campbell & MT. Mbizvo, Abstract, *Sexual Behaviour and HIV Knowledge Among Adolescent Boys in Zimbabwe*, 40 *The Central African Journal of Medicine* 9, 245-50 (Sept. 1994), available at www.pubmed.gov (search PubMed ID 7834713).

⁴⁶ *Id.*

⁴⁷ Public health awareness campaigns are an important component in any disease's prevention. However, more successful governmental actions combine multiple approaches, including education, condom distribution, and illness treatment. Without public awareness of a disease, though, systemic efforts are less likely to succeed at reducing infection and mortality rates. Peter R. Lamprey, *Reducing Heterosexual Transmission of HIV in Poor Countries*, in *CONTEMPORARY ISSUES IN BIOETHICS* 688-89 (Tom L. Beauchamp & LeRoy Walters eds., 6th ed. 2003).

⁴⁸ See Michael Marmot, *Social Determinants of Health Inequalities*, 365 *THE LANCET* 1099, 1101-02 (2005).

⁴⁹ KARIN SCHELZIG, ASIAN DEV. BANK, *POVERTY IN THE PHILIPPINES: INCOME, ASSETS, AND ACCESS* 28 (2005), available at <http://209.225.62.100/Documents/Books/Poverty-in-the-Philippines>.

⁵⁰ See TAN, *supra* note 25, at 10. Lower transmission rates could be the result of easier accessibility to sterilized facilities, reducing the contact of blood from mother to child during the birthing process.

⁵¹ See Alejandro Herrin, *Health Dimension of Population Growth in THE TIES THAT BIND POPULATION AND DEVELOPMENT IN THE PHILIPPINES* 32 (Luningning Achacoso-Sevilla ed. 2nd ed. 2004).

⁵² See *id.* at 24.

Because of poverty and the fees associated with testing, many Filipinos cannot easily obtain HIV/AIDS tests. While some testing centers are free, others charge testing and consultation fees.⁵³ Absent free, accessible testing, it is likely that individuals will prioritize food and shelter over testing.⁵⁴ Therefore, it can be inferred that these financial barriers decrease the number of Filipinos who are tested for HIV/AIDS and who would receive proper treatment.

Lack of access to condoms is a pervasive problem that plagues HIV/AIDS prevention and control in the Philippines.⁵⁵ A significant number of Filipinos cannot make use of vital disease prevention resources, including condoms, because they live in poverty.⁵⁶ As the experience of other nations demonstrates, government sanctioning and funding for programs promoting condom usage are powerful tools for fighting HIV/AIDS. Thailand's infection rates dramatically decreased once the government began providing subsidized condoms and required sex workers to use condoms.⁵⁷ Japan's condom policies are also noteworthy. Until 1999, Japan had a policy against oral contraceptives for non-therapeutic reasons, making condoms the primary contraceptive and the main way of family planning in the country.⁵⁸ Unsurprisingly, Japan has one of the lowest HIV/AIDS rates in developed countries.⁵⁹

Currently, funding for condoms in the Philippines is below the level necessary to provide adequate access to condoms for many Filipinos. The

⁵³ Consulting fees range from P80 to P250 in the Manila metro area. The Foundation for Adolescent Development, *STD/HIV/AIDS Testing & Treatment*, <http://www.teenfad.ph/teenhelp/stdtest.htm> (last visited Jan. 11, 2007). This translates to anywhere from 1.63-5.11 United States dollars. International Currency Calculator, <http://www.gocurrency.com> (last visited Jan. 11, 2007). This means that almost 44% of the population could barely afford even some of the cheapest testing centers in the Manila metro area. See *supra* note 49 and accompanying text.

⁵⁴ See Magdalena C. Cabaraban, *Family Planning and Reproductive Health Needs: A Health Challenge to the Community* 8-9 (Mar. 1998) (unpublished research study paper at the Research Institute for Mindanao Culture, Xavier University, on file with the Pacific Rim Law & Policy Journal).

⁵⁵ Worldwide there is a lack of condoms in developing countries. David E. Sanger & Donald G. McNeil, Jr., *Bush Backs Condom Use to Prevent Spread of AIDS*, N.Y. TIMES, June 24, 2004, at A20, available at <http://query.nytimes.com/gst/fullpage.html?res=9504E1DD1E39F937A15755C0A9629C8B63&sec=health&spon=&pagewanted=2>; see UNPROTECTED, *supra* note 2, at 11-12.

⁵⁶ See SCHELZIG, *supra* note 49.

⁵⁷ See Robert Hanenberg & Wiwat Rojanapithayakorn, *Prevention as Policy: How Thailand Reduced STD and HIV Transmission*, AIDScriptions, May 1996, available at <http://www.fhi.org/en/HIVAIDS/pub/Archive/articles/AIDScaptions/volume3no1/PreventionAndPolicyThailand.htm>.

⁵⁸ Aya Goto et al., *Oral Contraceptives and Women's Health in Japan*, 282 JAMA 2173 (1999); TAN, *supra* note 25, at 70.

⁵⁹ See U.S. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: RANK ORDER—HIV/AIDS—ADULT PREVALENCE RATE, <https://www.cia.gov/cia/publications/factbook/rankorder/2155rank.html> (last visited Mar. 6, 2007) (ranking Japan 148 among 168 listed nations using 2001 and 2003 estimates); TAN, *supra* note 25, at 70.

Philippine government has shifted funds from condom distribution to natural planning methods.⁶⁰ While the ability to rely on publicly funded contraceptive supplies has decreased in recent years,⁶¹ 67% of citizens still rely on public sources for contraceptives.⁶² Thus, the recent reallocation of public funds away from condoms will further decrease supplies that the majority of Filipinos greatly need.⁶³ Moreover, foreign financial aid for distributing condoms and in providing subsidized condoms, specifically from the United States, is lower today than in the 1990s.⁶⁴

D. *The Catholic Church Advocates Values and Beliefs That Are Inconsistent with Comprehensive Disease Prevention Measures*

Religious views regarding family planning, population control, and contraceptives have been central to the debate concerning access to condoms in the Philippines.⁶⁵ The Philippines has a large and extremely conservative Catholic population.⁶⁶ The Catholic Church has incredible access to and

⁶⁰ *Arroyo Diverted Funds for Contraceptives*, THE PHILIPPINE STAR, Oct. 24, 2003, available at <http://www.philstar.com/philstar/print.asp?article=142355>; *Ban on Philippine Condom Funds Blasted*, TAIPEI TIMES, May 5, 2004, at 5, available at <http://www.taipetimes.com/News/world/archives/2004/05/05/2003154208>. Natural Family Planning Methods consist of methods used to prevent (or plan) pregnancy that do not involve artificial contraceptive devices or drugs. Instead they rely on altering sexual activity levels during fertile periods. Allison Tarmann, *Philippine Business Leaders Spearhead Drive for Family Planning*, U.S. POPULATION REFERENCE BUREAU, Mar. 2004, available at <http://www.prb.org/Articles/2004/PhilippineBusinessLeadersSpearheadDriveforFamilyPlanning.aspx>.

⁶¹ *Ban on Philippine Condom Funds Blasted*, *supra* note 60.

⁶² 2003 NDHS SUMMARY OF FINDINGS, *supra* note 6.

⁶³ See *supra* note 60 and accompanying text.

⁶⁴ See Sanger, *supra* note 55. The United States is one of the biggest exporters of subsidized condoms to developing nations. While the current administration has increased the number of condoms provided in recent years, its spending still does not reach the level achieved in the early 1990s and needed worldwide. *Id.*

⁶⁵ See WILKINSON, *supra* note 32, at 47, 50-51. Particularly during the years when less deference was given to church ideals by President Ramos, ideological battles played out in the public media. See, e.g., *id.* at chs. 5-6 (reviewing a plethora of heated church, political, and individual newspaper articles and letters concerning contraceptive policies, specifically, condom promotion by the Secretary of Health Juan Flavio; UNPROTECTED, *supra* note 2, at 13. It is unknown exactly how much access and influence Church leaders have under the current Arroyo administration. President Gloria Macapagal-Arroyo is herself a "staunch Catholic," but it appears to have some power. *Id.* at 72-73. Funding for subsidized contraceptives and family planning has shifted from artificial birth control-friendly programs to natural family planning programs or to other population problems, such as hunger, under President Arroyo's leadership. See *Arroyo Diverted Funds for Contraceptives*, *supra* note 60; *Ban on Philippine Condom Funds Blasted*, *supra* note 60; *Philippine Gov't Unwilling to Fund Population Control Programs*, PEOPLE'S DAILY ONLINE, May 13, 2006, available at http://english.peopledaily.com.cn/200605/13/eng20060513_265146.html.

⁶⁶ Nearly 85% of Filipinos are Catholic. UNPROTECTED, *supra* note 2, at 13. In addition to an overwhelming religious majority, the Philippines Catholic hierarchal leadership includes some of the strictest adherents to the most conservative views of the Church. In fact, one of the most vocal, prominent,

influence on government policy-making in the Philippines.⁶⁷ For example, in 1992 the Church attacked the Secretary of Health's promotion of condom usage to prevent HIV transmission.⁶⁸ These public attacks induced a Senatorial request for the resignation of the Secretary because of his pro-condom policies.⁶⁹

The Church regularly makes inaccurate claims that affect Filipinos' use of condoms. Some of these statements claim that condoms contain holes,⁷⁰ government sponsored sex education will promote promiscuity,⁷¹ and that condoning condom use will result in complacency for finding a cure.⁷² In fact, research actually indicates condoms are impermeable to HIV when used correctly.⁷³ Many studies show that sexual education leads not to promiscuity, but instead to safer sexual practices.⁷⁴ Unfortunately, today many Filipinos still widely believe many of these scientifically inaccurate ideas,⁷⁵ which is strongly indicative of the Church's influence on societal values and beliefs.⁷⁶

III. THE PHILIPPINE LEGISLATURE PASSED APCA TO ADDRESS MANY HIV/AIDS CONCERNS

The APCA articulates several goals and requirements for government action in order to combat a variety of HIV/AIDS issues. Achieving these goals will help bring the country into compliance with promises stemming from its government's ratification of a United Nations treaty on disease prevention. For several substantive HIV/AIDS legal issues, including banning mandatory HIV testing and discrimination, APCA provides direct

and influential church leaders over the past two decades, until his recent death, was the Archbishop of Manila Jamie Cardinal Sin. He was one of the closest followers of papal proclamations and was so faithful to the rules of the Church that at one time it was even believed he could ascend to the papacy. WILKINSON, *supra* note 32, at 50-51; *See* UNPROTECTED, *supra* note 2, at 13.

⁶⁷ *See* WILKINSON, *supra* note 32, at 48-50, 72 (stating perceived levels of interaction between Church leaders and Philippine presidents over two decades).

⁶⁸ WILKINSON, *supra* note 32, at 59. At one point "the Archbishop of Manila even threatened to 'tie a millstone around [the Health Secretary's] neck and drop him in the middle of the Manila Bay.'" *Id.* at 204.

⁶⁹ *Id.* at 59-60.

⁷⁰ *See* Earl K. Wilkinson, Letter to the Editor, *Divisive Hate*, BUSINESS WORLD, Jan. 8, 1993, at 5.

⁷¹ UNPROTECTED, *supra* note 2, at 13, 17.

⁷² Pastoral letter from Carmelo Morelos, Bishop of Butuan in the name of the Catholic Bishops' Conference of the Philippines, In the Compassion of Jesus: A Pastoral Letter on AIDS (Jan. 23, 1993), available at <http://www.cbcponline.net/documents/1990s/1993-aids.html>.

⁷³ EUROPEAN COMMISSION, *supra* note 42; *See* CENTER FOR DISEASE CONTROL AND PREVENTION, *supra* note 42.

⁷⁴ WILKINSON, *supra* note 32, at 93.

⁷⁵ *Supra* Part II.B.

⁷⁶ *See* UNPROTECTED, *supra* note 2, at 44-47.

and specific rules. For many other issues articulated in APCA, power is invested in the Philippine National AIDS Council to establish, implement, and monitor regulations.

A. *The Title and Policy Declarations of APCA Indicate a Governmental Goal of Curtailing the Effects and Spread of HIV/AIDS*

The full title of APCA itself states it is “[a]n act promulgating policies and prescribing measures for the prevention and control of HIV/AIDS in the Philippines, instituting a nationwide HIV/AIDS information and educational program, [and] establishing a comprehensive HIV/AIDS monitoring system”⁷⁷ The rationale and overarching reason for APCA is that the “gravity of the AIDS threat demands State action *today*”⁷⁸ This unequivocally means that the articulated policy goals of the Act necessitate governmental action.

The Act articulates clear governmental goals of promoting awareness of the prevention of HIV/AIDS and protecting the rights of those infected by the disease. APCA contains several specific and unambiguous duties that the government imposed on itself through the Act’s five main mandates. The first requirement is that the government “shall promote public awareness about the causes, modes of transmission, consequences, [and] means of prevention and control of HIV/AIDS through a comprehensive nationwide educational and information campaign organized and conducted by the State.”⁷⁹ The second requirement is to protect the “human rights and civil liberties” of those infected.⁸⁰ A third is that the “State shall promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission.”⁸¹ The fourth requirement calls for affirmative government work to “eradicate conditions that aggravate the spread of HIV infection, including but not limited to, poverty, gender inequality, prostitution, marginalization, drug abuse and ignorance.”⁸² The final requirement is to promote awareness of the effects of HIV/AIDS by utilizing individuals with personal experiences with the disease.⁸³ Each mandate is an affirmative command as indicated by the language that the

⁷⁷ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9.

⁷⁸ *Id.* § 2 (emphasis added).

⁷⁹ *Id.* § 2(a).

⁸⁰ *Id.* § 2(b). Examples of rights and liberties that should be protected for HIV-infected individuals are a right to privacy, freedom from discrimination, and an assurance of basic health and social services. *Id.* § 2(b)(2)-(4).

⁸¹ *Id.* § 2(c).

⁸² *Id.* § 2(d).

⁸³ *Id.* § 2(e).

government “shall” take these steps.⁸⁴ By articulating such clear and unambiguous requirements in APCA, the government has legally committed itself to fulfilling these goals.

B. The Passing of APCA Helps the Philippines Fulfill Its United Nations Treaty Obligations

By requiring the government to take affirmative steps to control the spread of HIV, APCA helps the Philippines fulfill its commitments under ICESCR. Under the Philippines’ current Constitution, ratified treaties are considered national law.⁸⁵ The Philippine government ratified ICESCR in 1974,⁸⁶ promising to fulfill the responsibilities outlined and agreed upon by all signatory nations, including specific actions to help citizens achieve a right to health.⁸⁷ Article 12, Section two of ICESCR states that: “[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (c) ‘[t]he prevention, treatment and *control of* epidemic, endemic, occupational and other diseases’”⁸⁸

A formal, but non-binding, interpretation of Article 12 provides guidance on implementation tools for a country to fulfill disease prevention

⁸⁴ *Id.* § 2(a)-(e) (emphasis added).

⁸⁵ HEYNS & VILJOEN, *supra* note 15, § 14:1.26 at 449; *see* CONST. (1987), Art. VII, § 21, (Phil.), available at <http://www.gov.ph/aboutphil/constitution.asp>.

⁸⁶ HEYNS & VILJOEN, *supra* note 15, § 14:3.2 at 451.

⁸⁷ MINDY ROSEMAN ET AL, HIV/AIDS & HUMAN RIGHTS IN A NUTSHELL 3-4 (2004), available at http://www.hsph.harvard.edu/xfbcenter/HIVAIDS_and_HRinNutshell-Webversion1.pdf. The World Health Organization (“WHO”) Constitution and several successive treaties form the foundation for the right to health. *See* DAVID P. FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASES 180-81 (1999). In 1946, the WHO Constitution made the first declaration of a right to health by stating: “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.” World Health Organization [WHO], *Const. of WHO*, pmbl. (July 22, 1946) (entered into force Apr. 7, 1948), available at http://www.who.int/governance/eb/who_constitution_en.pdf; FIDLER, *supra*, at 180. This preamble is similar to the United Nations mission to promote “solutions of international economic, social, health, and related problems.” U.N. Charter art. 55, para. b., available at <http://www.un.org/aboutun/charter/index.html>. The WHO constitution’s health right acknowledgement set the stage for the Universal Declaration of Human Rights (“UDHR”), which was passed two years later. Universal Declaration of Human Rights. G.A. Res. 217A, at 76, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). UDHR states that access to medical care and social services is an individual right. *Id.* at art. 25. While the UDHR is not binding in any formal legal sense, many nations of the world have endorsed these universal rights and are committed to this common ground. ROSEMAN ET AL, *supra*, at 3. After UDHR, a significant number of treaties and international agreements that focus on protecting an individual’s right to health were passed. FIDLER, *supra*, at 180.

⁸⁸ International Covenant on Economic, Social and Cultural Rights, *supra* note 13, at art. 12 § 2(c) (emphasis added). Section one of the same article reinforces this duty by emphasizing a general right to health: “The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” *Id.* at art. 12 § 1.

obligations. In 2000, the Committee on Economic, Social, and Cultural Rights (“CESCR”) issued a General Comment⁸⁹ providing a settled interpretation of ICESCR.⁹⁰ It is a valuable resource that governments can turn to for guidance in interpreting the agreement.⁹¹ CESCR General Comments are important authoritative sources for promoting a common understanding among signatory nations and for creating jurisprudence on the treaty.⁹² Though non-binding, General Comments do impact how governments report their progress toward meeting their obligations under ICESCR and the expectations of CESCR.⁹³ They therefore have an impact on how governments work towards fulfilling these promises.⁹⁴

The CESCR’s General Comment provides significant insight into ICESCR. The Comment begins by characterizing Article 12.2 (c) as “requir[ing] the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS”⁹⁵ Further, CESCR states that “[t]he control of diseases refers to States’ individual and joint efforts to, *inter alia*, make available relevant technologies”⁹⁶ Additionally, “[s]tates should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people’s participation in health-related matters.”⁹⁷ CESCR also states that countries should fulfill their obligations arising under Article 12 of ICESCR efficiently and expeditiously.⁹⁸

The Philippines implicitly sought to fulfill the promises made by ratification of ICESCR through APCA.⁹⁹ APCA contains specific directives

⁸⁹ U.N. Comm. on Econ., Soc. and Cultural Rights [CESCR], *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 14 on the Right to the Highest Attainable Standard of Health*, § 16, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter *General Comment 14*].

⁹⁰ MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 91 (1995).

⁹¹ *See id.*

⁹² OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, FACT SHEET NO.16 (REV.1), *THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PART 6 – GENERATING INTERPRETATIVE CLARITY* (July 1991), available at <http://www.unhchr.ch/html/menu6/2/fs16.htm#6>.

⁹³ CRAVEN, *supra* note 90, at 91.

⁹⁴ *See id.*

⁹⁵ *General Comment 14, supra* 89.

⁹⁶ *Id.*

⁹⁷ *Id.* § 34.

⁹⁸ *Id.* § 31.

⁹⁹ There is no specific rule that domestic law must be interpreted in conformance with international treaties. HEYNS & VILJOEN, *supra* note 15, at 450. This comment does not assert that a conflict exists

and establishes action-oriented steps to slow the spread of HIV.¹⁰⁰ This presumably satisfies ICESCR Article 12's clear goal that signatory nations proactively work to control the spread of diseases.¹⁰¹ Thus, it can be inferred from both ICESCR and APCA's overlapping policy goals regarding the same substantive areas of public health, that APCA is a governmental measure relating to ICESCR ratification promises.

C. *The APCA Promotes Positive Changes for Several HIV/AIDS-Related Issues While Establishing a Regulatory Body for Future Improvements*

The APCA addresses general issues related to HIV/AIDS and provides rules that directly target several of them. The statute is unique in Southeast Asia and serves as model legislation for neighboring countries.¹⁰² Mandatory HIV testing is illegal in most circumstances,¹⁰³ which helps minimize the existence of information that could be used discriminatorily. APCA contains other measures about specific forms of prohibited discrimination, and even provides criminal penalties for discriminatory actions and policies.¹⁰⁴ APCA also explicitly establishes rules to ensure the safety of blood donations.¹⁰⁵ Additionally, APCA provides for public education about HIV/AIDS prevention and treatment measures.¹⁰⁶

The APCA vests power in the Philippines National AIDS Council¹⁰⁷ as the authoritative governing body for APCA. PNAC is charged with creating, implementing, and monitoring regulations to achieve the APCA's goals.¹⁰⁸ Taking into consideration the APCA's goals, PNAC drafted regulations utilizing its vision to create "a fully empowered nation where different individuals and sectors work in partnership to prevent HIV transmission and to lessen its impact on affected persons in particular, [and] society in

between the goals of APCA and provisions of ICESCR; rather, it asserts the goals of APCA are not achieved by statutory construction. Achieving the articulated goals of APCA will simultaneously help fulfill promises made to other signatory nations of ICESCR as well as fulfill the commitment the government made upon ratifying ICESCR giving it that status of national law.

¹⁰⁰ See *supra* Part III.A.

¹⁰¹ International Covenant on Economic, Social and Cultural Rights, *supra* note 13, at art. 12.

¹⁰² ASEAN REPORT, *supra* note 17, at 18.

¹⁰³ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at §§ 15–17.

¹⁰⁴ *Id.* §§ 35–42.

¹⁰⁵ *Id.* § 12.

¹⁰⁶ *Id.* §§ 4–10.

¹⁰⁷ PNAC was established in 1992 by President Ramos as an advisory board to create policy recommendations on HIV/AIDS prevention. Philippine National AIDS Council, <http://www.doh.gov.ph/aids> (last visited Feb. 13, 2007). The scope, charge, and authority of the body was expanded under APCA and PNAC became associated with the Philippine Department of Health. Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at §§ 43–47.

¹⁰⁸ *Id.* § 44.

general.”¹⁰⁹ PNAC promulgated these extensive regulations on April 13, 1999, addressing substantive areas of APCA.¹¹⁰ Additionally, PNAC produces periodic reports reviewing the current state of HIV/AIDS in the country, analyzing the effectiveness of policies, and creating a strategic plan with specific goals for the future.¹¹¹

IV. THE APCA AND THE PNAC REGULATIONS FAIL TO EFFECTIVELY ENSURE THAT CITIZENS ARE FULLY EDUCATED ABOUT HIV/AIDS PREVENTION AND TREATMENT

The Philippine government diminishes its citizens’ ability to receive HIV preventive information by sending conflicting messages to health care providers about what information they can disclose to patients concerning HIV/AIDS preventive measures. APCA and its regulations frustrate the purpose of the Act by failing to provide a functional method for educating the general population about the risks of HIV/AIDS infection. The statute and its regulations fail to instruct health care providers as to what information is legally permissible to share with patients due to its vague criteria defining “misinformation.” Moreover, the Act prescribes criminal sanctions for providing “misinformation” about HIV/AIDS. Thus, the lack of clarity about acceptable information and the threat of criminal punishment thwart attempts to educate Filipinos about the risks of HIV/AIDS and scientifically proven preventive measures.

A. *Promulgated Regulations Undermine Stated Goals for Education and Prevention Measures*

Both APCA and the PNAC regulations state a clear intent to ensure that accurate information about HIV/AIDS reaches individuals.¹¹² Specifically, APCA requires the government to “positively address and seek to eradicate conditions that aggravate the spread of HIV infection, including but not limited to . . . ignorance.”¹¹³ The PNAC regulations provide the additional goal that “[p]eople should be empowered to prevent further HIV transmission. Empowerment for all Filipinos will come through access to

¹⁰⁹ Philippine National AIDS Council, *supra* note 107.

¹¹⁰ Implementing Regulations, *supra* note 10. Extensive discussion of applicable regulations for this argument is contained in Part IV of this comment.

¹¹¹ The most recent report established an action plan for 2005-2010. PHILIPPINE NATIONAL AIDS COUNCIL, 4TH AIDS MEDIUM TERM PLAN: 2005-2010 (2005), available at <http://www.doh.gov.ph/pnacwebsite/4th%20AMTP.pdf>.

¹¹² See *supra* Part III.A.

¹¹³ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 2(d).

appropriate information and resources for prevention.”¹¹⁴ These statements unambiguously express the government’s intent to promote open access to HIV/AIDS information. APCA itself makes it “a civic duty of health providers in the private sector to make available to the public such information necessary to control the spread of HIV/AIDS and to correct common misconceptions about this disease.”¹¹⁵ The regulations further create a duty on a variety of government agencies to develop prototype curricula for educating different audiences.¹¹⁶ Additionally, PNAC places a duty on its own agency employees to ensure that public health workers receive HIV/AIDS training.¹¹⁷

Unfortunately, APCA’s language is cursory and contradictory when describing what type of information must be disseminated. APCA does not explicitly describe any criteria or provide a definition of the basic information to which the statute entitles Filipinos. Instead, the Act states that a health care provider shall have “skills for proper information dissemination and education on HIV/AIDS,”¹¹⁸ and that specific information must be attached to prophylactics.¹¹⁹ The only other reference and guidance APCA offers on basic information is that criminal offenses and punishments exist for providing misinformation about prophylactics.¹²⁰

The PNAC regulations fail to adequately clarify the definition of “standardized basic information”¹²¹ that must be disseminated to Filipinos. The regulations codify more specific criteria for the information that Filipinos are entitled to know, but do not go far enough in describing such information clearly and unambiguously.¹²² The definition of “standardized basic information” used throughout the regulation only describes the type of information that must be provided, such as information about medical confidentiality, modes of transmission, and risk factors.¹²³ This list only contains topics about which Filipinos are entitled to learn, but does not

¹¹⁴ Compare Implementing Regulations, *supra* note 10, at § 3.f.2 with Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 2 (listing goals guiding the development of regulations that are in addition to the Act’s goals).

¹¹⁵ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 5.

¹¹⁶ Implementing Regulations, *supra* note 10, at § 8.

¹¹⁷ *Id.* § 14.

¹¹⁸ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 5.

¹¹⁹ Information that must be attached to prophylactics under APCA are instructions on proper use, information about the effectiveness against HIV and other sexually transmitted disease infections, and a reminder about sexual abstinence and partner fidelity. *Id.* § 10.

¹²⁰ *Id.* § 11.

¹²¹ Implementing Regulations, *supra* note 10, at § 4.39. This lack of clarity is particularly important because providing “misinformation” can result in criminal punishments. *Id.* § 20.

¹²² *Id.* § 4.39.

¹²³ *Id.*

provide a description about the accuracy of the information conveyed.¹²⁴ APCA does not clarify what is “proper” information that health care providers should disseminate.¹²⁵ The regulations fail to provide the specificity desired by those who want to promote HIV/AIDS education.¹²⁶

“Standardized basic information” must be “accurate, adequate, appropriate, and relevant” to empower Filipinos.¹²⁷ Of these terms, the regulations only define “accurate” and “appropriate.”¹²⁸ Under the regulations, “accurate” means “consistent with empirical evidence of the World Health Organization, the [Department of Health], or other recognized scientific bodies.”¹²⁹ The law contains no elaboration about what qualifies as a recognized scientific body. The statute suggests that there is a process to verify that information comes from an approved source,¹³⁰ but there is no pre-approved list establishing what may be a reputable source for health providers to reference. The regulations seem to imply that providers must verify proactively their source of information with PNAC before disclosing information if WHO or Department of Health (“DOH”) does not have supporting evidence.¹³¹ “Appropriate” is defined as what is “acceptable to the target audience.”¹³² This definition provides no further insight as to what information should be included in “standardized basic information.”

Even if information does have scientific backing, a provider may hesitate to disclose the information because of other contradictory criteria listed within the PNAC regulations. In addition to accuracy and appropriateness, the regulations require “standardized basic information” to be culturally sensitive and non-moralistic.¹³³ Information should recognize and respect cultural differences¹³⁴ and not “condemn the attitudes or behaviors of any individual . . .”¹³⁵ When read together with the regulations’ definition of “appropriateness,” these criteria may hinder the delivery of “accurate” information to patients. For example, scientific evidence proves that condoms are extremely effective at preventing the

¹²⁴ *See id.*

¹²⁵ Health care providers must have skills for disseminating “proper information” about HIV/AIDS. Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 5.

¹²⁶ Implementing Regulations, *supra* note 10, at §§ 6-7.

¹²⁷ *Id.* § 6.

¹²⁸ *Id.* §§ 7.a, d.

¹²⁹ *Id.* § 7.a.

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *Id.* § 7.d.

¹³³ *Id.* §§ 7.f, h.

¹³⁴ *Id.* § 7.f.

¹³⁵ *Id.* § 7.h.

spread of HIV, when used correctly.¹³⁶ Because condoms are culturally unacceptable in the Philippines—in part due to Church advocacy against condom use¹³⁷—information about condoms might be deemed moralistic and inappropriate for health care providers to share with patients. Under such an interpretation of the law, doctors could face criminal sanctions.¹³⁸ Thus, while the regulations do provide some criteria for evaluating what information Filipinos are entitled to, there are nonetheless no clear means of ensuring that all accurate information will reach them.

Even if it were clear what information should and could be provided to Filipinos, contradictory APCA and regulatory provisions limit where and how such information can be disseminated. Under Article 1 of APCA, public and private schools must integrate HIV/AIDS education into the curriculum, including transmission modes and prevention methods for HIV/AIDS and other sexually transmitted diseases—except this teaching cannot be “an excuse to propagate birth control or the sale or distribution of birth control devices . . .”¹³⁹ This raises the question: how exactly is one supposed to educate without publicizing or propagating contraceptive use? The very nature of education¹⁴⁰ requires exposing students to new ideas, and merely talking about an issue relating to morals might be considered propagation. The regulations enacted by PNAC fail to address the question of what propagating means within the statute. Instead of providing specific criteria for, or examples of, acceptable educational information, the regulations outline general topics to be covered and require other agencies to develop a curriculum.¹⁴¹ In the absence of specific regulations, there is little to help reconcile this apparent contradictory language within APCA.

In light of overwhelming evidence of an impending HIV epidemic in the Philippines, the Philippine government should be more proactive in promoting prevention techniques. Previously discussed risk factors, including general ignorance of the disease among Filipinos, condom inaccessibility, and lack of access to health care,¹⁴² make it irresponsible for the Philippine government to not take further action in the present to prevent

¹³⁶ EUROPEAN COMMISSION, *supra* note 42; *See* CENTER FOR DISEASE CONTROL AND PREVENTION, *supra* note 42.

¹³⁷ *See supra* Part II.D.

¹³⁸ *See infra* Part IV.B.

¹³⁹ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 4.

¹⁴⁰ This reference is to education in general from a theoretical standpoint and not specifically sexual education in the Philippines.

¹⁴¹ Implementing Regulations, *supra* note 10, at § 13. The Department of Education, Culture and Sport, the Commission on Higher Education, and the Technical Education and Skills Development Authority all have duties to create prototype curriculum. *Id.*

¹⁴² *See supra* Part II.

an outbreak. Considering the country's close proximity to nations with higher HIV/AIDS rates, HIV/AIDS rates in the Philippines will likely increase due to increased tourism as the government becomes more stable.¹⁴³ The government should refine APCA and its accompanying regulations to fulfill its self-proclaimed and imposed need for immediate action to address the grave threat of AIDS.¹⁴⁴

B. Criminal Penalties Work Against the Goal of Open Access to Information

The APCA directs Philippine health providers to provide health information to the public about HIV/AIDS.¹⁴⁵ The purposes of ICESCR indirectly support this directive.¹⁴⁶ However, contradictions within APCA make it impossible for providers to know what information is and is not legal to share.¹⁴⁷ The potential for harsh penalties for providing incorrect information exacerbates this ambiguity.¹⁴⁸

The APCA and its regulations impose an affirmative duty on health service providers to inform patients about HIV/AIDS, while possibly imposing criminal penalties for providing "misinformation," a concept left undefined. APCA includes requirements that public health officials know and disseminate information on HIV/AIDS.¹⁴⁹ It further declares it "a civic duty of health providers in a private sector to make available to the public such information necessary to control the spread of HIV/AIDS and to correct common misconceptions about this disease."¹⁵⁰ However, the law also provides for severe penalties for providing "misinformation" on prevention and control measures.¹⁵¹ Sanctions range from imprisonment of up to two years to revocation of a professional or business license for providing such misinformation.¹⁵² These criminal provisions appear from a cursory reading to apply only to false advertising. However, a close examination of the language reveals that "misleading information *may* take the form of false or

¹⁴³ Neighboring countries within the region have much higher levels of HIV infection at this time. See ASEAN REPORT, *supra* note 17, at 13.

¹⁴⁴ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 2; Implementing Regulations, *supra* note 10, at § 3.

¹⁴⁵ See *supra* notes 112-115 and accompanying text.

¹⁴⁶ See *supra* Part III.B.

¹⁴⁷ See *supra* notes 121-132 and accompanying text.

¹⁴⁸ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 11.

¹⁴⁹ *Id.* § 5.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* § 11.

¹⁵² *Id.*

deceptive advertisements.”¹⁵³ This could allow the criminalization provisions to be applied in other circumstances, such as to health care providers. Although the criminal sanctions do not expressly target health care providers, they implicitly do so by including punishments that cover the loss of a professional (i.e., health care provider) or business license.¹⁵⁴ Because the criminal sanctions are at the end of Article 1 in APCA, it is possible to infer that the punishments could be extended to all entities named within the article—including health care providers.

Local governments also pass ordinances relating to contraceptive information and dissemination that may incorrectly be linked to APCA sanctions by health care providers. For instance, in Manila, providing inappropriate health services can result in loss of employment by the government¹⁵⁵ or even result in the shutting down of a health clinic.¹⁵⁶ While these sanctions stem from a local executive order by the Mayor of Manila and only apply within city limits,¹⁵⁷ some health care providers outside of Manila’s jurisdiction may think incorrectly that the authority for these punishments originates from APCA and the PNAC regulations. This may make health care providers everywhere less likely to provide HIV/AIDS contraception information. Establishing clearer language within APCA will correct health care providers’ inaccurate perceptions of the distinction between local ordinances and APCA’s punishments. Consequently, health care providers will not have to fear that what happens in Manila will also happen to them.

Currently, the APCA regulations pit the lives of patients against a provider’s own well-being and freedom. A health care provider is faced with a moral dilemma: he or she must weigh the interest of the patient against the potential for criminal punishment. Theoretically, providers must determine what disclosures they believe are acceptable under APCA and its regulations. Then, providers must risk that their interpretation is correct; if they are wrong, personal and professional consequences could result. A doctor is faced with an extremely difficult choice that he or she should not have to make. Further complicating the matter is an implicit duty to inform under

¹⁵³ Implementing Regulations, *supra* note 10, at § 20 (emphasis added).

¹⁵⁴ See Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 11; Implementing Regulations, *supra* note 10, at § 20.

¹⁵⁵ Jaileen F. Jimeno, *In Manila, Pills and Condoms Go Underground*, MANILA TIMES INTERNET EDITION, May 23, 2005, <http://www.manilatimes.net/others/special/2005/may/23/20050523spe1.html> (last visited Mar. 7, 2007).

¹⁵⁶ UNPROTECTED, *supra* note 2, at 28-29.

¹⁵⁷ UNPROTECTED, *supra* note 2, at 28; Jimeno, *supra* note 155.

ICESCR.¹⁵⁸ Since ratified treaties are treated as national law, theoretically the provider could be sued by an individual or the government.¹⁵⁹ If a health care provider knowingly withholds information or aids in the perpetuation of disease misconceptions, it also could be a violation of the doctor's Hippocratic Oath.¹⁶⁰

The APCA regulations also remove autonomous decision-making from Filipino citizens. Individuals cannot make decisions if they do not have all the available information. Whether an individual receives health-related information should not be influenced by the health care provider's self-interest. The APCA regulations create a conflict of interest by requiring that providers balance their own well being against that of patients. This is fundamentally unfair to the patient. More harm will likely occur to an individual by withholding *preventive* HIV/AIDS information than will result from sharing it.

V. PUBLIC HEALTH AND POLICY REASONS COMPEL CHANGES TO APCA AND THE PNAC REGULATIONS TO CONFORM TO APCA'S STATED GOALS

There is a great need to ensure that Filipinos receive correct information about HIV/AIDS. As far back as 1997, the Philippine government itself acknowledged there may be as many as 20,000 actual cases of HIV/AIDS in the country.¹⁶¹ Regardless of the real number of HIV/AIDS cases, the disease could increase rapidly if the government is complacent the disease's prevalence. As more people become infected, others have an increasing chance of becoming infected as well. In order to fight the spread of this disease more aggressively, the Philippine legislature should re-evaluate the clarity of APCA and PNAC should re-examine the accompanying recommendations.

¹⁵⁸ Under ICESCR, the government has a duty both to uphold the right to health and to foster an environment where its citizens can realize this right. Sofia Gruskin & Danial Tarantola, *Health and Human Rights*, in PERSPECTIVES ON HEALTH AND HUMAN RIGHTS 3, 13 (Sofia Gruskin, Michael Grodin, George Annas & Stephen Marks eds., 2005). Infectious diseases, such as HIV/AIDS, relate to an individual's health and from a human rights standpoint, can deprive an individual of the right to health. FIDLER, *supra* note 87, at 169. Health care providers then should reasonably expect from the international understanding of the right to human health that there is an obligation to inform patients about HIV prevention and treatment options.

¹⁵⁹ HEYNS & VILJOEN, *supra* note 15, at 449; *see supra* notes 85-87 and accompanying text.

¹⁶⁰ The Hippocratic Oath is taken by doctors throughout the world as a pledge in general terms to "do no harm." National Institutes of Health, *Greek Medicine: The Hippocratic Oath*, http://www.nlm.nih.gov/hmd/greek/greek_oath.html (last visited Mar. 6, 2007).

¹⁶¹ TAN, *supra* note 25, at 5.

A. *The PNAC Should Incorporate a Clear Definition of What Is Permissible Information to Share under APCA*

A straightforward definition or criteria of what is legally permissible information to disseminate to the public by health care providers should be added to the PNAC regulations. Currently the explanation of permissible information under the regulations is vague and ineffective.¹⁶² Using words like “appropriate” and “relevant” do not clarify what is legally acceptable and correct information that can be conveyed.¹⁶³

The legal definitions of required and permissible information should not be subject to cultural and societal norms, as is possible under the current scheme. Legal definitions often do not fall into accordance with everyday understanding of words. Statutory definitions promote a uniform and more permanent understanding of terms. By neglecting to provide an explicit definition of a word or concept, the definition is left to the capricious whims of society. Laws should be more predictable and based on objective criteria.

Filipino societal views and values are influenced by a variety of factors, can change rapidly, and do not always match scientific certainties. The Philippine government has asserted for decades that few Filipinos are infected with HIV, despite external estimates that infection rates are much higher.¹⁶⁴ Religious leaders make proclamations regularly about HIV/AIDS that differ with scientific understanding.¹⁶⁵ Both of these expositions of “truth,” whether they are scientifically accurate or not, influence what is accepted in Filipino society as “the truth.” In the absence of explicit statutory definitions, “the truth” is simply a social construct. This makes it virtually impossible for individuals to predict with any accuracy the applicability and extent of a law. Thus, the Philippines should set explicit definitions and criteria of what is acceptable information in order to avoid subjective societal values and views from changing APCA beyond its original intent.¹⁶⁶

The PNAC should provide more explicit examples within the APCA regulations as to what qualifies as “accurate” information.¹⁶⁷ The regulations currently include the WHO and the DOH as two specific sources

¹⁶² Implementing Regulations, *supra* note 10, at §§ 6-7; *see supra* Part IV.A.

¹⁶³ Implementing Regulations, *supra* note 10, at § 6.

¹⁶⁴ *See supra* notes 16-23 and accompanying text.

¹⁶⁵ *See supra* notes 70-76 and accompanying text.

¹⁶⁶ For the same reasons, an analogous recommendation should be considered to clarify similar concerns about the lack of predictability and enforceability in the APCA’s limitations on encouraging contraceptive use in educational settings. *Supra* notes 139-141 and accompanying text.

¹⁶⁷ Implementing Regulations, *supra* note 10, at § 7.a.

of evidence that can be used to establish whether disseminated information is accurate, and, therefore, legal.¹⁶⁸ More examples of specific scientific bodies that are deemed to be reliable sources of empirical evidence¹⁶⁹ by PNAC should be added. PNAC should proclaim information supported by research in highly reputable scientific journals to be legally “accurate.” Specifically, PNAC could include respected American scientific journals such as *Science* and *Nature*, or the Filipino equivalents. The key to this recommendation is inclusion of new regulatory language establishing an extensive list of specific scientific bodies or journals that are legally permissible upon which to rely. PNAC could develop this list based on its own criteria of what is reputable, or simply legalize references to all journals cited in medical library directories like PubMed.¹⁷⁰ Regardless of how journals are selected, by establishing a list of reputable scientific journals from both within the country and throughout the world in its regulations, PNAC will provide more structure and predictability to the law. Health care providers will be able to utilize several different sources to establish information they know assuredly is legal to provide. Additionally, providers will have multiple scientific bodies to reference and protect themselves against claims that they are providing misleading information.

One criticism of this recommendation may be that scientific articles in different journals do not always come to the same conclusions. Relying on conflicting sources may result in incorrect information dissemination if the findings of an article are wrong and a health care provider relies upon it. However, the concern highlights the importance of using an extensive list. A large listing of scientific bodies and journals will allow for a variety of scientifically accurate viewpoints to be presentable for both professionals and citizens to evaluate.

The PNAC needs to provide more guidance on how to use its stated criteria for determining the appropriate content of information for education. A blanket statement indicating that permissible information is “guided by” criteria such as accuracy, appropriateness, and cultural sensitivity, does not allow for predictability in the law.¹⁷¹ The regulations should specify which

¹⁶⁸ Implementing Regulations, *supra* note 10, at § 7.a.

¹⁶⁹ Empirical evidence by definition encompasses evidence generated from observation and hypothesis testing as well as that generated from practical non-theoretical work such as is gathered in the medical field. THE AMERICAN HERITAGE DICTIONARY (4th ed. 2004), available at <http://dictionary.reference.com/browse/empirical>; see BLACK'S LAW DICTIONARY 563 (8th ed. 2004).

¹⁷⁰ PubMed is a medical journal directory database maintained by the United States National Institutes of Health accessible at <http://www.pubmedcentral.nih.gov>. Information on how journals are selected for inclusion and background information about the database can be found at <http://www.pubmedcentral.nih.gov/about/faq.html>.

¹⁷¹ Implementing Regulations, *supra* note 10, at § 7.

criteria are most important, rather than simply listing factors to be considered. Currently there is no way to know whether PNAC focuses more on accuracy than cultural sensitivity, or whether the non-moralistic criterion is the most important. Because scientific accuracy is less subject to influence by societal beliefs due to its reliance on quantitative, rather than qualitative, data,¹⁷² scientific accuracy should be the governing principle within this section. Additionally, by establishing scientific accuracy as the main criterion, the government will ensure that Filipinos receive scientifically sound views on preventive measures—unlike the current situation, where they primarily receive only the Catholic Church's condemning views on contraceptives.¹⁷³

B. Current Criminal Provisions of APCA and the PNAC Regulations Should be Amended to Clarify That They Do Not Apply to Health Care Providers

In order to ensure open access of HIV/AIDS information for Filipinos, criminal provisions of APCA and the PNAC regulations should not include health providers.¹⁷⁴ The legislature should add an explanatory clause in Section 11 of APCA that states expressly that criminal sanctions do not apply to health care providers. Ensuring that providers are not subject to criminal sanctions for disseminating information about HIV/AIDS will encourage providers to give information to patients. Patients then can determine for themselves what to believe and what to do with the information provided.

C. Incorporating Respect for Autonomous Decision-Making into the Regulations Will Free Physicians from a Moral Dilemma

The Philippine government should respect autonomous decision-making when statutorily defining truth and/or misinformation in APCA and its accompanying regulations. Respect for autonomy is a fundamental standard that can provide guidance to health care providers. In the United States, this principle underlies discussions of ethical, legal, and social issues

¹⁷² Science focuses on hypothesis testing which seeks to prove a hypothesis with empirical evidence. This empirical evidence is minimally influenced by moral and societal beliefs. The interpretation of the data may be influenced by such beliefs, but the quantitative data itself is not influenced. See F. JAMES RUTHERFORD & ANDREW AHLGREN, *SCIENCE FOR ALL AMERICANS* ch. 1 (1991), available at <http://www.project2061.org/publications/sfaa/online/chap1.htm>.

¹⁷³ See *supra* Part II.D.

¹⁷⁴ Philippine AIDS Prevention and Control Act of 1998, *supra* note 9, at § 1; Implementing Regulations, *supra* note 10, at § 20.

in the public health arena.¹⁷⁵ Autonomous decision-making requires that an individual be as informed as possible in as unbiased a way as possible, and then left to make a decision based on personal beliefs and values.¹⁷⁶ It is the individual who should decide what is correct and incorrect information and how to proceed personally with prevention measures and medical care.¹⁷⁷

A state should not alter an individual's right to autonomy by legislatively placing the decisions of whether someone receives potentially life-saving information in the hands of another. APCA and its accompanying regulations do just this by preventing information from ever reaching individuals. Information cannot be evaluated on a personal level if it is never even heard. While doctors may have sway because of their professional position and stature, it ultimately should be a patient's choice to accept or reject information shared based on his or her own values.¹⁷⁸

Respecting autonomous decision-making will also allow the Philippines to allocate more energy and resources to other HIV/AIDS control measures. Rather than spending money investigating and determining whether improper information was shared, the government should allow more information to reach patients and let them make decisions about its reliability and validity. Some may choose to follow their doctor's ideas, some their church's, and others their own views. Under the autonomous decision-making philosophy, it does not matter what choice an individual makes so long as the patient has a choice.¹⁷⁹ Under the current system in the Philippines, health care providers—not individual patients—make these choices. Government funds would more appropriately be used to promote an understanding of condom usage, and to subsidize condom distribution throughout the country. Such expenditures would better help the government achieve its self-mandated duties arising from APCA for controlling HIV/AIDS.

VI. CONCLUSION

The Philippines risks an HIV/AIDS epidemic because of many risk factors. In particular, incorrect beliefs and a lack of access to HIV/AIDS preventive information pervade the country. APCA and its regulatory scheme inadequately define what information Filipinos are entitled to

¹⁷⁵ See Tom L. Beauchamp, *Introduction to Ethics*, in CONTEMPORARY ISSUES IN BIOETHICS 22-23 (Tom L. Beauchamp and LeRoy Walters eds., 6th ed. 2003).

¹⁷⁶ See *id.* at 22.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

regarding HIV/AIDS prevention. APCA purports to ensure access to accurate and relevant information, but limits what is legally permissible to disseminate based on subjective cultural and moral considerations. The lack of scientifically and medically objective criteria as to what constitutes acceptable information actively prevents health care providers from sharing life saving information with patients. Currently, Filipinos are left to sort out what information is true from a variety of limited sources, including science, the media, and the Catholic Church. In order to ensure that Filipinos have scientifically accurate information, the Philippine government should modify APCA and its regulations to include specific, objective language on what is permissible information for health care providers to share. Additionally, the legislature should clarify that current criminalization statutes are not applicable to health care providers to ensure that providers are not placed in a moral dilemma that inadvertently hurts patients. Only when health care providers understand what they are legally allowed to share can they provide more specific and thorough information to patients. Then, and only then, Filipinos will be able to make autonomous decisions to combat HIV/AIDS for themselves.